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CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 19-0674

DA 19-0674

IN THE SUPREME COURT OF THE STATE OF MONTANA

2020 MT 196

JACOB ROSS DICKSON,

Appellant,

v.

TORI MARINO (f/k/a Tori Norman), MIRANDA GARDING, KATHERINE HAEGELE, THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, & JOHN DOES 1-10,

Appellees.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. BDV-2018-187
Honorable Mike Menahan, Presiding Judge

COUNSEL OF RECORD:

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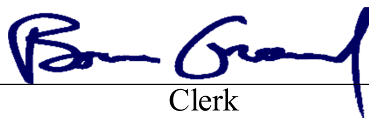
Submitted on Briefs: May 27, 2020

Decided: August 4, 2020

Filed:



Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Jacob Ross Dickson appeals the First Judicial District Court's order dismissing his complaint on the ground that his state common-law tort claims for slander and emotional distress are preempted by the federal Civil Service Reform Act because they involve "prohibited personnel practices" within the definition of the federal law. We hold that the District Court prematurely dismissed the case without the factual record needed to determine preemption. We accordingly reverse and remand for further development of the facts.

FACTUAL AND PROCEDURAL BACKGROUND[1]

¶2 Dickson worked as Chief of Prosthetics and Sensory Aid Services at the Montana Veterans Administration Health Care System ("Montana VA"). At the same time, Defendant Tori Marino was employed as a medical support assistant with the Montana VA. Defendant American Federation of Government Employees ("AFGE") is an unincorporated labor union representing government and private sector employees. Defendants Haegele and Garding, also employees of the Montana VA, serve as a local union president and union steward, respectively, for the AFGE. Dickson was not a member of the AFGE.

[1] For purposes of this Opinion, we adopt the facts as alleged in Dickson's amended complaint. *See, e.g., Stowe v. Big Sky Vacation Rentals, Inc.*, 2019 MT 288, ¶ 12, 398 Mont. 91, 454 P.3d 655 (In ruling on a 12(b)(1) motion to dismiss for lack of subject matter jurisdiction, courts must generally take all well-pled factual assertions as true in the light most favorable to the claimant).

¶3 Dickson and Marino had consensual sex on multiple occasions, including an encounter on May 27, 2016, in Dickson's office at the Montana VA. In June 2016, Marino and Garding met with the Montana VA Police to falsely report that Dickson had sexually assaulted Marino on May 27. The Montana VA Police and the Veterans' Administrative Office of Inspector General ("OIG") investigated Marino's allegation; they concluded that Marino and Dickson had engaged in a consensual sexual relationship and that they lacked sufficient evidence to charge Dickson with sexual assault. The government charged Marino and Dickson with unlawful sexual activity but later dismissed the charge with prejudice.

¶4 In July, Marino signed a voluntary statement recanting the allegation and admitting that her relationship with Dickson was consensual. Marino later told Dickson that Garding and Haegele had encouraged her to falsely accuse Dickson of sexual assault to the Montana VA Police, to OIG, and to United States Senator Jon Tester's office, in order to avoid losing her job.

¶5 Dickson filed a complaint in the First Judicial District Court, Lewis and Clark County, against Marino, Garding, Haegele, and the AFGE, seeking damages for slander, intentional infliction of emotional distress, and negligent infliction of emotional distress.[2] Defendants Haegele, Garding, and AFGE (collectively "Union Defendants") moved to dismiss the complaint for failure to state a claim under M. R. Civ. P. 12(b)(6) and lack of subject matter jurisdiction under M. R. Civ. P. 12(b)(1). They argued in part that the Civil

[2] Dickson later dismissed Marino from the action.

Service Reform Act ("CSRA" or the "Act") preempts Dickson's state-law tort claims. The District Court agreed. It determined that the CSRA "provides an exclusive remedy for, and therefore preempts, state law tort claims when those claims involve . . . 'prohibited personnel practices,' under 5 U.S.C. § 2302." It held that the Union Defendants' conduct constituted a "prohibited personnel practice" and that the CSRA thus preempted Dickson's claims. This appeal followed.

STANDARD OF REVIEW

¶6 We review de novo a district court's ruling on a M. R. Civ. P. 12(b) motion to dismiss. *Big Spring v. Conway (In re Estate of Big Spring)*, 2011 MT 109, ¶ 20, 360 Mont. 370, 255 P.3d 121 (citation omitted); *Western Sec. Bank v. Eide Bailly LLP*, 2010 MT 291, ¶ 18, 359 Mont. 34, 249 P.3d 35 (citation omitted). The district court's determination is a conclusion of law that we review for correctness. *In re Estate of Big Spring*, ¶ 20 (citation omitted); *Sinclair v. Burlington Northern & Santa Fe Ry.*, 2008 MT 424, ¶ 25, 347 Mont. 395, 200 P.3d 46 (citation omitted).

DISCUSSION

¶7 *Did the District Court err in granting the Union Defendants' motion to dismiss on the basis that Dickson's claims are preempted by the CSRA?*

¶8 Congress enacted the CSRA to comprehensively overhaul the civil service system to "prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government." *Gutierrez v. Flores*, 543 F.3d 248, 253 (5th Cir. 2008) (citations omitted). The Act regulates the relationship between most federal civil service employees

and their employers, in part by providing a remedial scheme through which federal employees may challenge "prohibited personnel practices" committed by their employers. *Gilding v. Carr*, 608 F. Supp. 2d 1147, 1150 (D. Ariz. 2009); *Schwartz v. Int'l Fedn. of Prof'l & Tech. Eng'rs, AFL-CIO*, 306 Fed. App'x 168, 172 (5th Cir. 2009) (per curiam); *Brock v. United States*, 64 F.3d 1421, 1424 (9th Cir. 1995). To resolve whether the CSRA preempts a state-law claim, courts must determine whether the challenged conduct falls within the scope of the CSRA's "prohibited personnel practices." *Gilding*, 608 F. Supp. 2d at 1151 (quoting *Mangano v. United States*, 529 F.3d 1243, 1246 (9th Cir. 2008)). If it does, the lawsuit is preempted, and the Act's administrative remedies are the employee's only recourse. *Gilding*, 608 F. Supp. 2d at 1151 (quoting *Mangano*, 529 F.3d at 1246); *see also Mahtesian v. Lee*, 406 F.3d 1131, 1134 (9th Cir. 2005).

¶9 The CSRA defines "prohibited personnel practices" as taking "personnel actions" that violate its merit system principles, including treating employees "with proper regard for their privacy and constitutional rights." 5 U.S.C. § 2302(b)(1), (12); 5 U.S.C. § 2301(b)(2); *see also Saul v. United States*, 928 F.2d 829, 833 (9th Cir. 1991). In turn, the Act defines "personnel actions" to include among other things an appointment, a promotion, or a disciplinary or corrective action. 5 U.S.C. § 2302(a)(2)(A); *see also Brock*, 64 F.3d at 1424. Of significance here, "the prohibited conduct must be performed by a federal employee who has the authority 'to take, direct others to take, or approve personnel action.'" *Murphree v. AFGE*, 850 F. Supp. 2d 1256, 1264 (N.D. Ala. 2012) (quoting 5 U.S.C. § 2302(b)).

¶10 Thus, for a federal employee's claim to be preempted, the challenged conduct must "constitute a 'prohibited personnel practice' as enumerated in the statute, must be committed by an employee who has the authority to take, recommend, or approve a personnel action against the plaintiff, and [] must constitute 'personnel action' as defined in the statute." *Gilding*, 608 F. Supp. 2d at 1151-52 (citations omitted).

¶11 The District Court concluded that the Union Defendants' alleged conduct—encouraging Marino to falsely accuse Dickson of sexual assault—constituted "corrective action" that violated Dickson's privacy or constitutional rights. Without addressing whether or how the Union Defendants had the required authority to take or recommend this "personnel action" against Dickson, the court concluded that their conduct fell within the ambit of "prohibited personnel practices" under the CSRA, thus preempting his claims. On appeal, Dickson challenges the District Court on two grounds, contending first that the Union Defendants' conduct is not "corrective action" necessary to constitute a "personnel action" under § 2302(a)(2)(A), and second, that the Union Defendants lacked the authority to take "personnel action" against him as required by 5 U.S.C. § 2302(b).[3] We address each contention in turn.

¶12 "What constitutes personnel action is an issue that courts have grappled with, particularly in cases where the defendant is not the plaintiff's supervisor or takes action not typically considered traditional personnel action." *Murphree*, 850 F. Supp. 2d at 1264.

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[3] Dickson also challenges other arguments that the Union Defendants advanced in the District Court. But as Dickson points out, the District Court did not base its decision to dismiss his claims on these other arguments, and they are not determinative to our decision on appeal.

Courts have broadly construed the term "personnel action." *Murphree*, 850 F. Supp. 2d at 1264 (citing *Schwartz*, 306 Fed. App'x at 173; *Saul*, 928 F.2d at 834; *Carducci v. Regan*, 714 F.2d 171, 174 n.3 (D.C. Cir. 1983); *Greene v. AFGE, AFL-CIO, Local 2607*, 2005 U.S. Dist. LEXIS 19983 (D.D.C. Sept. 7, 2005)). In *Schwartz*, for example, the plaintiff, a senior administrative law judge, alleged that two union representatives forced him to step down from his position through persistent antagonism, such as accusing him of misconduct and filing grievances. *Schwartz*, 306 Fed. App'x at 170. He further alleged that the union representatives conspired to deprive him of his senior status, forcing him into inferior office space. *Schwartz*, 306 Fed. App'x at 170. The Fifth Circuit determined that the union representatives' alleged conduct constituted "personnel action" because it related to Schwartz's working conditions. *Schwartz*, 306 Fed. App'x at 173. In *Dettrich v. Shinseki*, 2011 U.S. Dist. LEXIS 81837, at *12 (D. Idaho 2011), the court dismissed the plaintiff's state-law tort claims grounded in actions of her co-workers, who allegedly accessed her private psychiatric records and disseminated such information among the staff; held an "intervention" with the plaintiff to criticize her for forgetting things and making mistakes; made false allegations regarding the plaintiff's work habits; and asked inappropriate questions during the plaintiff's interview process. Because these actions "resulted in a reprimand by Plaintiff's supervisor and a subsequent Professional Standards Board review," the court found them covered by the CSRA's definitions of "personnel action." *Dettrich*, 2011 U.S. Dist. LEXIS at *13.

¶13 Courts have given "corrective action" a similarly broad reach, but not without limits. In *Saul*, 928 F.2d at 834, the Ninth Circuit held that "corrective action" encompassed a

Social Security Administration employee's claims that his supervisors opened his mail and made defamatory statements about his performance and in response to his work-related grievances. *See also Roth v. United States*, 952 F.2d 611, 614 (1st Cir. 1991) (holding that "corrective action" is a "capacious" category that "encompass[es] a wide variety of conduct affecting federal employees."). Other conduct, in contrast, has been held to fall outside the scope of "personnel action." *See, e.g., Brock*, 64 F.3d at 1424-25 (holding that the CSRA did not preempt the plaintiff's claims that her supervisor raped and sexually assaulted her because rape and sexual assault do not constitute "personnel action"); *Garvais v. Carter*, 2006 U.S. Dist. LEXIS 54070, at *22 (E.D. Wash. 2006) (holding that allegations of retaliation, intimidating plaintiff and his family, and conspiracy to have plaintiff BIA police officer incarcerated by concocting false charges would, if proven, fall outside the definition of "personnel practice" and the scope of the CSRA). And courts have found no "personnel action" where the challenged conduct does not involve employment action taken by the employer against an employee. For example, in *Anderson v. AFGE, AFL-CIO*, 338 S.W.3d 709, 711-12 (Tex. Ct. App. 2011), Anderson, a supervisor at the Social Security Administration Office of Disability Adjudication and Review, initiated disciplinary proceedings against a supervisee, Stier, resulting in his suspension. The following year, Anderson discovered that Stier had published defamatory statements about her to the union website. Anderson sued Stier for libel, slander, and intentional infliction of emotional distress. *Anderson*, 338 S.W.3d at 712. The Texas court held that her claims were not preempted by the CSRA because Stier's defamatory statements were not made during the course of his disciplinary proceeding, no employment action was alleged to have been

taken against Anderson, and Anderson alleged no "personnel action" against her by her federal employer. *Anderson*, 338 S.W.3d at 715-16.

¶14 The District Court here held that, in light of the Ninth Circuit's reasoning in *Saul*, "it is not a reach to conclude that [the Union Defendants' conduct], by encouraging Marino to falsely accuse Dickson of sexual assault, falls within the ambit of 'corrective action.' This is especially true where, as here, [the Union] Defendants' actions precipitated a disciplinary investigation." But it is unclear based on the record how this conduct fits the definition of "corrective action" or another type of "personnel action" enumerated in 5 U.S.C. § 2302(a)(2)(A) as the courts have construed it. "[A] plaintiff may allege conduct that does not fall within the purview of the CSRA, even though the underlying conduct may 'implicate' personnel action." *Murphree*, 850 F. Supp. 2d at 1268 (citing *Gutierrez*, 543 F.3d at 254 n.8). Because the District Court resolved the question on a motion to dismiss, there is no factual record on which we can determine whether the Union Defendants' conduct constituted or merely implicated a "corrective action" or other "personnel action." Taking the factual allegations of Dickson's complaint as true, he does not place at issue any disciplinary action the VA initiated against him as a result of the consensual sexual activity, but challenges only the alleged defamatory statements by the Union Defendants that Dickson sexually assaulted Marino. "The relevant inquiry is not whether [Dickson's] claim implicates, or is remotely connected to, a personnel action, but instead whether the claim he asserts against the union defendants alleges a prohibited personnel practice by the union defendants." *Murphree*, 850 F. Supp. 2d at 1268.

¶15 Even giving the "prohibited personnel practice" factor a broad construction, Dickson also contends that the District Court erred in dismissing his claims because the Union Defendants lack the requisite statutory authority to take or recommend "personnel actions" against him. He cites *Gilding*, in which the court concluded that the defendant union and two local union officers, each of whom was in a non-management position with the plaintiff's employer, were not "in a position to take, recommend, or approve any 'personnel action' with respect to Gilding." *Gilding*, 608 F. Supp. 2d at 1152. The court acknowledged that "appropriately placed government officials and employees have 'authority to recommend personnel action' under the statute even if they are not [the plaintiff's] direct supervisors." *Gilding*, 608 F. Supp. 2d at 1153. It concluded, however, that the union defendant was not "an employee" who could recommend or approve "personnel action" against the plaintiff as required by 5 U.S.C. § 2302(b) and that the union representative defendants did not have authority to take "personnel action" by virtue of their federal employment or union positions alone. *Gilding*, 608 F. Supp. 2d at 1153.

¶16 Relying on *Mahtesian*, 406 F.3d 1131, the Union Defendants respond that Haegele and Garding had the requisite authority because they "were queried by appropriate authorities, the VA OIG and the VA Chief of Police." Mahtesian, an employee of the Department of Justice ("DOJ"), applied for a promotion to work at the Department of Treasury ("DOT") and was offered the job pending a background investigation. *Mahtesian*, 406 F.3d at 1133. Background investigators interviewed a former DOJ co-worker who was highly critical of Mahtesian. *Mahtesian*, 406 F.3d at 1133. DOT rescinded its offer. Mahtesian sued the co-worker for slander and defamation, alleging that

her statements were false. *Mahtesian*, 406 F.3d at 1133. The Ninth Circuit affirmed the lower court's determination that the CSRA preempted Mahtesian's claims, concluding that the co-worker had authority to take such "personnel action"—not recommending him for employment—because she was approached by DOT officials with authority to solicit recommendations. *Mahtesian*, 406 F.3d at 1134.

¶17 In this case, it is not clear whether or how the Union Defendants had authority to take or recommend "personnel action" against Dickson. Dickson claims that he is not a member of AFGE; that Haegele and Garding are not his supervisors; and that Haegele and Garding were not approached by VA officials. Dickson alleges that they instead sought out VA officials and Senator Tester's office to make their allegedly false and damaging reports. As in *Gilding*, Dickson brings defamation and emotional distress claims against officers of a union to which he did not belong, alleging that as a result of the publication of their allegedly false statements, he suffered adverse consequences both within his employment and to his public reputation and his physical and emotional health. There is no factual record upon which we can conclude at this point how AFGE is distinct from the union in *Gilding* so as to qualify as "an employee" or why Garding and Haegele were in a position to take, recommend, or approve "personnel action" against Dickson. The District Court dismissed Dickson's claims before the Union Defendants filed an answer and before the parties engaged in discovery. We conclude the court did so prematurely and without a sufficient factual record on which to base its conclusion that the Act preempts Dickson's state-law claims.

¶18 The relevant inquiry for preemption is whether Dickson's claims against the Union Defendants allege that they committed a "prohibited personnel practice"—i.e., (1) whether the Union Defendants had the authority to take or recommend a "corrective action" or other "personnel action" against Dickson and (2) that their conduct in allegedly making false statements about him to the VA Police, to the VA OIG, and to a United States senator constituted such actions. *See Murphree*, 850 F. Supp. 2d at 1268. A court may dismiss an action at any time upon a conclusion that it lacks subject matter jurisdiction. We conclude that Dickson should have an opportunity to establish the jurisdictional facts he would need to survive a CSRA preemption claim. *See Buckles v. Cont'l Res., Inc.*, 2017 MT 235, ¶ 28, 388 Mont. 517, 402 P.3d 1213.

CONCLUSION

¶19 The District Court erred in concluding on the allegations of Dickson's complaint alone that his claims are preempted by the CSRA. We reverse its order granting the Union Defendants' motion to dismiss and remand for further development of the record consistent with this Opinion.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ DIRK M. SANDEFUR
/S/ JIM RICE
/S/ INGRID GUSTAFSON