

1988 WL 19284  
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United States District Court, E.D. Louisiana.

DEL A., et al.  
v.  
Edwin EDWARDS, et al.

Civ. A. No. 86-0801. | March 2, 1988.

### MINUTE ENTRY

SEAR, District Judge.

\*1 This civil rights action was brought under 42 U.S.C. § 1983 on behalf of children in the Louisiana foster care program against the Governor of Louisiana, and the Secretary, Assistant Secretary, and Undersecretary of the Louisiana Department of Health and Human Resources, which administers the foster care program. The plaintiffs allege violations of a number of rights secured by the Adoption Assistance Act and by the United States Constitution.

The defendants have brought a motion to dismiss and/or for summary judgment against plaintiffs' claims for damages, asserting the defense of qualified immunity, and also against some of plaintiffs' claims for declaratory and injunctive relief. While the motion was under submission, the defendants moved before the magistrate for a protective order staying all discovery. The magistrate denied the motion. The defendants then moved to review the magistrate's order. Since the filing of this action, a new governor has been elected for the State of Louisiana and an additional lawyer retained to represent the state. In order to give defendants' new counsel time to file a supplemental brief, this motion was continued and certain discovery matters were stayed, pending resolution of the defendants' motion to dismiss and/or for summary judgment.

A number of issues raised in the original brief submitted by the defendants have not been opposed by the plaintiffs. The parties agree that no damages are available against the defendants in their official capacities, pursuant to the Eleventh Amendment. The parties agree that the defendants may not be held liable even in their individual

capacities for events occurring prior to the dates of their respective assumptions of the office. Plaintiffs do not object to dismissal of any claims based on Eighth Amendment rights. Finally, the parties agree that under § 1983 a defendant may not be held liable under doctrines of respondeat superior or for simple negligence in supervision, and that a federal court cannot enjoin state officials to follow state laws.

Furthermore, claims based on First and Ninth Amendment rights appear to have been abandoned by the plaintiffs. On the other hand, plaintiffs' claims of violations of their procedural due process rights relating to entitlements under state and federal statutes and other liberty interests were not squarely addressed in either of defendants' memoranda, and consequently the motion of defendants with respect to these claims has been considered withdrawn. Similarly, it does not appear that the defendants have controverted plaintiffs' claims for declaratory and injunctive relief grounded on constitutional violations.

The parties dispute, however, whether, to what extent, and for what relief, the plaintiffs may assert claims under § 1983 based on violations of the Adoption Assistance Act and of the constitutional rights of the plaintiffs to protection from harm and to placement in the least restrictive appropriate setting. In particular, the defendants contest the availability of damages under § 1983 for the alleged violations, and assert the defense of qualified immunity.

Qualified immunity is available to the defendants if they show that the illegal actions of which they are accused were taken within their discretionary authority, *Creamer v. Porter*, 754 F.2d 1311 (5th Cir.1985); *Saldana v. Garza*, 684 F.2d 1159 (5th Cir.1982), and the plaintiffs fail to show that the alleged actions violated then clearly established federal statutory or constitutional law of which a reasonable person would have known, *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727 (1982). The defendants have not shown the former; more importantly, the plaintiffs have, for the most part, shown the latter.

#### I. The Alleged Statutory Violations

\*2 The plaintiffs allege that the defendants have violated a number of rights secured to them by the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 670et seq. Specifically, the plaintiffs allege violations of § 671(a)(16) (requiring the development of a "case plan" for each child and a "case review system"); § 675(1)

(defining a “case plan” to require written documents describing various plans for the child); § 675(5)(a) (defining a “case review system” to include “a procedure for assuring that ... each child have a case plan designed to achieve placement in the least restrictive (most family-like) setting available and in close proximity to the parents’ home, consistent with the best interests and special needs of the child”); § 671(5)(B) (defining a “case review system” to include “a procedure for assuring that ... the status of each child is reviewed periodically but no less frequently than once every six months”); and § 671(a)(15) (requiring that “in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of a child from his home, and (B) to make it possible for the child to return to his home”); effective October 1983). Plaintiffs proffer substantial evidence indicating potentially widespread violations that defendants do not controvert except with conclusory statements.

These statutory rights are clearly established by their very nature, and the primary question is whether the statute creates substantive rights enforceable under § 1983. The Adoption Assistance Act creates substantive rights enforceable by actions brought under § 1983 on behalf of foster children, *L.J. v. Massinga*, No. 87–2156, slip. op. (4th Cir., Feb. 1, 1988); *Lynch v. Dukakis*, 719 F.2d 504 (1st Cir.1983), and the available remedies include monetary damages, *J.L. v. Massinga*, slip. op. at 15; *but see Scrivner v. Andrews*, 816 F.2d 261 (6th Cir.1987) (alternative holding based on dubious reading of an earlier case). Specifically, the Fourth Circuit found that a standard of conduct, privately enforceable in damages, arises from the provisions in §§ 671(a)(10), 627(a)(2)(B), 671(a)(16), and 671(a)(9), especially in light of the definitions provided in § 675. *J.L. v. Massinga*, slip. op. at 12–15; *see also Lynch v. Dukakis*, 719 F.2d at 512 (finding enforceable §§ 671(a)(16), 675(1), and 675(5)(B); only injunctive relief was sought). Section 671(a)(15) should be similarly enforceable.

## II. The Alleged Constitutional Violations

For constitutional rights to be “clearly established” it suffices if the defendant should have been aware that the violations contravened “general, well-developed legal principles.” *Jefferson v. Yseleta Independent School District*, 817 F.2d 303, 305 (5th Cir.1987). It is not necessary that there be a precedent that is “factually on all-fours with the case at bar.” *Id.*

\*3 The plaintiffs allege that the defendants violated the plaintiffs’ constitutional rights to “protection from harm” and to “placement in the least restrictive, appropriate

setting.” The right of children in the custody of the state to safety and protection from harm has been clearly established since well before 1984, the earliest year of assumption of office of any of the defendants. *L.J. v. Massinga*, Civil Action No. JH–84–4409 (D.Md. July 27, 1987) (finding the right to have been clearly established as early as 1974); *Doe v. New York City Dept. of Social Services*, 649 F.2d 134 (2d Cir.1981); *see Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir.1987); *cf. Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452 (1982); *Donaldson v. O’Connor*, 493 F.2d 507 (5th Cir.1974), *vacated*, 422 U.S. 563, 95 S.Ct. 2486 (1975); *Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir.1974); *Gary W. v. State of Louisiana*, 437 F.Supp. 1209 (E.D.La.1976) (Rubin, J.). Plaintiffs argue that the right to protection extends also to children not in the custody of the state, where the officials know of a threat to the children, have a special relationship with the children, and are in a position to thwart the threat. Plaintiffs have conceded, however, that the right of children not in state custody to the protection of state officials under these circumstances is not clearly established. *Compare Estate of Bailey v. County of York*, 768 F.2d 503 (3rd Cir.1985) (there is such a duty) *with DeShaney v. Winnebago County Dept. of Social Services*, 812 F.2d 298 (7th Cir.1987) (there is not). Resolution of the issue of the existence of this right is reserved for a later date.

Although plaintiffs expressly disavow asserting a “right to be protected from emotional distress,” plaintiffs do maintain that emotional distress is a proper element of damages under a § 1983 claim. The scope of the right to safety and protection from harm, the proper elements of damages, and the proper means of measurement of those elements of damages, taking into account the proper standard of causation, are also reserved for a later date.

The plaintiffs allege that the defendants also violated their constitutional rights to “placement in the least restrictive, appropriate setting.” By this the plaintiffs do not suggest that least-restrictive-alternative analysis should be applied in order to optimize improvement in the lives of the children during their time in state custody, *cf. Leslz v. Kavanaugh*, 807 F.2d 1243 (5th Cir.1987), but merely to the extent necessary to assure them protection from unnecessary harm, *cf. Lynch v. Baxley*, 744 F.2d 1452 (11th Cir.1984); *Dilmmore v. Stubbs*, 636 F.2d 966 (5th Cir.1981). In light of the determination that § 675(5)(a) (defining a “case review system” to include “a procedure for assuring that ... each child have a case plan designed to achieve placement in the least restrictive (most family-like) setting available and in close proximity to the parents’ home, consistent with the best interests and special needs of the child”) creates a substantive rights

enforceable under § 1983, it is unnecessary to decide now this constitutional issue, because it appears that the statute already gives greater guarantees to the plaintiffs than the relief they seek under the constitution. *See also L.J. v. Massinga*, slip. op. at 12 (unnecessary to decide constitutional issues on motion to dismiss on grounds of qualified immunity, where related statutory allegations survive challenge).

The plaintiffs have properly alleged that deliberate indifference and gross negligence on the part of the defendants has caused deprivations of their statutory and constitutional rights, *see Doe v. New York City Dept. of Social Services*, 649 F.2d 134 (2d Cir.1981); *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir.1987); *see also Hinshaw v. Doffer*, 785 F.2d 1260, 1263 (5th Cir.1986) (“supervisory officials ... may be liable when their own action or inaction, including a failure to supervise that amounts to gross negligence or deliberate indifference, is a proximate cause of the constitutional violation”; “a failure to supervise gives rise to section 1983 liability ... in those situations in which there is a history of widespread abuse”). The plaintiffs have proffered sufficient evidence to indicate that there are significant numbers of violations, enough to justify allowing discovery to go forward, and to deny the motion for summary judgment.

\*4 It is implicit in the foregoing that all of the claims that may give rise to damages may also support declaratory and injunctive relief, given in a proper form, *see Lynch v.*

*Dukakis*, 719 F.2d 504 (1st Cir.1983), and, indeed, there may be some claims that, while not giving rise to damages because not clearly established at the time of the alleged violations, nevertheless will form a basis for declaratory and/or injunctive relief.

Finally, the defendants have moved to dismiss some plaintiffs on the grounds that in depositions they indicated a lack of intent to pursue § 1983 claims against the officials in their individual capacities. On this issue, I am inclined to accept the affidavits signed with the advice of counsel as stating the informed decisions of the plaintiffs.

Accordingly,

IT IS ORDERED that the defendants’ motion to dismiss and/or for summary judgment is DENIED;

IT IS FURTHER ORDERED that the defendants’ motion to review the magistrate’s denial of the motion for protective order is DENIED;

IT IS FURTHER ORDERED that the stay on certain discovery matters is REMOVED.

#### All Citations

Not Reported in F.Supp., 1988 WL 19284

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