

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

WILLIAM E. POWELL,

Plaintiff,

v.

HOWARD ROSS, JANET WRIGHT,
CHARLES ZASTROW, KAREN KIRST-
ASHMAN, and EUGENE FUJIMOTO,

Defendants.

OPINION AND ORDER

03-C-0610-C

This is a civil suit for money damages in which plaintiff William E. Powell, a professor in the Department of Social Work at the University of Wisconsin-Whitewater, contends that defendants Howard Ross, Janet Wright, Charles Zastrow, Karen Kirst-Ashman and Eugene Fujimoto, all administrators or professors at the university, conspired to defame him by preparing and submitting to the chancellor a report falsely stating that he had sexually harassed numerous students and coworkers. Plaintiff alleges one federal and four state law claims: (1) deprivation of liberty or property without due process of law, in violation of 42 U.S.C. § 1983; (2) conspiracy; (3) intentional infliction of emotional distress; (4) tortious interference with a contract; and (5) libel or defamation. Plaintiff brings the action pursuant

to 28 U.S.C. § 1331.

Before the court is defendants' motion to dismiss pursuant to Fed. R. Civ. P. 8(a), 12(b)(6) and 12(c). Defendants contend that the complaint fails to state a claim upon which relief may be granted, plaintiff failed to file a timely notice of claim and workers' compensation provides the exclusive remedy for plaintiff's conspiracy, emotional distress and defamation claims.

Because I find plaintiff's complaint insufficient to support a violation of due process, I will grant defendants' motion to dismiss that claim. Because I find no basis on which to exercise diversity jurisdiction under 28 U.S.C. § 1332 over the remaining state law claims, and I decline to invoke supplemental jurisdiction under 28 U.S.C. § 1367(c), I will grant defendants' motion to dismiss those claims.

When considering a motion to dismiss for failure to state a claim, a court must accept as true the well-pleaded factual allegations in the complaint and draw all reasonable inferences in favor of the plaintiff. Yeksigian v. Nappi, 900 F.2d 101, 102 (7th Cir. 1990). For the sole purpose of deciding the motion to dismiss, I find that the well-pleaded allegations of plaintiff's complaint fairly allege the following.

ALLEGATIONS OF FACT

Plaintiff William E. Powell is a professor in the Department of Social Work at the

University of Wisconsin-Whitewater. Defendants Howard Ross, Janet Wright, Charles Zastrow, Karen Kirst-Ashman, and Eugene Fujimoto are either administrators or professors at the university.

On May 6, 2002, defendant Fujimoto, Assistant to the Chancellor for Affirmative Action, issued an eleven-page “Sexual Harassment Complaint Finding” against plaintiff, alleging that plaintiff made inappropriate and offensive comments and evinced clear lack of judgment expected of a faculty member. The report recommended that the chancellor issue plaintiff a strong letter of reprimand and place the report in plaintiff’s personnel file. It further recommended that plaintiff be required to (1) attend sexual harassment training to identify his “problem areas”; (2) leave his office door open when meeting with students; and (3) meet with the dean and department chair each semester for five years to be reminded about “appropriate behavior” and “proper professional boundaries” with students. The report also recommended “more serious measures” be taken if additional complaints surfaced, and finally, that the whole department undergo sexual harassment training.

On May 22, 2002, in reliance on defendant Fujimoto’s report, University of Wisconsin-Whitewater Chancellor Jack Miller formally charged plaintiff with a violation of the University Handbook.

Defendant Ross, Dean of the Department of Social Work, defendant Wright, Department of Social Work professor and chairperson, and defendants Zastrow and Kirst-

Ashman, Department of Social Work professors, made or propagated knowingly false or unsubstantiated statements regarding plaintiff's conduct to defendant Fujimoto to be included in Fujimoto's report. All defendants knew or should have known the statements were false or not credible. Defendants Ross, Wright, Zastrow and Kirst-Ashman conspired to defame plaintiff by fabricating incidents of prior misconduct and inducing a student to falsely accuse him of wrongdoing.

As a result of defendants' actions, plaintiff's professional reputation has been damaged, leading to lost earnings and diminished earning capacity. In addition, plaintiff has incurred substantial attorney fees and suffered emotional harm. Plaintiff remains in his position as a professor in the Department of Social Work at the University of Wisconsin-Whitewater, and has not been transferred, demoted or terminated.

OPINION

A. Motion to Dismiss Claim Under 28 U.S.C. § 1983

Plaintiff alleges that defendants caused him to suffer "irreparable damage to his reputation and career as a professor and consequential lost earnings and earning capacity." 42 U.S.C. § 1983 states that "[e]very person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights . . . secured by the Constitution and laws . . . shall be liable to the

party injured in an action at law, suit in equity, or other proper proceeding for redress[.]” Plaintiff contends that he is entitled to relief for deprivation of liberty or property without due process of law as guaranteed by the Fourteenth Amendment.

The Supreme Court has held that governmental action that injures a person’s reputation within the community does not always constitute a deprivation of liberty requiring a hearing. See Paul v. Davis, 424 U.S. 693, 708-10 (1976). Generally, the stigma inflicted on the plaintiff must be so severe that he is no longer able to pursue the occupation of his choice. Doyle v. Camelot Care Centers, Inc., 305 F.3d 603, 624 (7th Cir. 2002); see also Colaizzi v. Walker, 812 F.2d 304, 307 (7th Cir. 1987) (defendant’s actions must have “the effect of blacklisting the employee from employment in comparable jobs”). “Simple charges of professional incompetence do not impose the sort of stigma that actually infringes an employee's liberty to pursue an occupation.” Head v. Chicago School Reform Bd. of Trustees, 225 F.3d 794, 802 (7th Cir. 2000). At minimum, the plaintiff must show that the defamation was coupled with the loss of his job or demotion to a position “far beneath” the one he previously held, Klug v. Chicago School Reform Board Trustees, 197 F.3d 853, 860 (7th Cir. 1999), although even this is often insufficient without more, Townsend v. Vallas, 256 F.3d 661, 669 (7th Cir. 2001).

Plaintiff does not allege he has become unemployable since defendants made the allegedly false statements or even that he was lost his position at the university. Plaintiff has

retained the same position he had before. Townsend, 256 F.3d at 271 (no liberty interest implicated when plaintiff retained same position). Rather, he alleges only that he has incurred attorney fees, suffered emotional harm and lost earnings and earning capacity. Even if he could prove this allegation, such a loss does not amount to a deprivation of liberty. One does not lose his liberty within the meaning of the due process clause simply because he may have been “force[d] down a few notches in the professional hierarchy.” Simpkins v. Sandwich Community Hospital, 854 F.2d 215, 218 (7th Cir. 1988).

A loss of pay could be considered a deprivation of *property*, Swick v. City of Chicago, 11 F.3d 85, 87 (7th Cir. 1993), but plaintiff does not allege that he had a property interest in his job. Further, plaintiff appears to concede in his brief that he cannot state a claim for a deprivation of property without due process of law. Plaintiff did not refute defendants’ argument in their brief-in-chief that he had not alleged a deprivation of a property interest. Therefore, defendants’ motion to dismiss plaintiff’s due process claim will be granted.

B. Motions to Dismiss State Law Claims

Generally, a federal court has jurisdiction to hear a case in three instances: (1) when the complaint raises a federal question, 28 U.S.C. § 1331; (2) when the parties are citizens of different states and the amount in controversy is greater than \$75,000, 28 U.S.C. § 1332; and (3) when a state law claim is part of the same case or controversy as a federal law claim

that may be considered under § 1331, 28 U.S.C. § 1367.

Upon dismissal of plaintiff's only claim raising a federal question, the court no longer has subject matter jurisdiction under 28 U.S.C. § 1331 over the remaining state law claims. Because no inference can be drawn from the complaint that the parties are domiciled in separate states, I find no basis for exercising diversity jurisdiction over this case, pursuant to 28 U.S.C. § 1332. Finally, I decline to exercise supplemental jurisdiction, pursuant to 28 U.S.C. § 1367(c). A state court would be better suited to decide the issues of state law that plaintiff has raised. Therefore, defendants' motions to dismiss the remaining claims will be granted.

ORDER

IT IS ORDERED that

Defendants Howard Ross, Janet Wright, Charles Zastrow, Karen Kirst-Ashman and Eugene Fujimoto's motion to dismiss plaintiff's 28 U.S.C. § 1983 claim is GRANTED. I decline to exercise supplemental jurisdiction over plaintiff's remaining state law claims. Accordingly, these claimed are DISMISSED. The clerk of court is directed to enter

judgment in favor of defendants and close this case.

Entered this 27th day of February, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge