NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with FED. R. APP. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Argued December 13, 2023
Decided February 9, 2024

Before

DIANE P. WOOD, *Circuit Judge*

THOMAS L. KIRSCH II, *Circuit Judge*

JOHN Z. LEE, *Circuit Judge*

No. 23-1786

JOSEPH BALIGA,
Plaintiff-Appellant,

v.

MICHAEL SMITH, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

No. 1:21-cv-00472-JRS-TAB

James R. Sweeney II,
Judge.

O R D E R

The Indiana Horse Racing Commission suspended Dr. Joseph Baliga's license to practice veterinary medicine at horse-racing tracks after a witness reported seeing him administering a drug in an unapproved manner. Baliga sought judicial review, and the Indiana Court of Appeals remanded, concluding that the Commission had abused its discretion. The Commission later dismissed the charges against Baliga, who then brought this suit in federal court, asserting a class-of-one equal protection claim. The

district court entered summary judgment for the defendants. Though the standards that apply to class-of-one claims are unsettled in this court, we affirm because Baliga's claim fails regardless of which standard we apply.

Background

This appeal concerns the Indiana Horse Racing Commission's investigation and prosecution of Baliga after he allegedly violated the Commission's drug administration rules. The Commission, which is both a regulatory and adjudicative body, prohibits horses dosed with any foreign substance except furosemide from participating in a race. 71 IND. ADMIN. CODE 8-1-2, 3. (Furosemide—brand name Lasix—is a diuretic that is commonly given to racehorses. *Baliga v. Ind. Horse Racing Comm'n*, 112 N.E.3d 731, 734 (Ind. Ct. App. 2018).) The Commission has strict protocols for the race-day administration of Lasix: Only veterinarians licensed by the Commission may administer it, and only a certain amount from a factory-sealed bottle. 71 IND. ADMIN. CODE 8-1-5. A Lasix "escort" must accompany the veterinarian. *See id.*

On September 30, 2016, Baliga, a veterinarian with the requisite Commission license, administered Lasix to horses that were racing later that day. He was accompanied by a Lasix escort, David Hicks. According to Hicks, at one point while he and Baliga were in the Lasix room (a secure room to which only a few people had a key), Baliga drew fluid from a small, unidentified vial into a syringe. Baliga then drew Lasix into the same syringe and placed the syringe in his pocket. Later, Hicks saw Baliga remove the syringe from his pocket and administer its contents to a horse.

After Baliga finished administering Lasix for the day, Hicks told the track judges, who are authorized to impose summary suspensions, IND. CODE § 4-31-12-15, what he had allegedly witnessed. Hicks then found a small, non-Lasix vial in the Lasix room's trashcan. That evening, the Commission's general counsel, Lea Ellingwood, emailed a Commission investigator, the executive director, the deputy executive director, and others. She said that Baliga had "operated on the fringe without getting caught in the past," and instructed the recipients to, "for sake [sic] of prosecuting this," ensure that they had Hicks identify the vial and confiscate it, "[t]oss Baliga's truck," and "[s]earch Baliga and his wife."

Under Indiana Law, an incident like the one here can lead to two types of disciplinary proceedings. *Baliga*, 112 N.E.3d at 732–33. First, the track judges may summarily suspend a license, after which the licensee is entitled to a hearing contesting

the summary decision. *See generally* 71 IND. ADMIN. CODE 10-2. The judges may then continue to a disciplinary hearing at which they hear the evidence and decide whether the licensee committed any violations. *See id.* Second, the Commission, through its executive director, may file an administrative complaint against a licensee, after which the licensee may request a hearing. *See id.* 10-3-20. Commission staff prosecute the complaint, and an administrative law judge—chosen by the Commission's chairman—presides over the hearing. The ALJ then issues an order, which the Commissioners may affirm, modify, dissolve, or remand. *Id.* 10-3-15.

The Commission pursued both routes against Baliga. The track judges summarily suspended Baliga's license based on Hicks's statement. After the hearing on the summary suspension, the judges decided to leave the suspension in place until a merits hearing could be held. *Baliga*, 112 N.E.3d at 733. And on November 10, 2016, the Commission's executive director, Michael Smith, filed an administrative complaint against Baliga. The complaint alleged that Baliga had violated the Commission's regulations by administering a substance other than furosemide, failing to keep compliant records, and having contact with a horse for purposes other than injecting furosemide. (Baliga emphasizes that the complaint relied on an affidavit from Hicks that was not signed until November 10, though the complaint was dated November 4.) Ellingwood assigned Holly Newell, the deputy general counsel, to prosecute the complaint before the ALJ. Ellingwood herself would advise the Commissioners on how to proceed on the ALJ's order.

Newell was already familiar with Baliga. In 2014, the Commission had confiscated a package that Baliga had left for someone at a racetrack, and an unknown substance was found inside. Around that time, Newell sent an email to track judges stating that it "would be fun" to "get the Baliga ruling out." The judges responded, "Hey that really sounds like fun." The contents of that package were tested in 2016, and the test was negative for impermissible substances. Newell then sought to have the contents retested in 2017, and Smith asked about the substance and test results in 2018. Smith later testified that he could not recall the Commission ever holding a substance for so long.

Newell also was familiar with the attorney who represented Baliga before the Commission: He had previously filed two complaints against Newell—one with the Commission and one with the Indiana Supreme Court's disciplinary body. The complaints did not result in discipline, although they prompted Ellingwood and Smith to speak with Newell about them.

We return to the matter at hand. The Commission sent off the blood and urine of the treated horse for testing as well as the vial Hicks reported finding in the Lasix room. The blood and urine results, which the Commission likely received before filing the administrative complaint (although the record does not establish this definitively), were negative for impermissible substances. And the results for the vial, which the Commission received after it filed the complaint, indicated only Lasix. Neither Newell nor Smith could recall a time when a licensee was charged for improper drug administration when the test results did not indicate prohibited drugs and the accused did not admit to the allegations.

To defend against the administrative complaint, Baliga was required to timely request a hearing. 71 IND. ADMIN. CODE 10-3-20(d). Although he appealed the summary suspension by the track judges, he did not request a hearing to challenge the administrative complaint. *Baliga*, 112 N.E.3d at 734. Six days after the time to request a hearing expired, and the same day the Commission received the results from the vial's testing, Newell (with Smith's authorization) moved for a default judgment against Baliga. Neither Newell nor Smith could recall ever having sought a default judgment before.

The ALJ recommended that Baliga be found in default. *Id.* The Commissioners agreed, entered the default judgment, and imposed a five-year suspension of Baliga's Commission license, a permanent ban from the Lasix administration program, and a $20,000 fine. *Id.* The Commission's newsletter later announced Baliga's suspension.

Baliga sought judicial review in state court. *Baliga*, 112 N.E.3d at 734. The Indiana Court of Appeals ultimately concluded that the default judgment was an abuse of discretion and remanded to the Commission for a hearing on the merits. *Id.* at 737–38. The Commission sought review by the Indiana Supreme Court, which denied transfer in December 2019. *Baliga v. Ind. Horse Racing Comm'n*, 123 N.E.3d 140 (Ind. 2019).

Smith decided at some point before October 2019 to cease prosecuting Baliga, but the administrative complaint was not withdrawn until June 11, 2020, after Smith had retired. Deena Pitman replaced Smith as executive director of the Commission.

In October 2020, Baliga applied for a new Commission license. His application was referred to Pitman because of his history. Although applications are typically processed within 72 hours of submission, no action was taken on Baliga's application by the end of the racing season, over a month later. Pitman later testified that the

application was in the "executive queue," which was generally reserved for individuals with previous racing indiscretions, and Pitman never acted on it because she was especially busy that season.

Baliga applied for a license again in 2021. This time, Pitman approved the application. But Baliga did not receive notice from the Commission that it was approved, although such notice was customarily provided.

Baliga then sued numerous Commission defendants—including the Commissioners, their general counsels, and their executive directors, as well as the track judges—in federal court, asserting an equal protection violation under a class-of-one theory.[1] *See* 42 U.S.C. § 1983. After the district court partially granted a motion to dismiss, the defendants moved for summary judgment. They argued that they had a rational basis for bringing the disciplinary actions, that Baliga lacked evidence that they acted with animus, and that he failed to identify similarly situated individuals who were treated better than he. The defendants also asserted several types of legal immunity. In response, Baliga argued that he had produced evidence from which a reasonable jury could conclude that the defendants' conduct was irrational and motivated by animus and, thus, he did not need to identify similarly situated licensees. In making his case, he also relied on the defendants' admissions that they had not taken some of these actions before.[2]

The district court entered summary judgment for the defendants. It noted the unsettled law in our circuit regarding the role of animus in class-of-one claims and questioned whether this type of equal protection claim is coextensive with claims under the due-process clause. But, in the end, it concluded, relying on *Katz-Crank v. Haskett*, 843 F.3d 641 (7th Cir. 2016), that because the defendants' actions were discretionary in nature, Baliga could not challenge them through a class-of-one claim. And regardless, the court continued, the defendants had a rational basis for initiating disciplinary proceedings, and Baliga did not show that he was treated worse than other licensees. The court then denied Baliga's timely motion to reconsider. *See* FED. R. CIV. P. 59(e). Baliga appeals both decisions. *See* FED. R. APP. P. 4(a)(4)(A)(iv).

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[1] Baliga brought other constitutional and state-law claims, but he presses only his equal protection claim on appeal.

[2] On appeal, Baliga appears to re-frame this argument by asserting only that he need not identify similarly situated individuals if he can show animus.

Analysis

On appeal, Baliga argues that the district court incorrectly ruled that the defendants' discretionary decisions were outside the scope of a class-of-one claim and that he produced sufficient evidence that the defendants' actions were irrational and motivated by malice. To succeed on a class-of-one equal protection claim, Baliga must show, at a minimum, that he was "intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). We review the summary judgment decision de novo and construe the evidence in the light most favorable to Baliga. *Brunson v. Murray*, 843 F.3d 698, 704 (7th Cir. 2016).

Though the *Olech* standard is uncontroversial, the requirements for a successful class-of-one claim—particularly, what, if any, role animus has—remain unsettled in this court. *See FKFJ, Inc. v. Village of Worth*, 11 F.4th 574, 588–89 (7th Cir. 2021) (collecting cases); *Frederickson v. Landeros*, 943 F.3d 1054, 1061–62 (7th Cir. 2019). This court's attempt to harmonize its precedent in *Del Marcelle v. Brown County Corp.*, 680 F.3d 887 (7th Cir. 2012) (en banc), resulted in three separate opinions, and an affirmance by an evenly divided court. In *Brunson*, we summarized the three *Del Marcelle* opinions:

> The crux of the disagreement was whether the plaintiff in a class-of-one claim must demonstrate only that there is no possible justification or rational basis for the defendant's actions, *id.* at 900 (Easterbrook, C.J., concurring in the judgment), or if the plaintiff must demonstrate a lack of justification and also present evidence of hostile intent or animus, *id.* at 889 (Posner, J., plurality opinion), or if the plaintiff must demonstrate an absence of rational basis, which can be satisfied with evidence of animus, *id.* at 913 (Wood, J., dissenting).

843 F.3d at 706. But, here, we need not resolve these questions because Baliga cannot succeed regardless of which standard we apply.

I.

We agree with Baliga that the first reason that the district court gave for granting summary judgment—that class-of-one claims "cannot be used to challenge discretionary governmental action"—overstates the principle. Outside the public employment context, we have permitted multiple class-of-one challenges to various

types of discretionary conduct. *See, e.g.*, *Geinosky v. City of Chicago*, 675 F.3d 743, 745 (7th Cir. 2012) (issuing parking tickets); *Hanes v. Zurick*, 578 F.3d 491, 492 (7th Cir. 2009) (making repeated arrests); *cf. Hilton v. City of Wheeling*, 209 F.3d 1005, 1007–08 (7th Cir. 2000) (enforcing public nuisance laws).

True, we have stated that a plaintiff may not use a class-of-one claim "to challenge discretionary governmental action like the decision to initiate prosecution," *Katz-Crank*, 843 F.3d at 649, at least when the challenge is "premised solely on arbitrariness/irrationality," *United States v. Moore*, 543 F.3d 891, 901 (7th Cir. 2008). *Cf. Hanes*, 578 F.3d at 495 (stating that "*Moore* simply honors the rule that prosecutorial conduct is absolutely immune from civil liability because prosecutors need unfettered discretion"). But we construe Baliga as challenging more than just the "discretionary" initiation of disciplinary proceedings: He asserts generally that the defendants conducted a "prolonged campaign" against him and subjected him to "years of harassment, and misuse of governmental power," in order to "disrupt and significantly affect [his] livelihood." We have allowed plaintiffs to bring class-of-one claims challenging similar purportedly targeted actions. *See, e.g.*, *Esmail v. Macrane*, 53 F.3d 176, 179–80 (7th Cir. 1995) (plaintiff could succeed on class-of-one claim if he could prove defendants were out to "get" him and subjected him to an "orchestrated campaign of official harassment"); *see also Swanson v. City of Chetek*, 719 F.3d 780, 782, 784 (7th Cir. 2013) (class-of-one claim premised in part on defendant causing delay or denial in permit and initiation of prosecution, survived summary judgment).

II.

We turn to the district court's second reason for entering summary judgment—that a reasonable jury could not conclude that there was no rational basis for the defendants' actions. In attacking the court's rational-basis conclusion, Baliga must "eliminate any reasonably conceivable state of facts that could provide a rational basis." *D.B. ex rel. Kurtis B. v. Kopp*, 725 F.3d 681, 686 (7th Cir. 2013) (citation omitted). The reasons need not be the ones that actually motivated the defendants; only "a *conceivable* rational basis" is required. *Id.* (emphasis in original).

On this record, no reasonable factfinder would find that the defendants lacked a conceivable rational basis for how they proceeded against Baliga. Baliga seems to concede that the initial suspension of his license was justified based on Hicks's statement and the empty vial. He argues, however, that there is no rational basis for what occurred after the test results came back negative for banned substances. We

disagree for several reasons. Some of the test results came back *after* the Commission filed its administrative complaint. And Smith explained during his deposition that there could have been wrongdoing even if the test results were negative: Some prohibited drugs are not detected by the tests. Regardless, the question whether Baliga administered Lasix in a way that violated established protocols—*e.g.*, by using a non-Lasix vial—is a rational basis for proceeding against him (even if this was not one of the offenses charged originally).

We similarly conclude that no reasonable jury would find that the delay in processing Baliga's 2020 license application lacked any rational basis. The application was placed in the executive queue due to his prior history. Pitman explained that she was unusually busy organizing the Breeders Crown event and did not review the application. Baliga has not pointed to any evidence disputing this assertion, nor is there any indication that Pitman had ignored his application and not others in the executive queue. *Cf. McDonald v. Village of Winnetka*, 371 F.3d 992, 1009 (7th Cir. 2004) (even if plaintiff was "wronged," he did not show wrong was "discriminatory in nature"). Baliga points out that, even when the application was approved, he did not receive any notice from the Commission that this was the case. And he complains that, even after the Commission decided to stop pressing its charges against him, it did not dismiss the charges for some time. While the Commission certainly could have acted with more dispatch in both situations, nothing in the record indicates that these delays were intentional, let alone motivated by animus.

Indeed, there are no facts in the record from which a reasonable jury could infer animus. In the district court, Baliga highlighted numerous circumstances which he argued showed animus. But we generally look for "a clear showing of animus," for example, when a plaintiff "has identified his specific harasser, provided a plausible motive and detailed a series of alleged actions" by the harasser that seem illegitimate. *Swanson*, 719 F.3d at 783, 785. Baliga's evidence cannot be described as showing this "readily-apparent hostility." *Id.* at 785. Bureaucratic delay, the use of permitted litigation tactics, and snide remarks simply aren't the kinds of evidence that we have described as suggesting animus. *Compare id.* at 784–85 (mayor's "statements made clear that his personal hatred caused ... unwarranted difference in treatment," including harassment, investigation into plaintiff, delay in permit); *Brunson*, 843 F.3d at 707–08 (defendants repeatedly attempted to enforce "non-existent state and local liquor laws" while also refusing to act on license renewal to drive plaintiff out of business), *with Bell v. Duperrault*, 367 F.3d 703, 709 (7th Cir. 2004) ("bureaucratic inefficiencies," "downright rudeness" do not show animus).

Furthermore, Baliga attempts to string together numerous incidents to demonstrate animus, but these actions were taken by different people, in different contexts, sometimes years apart. (For example, he cites both an email that Newell sent in 2014 and Pitman's actions in 2020.) And Baliga does not point to any evidence that these people all shared the same hostility toward him or that the animus of any person can be imputed to all the rest.

Because the evidence of animus falls short, there is no need to address Baliga's argument that a showing of animus relieves a plaintiff from identifying similarly situated individuals who were treated more favorably. *See Swanson*, 719 F.3d at 784. And we need not address the defendants' arguments that they are entitled to immunity because we conclude that Baliga's claim does not prevail on the merits.

* * *

The Commission's proceedings against Baliga may not have been a "well-administered investigation, or a wise exercise of prosecutorial discretion." *See Kopp*, 725 F.3d at 687. But class-of-one plaintiffs must meet a heavy burden, *see FKFJ, Inc.*, 11 F.4th at 588, and Baliga lacks sufficient evidence for his class-of-one claim to withstand summary judgment. We therefore affirm.

AFFIRMED