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The Honorable Ronald B. Leighton

**UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA**

DANNY RAY MONTGOMERY,

Plaintiff,

v.

STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL &
HEALTH SERVICES DIVISION OF
CHILD SUPPORT, DAVID STILLMAN,
Director, Division of Child Support,
ROBIN ARNOLD-WILLIAMS,
Secretary, Department of Social & Health
Services, & JOHN or JANE DOE,

Defendants.

3:09-cv-05453-RBL

ORDER GRANTING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT
[Dkt. #12]

THIS MATTER is before the court on the Defendants' Motion to Dismiss the complaint for lack of subject matter jurisdiction. [Dkt. #12]. Plaintiff Montgomery asserts 42 U.S.C. §1983 claims¹ for violations of the 4th and 14th Amendments (due process, with respect to "the right to travel") based on the fact that he was not eligible for a United States passport because the Defendants determined that he was "in arrears" on his child support payments, and reported that finding to the United States Secretary of Health and Human Services.

¹ Plaintiff's complaint also alleges a "violation" of §1983, but no such claim is cognizable. "One cannot go into court and claim a violation of §1983 – for §1983 by itself does not protect anyone against anything." It does not create any substantive rights; rather it is the vehicle whereby plaintiffs can challenge actions by government officials. See, e.g., *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979).

1 The state agency Defendant (Department of Social & Health services, Division of
2 Child Support) (“DCS”) argues that it is not a “person” subject to suit under §1983, and has
3 Eleventh Amendment Immunity from suit in Federal Court. It also argues that even if the
4 Court has jurisdiction, it complied with the federal statutory and regulatory scheme in
5 denying Plaintiff’s passport, and are in any event qualifiedly immune from this action.

6 **A. Facts.**

7 The facts are undisputed. The Plaintiff, Danny Montgomery, was court ordered to
8 pay support for his son, Mathew, and his former wife, Concepcion Montgomery, in his
9 dissolution action. The state Department of Social and Health Services (DSHS) enforced
10 both obligations. Danny Montgomery’s arrearages for his child and spousal support
11 obligations exceeded \$2,500. DSHS certified Danny Montgomery’s arrearages to federal
12 Secretary of Health and Human Services, which resulted in Danny Montgomery being
13 ineligible for a passport. Montgomery emphasizes that he was current on his “child
14 support” payments, and argues that his failure to pay “spousal maintenance” was insufficient
15 grounds for denial of a passport. He has sued the state, the state agency, and various
16 individuals within the agency under 42 U.S.C. §1983, alleging violations of due process
17 under the 4th and 14th Amendments.

18 **A. Summary Judgment Standard.**

19 Summary judgment is appropriate when, viewing the facts in the light most favorable
20 to the nonmoving party, there is no genuine issue of material fact which would preclude
21 summary judgment as a matter of law. Once the moving party has satisfied its burden, it is
22 entitled to summary judgment if the non-moving party fails to present, by affidavits,
23 depositions, answers to interrogatories, or admissions on file, “specific facts showing that
24 there is a genuine issue for trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). “The
25 mere existence of a scintilla of evidence in support of the non-moving party’s position is not
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1 sufficient.” *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995).
2 Factual disputes whose resolution would not affect the outcome of the suit are irrelevant to
3 the consideration of a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477
4 U.S. 242, 248 (1986). In other words, “summary judgment should be granted where the
5 nonmoving party fails to offer evidence from which a reasonable [fact finder] could return a
6 [decision] in its favor.” *Triton Energy*, 68 F.3d at 1220.

7 **B. Defendants’ status as “persons” under §1983.**

8 Defendants seek dismissal of Plaintiff’s §1983 claims against the state, the DCS, and
9 the individuals in their *official* capacities, because they are not, as a matter of law, “persons”
10 within the meaning of 42 U.S.C. §1983.

11 Plaintiff’s response conflates this issue with Eleventh Amendment immunity,
12 discussed below. His response on this point does not refute the Defendants’ claims and the
13 Plaintiff’s §1983 claims against these Defendants are not sustainable.

14 **C. State’s Eleventh Amendment Immunity.**

15 Defendants make a related but separate argument that the state (and state agency, as
16 well as state officials in their official capacities) cannot be sued in Federal court because they
17 have not waived their Eleventh Amendment Immunity.

18 The Eleventh Amendment to the United States Constitution bars a person from suing
19 a state in federal court without the state’s consent. *See Seminole Tribe of Florida v. Florida*
20 116 S.Ct. 1114, 1131 (1996); *Natural Resources Defense Council v. California Dep’t of*
21 *Transportation*, 96 F.3d 420, 421 (9th Cir. 1996). Eleventh Amendment immunity extends
22 to state agencies. *Pennhurst State Sch. & Hosp. v. Holdeman*, 465 U.S. 89, 101-102 (1984).

23
24 Plaintiff argues that the state waived immunity for tort actions in RCW 4.92.090,
25 which provides: “The state of Washington, whether acting in its governmental or proprietary
26 capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if

1 it were a private person or corporation.” He claims that §1983 claims are a “species of tort
2 liability” to which this waiver² applies. He provides no authority for the proposition that this
3 is the case, or that the waiver extends to suits in federal court.
4

5 Although Congress may waive a state’s Eleventh Amendment immunity under
6 circumstances, Congress has not abrogated the States’ Eleventh Amendment immunity
7 against state law claims brought in federal court. *Mascheroni v. Board of Regents of Univ. of*
8 *Cal.*, 28 F.3d 1554, 1560 (10th Cir. 1994). Moreover, even if Washington had waived
9 immunity in its own courts, such a waiver does not waive its immunity in federal court.
10 *McConnell v. Critchlow*, 661 F.2d 116, 117 (9th Cir. 1981), *citing Skokomish Indian Tribe v.*
11 *France*, 269 F.2d 555, 561 (9th Cir. 1959).
12

13 This court lacks subject matter jurisdiction to decide on the merits the Plaintiff’s
14 complaint against the state and state agency defendants, based on the Eleventh Amendment.

15 **D. Qualified Immunity.**

16 Even if the Court were to reach the merits, the Plaintiff cannot prevail as a matter of
17 law. It is not entirely clear that the plaintiff has sought to sue the individual state defendants
18 in their individual, as opposed to official, capacities. But even assuming that he did so, the
19 court must examine whether the state actors are entitled to qualified immunity.
20

21 Pursuant to the qualified immunity doctrine, “government officials performing
22 discretionary functions generally are shielded from liability for civil damages insofar as their
23 conduct does not violate clearly established statutory or constitutional rights of which a
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25 ² It should be noted that, if the Plaintiff’s claim on the waiver of immunity for tort actions was correct in
26 this context, he would still have to comply with the procedures outlined in Chapter 4.92 RCW for the prosecution
of such tort claims. These include pre-claim notice under RCW 4.92.100 and .110. There is no indication that
these procedures were followed.

1 reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818,(1982). In
2 analyzing a qualified immunity defense, the Court must determine first, whether a
3 constitutional right would have been violated on the facts alleged, taken in the light most
4 favorable to the party asserting the injury; and then, whether the right was clearly established
5 when viewed in the specific context of the case. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).
6 “The relevant dispositive inquiry in determining whether a right is clearly established is
7 whether it would be clear to a reasonable officer that his conduct was unlawful in the situation
8 he confronted.” *Id.* The privilege of qualified immunity is an immunity from suit rather than a
9 mere defense to liability, and like absolute immunity, it is effectively lost if a case is
10 erroneously permitted to go to trial. *Id.*

11
12 The Supreme Court has recently held “that the *Saucier* protocol should not be
13 mandatory in all cases . . . [but] it is often beneficial.” *Pearson v. Callahan*, 129 S. Ct. 808,
14 818 (2009). In this case it is beneficial to first determine whether a constitutional right was
15 violated before moving to the second question of whether the right was clearly established.
16

17 As to the first inquiry, it does not appear that the Plaintiff can make out the requisite
18 Constitutional violation, based on the undisputed facts.

19 Under Federal law, a parent is not eligible for a passport if the parent’s support
20 obligation exceeds \$2,500. Spousal support is included within the definition of “child
21 support” for purposes of the Title IV-D of the Social Security Act. *See* 42 U.S.C. § 659(j)(2);
22 42 U.S.C. § 664(c) (“child support” and similar terms are consistently defined to include spousal
23 support so long as the recipient is living with a child for whom support is also owed). Plaintiff
24 has not established, and cannot establish, otherwise. The Washington State DSHS and the
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1 DCS properly included Danny Montgomery's spousal support obligation in its arrearage
2 certification to the Secretary of the Department of Health and Human Services. Because
3 Danny Montgomery's support arrearage made him ineligible for a passport under federal
4 law, his due process rights under the Constitution were not violated by the state defendants as
5 a matter of law.
6

7 Even if the conduct of which plaintiff complains could be construed as a
8 Constitutional violation, however, Plaintiff cannot overcome the second hurdle of the
9 qualified immunity inquiry. Because there is no authority holding that the "support" scheme
10 outlined above is unconstitutional, Plaintiff cannot establish that the right he claims was
11 violated by the state defendants was "clearly established."
12

13 The individual state defendants are qualifiedly immune from Plaintiff's Constitutional
14 claims against them.

15 For these reasons, that Defendants' Motion for Summary Judgment [Dkt. #12] is
16 GRANTED, and Plaintiff's Complaint is DIMISSED WITH PREJUDICE.

17 IT IS SO ORDERED.

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19 DATED this 27th day of May, 2010.

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21 RONALD B. LEIGHTON
22 UNITED STATES DISTRICT JUDGE
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