

STATE OF MICHIGAN
COURT OF APPEALS

BARTON MITCHELL and YOLANDA
MITCHELL,

UNPUBLISHED
February 26, 1999

Plaintiffs-Appellants,

v

No. 199522
Wayne Circuit Court
LC No. 95-506775 NO

CITY OF DETROIT, DANNY MAYNARD and
MONICA CHILDS,

Defendants-Appellees.

Before: Hoekstra, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Plaintiffs¹ appeal as of right from the trial court's order granting defendants, City of Detroit, Danny Maynard and Monica Childs', motion for a directed verdict in this 42 USC 1983 action.² We affirm.

This Court reviews a trial court's decision to grant a directed verdict de novo. *Meagher v Wayne State University*, 222 Mich App 700, 708; 565 NW2d 401 (1997). An appellate court considers the evidence presented up to the time that the motion is made and views that evidence in the light most favorable to the nonmoving party while resolving all doubt in the nonmoving party's favor. *Id.* "Directed verdicts are appropriate only when no factual question exists upon which reasonable minds may differ." *Id.*

Plaintiffs argue that defendant followed a policy of referring police officers who had been involved in shooting incidents for psychiatric evaluations, and then ignoring the recommendations of the psychiatrists that those officers deemed fit to return to duty receive psychotherapy. As a result of this policy, plaintiffs argue that plaintiff did not receive necessary psychotherapy following a duty-related shooting incident, and the deprivation of this psychotherapy resulted in a second shooting incident as a

result of which plaintiff lost his job. Plaintiff argues that the loss of his employment with defendant under these circumstances constituted a violation of 42 USC 1983. We disagree.

To make out a claim under 42 USC 1983, a plaintiff must first establish that “the defendant has deprived him of a right secured by the “Constitution and laws of the United States” and that defendant did so “under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory.” That is, plaintiff must show that defendant deprived him of the right under the color of state law. *Adickes v S H Kress & Co*, 398 US 144, 150; 90 S Ct 1598; 26 L Ed 2d 142 (1970), citing *Monroe v Pape*, 365 US 167, 184, 187; 81 S Ct 473; 5 L Ed 2d 492 (1961). Plaintiff has not met either of these requirements.

The Due Process Clause of the Fourteenth Amendment “provides two different kinds of constitutional protection: procedural due process and substantive due process.” *McKinney v Pate*, 20 F3d 1550, 1555 (CA11, 1994). “A violation of either of these kinds of protection may form the basis for a suit under section 1983.” *Id.* Plaintiff’s claims are factually unique for a §1983 employment termination claim. Specifically, plaintiff does not claim that he was wrongfully discharged. Rather, he maintains that but for defendant’s alleged practice of withholding from its police officers information that their psychologists recommended additional sessions, he would not have engaged in behavior that led to his procedurally proper discharge. Because plaintiff advances no claim of procedural impropriety in his termination process, we interpret his claim to allege a substantive due process violation.

However, when so constructed, plaintiff’s complaint fails to state a claim upon which relief can be granted. Plaintiff enjoys no substantive due process right in his state created employment. In *Sutton v Cleveland Bd of Educ*, 958 F2d 1339 (CA 6; 1992), the Sixth Circuit cited with approval Justice Powell’s concurrence in *Regents of the Univ of Mich v Ewing*, 447 US 214, 229; 106 S Ct 507; 88 L Ed 2d 523 (1992):

Even if one assumes the existence of a property right, however, not every such right is entitled to the protection of substantive due process. While property interests are protected by procedural due process even though the interest is derived from state law rather than the Constitution, *Bd of Regents v Roth*, 408 US 564, 577 [92 S Ct 2701, 2709; 33 L Ed 2d 548] (1972), substantive due process rights are created only by the Constitution. [*Sutton, supra.*]

The Sixth Circuit concluded, “Absent the infringement of some ‘fundamental’ right, it would appear that the termination of public employment does not constitute a denial of substantive due process.” *Id.* at 1351. Other federal courts have reached the same conclusion. In *McKinney v Pate, supra* at 1556, the Eleventh Circuit concluded:

[A]reas in which substantive rights are created only by state law (as is the case with tort law and employment law) are not subject to substantive due process protection under the Due Process Clause because “substantive due process rights are created only by the Constitution.” [*Id.* (citing *Ewing, supra*, 474 US 214, 229 (Powell, J., concurring).]

Therefore, while state created property interests in employment are subject to procedural due process requirements, they do not enjoy substantive due process protection. *Id.* See also *Bussinger v City of New Smyrna Beach*, 50 F3d 922, 925 (CA 11, 1995) (Noting that *McKinney* held that an employee with a protected interest in his job may not maintain a substantive due process claim arising out of his termination) and *Local 342 v Town Bd of the Town of Huntington*, 31 F3d 1191, 1196 (CA 2, 1994) (It is well settled that, where the alleged right cannot be considered so rooted in the traditions and conscience of our people as to be ranked as fundamental, notions of substantive due process will not apply).³

Because plaintiff cannot claim substantive due process protection for his state created interest in employment, an analysis of whether he satisfies the second element of a § 1983 claim – that he was deprived of his constitutionally protected property interest in his employment under color of law – is immaterial to a resolution of this issue. *Booth Newspapers, Inc v University of Mich Bd of Regents*, 444 Mich 211, 234; 507 NW2d 422 (1993). However, we agree with the trial court that plaintiff has failed to provide any evidence that the police department had a policy or custom of refusing to forward psychiatric recommendations to its officers. Therefore, plaintiff’s claim also fails to meet the second requirement for claims brought under 42 USC 1983.

Affirmed.

/s/ Joel P. Hoekstra

/s/ Martin M. Doctoroff

/s/ Peter D. O’Connell

¹ Plaintiff Yolanda Mitchell’s claim against defendants is based on loss of consortium. Because this claim is derivative of Barton Mitchell’s 42 USC 1983 claim, *Cebulski v City of Belleville*, 156 Mich App 190, 193; 401 NW2d 616 (1987), and plaintiffs raise no issues on appeal relating directly to Yolanda Mitchell’s claim for loss of consortium, singular references to plaintiff throughout the remainder of this opinion are to Barton Mitchell, only.

² In this order, plaintiffs also stipulated to the voluntary dismissal with prejudice of all claims against Danny Maynard and Monica Childs, and to the voluntary dismissal with prejudice of all tort claims against the City of Detroit. Plaintiffs do not appeal these dismissals. Therefore, throughout the remainder of this opinion, singular references to defendant will be to the City of Detroit, only.

³ There is some disagreement among federal circuit courts concerning whether state employees are entitled to substantive due process protection when terminated. See *Schaper v City of Huntsville*, 813 F2d 709, 717 (CA 5, 1987). In *Ewing, supra*, however, the United States Supreme Court, while assuming a state created property interest, evaluated the University’s decision to revoke that property interest in light of its arbitrariness and capriciousness. *Id.* at 225. Plaintiff in the instant case offers no reason to believe that his termination was arbitrary or capricious. Therefore, even if we assumed that he was entitled to substantive due process protection for his state-created property interest in his position as a police officer, he still fails to prove a substantive due process violation.

