

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

BRETT TIMMERMAN,

Plaintiff,

v.

MEMORANDUM AND ORDER

ENOVE Q. URIAS, ODEN A. WAITE,
DORAN E. WAITE and JOHN DEERE
HEALTH CARE, INC.,

05-C-0596-S

Defendants.

Plaintiff Brett Timmerman commenced this civil action against defendants Enove Q. Urias, Oden A. Waite and Doran E. Waite under 42 U.S.C. § 1985(3) claiming that they conspired to deprive him of his equal protection rights. He also pursues state law battery and libel claims. Defendant Oden Waite pursues a counterclaim for battery. Plaintiff's motion for summary judgment was denied on January 20, 2006.

On February 15, 2006 defendant filed a motion for summary judgment on plaintiff's 42 U.S.C. § 1985(3) claim. This motion was based on the facts already in the record. This motion has been fully briefed and is ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if

not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

FACTS

For purposes of deciding the motion for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff Brett Timmerman is an adult resident of Platteville, Wisconsin. His sexual orientation is homosexual. Defendant Oden Waite is an adult resident of Platteville, Wisconsin.

In the early morning hours of July 3, 2005 plaintiff and his friend Shannon Wallace were walking downtown in the City of Platteville to "Mike's Subs".

Plaintiff asserts in his affidavit that as he was opening the door to "Mike's Subs" Oden Waite said to him, "Why don't you take your fucking faggot ass back to Madison?" He also asserts that Oden Waite spit in his face and hit him on the side of his head. Plaintiff asserts that Enove Q. Urias slapped him on the cheek. He further asserts that Oden Waite grabbed him around the neck bringing him to the ground and that he scratched Oden Waite in self defense.

In his affidavit Oden Waite stated that he did not know plaintiff was a homosexual and did not refer to his sexuality in any way that night. He also asserts he only put plaintiff on the ground after plaintiff jumped him.

The police arrived and the people involved made written statements. On July 13, 2005 plaintiff was charged with criminal disorderly conduct. The criminal charge was ultimately dismissed. Defendant Oden Waite was also charged with criminal disorderly conduct.

In his affidavit plaintiff asserts that Oden Waite gave a false statement to the police. He also asserts that Enove Q. Urias and Doren A. Waite gave false statements to the police.

MEMORANDUM

Defendant contends that this Court does not have subject matter jurisdiction of plaintiff's 42 U.S.C. § 1985(3) claim because there was no state action. The statute provides in pertinent part as follows:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any state or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws...

To prevail on this 42 U.S.C. § 1985(3) claim plaintiff must prove a conspiracy for the purpose of depriving any person the equal protection of the laws, an act in furtherance of the conspiracy and an injury to the person. Griffin v. Breckenridge, 403 U.S. 88 (1971). In Griffin, the Court limited the application of the statute's first clause to conspiracies motivated to deprive discriminatory intent to deprive plaintiffs of rights constitutionally protected against private (and not just governmental) deprivation. In Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 297 (1993), the Court defined the rights which were protected against private action as only the constitutional right of interstate travel and the rights granted by the Thirteenth Amendment.

The facts concerning the July 3, 2005 incident are in dispute. For the purpose of deciding defendant's motion for summary judgment the Court will accept plaintiff's version of the facts. Plaintiff asserts in his affidavit that as he was opening the door to "Mike's Subs" Oden Waite said to him, "Why don't you take your fucking faggot ass back to Madison?" He also asserts that Oden Waite spit in his face and hit him on the side of his head. He further asserts that Oden Waite grabbed him around the neck bringing him to the ground and that he scratched Oden Waite in self defense.

These facts do not allege any action by the government. Without state action, to prevail on a claim under the first clause of 42 U.S.C. § 1985(3), plaintiff would have to show a conspiracy to deprive him of his right to interstate travel or rights granted under the Thirteenth Amendment. He has not alleged that he was deprived of either right. Accordingly, this Court lacks subject matter jurisdiction of plaintiff's claim under the first clause of 1985(3) because there was no state action.

The second clause of 42 U.S.C. § 1985(3) prohibits private individuals from hindering the state authorities from giving or securing to all persons within such State or Territory the equal protection of the laws. The Court stated in Bray as follows:

Private conspiracies to injure according to class or classification are not enough here, they must be conspiracies to act with enough force, of whatever sort, to overwhelm the

capacity of legal authority to act
evenhandedly in administering the law.

Id. at 300. The hindrance clause provides a cause of action only where the purposeful hindering of state officials was directed at denying or infringing on the rights of a group of citizens. Libertad v. Welch, 53 F.3d 428, 450 (1st Cir. 1995). The purpose of the conspiracy must be to impede state officials in their efforts to secure equal protection of the laws.

Plaintiff claims that the defendants conspired to lie to police to have plaintiff criminally prosecuted which prevented the police and prosecutor from securing to plaintiff the equal protection of the law. The only evidence that plaintiff presents in support of this claim is at paragraph 37 of his affidavit which states as follows:

The timing of everything (Oden first refusing to give a statement, but then giving one after he realized that Shannon Wallace and I were giving statements), Doran and Enove not giving statements to police at the time of the incident but then two days later giving written statements, and the fact that Oden is the one who brought Enove to the police department, makes it appear to me that these three defendants conferred over the course of a couple of days, came up with a false version of events and conspired to provide that false version of events to law enforcement so as to get me prosecuted and so as to get the defendants off the hook.

Plaintiff has no evidence that there was a conspiracy. He merely argues that it appears to him that there was. There is absolutely no evidence in the record that Oden Waite, Doran Waite

and Enove purposely conspired to act with enough force to overwhelm the capacity of legal authority to act evenhandedly in administering the law. In fact the disorderly conduct charge against plaintiff was dismissed. There is no evidence to support a conspiracy claim under the hindrance clause. Defendant Oden Waite's motion for summary judgment will be granted. Since plaintiff has no claim under 42 U.S.C. § 1985(3) his claim will be dismissed as to all defendants for lack of subject matter jurisdiction.

The remaining claims in this action are state law claims. This Court declines to exercise continuing supplemental jurisdiction over plaintiff's state law claims pursuant to 28 U.S.C. §1367(c) (3) and United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1986). See Brazinski v. Amoco Petroleum Additives Co., 6 F.3d 1176, 1182 (7th Cir. 1993). Plaintiff's state law claims will be dismissed without prejudice. Defendant Oden Waite's state law battery claim will also be dismissed without prejudice.

ORDER

IT IS ORDERED that defendant Oden Waite's motion for summary judgment is GRANTED.

IT IS FURTHER ORDERED that judgment is entered in favor of defendants against plaintiff DISMISSING his federal law claims with

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prejudice for lack of subject matter jurisdiction and his state law claims without prejudice.

IT IS FURTHER ORDERED that defendant Oden Waite's state law counterclaim is DISMISSED without prejudice.

Entered this 23rd day of March, 2006.

BY THE COURT:

S/

JOHN C. SHABAZ
District Judge