IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

CHRISTOPHER J. MCMAHON,

Plaintiff,

v.

MEMORANDUM and ORDER
06-C-285-S

JOHN KINDLARKSI, JOHN NIEBUHR, RONALD DeBRUYNE, SR., JUDITH DeBRUYNE, KRISTEN DeBRUYNE and WISCONSIN MUTUAL INSURANCE COMPANY,

Defendants.

Plaintiff Christopher J. McMahon commenced this civil action against defendants John Kindlarski, John Niebuhr, Ronald DeBruyne, Sr., Judith DeBruyne and Kristen DeBruyne alleging that they conspired to violate his equal protection and due process rights and his rights under state law. Wisconsin Mutual Insurance Company's motion for summary judgment was granted on November 15, 2006.

On October 16, 2006 defendants moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of facts, conclusions of law, affidavits and a brief in support thereof. Plaintiff opposed these motions. No further briefing is required.

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).

Plaintiff moves to strike defendants' motions for summary judgment because of reference to the child pornography images allegedly found on plaintiff's computer. Plaintiff argues there is no foundation in the record that these were the actual images found on the computer. This evidentiary defect does not require summarily denying defendants' motions for summary judgment.

Plaintiff also moves to refuse the defendants' application for judgment because defendant Kristen refused to complete her deposition testimony. Any further testimony of Kristen is not necessary for the resolution of defendants' motion for summary judgment.

Plaintiff also moves to strike from the record the briefs and proposed facts of defendants Niebuhr and Kindlarski. These defendants move to deem the corrected filing timely filed. Plaintiff's motion to strike will be denied and the pleadings will be deemed timely filed.

FACTS

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

Plaintiff Christopher J. McMahon is an adult resident of Wisconsin Rapids, Wisconsin. Defendant Kristen DeBruyne is an adult resident of Arbor Vitae, Wisconsin. Defendants Judith DeBruyne and Ronald DeBruyne, the parents of Kristen, are also adult residents of Arbor Vitae, Wisconsin. Defendant Ronald DeBruyne has been a member of the Vilas County Board of Supervisors. J.A. is the daughter of the plaintiff and defendant Kristen DeBruyne and was born on January 10, 2002.

Defendant John Niebuhr is the Sheriff of Vilas County. Defendant John Kindlarski is a Detective Sergeant of the Vilas County Sheriff's Department.

In April 2001 plaintiff who was 26 met Kristen Debruyne who was 17. In the spring of 2001 plaintiff learned that she was pregnant.

On November 7, 2001 the Vilas County Sheriff's Department received three telephone calls from Judith DeBruyne at 7:54 a.m., 4:10 p.m. and 9:02 p.m. complaining that plaintiff then 26 years old was harassing her daughter, Kristen, then aged 17.

On November 8, 2001 Sheriff Niebuhr assigned Detective Sergeant Kindlarksi to investigate Judith's complaints. Kindlarski conducted an interview with Judith DeBruyne on November 14, 2001 who advised that plaintiff was harassing Kristen with numerous emails, telephone calls and unexpected visits.

On November 16, 2001 Detective Kindlarski spoke with plaintiff and advised him that the DeBruynes wanted no further contact with him. Detective Kindlarksi then called Judith and advised her of the status of his investigation.

Plaintiff initiated an action in November 2001 in Oneida County Circuit Court against Kristen seeking to confirm the paternity of J.A. and obtain visitation rights. In November 2001, Kristen DeBruyne married Michael Ervin and moved to Libertyville, Illinois.

On January 10, 2002 Kristen gave birth to J.A. In March 2002 the Court appointed Natalie Tyler as the guardian ad litem for J.A.

Plaintiff enrolled in the University of Wisconsin-Eau Claire in the fall of 2002. Plaintiff volunteered at "Safe and Sound", a program for children, but was terminated after his November 16, 2001 interview with Detective Kindlarski,

Plaintiff assumed a female identity as a single mother on an internet chat site that Kristen frequented naming himself "bluekellylilly". He managed to befriend Kristen using this identity and chatted with her for nine months until she confessed that she had "lost it" and slapped J. A.

On November 11, 2002 plaintiff immediately reported Kristen and her husband for alleged abuse of J.A. in Libertyville, Illinois. The Libertyville Illinois Police Department commenced an investigation. On December 4, 2002 plaintiff advised the guardian ad litem in his paternity case, Natalie Tyler, of the abuse investigation. He also told the Libertyville Police Department that he had saved communications with Kristen on his computer. On December 13, 2002 after signing a consent to search plaintiff provided his computer to the Mundelein Police Department as evidence in the abuse investigation. Twelve photographs of child pornography were found on the computer.

On January 29, 2003 Judith DeBruyne reported to the Vilas County Sheriff's Department that plaintiff was harassing Kristen and her. Detective Kindlarski met with Judith who advised him that Kristen wished to report plaintiff for sexual assault. Judith also advised that blood tests indicated plaintiff was the father of Kristen's child J.A.

Oneida County Sheriff's Department Detective Glen Schaape and Deputy Terry Smoczyk conducted a videotaped interview of Kristen in

which she recounted a violent and non-consensual sexual assault by plaintiff. Because Kristen stated that the assault occurred in Vilas County and not Oneida County, Detective Kindlarski began an investigation of her allegations.

On February 4, 2003 Detective Kindlarski conducted an interview of Kristen's husband Michael who reported that Kristen had told him she had been sexually assaulted. This account of the sexual assault was significantly different than the account Kristen gave to the Oneida County Sheriff's Department.

On February 10, 2003 Detective Kindlarski spoke to Detective William Kinast of the Libertyville Police Department. That same day Detective Kindlarksi completed an Affidavit in Support of Subpoena for Documents and Order in which he advised that he was investigating a reported First Degree Sexual Assault and a reported Harassment. He also advised the court of the ongoing investigation in Libertyville, Illinois that disclosed child pornography on McMahon's computer. Detective Kindlarski did not speak to Ronald, Judith or Kristen about the contents of this affidavit and they did not contribute to its contents. The subpoena was signed by the Honorable Circuit Court Judge James B. Mohr regarding plaintiff's use of the UW-Eau Claire's campus computer network. The subpoena advised that the matter was confidential and involved and ongoing criminal investigation.

On February 13, 2003 Kindlarski met with Dean Robert Shaw and Rick Richmond of UW-Eau Claire to serve the subpoena. Richmond eventually gave Kindlarksi a disc and an index of materials on the disc in response to the subpoena.

On February 13, 2003 Kindlarski and Officer Hubbard, a University of Wisconsin-Eau Claire police officer, interviewed plaintiff about the alleged sexual assault of Kristen and about the child pornography found on his computer. Kindlarksi showed plaintiff twelve photographs depicting child pornography. At the end of the interview plaintiff signed a "Consent to Search" form that allowed Detective Kindlarski to search numerous papers he had collected when he had communicated with Kristen in chat rooms.

On February 23, 2003 Judith reported on-going harassment of Kristen. On April 4, 2003 Detective Kindlarski met with Judith and Kristen who advised him that she wished to discontinue the sexual assault investigation. After consulting with the Sheriff, Kindlarski closed the sexual assault investigation on April 11, 2003.

In the spring of 2003 the Eau Claire District Attorney decided not to charge plaintiff with possession of child pornography. Officer Hubbard then stopped his investigation of plaintiff.

Plaintiff alleges that although Dean Shaw asked him to leave the University of Wisconsin-Eau Claire in the spring semester of 2003 he did not leave. Plaintiff transferred to the University of

Wisconsin-Stevens Point for the 2003-2004 school year and changed his major from education to sociology.

On May 20, 2004 Judith reported to the Vilas County Sheriff's Department that she and Kristen were being stalked by plaintiff. An investigation was commenced and assigned to Deputy Heller.

On June 15, 2004 the Oneida County Circuit Court heard testimony from plaintiff and the DeBruyne family concerning the paternity of J.A. Defendant Kindlarski testified at this hearing. The Court continued the proceedings until July 22, 2004 and heard more testimony. On September 16, 2004 the Court ordered joint legal custody of J.A., that she reside between Kristen and plaintiff with periods of physical placement granted to Ron and Judy at the same time as Kristen. In October 2004 defendants Ronald and Judith De Bruyne moved reconsideration of the September 16, 2004 order.

In July 2004 plaintiff obtained an internship under Laura Kuehn, Coordinator of the Lac du Flambeau Indian Child Welfare Agency in Vilas County. Kindlarski spoke with Kuehn and advised her that the UW-Eau Claire University Police Department had referred McMahon's child pornography investigation to the Eau Claire County District Attorney's office for charges and that Kristen had alleged that plaintiff had sexually assaulted her. Later that day Kuehn advised plaintiff he was released from his internship. The internship was unpaid but provided plaintiff six

credits toward his degree at UW-Stevens Point. Plaintiff was then placed in an alternative internship and received six credits.

On December 21, 2004 Judith DeBruyne reported to the Vilas County Department of Social Services and the Vilas County Sheriff's Department that J.A. was exhibiting unusual behavior and that she had an injury to her vagina. She was taken to the hospital to be examined but it could not be determined whether she was sexually assaulted. Detective Kindlarski investigated the allegations. On January 20, 2005 the Vilas County Department of Social Services closed the case due to lack of evidence.

On January 30, 2005 Judith took J.A. to Howard Young Medical Center Emergency Room as J.A.'s pubic area was raw. She reported the injury to the Vilas County Sheriff's Department. There was no physical evidence that J.A. had been sexually assaulted. The case was closed in March 2005.

On June 1, 2005 Judith again reported that J.A. had engaged in more sexual behavior. This information was provided to the Oneida County Sheriff's Department and the Vilas County Department of Social Services, both of whom had ongoing related investigations.

On October 26, 2005 plaintiff moved for sole custody of J.A. The paternity case was tried before the Honorable Mark A. Mangerson commencing on December 5, 2005 and ending on December 9, 2005. The Court awarded sole legal custody and primary placement of J.A. to

plaintiff granting the DeBruynes visitation rights every other weekend from Friday until Sunday.

Plaintiff obtained a degree from UW-Stevens Point in the spring of 2005. He began a job with Forward Service as a social worker shortly thereafter where he remains employed today.

Kevin Schutz, a vocational rehabilitation counselor, has submitted an affidavit in opposition to defednants' motions for summary judgment asserting that plaintiff was stigmatized by the defendants' conduct and suffered a tangible loss of educational and employment opportunities as a result of the defednants' false public disclosures.

MEMORANDUM

Plaintiff claims that he was denied his procedural due process rights when he was deprived of educational and employment opportunities and association with his daughter. Plaintiff also claims he was denied equal protection of the laws. Plaintiff further alleges that all the defendants conspired to violate his Constitutional rights and deprived him of his rights under state law.

Under 42 U.S.C. § 1983 plaintiff must prove that a person acting under color of state law violated his constitutional rights. In addition he may show that private parties conspired with state actors to deprive him of his constitutional rights. See Moore v. Marketplace Restaurant, Inc., 754 F.2d 1336, 1352 (7th Cir. 1985).

The Court first addresses whether plaintiff's constitutional rights were violated.

To prevail on his claim that his due process rights were violated, plaintiff must first prove that he had a protected liberty or property interest. The Court has held that a person does not have a protected liberty or property interest in his or her reputation. Paul v. Davis, 424 U.S. 693, 701, 711-712 (1976). It is the alteration of legal status combined with the injury resulting from the defamation that justifies the invocation of procedural safeguards. The Court in Siegert v. Gilley, 500 U.S. 226, 233 (1991), held that "Our decision in *Paul v. Davis* did not turn, however, on the state of mind of the defendant, but on the lack of any constitutional protection for the interest in reputation."

It may be that a resulting inability to find work in the defamed person's chosen profession is itself an alteration of legal status that would give rise to a due process claim on the part of a non-government employee whose employment was terminated because of the government's defamation. Hojnacki v. Klein-Acosta, 285 F.3d 544, 548 (7th Cir. 2002). For a plaintiff to establish a protectable liberty interest any stigmatic harm must take concrete forms and extend beyond mere reputational interests. Brown v. City of Michigan, City, Indiana, 462 F.3d 720(7th Cir. 2006).

Plaintiff contends that defendant Kindlarksi made false statements about him to University of Wisconsin Eau Claire administrators, to the guardian ad litem, and to Laura Kuehn, his internship supervisor. There is a genuine issue of material fact whether the statements were false.

Plaintiff received custody of his child, received credits for an alternate internship, was not required to leave the University of Wisconsin Eau Claire, has received his college degree from UW-Stevens Point and is employed in the field of social work. Plaintiff's expert, however, asserts that plaintiff has suffered a tangible loss of educational and employment opportunities due to defendants' statements. A genuine factual issue remains whether plaintiff was deprived of a protected liberty interest in the loss of educational and employment opportunities. It may also be that a factual issue remains as to whether the alleged denial of his employment opportunities implicated a protected property interest as well as a protected liberty interest.

In his opposition brief to defendants' motions for summary judgment plaintiff states that "by intentionally delaying the custody proceedings with unfounded and malicious accusations against McMahon, the defendants violated his right to establish a home with JADE and to participate in her upbringing". In Doe v. Heck, 327 F.3d 492, 517 (7th Cir. 2003), the Court recognized that parents have a liberty interest in familial relations which

includes the right to "establish a home and bring up children"... Plaintiff claims that he was denied this liberty interest in raising his daughter without due process when the paternity case proceedings were delayed by the defendants' actions. A genuine factual dispute remains whether defendant was denied a protected liberty interest in the loss of association with his daughter.

After finding that plaintiff may have been deprived of a protected liberty or property interest, the second step of the analysis of a Fourteenth Amendment procedural due process claim is the determination of what process is due. The Court has defined the process that is due when a deprivation results from the intentional but "random and unauthorized conduct" of a state employee. Hudson v. Palmer, 468 U.S. 517, 533 (1984). Unauthorized intentional deprivation of property by a state employee does not constitute a violation of the Due Process Clause if a meaningful postdeprivation remedy for the loss is available. Id. Where state law remedies exist, a plaintiff must either avail himself or herself of the remedies guaranteed by state law or demonstrate that the available state remedies are inadequate. Daniels v. Williams, 474 U.S. 327 (1986).

In Easter House v. Felder, 910 F. 2d 1387 (7th Cir. 1990) the Court found that meaningful postdeprivation remedies existed under Illinois state law including a tort action for interference with business relationships, a tort action for malicious and wrongful

impairment of property and a deceptive trade practice action. The Court held that these potential causes of action adequately afforded Easter House meaningful post-deprivation remedies sufficient to provide the requisite due process protections.

Plaintiff concedes that the acts which deprived him of any alleged protected property or liberty interest were random and unauthorized. The question is whether adequate meaningful postdeprivation remedies existed under Wisconsin state law.

In Mahoney v. Kersey, 976 F.2d. 1054, 1061 (7th Cir. 1992), the Court stated that for unauthorized acts a post deprivation remedy is all that due process requires. Specifically, the Court stated:

> ...the State of Wisconsin provides a machinery for rectifying groundless prosecutions. The machinery includes trials and appeals as well as the right to bring a common law suit for malicious prosecution.

Although, as plaintiff argues, the Court in Mahoney stated that such a rule will "eventually be discovered to have wiped out all constitutional defamation claims and malicious prosecutions as well," it is still the rule that where plaintiff has a meaningful state law post deprivation remedy he has received the requisite due process protection. See Cushing v. City of Chicago, 3 F.3d 1156, 1164-1165 (7th Cir. 1993).

Plaintiff also argues that according to Baird v. Board of Educ. School Dist. #205, 389 F.3d 685 (7th Cir. 2004) the state must

provide prompt post-deprivation remedies. The Court held as follows:

> Thus, when a public employee terminated for cause has a present entitlement, and when the only available post-termination remedy is the opportunity to bring a state breach of contract suit, the pre-termination hearing to which such an employee is entitled must fully satisfy the due process requirements of confrontation and cross-examination in addition to the minimal *Loudermill* requirements of notice and opportunity to be heard.

Plaintiff's case is distinguishable from Baird. He was not a public employee with a present entitlement. Baird was entitled to a pre-deprivation hearing to which plaintiff was not entitled. Plaintiff was only entitled to post deprivation remedies.

In this case plaintiff is pursuing Wisconsin state law actions of defamation, abuse of process, interference with contract, malicious prosecution and intentional infliction of emotional distress. These are meaningful state law post-deprivation remedies sufficient to provide the requisite due process protection for any deprivation of liberty or property that plaintiff may have suffered. Accordingly, plaintiff's Fourteenth Amendment due process rights were not violated.

Plaintiff may prevail on his equal protection claim by proving he was intentionally treated differently from others who are similarly situated and that there is no rational basis for the treatment. Village of Willowbrook v. Olech, 528 U.S. 562 (2000).

In McDonald v. Village of Winnetka, 371 F.3d 992, 1001 (7th Cir. 2004), the Court held that a plaintiff may bring a "class of one" equal protection claim where he or she alleges that he has been intentionally treated differently from others similarly situated and there is not a rational basis for the difference in treatment or the cause of the differential treatment is a "totally illegitimate animus" toward the plaintiff by the defendant.

In McDonald plaintiff claimed that the Fire Department did not follow its policy to rule out all non-arson causes before making an arson determination. The Court held that plaintiff's claim failed because he had not presented evidence that he was treated differently than a similarly situated individual. The Court stated, "The reason that there is a "similarly situated" requirement in the first place is that at their heart, equal protection claims, even "class of one" claims are basically claims of discrimination." Id, at 1009. See also Lunni v. Grayeb, 395 F.3d 761, 769 (7th Cir. 2005).

In Maulding Development v. Springfield, ILL., 453 F.3d 967, 970 (7th Cir. 2006), the Court discussed Maulding's class of one claim as follows:

> Maulding's claim is doomed because of the total lack of evidence of someone who is similarly situated by intentionally treated differently than it. This type of evidence is required because "[d]ifferent treatment of dissimilarly situated persons does not violate the equal protection clause. (Citations omitted)

It is the plaintiff's burden to show that he was treated differently than a similarly situated individual. Plaintiff's conclusory statement that no one had been treated the way he was treated is insufficient to meet his burden. He has not presented any evidence that a similarly situated individual was treated differently than he was during an investigation. Since he has not presented this necessary evidence, plaintiff cannot prevail on his equal protection claim.

Since plaintiff's constitutional rights were not violated, the Court need not address the issue of whether there was a conspiracy to violate his constitutional rights either under 42 U.S.C. § 1983 or § 1985. Defendants are entitled to judgment in their favor on plaintiff's federal law claims.

Remaining are plaintiff's state law claims for defamation, malicious prosecution, abuse of process, interference with employment and intentional infliction of emotional distress. 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.

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ORDER

IT IS ORDERED that plaintiff's motions to strike defendants' motions for summary judgment, to refuse defendants' motions for summary judgment and to strike defendants Kindlarski and Niebuhr's brief and proposed findings of fact from the record are DENIED.

IT IS FURTHER ORDERED that the motion of defendants Kindlarski and Niebuhr to correct filing and to deem correct filings as timely file is GRANTED.

IT IS FURTHER ORDERED that the motions for summary judgment of defendants John Kindlarski, John Niebuhr, Ron DeBruyne, Judith DeBruyne and Kristen DeBruyne is GRANTED.

IT IS FURTHER ORDERED that judgment be entered in favor of all defendants against plaintiff DISMISSING all federal law claims with prejudice and state law claims without prejudice.

Entered this 20th day of November, 2006.

BY THE COURT:

s/

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JOHN C. SHABAZ
District Judge