EMANUEL SMITH, III	*	**NO. 2017-CA-0038**
VERSUS	*	
		COURT OF APPEAL
HOUSING AUTHORITY OF NEW ORLEANS, SILAS PHIPPS, JR., ROBERT ANDERSON, GREGG FORTNER, AND AB INSURANCE COMPANY	*	**FOURTH CIRCUIT**
		STATE OF LOUISIANA
	* * * * * * *	

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2016-01504, DIVISION "I-14"
Honorable Piper D. Griffin, Judge
* * * * * *

Judge Terri F. Love
* * * * * *

(Court composed of Judge Terri F. Love, Judge Daniel L. Dysart, Judge Terrel J. Broussard, Pro Tempore)

BROUSSARD, J., DISSENTS

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AFFIRMED
JUNE 28, 2017

This appeal arises from plaintiff's termination as a housing authority police officer. Plaintiff contends that he was terminated as an "at will" employee instead of as a civil servant, which violated his civil rights. Defendants filed numerous exceptions. The trial court granted the housing authority's and his supervisors' exceptions of no cause of action as to 42 U.S.C. § 1983, and dismissed plaintiff's claims regarding same.

We find that the housing authority is an instrumentality of the state except as outlined in La. R.S. 40:539(C)(8)(b). As such, HANO does not constitute a person for purposes of a § 1983 suit. Further, plaintiff's supervisors' actions regarding his termination from an "at-will" position for sleeping on duty were objectively reasonable. Accordingly, the trial court did not err by granting the exceptions of no cause of action. The trial court's judgment is affirmed.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Emanuel Smith III was employed as a police officer with the Housing Authority of New Orleans ("HANO"), when he alleged that Silas Phipps, Jr. illegally retrieved information about him from the National Crime Information Center ("NCIC") and then shared the information with third parties. Mr. Smith

contends that Mr. Phipps' actions caused "great embarrassment, humiliation, and loss of standing in his community and with his peers." Mr. Smith spoke with Robert Anderson, the chief of HANO police, wherein Mr. Anderson allegedly told Mr. Smith to sue him. Mr. Smith then filed a formal complaint against Mr. Phipps. Subsequently, Mr. Smith was cited for sleeping while on duty for the second time and was terminated by a supervisor, Greg Fortner.

Mr. Smith filed a Petition for Damages, Declaratory Judgment, and Writ of Mandamus against HANO, Mr. Phipps, Mr. Anderson, Mr. Fortner, and AIG Insurance Company ("AIG"), as HANO's insurer, asserting that he was wrongfully terminated without civil service protections and because he was a whistleblower. Thereafter, HANO, Mr. Anderson, Mr. Fortner, and AIG (collectively "Defendants") filed a dilatory exception of vagueness and a peremptory exception of no cause of action. Mr. Phipps also filed an exception of no cause of action. The trial court granted HANO's exception of vagueness and ordered Mr. Smith to amend his petition within twenty days.[1] Further, the trial court granted HANO, Mr. Anderson, Mr. Fortner, and AIG's exception of no cause of action regarding Mr. Smith's 42 U.S.C. § 1983 ("§1983") claims. The trial court dismissed Mr. Smith's §1983 claims with prejudice. Mr. Smith's supplemental petition[2] and devolutive appeal followed.

Mr. Smith asserts that the trial court erroneously granted the Defendants' exceptions of no cause of action because HANO is an instrumentality of the state. Mr. Smith also contends that he possesses valid §1983 causes of action against

[1] Mr. Smith's claims regarding § 1985, § 1986, La. R.S. 23:967, La. R.S. 42:1169, and enforcing alleged remedies available through the Civil Service System (the alleged unconstitutionality of La. R.S. 40:539(C)(8)(b)) still remain.

[2] The trial court ordered Mr. Smith to amend his petition. However, the amended petition is not before this Court on appeal.

Messrs. Anderson and Fortner because they are not protected by immunity.[3]

NO CAUSE OF ACTION

"An exception is a means of defense, other than a denial or avoidance of the demand, used by the defendant, whether in the principal or an incidental action, to retard, dismiss, or defeat the demand brought against him." La. C.C.P. art. 921. An exception of no cause of action is a peremptory exception, the function of which "is to have the plaintiff's action declared legally nonexistent, or barred by effect of law, and hence this exception tends to dismiss or defeat the action." La. C.C.P. art. 923. *See also* La. C.C.P. art. 927. "On the trial of the peremptory exception pleaded at or prior to the trial of the case, evidence may be introduced to support or controvert any of the objections pleaded, when the grounds thereof do not appear from the petition." La. C.C.P. art. 931. "When the grounds of the objection pleaded by the peremptory exception may be removed by amendment of the petition, the judgment sustaining the exception shall order such amendment within the delay allowed by the court." La. C.C.P. art. 934. However, "[i]f the grounds of the objection raised through the exception cannot be so removed, or if the plaintiff fails to comply with the order to amend, the action, claim, demand, issue, or theory shall be dismissed." *Id*.

"The burden of demonstrating that no cause of action has been stated is upon the mover or exceptor." *City of New Orleans v. Bd. of Comm'rs of Orleans Levee*

[3] Mr. Smith also asserts that La. R.S. 40:539 exempting HANO police officers from the civil service system is unconstitutional. However, the constitutionality of the statute is not before us on appeal, as the trial court has not yet ruled on the issue without the full involvement of the Attorney General. The trial court's judgment stated: The Plaintiff's No Cause of Action pursuant to LA R.S. 40:539 C(8) being "at will" employees as HANO is not part of the State's Civil Service is **DENIED** at this time in order that the Court may receive further information, after timely notice, from the Office of the Louisiana Attorney General in regard to the constitutionality of this statue [sic]."

Dist., 93-0690, p. 28 (La. 7/5/94), 640 So. 2d 237, 253. The trial "court must presume all factual allegations of the petition to be true and all reasonable inferences are made in favor of the non-moving party." *Id*. The appellate court reviews a sustained exception of no cause of action with the *de novo* standard of review "because the exception raises a question of law and the lower court's decision is based only on the sufficiency of the petition." *Id*. This Court must "follow the accepted rule that a petition should not be dismissed for failure to state a cause of action unless it appears beyond doubt that the plaintiff can prove no set of facts in support of any claim which would entitle him to relief." *Id*.

"The question therefore is whether in the light most favorable to plaintiff, and with every doubt resolved in his behalf, the petition states any valid cause of action for relief." *Id*., 93-0690, p. 29, 640 So. 2d at 253. "The petition should not be dismissed merely because plaintiff's allegations do not support the legal theory he intends to proceed on, since the court is under a duty to examine the petition to determine if the allegations provide for relief on any possible theory." *Id*. Generally, "an exception of no cause of action is likely to be granted only in the unusual case in which the plaintiff includes allegations that show on the face of the petition that there is some insuperable bar to relief." *Id*. "In other words, dismissal is justified only when the allegations of the petition itself clearly demonstrate that the plaintiff does not have a cause of action, or when its allegations indicate the existence of an affirmative defense that appears clearly on the face of the pleading." *Id*.

42 U.S.C. § 1983

42 U.S.C. § 1983 reads as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Mr. Smith contends that his petition sets forth causes of action against HANO and Messrs. Anderson and Fortner pursuant to §1983. Therefore, he maintains on appeal that the trial court erroneously granted the Defendants' exceptions of no cause of action.

HANO

Mr. Smith asserts that HANO cannot "pick and choose" when or when not to be considered an instrumentality of the state.

La. R.S. 40:539 was amended following HANO's takeover by the United States Department of Housing and Urban Development ("HUD") to provide that:

> [n]otwithstanding any provision of Subparagraph (a) of this Paragraph or of any other law to the contrary, **the Housing Authority of New Orleans shall not be considered to be an instrumentality of the state for purposes of Article X, Section 1(A) of the Constitution of Louisiana, and employees of the authority shall not be included in the state civil service.**

La. R.S. 40:539(C)(8)(b) (emphasis added). Article X, Section 1(A) of the Louisiana Constitution states:

> The state civil service is established and includes all

> persons holding offices and positions of trust or employment in the employ of the state, or any instrumentality thereof, and any joint state and federal agency, joint state and parochial agency, or joint state and municipal agency, regardless of the source of the funds used to pay for such employment. It shall not include members of the state police service as provided in Part IV of this Article or persons holding offices and positions of any municipal board of health or local governmental subdivision.

When read *in pari materia*, the revision provides that, for the limited purposes of the State of Louisiana's civil service system, HANO is not considered an instrumentality of the state. Further, HANO's employees are exempt from the civil service system. Otherwise, when dealing with matters outside the realm of the civil service system, HANO is considered an instrumentality of the state. *See Dep't of State Civil Serv. v. Hous. Auth.*, 95-1959, p. 5 (La. App. 1 Cir. 5/10/96), 673 So. 2d 726, 729 ("housing authorities are state agencies, or alternatively, instrumentalities of the state.").

The United States Supreme Court held that "a municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978). "[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents." *Id.*, 436 U.S. at 694, 98 S.Ct. at 2037. "Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.*, 436 U.S. at 694, 98 S.Ct. at 2037-38.

"[S]tate officials literally are persons." *Will v. Michigan Dep't of State*

Police, 491 U.S. 58, 71, 109 S.Ct. 2304, 2312, 105 L.Ed.2d 45 (1989). "But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office." *Id*. "As such, it is no different from a suit against the State itself." *Id*. Thus, the United State Supreme Court found that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983." *Id*.

Given the laws providing that HANO is an instrumentality of the state, which does not constitute a person under the auspices of §1983, we find that the trial court did not err by granting HANO's exception of no cause of action and dismissing Mr. Smith's §1983 claims against it.

Mr. Anderson & Mr. Fortner

Mr. Smith next asserts that he possesses a valid cause of action against his supervisors, Messrs. Anderson and Fortner, because there is no sovereign immunity for state officials acting unconstitutionally. Thereby, Mr. Smith maintains that the trial court erred by granting Messrs. Anderson and Fortner's exceptions of no cause of action regarding their individual capacity.[4]

The United States Supreme Court iterated "the importance of resolving immunity questions at the earliest possible stage in litigation." *Hunter v. Bryant*, 502 U.S. 224, 227, 112 S.Ct. 534, 536, 116 L.Ed.2d 589 (1991). "The resolution of immunity questions inherently requires a balance between the evils inevitable in any available alternative." *Harlow v. Fitzgerald*, 457 U.S. 800, 813, 102 S.Ct. 2727, 2736, 73 L.Ed.2d 396 (1982). "Public officials acting within the scope of

[4] Having found that HANO is an instrumentality of the state, Messrs. Anderson and Fortner, in their official capacities, are likewise not "persons" for the sake of §1983. We distinguish *Sommer v. State, Dep't of Transp. & Dev.*, 97-1929 (La. App. 4 Cir. 3/29/00), 758 So. 2d 923, 935, in that the *Sommer* court found that the public entities and their employees waived the right to immunity from §1983 liability.

their official duties are shielded from civil liability by the qualified immunity doctrine." *Kipps v. Caillier*, 197 F.3d 765, 768 (5th Cir. 1999). "Qualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official." *Id*., 457 U.S. at 815, 102 S.Ct. at 2736. The United States Supreme Court held that

> qualified immunity would be defeated if an official "knew or reasonably should have known that the action he took within his sphere of official responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury...."

Id., 457 U.S. at 815, 102 S.Ct. at 2737, *quoting Wood v. Strickland*, 420 U.S. 308, 322, 95 S.Ct. 992, 1001, 43 L.Ed.2d 214 (1975).

To show that Messrs. Anderson and Fortner are not entitled to qualified immunity, Mr. Smith was required to "satisfy a three-part test." *Kipps*, 197 F.3d at 768. "First, '[a] court evaluating a claim of qualified immunity must first determine whether the plaintiff has alleged the deprivation of a constitutional right at all.'" *Id*., *quoting Wilson v. Layne*, 526 U.S. 603, ___, 119 S.Ct. 1692, 1697, 143 L.Ed.2d 818 (1999). "Second, the court must 'determine whether that right was clearly established at the time of the alleged violation.'" *Id*. Finally, "[i]f it is determined that the official's conduct was unconstitutional, then the court must decide whether the conduct was nonetheless 'objectively reasonable.'" *Kipps*, 197 F.3d at 768, *citing Eugene v. Alief Indep. School Dist.*, 65 F.3d 1299, 1305 (5th Cir. 1995). Further, "'Objective reasonableness is a matter of law for the courts to decide, not a matter for the jury.'" *Kipps*, 197 F.3d at 769, *quoting Williams v. Bramer*, 180 F.3d 699, 703 (5th Cir. 1999).

Mr. Smith contends that upon being informed of Mr. Phipps' alleged

wrongdoing, Messrs. Anderson and Fortner failed to "timely perform a meaningful investigation about his complaint." Mr. Smith maintains that he was then targeted as a "whistleblower" or "troublemaker" and fired. Mr. Smith avers that he was wrongfully denied the protections provided for by the civil service and Police Officer's Bill of Rights.

Mr. Smith's assertion of entitlement to La. R.S. 40:2531 lacks merit. La. R.S. 40:2531 applies:

> only to police employees as defined by R.S. 40:1372(5), Louisiana P.O.S.T. certified probation and parole officers employed by the Louisiana Department of Public Safety and Corrections, division of probation and parole, and to those law enforcement officers employed by any municipality and campus police employed at any state-supported college or university who are under investigation . . . .

La. R.S. 40:1372(5) provides that a "'[p]olice employee' means any employee who is assigned to police work as a peace officer pursuant to R.S. 40:1379." Further, La. R.S. 40:1379 outlines the duties and powers of state police employees. Mr. Smith does not belong to the class of persons protected by La. R.S. 40:2531. He was not a state police employee, a "police employee," a "probation and parole officer", or a law enforcement officer employed by a municipality or state-supported college/university. *See* La. R.S. 40:2531, 40:1372(5), and 40:1379. HANO is "a public body, corporate and politic, previously established, or to be established, by a municipality or a parish . . . exercising necessary and essential governmental functions for the purposes . . . in matters of statewide concern, although its operations are local in nature." La. R.S. 40:384(16). *See also* La. R.S. 40:383. As such, he is not entitled to the protections outlined in the Police Officer's Bill of Rights.

The record indicates that Mr. Smith was terminated for a second offense of sleeping while on duty. Assuming arguendo that Messrs. Anderson and Fortner's conduct was unconstitutional and notwithstanding any subjective motivations, the record reveals that it was objectively reasonable to terminate an "at-will" employee[5] for the second offense of sleeping on duty. Further, "[a]n official cannot reasonably be expected to know at the time an action occurs that the law forbade conduct that was not previously identified as unlawful." *Amato v. Office of Louisiana Com'r of Sec.*, 94-0082, p. 10 (La. App. 4 Cir. 10/3/94), 644 So. 2d 412, 418. Accordingly, if La. R.S. 40:539(C)(8)(b) was later determined to be unconstitutional, Messrs. Anderson and Fortner could not be held liable under §1983 for firing an "at-will" employee, i.e., not covered by the civil service rules, at the time.

Further, La. R.S. 9:2798.1 provides general tort immunity, stating that "[l]iability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policymaking or discretionary acts when such acts are within the course and scope of their lawful powers and duties."

Even assuming all the allegations contained in the petition are true, there are no facts that lead this Court to conclude that Mr. Smith's termination was objectively unreasonable. Accordingly, the trial court did not err by granting Messrs. Anderson and Fortner's exception of no cause of action, as they benefit from qualified immunity from a §1983 suit and La. R.S. 9:2798.1 general tort immunity.

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[5] La. R.S. 40:539(C)(8)(b) specifically exempts HANO employees from the state civil service system.

DECREE

For the above-mentioned reasons, we find that HANO is an instrumentality of the state except as outlined in La. R.S. 40:539(C)(8)(b). As such, HANO is not a person for purposes of a §1983 suit. Therefore, the trial court did not err by granting HANO's exception of no cause of action. Likewise, as HANO is an instrumentality, Messrs. Anderson and Fortner, in their official capacities, are not persons for the purposes of a §1983 suit. As such, the trial court did not err by granting their exceptions of no cause of action. Further, Messrs. Anderson and Fortner's actions regarding Mr. Smith's termination from an "at-will" position for sleeping on duty were objectively reasonable. Accordingly, the trial court did not err by granting their exceptions of no cause of action in their individual capacities. The trial court's judgment is affirmed.

AFFIRMED