

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

HAROLD A. TRACY,)
)
 Plaintiff)
)
 v.) Civil No. 04-201-B-W
)
 ANDREW HAYWARD, et al.,)
)
 Defendants)

**RECOMMENDED DECISION
AND ORDERS**

Harold A. Tracy, an unemployed house painter, has brought an action pursuant to 42 U.S.C. § 1983 claiming that his former employer, Andrew Hayward, certain named hearing officers employed by the State of Maine Unemployment Insurance Commission, the commissioners of the Maine Unemployment Commission, and a Superior Court Justice have violated his constitutional rights. Now pending before the court are Hayward’s motion to dismiss (Docket No. 7), the State defendants’ motion to dismiss (Docket No. 9), a pro se motion to strike the motions to dismiss (Docket No. 10), and a pro se motion to amend the complaint (Docket No. 11) seeking to add two additional causes of action. I now **DENY** both the motion to strike and the motion to amend and recommend that the court **GRANT** both of the motions to dismiss.

Tracy's Motions

Tracy’s motion to strike the motions to dismiss is simply nonsensical. The motions to dismiss are authorized pleadings under the Federal Rules of Civil Procedure, timely filed, and in compliance with the Local Rules. See Fed. R. Civ. P. 12; Dist. Me.

Loc. R. 10. Because Tracy is proceeding pro se I subject his submissions to "less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519, 520 (1972). Also in light of Tracy's pro se status, I examine his other pleadings to understand the nature and basis of his claims. See Gray v. Poole, 275 F.3d 1113, 1115 (D.C. Cir. 2002) (citing the holding of Richardson v. United States, 193 F.3d 545, 548 (D.C.Cir.1999) that District Court abused its discretion when it failed to consider the pro se plaintiff's complaint in light of his reply to the motion to dismiss). Therefore, although I now **DENY** the motion to strike the motions to dismiss, I will consider the information therein in evaluating the pending motions to dismiss.

Tracy's motion to amend the complaint seeks to add two additional causes of action, but does not seek to add new factual allegations or change the complexion of the issues raised by way of the motions to dismiss. He wants to add a claim against Andrew Hayward for violating 26 M.R.S.A. § 1051 and a claim against the State defendants for violating the same statute and also for violating 17-A M.R.S.A. § 608. The amendment would be futile as to both sets of defendants and as to both causes of action. The provision in Title 17-A is a criminal violation and does not give Tracy a private cause of action. As to the provision in title 26, the Maine Law Court has held that "nothing in the plain language or legislative history of [§1051] indicates that our Legislature intended a private party to have a right of action under [this statute]." Larrabee v. Penobscot Frozen Foods, Inc., 486 A.2d 97, 101 (Me. 1984). Tracy's proposed amendment has no merit and it is **DENIED**.

Recommended Decision on Motions to Dismiss

Tracy's action, asserted under 42 U.S.C. § 1983, concerns the administration of his claim for unemployment insurance benefits filed on December 18, 2002. (Compl. ¶12.) Tracy names as defendants seven individuals, five of whom are employed by the State of Maine and were involved in the processing of that claim.¹ A sixth State defendant, Andrew M. Mead, is a Justice of the Maine Superior Court, who became involved in the matter of Tracy's entitlement to benefits when the claim was appealed by Tracy to the Superior Court in Penobscot County. Justice Mead ordered that the claim be remanded to the Unemployment Insurance Commission for rehearing. (Id. ¶ 45.) The seventh defendant, Andrew Hayward, Tracy's former employer, appealed the Maine Bureau of Unemployment Compensation's decision to grant unemployment benefits to Tracy and participated in the quasi-judicial and judicial proceedings which flowed from the initial appeal. (Id. ¶¶ 3, 23, 24, 31, 35, 40, 42, 45, 47, 62, 63, 64, 66.)

Tracy's complaint details the administrative and judicial processing of the claim from its filing, review and award of benefits by a deputy in December 2002 (id. ¶¶14-16), through a series of appeals that overturned the finding of entitlement on May 21, 2003, (id. ¶¶33-35), and the final award of benefits on December 17, 2003, (id. ¶48); see Docket No. 9, Ex. A.) Tracy alleges that his Fourteenth Amendment rights to due process were violated by the State defendants, apparently because they entertained an appeal of the original award filed by Tracy's employer. Tracy alleges that Hayward violated his Fourteenth Amendment rights to due process by appealing the initial determination and participating through testimony and written pleadings throughout the appeal process.

¹ Defendants Toubman, Rogers-Tomer, Wlodkowski, Hilly, and O'Malley. (Compl. ¶¶ 4-8.)

Motion to Dismiss Standard

Pursuant to Swierkiewicz v. Sorema N. A., 534 U.S. 506, 508 (2002) a motion to dismiss for failure to state a claim in the context of a 42 U.S.C. § 1983 complaint is reviewed under the following standard:

In civil rights actions, as in the mine-run of other cases for which no statute or Federal Rule of Civil Procedure provides for different treatment, a court confronted with a Rule 12(b)(6) motion "may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984).

Educadores Puertorriquenos en Accion v. Hernandez, 367 F.3d 61, 66 (1st Cir. 2004).

However, in Educadores Puertorrique nos en Accion the First Circuit did not indicate that every pleading, even those utterly devoid of meaningful factual content, necessarily survives a motion to dismiss:

Second, in considering motions to dismiss courts should continue to "eschew any reliance on bald assertions, unsupported conclusions, and opprobrious epithets." Chongris v. Bd. of Appeals, 811 F.2d 36, 37 (1st Cir.1987) (citation and internal quotation marks omitted). Such eschewal is merely an application of Rule 8(a)(2), not a heightened pleading standard uniquely applicable to civil rights claims. See Correa-Martinez, 903 F.2d at 52-53 (treating the general no-bald-assertions standard and the heightened pleading standard for civil rights cases as two separate requirements); see also Higgs, 286 F.3d at 439 (rejecting the idea of "special pleading rules for prisoner civil rights cases," but nonetheless requiring complaints to meet some measure of specificity). As such, we have applied this language equally in all types of cases. See, e.g., Arruda v. Sears, Roebuck & Co., 310 F.3d 13, 18 (1st Cir.2002) (holding plaintiff to this standard in a bankruptcy action); LaChapelle, 142 F.3d at 508 (holding plaintiff to this standard in an action alleging breach of contract and intentional infliction of emotional distress). We will continue to do so in the future.

Id. at 68. In ruling on a motion to dismiss pursuant to Civil Rule of Procedure 12(b)(6), the court may consider certain documents outside the complaint, such as official public records, without converting a Rule 12(b)(6) motion to one for summary judgment. See

Watterson v. Page, 987 F.2d 1, 4 (1st Cir. 1993). In the present case Tracy has provided the court with a copy of the certification of the record and a portion of the docket entries, marked as Exhibit 2, as attachments to his motion to strike the motions to dismiss. The State defendants have furnished a copy of the commission decision dated December 17, 2003, in conjunction with their motion to dismiss. These items are properly considered by the court when ruling upon these motions to dismiss.

1. Hayward's Motion to Dismiss

Tracy's due process claim is brought pursuant to 42 U.S.C. § 1983. "In order to state a claim under § 1983, a plaintiff must show both the existence of a federal constitutional or statutory right, and a deprivation of that right by a person acting under color of state law." Rockwell v. Cape Cod Hosp., 26 F.3d 254, 256 (1st Cir. 1994) (citing Watterson, 987 F.2d at 7). As it pertains to Hayward, Tracy claims he caused a deprivation of Tracy's constitutional right to due process by attempting to file an appeal of an administrative decision regarding Tracy's receipt of unemployment benefits. Hayward, as a private citizen, does not act under color of state law merely because he attempts to use the process available under state law. Section 1983's "color of law" requirement restricts §1983 to "state action," so a plaintiff must show that the alleged deprivation of rights is "fairly attributable to the State." Gonzalez-Morales v. Hernandez-Arencibia, 221 F.3d 45, 49 (1st Cir. 2000). Something more than mere resort to a state court or administrative procedure is required to transform a private party into a state actor. Casa Marie v. Superior Court of Puerto Rico, 988 F.2d 252, 258 (1st Cir. 1993). That something more has not been alleged in this complaint.

Furthermore, even if Tracy could somehow hurdle the "under color of state law" prong, he has utterly failed to show that he was deprived of any constitutional right to due process by these proceedings. Apparently his complaint is that the defendants, including Hayward, did not follow the state statute because Hayward sought and was allowed to take a late appeal. But in deciding whether a state has violated a person's constitutional right to procedural due process, whether the State has complied with procedures mandated by state law does not set the gold standard. See Hulen v. Yates, 322 F.3d 1229, 1246-47 (10th Cir. 2003). It is purely a matter of federal constitutional law whether the procedure afforded was adequate. As the Supreme Court said in Cleveland Bd. of Educ. v. Loudermill: "[O]nce it is determined that the Due Process Clause applies, the question remains what process is due. The answer to that question is not to be found in the [state] statute." 470 U.S. 532, 541 (1985) (internal citation and quotation marks omitted). "It is elementary that due process within administrative procedures requires the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Raper v. Lucey 488 F.2d 748, 753 (1st Cir. 1973) (quoting Goldberg v. Kelly, 397 U.S. 254, 267 (1970)). See also Maddocks v. Unemployment Ins. Comm'n, 2001 ME 60 ¶ 7, 768 A.2d 1023, 1025 ("The essential requirement of [procedural] due process in the administrative context is that a party be given notice and an opportunity to be heard") (quoting Martin v. Unemployment Ins. Comm'n, 1998 ME 271, ¶ 15, 723 A.2d 412, 417). It is Hayward, not Tracy, who might have had a colorable due process claim if the commission had not even considered the timeliness of his appeal. Tracy certainly received the process he was due and there was no deprivation of any procedural due process right by the State.

As to the suggestion that this complaint might raise a substantive due process claim, there is absolutely no nonconclusory allegation in the complaint that could possibly rise to the level of a substantive due process violation. In the context of allegations that a state official has abused his executive power, the test to ascertain a valid substantive due process violation is "whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." County of Sacramento v. Lewis, 523 U.S. 833, 847 n.8 (1998) (excessive force by police officer claim). I agree with Hayward's counsel that in order to make out a substantive due process claim "the requisite arbitrariness must be stunning, evidencing more than humdrum legal error." JSS Realty Co. LLC v. Town of Kittery, 177 F.Supp.2d 64 (D. Me. 2001) (quoting Amsden v. Moran, 904 F.2d 748, 754 n.5 (1st Cir. 1990)); see also Indiana Land Co., LLC v. City of Greenwood, 378 F.3d 705, 711 (7th Cir. 2004) (applying substantive due process principles in the context of a city council decision, observing that even if the procedure employed violated state law there was no substantive due process claim). These allegations viewed as true do not begin to rise to that level. There is no constitutional due process violation alleged in this complaint.

Tracy's state law defamation and slander claims against Hayward fare no better. Statements made by a defamation defendant in pleadings or testimony in judicial proceedings are absolutely privileged under Maine law. See Dineen v. Daughen, 381 A.2d 663, 664 (Me. 1978). Any pleadings or statements by Hayward before the Superior Court are therefore absolutely privileged. Regarding pleadings and statements to the Bureau of Unemployment Compensation: "All information transmitted to the bureau, commission or its duly authorized representatives pursuant to this chapter [on

unemployment compensation] is absolutely privileged and may not be made the subject matter or basis in any action of slander or libel in any court in this State." 26 M.R.S.A. § 1047. The state law claims, like the 42 U.S.C. § 1983 claim, must be dismissed for failure to state a claim.

2. The State Defendants' Motion

The claims for monetary damages against the six State defendants in their official capacities utterly fail to state a claim and should be dismissed. A "suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." Will v. Michigan Dep't. of State Police, 491 U.S. 58, 71 (1989). The official capacity monetary damages claims fail for the same Eleventh Amendment grounds as the claims would fail if they were brought directly against the State. All § 1983 claims against the State of Maine fail because a state and its agencies are not "persons" under 42 U.S.C. § 1983. See Brown v. Newberger, 291 F.3d 89, 92 (1st Cir. 2002) (dismissing claims against Massachusetts trial courts and Department of Social Services brought by fathers claiming visitation rights regarding their children in cases where mothers obtained court orders barring such visitation). Likewise monetary claims brought directly pursuant to constitutional provisions such as the Fourteenth Amendment fail because the State has not abrogated its Eleventh Amendment immunity. Id.

It is true that injunctive relief may be sought against a state official in his or her official capacity pursuant to 42 U.S.C. § 1983. Will, 491 U.S. at 71 n.10; Hawkins v. R.I. Lottery Comm'n., 238 F.3d 112, 116 n.5 (1st Cir. 2001). However, Tracy's complaint seeks as injunctive relief primarily remedies relating to his state law

defamation claims. Because I have already noted that the complaint fails to state a claim for defamation because any defamatory statement allegedly made by any of these defendants in the context of administrative and judicial proceedings was privileged as a matter of law, Tracy can obviously not carry his burden apropos the likelihood of success on the merits. Bl(a)ck Tea Society v. City Of Boston, 378 F.3d 8, 15 (1st Cir. 2004) ("We have frequently said that likelihood of success is an essential prerequisite for the issuance of a preliminary injunction.").

The complaint against the six individual state defendants recites the same sort of due process allegations as were made against Hayward. As I indicated above, the nonconclusory factual allegations, accepted as true, do not state a claim for either a procedural or substantive due process violation. Furthermore, if the complaint did state such a claim, these six state defendants would all be entitled to judicial or quasi-judicial absolute immunity because the conduct complained of involved judicial acts or the functional equivalent thereof. See Pierson v. Roy, 386 U.S. 547, 553-55 (1967) (discussing absolute immunity for judges under common law and 42 U.S.C. § 1983); Bettencourt v. Board of Registration in Med., 904 F. 2d 772, 782-85 (1st Cir. 1990) (Concluding that the members and professional staff of the Massachusetts Board of Registration in Medicine were absolutely immune from suit in their individual capacities under § 1983 on the ground that these officials serve in quasi-judicial capacities "functionally comparable" to those performed by a state court judge).

Conclusion

Based upon the foregoing, I **DENY** both the motion to strike and the motion to amend and recommend that the Court **GRANT** both motions to dismiss. (Docket Nos. 7 and 9).

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

/s/ Margaret J. Kravchuk
U.S. Magistrate Judge

Dated February 24, 2005

TRACY v. HAYWARD et al

Assigned to: JUDGE JOHN A. WOODCOCK, JR
Referred to: MAG. JUDGE MARGARET J.
KRAVCHUK

Cause: 28:1983 Civil Rights

Date Filed: 11/22/2004

Jury Demand: None

Nature of Suit: 440 Civil Rights:

Other

Jurisdiction: Federal Question

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Defendant

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Defendant

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Defendant

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