1-21-2011

Noak v. Idaho Dept of Correction Augmentation Record Dckt. 37788

In the Supreme Court of the State of Idaho

LAW CLERK

JOHN F. NOAK, M.D., Plaintiff-Appellant, v. IDAHO DEPARTMENT OF CORRECTION; and RICHARD D. HAAS, Defendants-Respondents, and PRISON HEALTH SERVICES, INC., a subsidiary of AMERICAN SERVICES GROUP, INC., and DOES 1-10, Defendants.	ORDER GRANTING MOTION TO AUGMENT THE APPELLATE RECORD AND REQUEST FOR JUDICIAL NOTICE Supreme Court Docket No. 37788-2010 Ada County District Court No. 2006-23517 Ref. No. 11-15

A MOTION TO AUGMENT THE APPELLATE RECORD AND REQUEST FOR JUDICIAL NOTICE with Exhibits A and B attached was filed by counsel for Respondents on December 16, 2010. Therefore, good cause appearing,

IT HEREBY IS ORDERED that Respondent's MOTION TO AUGMENT THE APPELLATE RECORD AND REQUEST FOR JUDICIAL NOTICE be, and hereby is, GRANTED and this Court SHALL TAKE JUDICIAL NOTICE and the AUGMENTATION RECORD SHALL INCLUDE certified copies of these documents, copies of which accompanied this Motion:

1. Defendants Idaho Department of Correction, Thomas J. Beauclair, Richard D. Haas and Steven Wolf's Motion to Dismiss and Motion for More Definite Statement, inclusive of their Memorandum in Support of Motion to Dismiss and Motion for More Definite Statement, both filed on August 7, 2006, in United States District Court Case No. CV 06-00039 (Electronic Case Filing ["ECF"] Docket No. 6, with Attachment #1), attached as Exhibit A; and
2. The Judgment entered on November 17, 2006, in United States District Court Case No. CV 06-00039 (ECF Docket No. 33), attached as Exhibit B.

DATED this 28 day of January 2011.

For the Supreme Court

AUGMENTATION RECORD

Stephen Kenyon

Stephen W. Kenyon, Clerk

cc: Counsel of Record

In the Supreme Court of the State of Idaho

JOHN F. NOAK, M.D., Plaintiff-Appellant, v. IDAHO DEPARTMENT OF CORRECTION; and RICHARD D. HAAS, Defendants-Respondents, and PRISON HEALTH SERVICES, INC., a subsidiary of AMERICAN SERVICES GROUP, INC., and DOES 1-10, Defendants.	)	ORDER GRANTING MOTION TO AUGMENT THE APPELLATE RECORD AND REQUEST FOR JUDICIAL NOTICE Supreme Court Docket No. 37788-2010 Ada County District Court No. 2006-23517 Ref. No. 11-15

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John F. Noak, M.D. vs. Prison Health Services, Inc.
And
Idaho Department of Correction; Richard D. Haas,
Does 1-10

Supreme Court Case No. 37788
District Court Case No. CV-OC-0623517

Exhibit A
to

Respondents' Motion to Augment the
Appellate Record and Request for Judicial Notice

LAWRENCE G. WASDEN
ATTORNEY GENERAL

DAVID G. HIGH
Chief, Civil Litigation Division

EMILY A. MAC MASTER, ISB NO. 6449
Deputy Attorneys General
Statehouse, Room 210
Boise, ID 83720-0010
Telephone: (208) 334-2400
Facsimile: (208) 334-2830
emily.macmaster@ag.idaho.gov
RISK/NOAK/P6181LMD.DOC
Attorneys for State Defendants Idaho Department of Correction, Thomas J. Beauclair, Richard D. Haas and Steven Wolf

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

JOHN F. NOAK, Plaintiff, v. PRISON HEALTH SERVICES, INC., a subsidiary of AMERICAN SERVICES GROUP, INC.; SECURE PHARMACY PLUS, INC., a subsidiary of AMERICAN SERVICES GROUP, INC.; RICHARD D. DULL; RODNEY D. HOLLIMAN; NORMA HERNANDEZ, JANA BETH NICOLSON; VICTORIA M WEREMECKI; KAREN BARRETT; LISA MAYS; IDAHO DEPARTMENT OF CORRECTION; THOMAS J. BEAUCLAIR, Director; RICHARD D. HAAS, Medical Services Manager, STEVEN WOLF, Office of Professional Standards IDOC; and DOES 1-10. Defendants.	Case No. CV 06-00039 **DEFENDANT IDAHO DEPARTMENT OF CORRECTION, THOMAS J. BEAUCLAIR, RICHARD D. HAAS AND STEVEN WOLF'S MOTION TO DISMISS AND MOTION FOR MORE DEFINITE STATEMENT**

COME NOW Defendants Idaho Department of Correction, Thomas J. Beauclair, Richard D. Haas and Steven Wolf (collectively, the "State Defendants"), by and through their counsel of record, the Office of the Attorney General, and bring this Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and (6) and hereby move the Court for an Order as to each of them dismissing the above-referenced lawsuit, in whole or in part, with prejudice.

Additionally, the State Defendants bring this Motion for More Definite Statement, pursuant to Fed. R. Civ. P. 12(e), and hereby move the Court for an Order, if any part of this action is allowed to continue in federal court, requiring Plaintiff John F. Noak to amend the Complaint filed on January 30, 2006, to provide a more definite statement.

This Motion to Dismiss and Motion for More Definite Statement is supported by Defendant Idaho Department of Correction, Thomas J. Beauclair, Richard D. Haas and Steven Wolf's Memorandum in Support of Motion to Dismiss and Motion for More Definite Statement, filed herewith, and the pleadings on file in this action.

DATED this 7th day of August, 2006.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By/s/ *Emily A. Mac Master*
EMILY A. MAC MASTER
Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent a Notice of Electronic Filing to the following:

Lois Weston Hart
GROBER & HART
loishartlawyer@cableone.net

/s/ Emily A. Mac Master
EMILY A. MAC MASTER

LAWRENCE G. WASDEN
ATTORNEY GENERAL

DAVID G. HIGH
Chief, Civil Litigation Division
EMILY A. MAC MASTER, ISB NO. 6449
Deputy Attorneys General
Statehouse, Room 210
Boise, ID 83720-0010
Telephone: (208) 334-2400
Facsimile: (208) 334-2830
emily.macmaster@ag.Idaho.gov
RISK/NOAK/P6211lma MDS Memo (Final).doc
Attorneys for the State Defendants Idaho Department of Correction, Thomas J. Beauclair, Richard D. Haas and Steven Wolf

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

JOHN F. NOAK, Plaintiff, v. PRISON HEALTH SERVICES, INC., a subsidiary of AMERICAN SERVICES GROUP, INC.; SECURE PHARMACY PLUS, INC., a subsidiary of AMERICAN SERVICES GROUP, INC.; RICHARD D. DULL; RODNEY D. HOLLIMAN; NORMA HERNANDEZ, JANA BETH NICOLSON; VICTORIA M WEREMECKI; KAREN BARRETT; LISA MAYS; IDAHO DEPARTMENT OF CORRECTION; THOMAS J. BEAUCLAIR, Director; RICHARD D. HAAS, Medical Services Manager, STEVEN WOLF, Office of Professional Standards IDOC; and DOES 1-10. Defendants.	Case No. CV 06-00039 **DEFENDANT IDAHO DEPARTMENT OF CORRECTION, THOMAS J. BEAUCLAIR, RICHARD D. HAAS AND STEVEN WOLF'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS AND MOTION FOR MORE DEFINITE STATEMENT**

COME NOW Defendants Idaho Department of Correction ("IDOC"), Thomas J. Beauclair ("Beauclair), Richard D. Haas ("Haas") and Steven Wolf ("Wolf") (collectively, "the State

Defendants"), by and through their legal counsel, the Office of the Idaho Attorney General, and hereby present this memorandum in support of their Motion to Dismiss and Motion for a More Definite Statement, each filed concurrently herewith.

I.

INTRODUCTION

In this lawsuit, Plaintiff John F. Noak, M.D. ("Plaintiff") alleges federal diversity jurisdiction and attempts to characterize state law claims as alleged violations of federal law. On the face of the Complaint, however, this lawsuit is not properly brought in federal court.

In the Complaint, Plaintiff alleges that he was an employee of Defendant Prison Health Services, Inc. ("PHS"). Plaintiff claims that, as a PHS employee, he provided physician services at IDOC facilities pursuant to a contract between PHS and IDOC. Plaintiff alleges that on March 10, 2004, after an incident involving his physical handling of a female prisoner, IDOC asserted its rights under the IDOC/PHS contract and requested that PHS replace Plaintiff's services.

Plaintiff's lawsuit is against PHS, the State Defendants and a number of other Defendants. In Counts I, V, VI and VIII of the Complaint, Plaintiff alleges a variety of state law tort claims against the State Defendants, alleging that they defamed Plaintiff, interfered with his alleged employment with PHS, acted wrongfully in investigations of his conduct and committed trespass. In Counts II and IV of the Complaint, Plaintiff alleges federal claims against the State Defendants under 42 U.S.C. § 2000(e), 42 U.S.C. § 1983 and 42 U.S.C. §§ 1985 (2) and (3). The gist of Count II is that the State Defendants allegedly defamed him and interfered with his employment with PHS. The gist of Count IV is that the State Defendants allegedly delayed in reporting Plaintiff's conduct to law enforcement and interfered in interviews conducted.

This Motion to Dismiss should be granted for the following reasons:

- There is no diversity jurisdiction pursuant to 28 U.S.C. § 1332.
- There is no federal subject matter jurisdiction pursuant to 28 U.S.C. § 1331 because: (1) Plaintiff has failed to state a claim against the State Defendants under 42 U.S.C.

§ 2000e (Title VII of the Civil Rights Act of 1964); (2) the Eleventh Amendment bars Plaintiff's claims under 42 U.S.C. § 1983 and 42 U.S.C. § 1985 against IDOC and Beauclair, Haas and Wolf in their official capacities; (3) Plaintiff has failed to state a claim under 42 U.S.C. § 1983 for alleged violations of Title VII, or the Equal Protection or Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution; and (4) Plaintiff has failed to state a claim for conspiracy under 42 U.S.C. §§ 1985(2) or (3).

- As there is no basis for federal diversity or federal subject matter jurisdiction, Plaintiff's supplemental state law claims should be dismissed. The proper forum for this lawsuit is state, not federal, court. If, however, any part of this federal lawsuit is allowed to continue, Plaintiff should be required to provide a more definite statement than his 118-page Complaint.

II.

MATERIAL RELEVANT FACTS

Following is a summary of the material factual allegations in the Complaint:[1]

1. Plaintiff resides in Idaho and is licensed to practice medicine in Idaho. IDOC is a subdivision of the State of Idaho. Beauclair, Haas, Wolf and several other individual Defendants reside in Idaho or resided in Idaho during the relevant time periods. Complaint, ¶¶ 7, 10, 12-20.

2. From approximately 2001 through July 1, 2005, PHS was the contractual provider of medical services for prisoners in IDOC facilities. Complaint, ¶¶ 7, 183.

3. In or about April 2002, PHS offered Plaintiff a job as a doctor for PHS at an IDOC facility. On or about October 1, 2002, Plaintiff became the PHS Medical Director. PHS governed and controlled the terms, conditions, rights and privileges of Plaintiff's alleged employment. Complaint, ¶¶ 7, 24-25.

4. On or about January 28, 2004, Defendant Norma Hernandez, an IDOC prisoner, sought medical treatment. Defendant Jana Nicholson treated Ms. Hernandez and consulted with

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[1] The State Defendants disagree with many of the factual allegations made in the Complaint. However, solely for purposes of this Motion to Dismiss, the facts must be liberally construed in Plaintiff's favor and assumed to be true.

Plaintiff by phone and used an "escalated demanding voice tone." Complaint, ¶¶ 12, 32-41.

5. On or about January 30, 2004, Plaintiff provided follow-up treatment to Ms. Hernandez. As Ms. Hernandez left the exam room, she felt that she was going to faint. Ms. Nicholson began to help Ms. Hernandez to use the wall to slide down. Plaintiff claims that he "smoothly stepped in between" Ms. Hernandez and Ms. Nicholson and walked Ms. Hernandez back down the hallway to her room. Ms. Nicholson became very angry. Complaint, ¶¶ 42-52. Other witnesses have reported the incident differently, as discussed below.

6. Later that day, Ms. Hernandez filed a complaint with IDOC, alleging that Plaintiff had grabbed her by the arm and pushed Ms. Nicholson to the side, then forced Ms. Hernandez to walk back to her room with no concern for her health or wellbeing. Complaint, ¶¶ 53-57.

7. IDOC's Office of Professional Standards initiated an investigation of the incident. The Ada County Sheriff's Office ("ACSO"), PHS, and the Idaho Board of Medicine also conducted investigations. Complaint, ¶¶ 58-98, 104-111, 121-122, 130-153, 158, 166, 174.

8. On or about February 12, 2004, Plaintiff was escorted off IDOC premises, and PHS placed Plaintiff on administrative leave with pay. Complaint, ¶¶ 99-101, 111-114.

9. In a memorandum to Haas' supervisor dated February 13, 2004, Haas allegedly wrote regarding the PHS investigation: "Regarding the review by the [PHS] attorney/nurse, I expressed IDOC's concerns that PHS's proposed review could appear to violate state statutes related to intimidation of witnesses and impeding a criminal investigation." Complaint, ¶ 115.

10. On February 16, 2004, Beauclair held a meeting with all Boise-area PHS contract employees. Complaint, ¶ 116.

11. On or about February 24, 2004, ACSO recommended to the Ada County Prosecuting Attorney that a warrant be sought for Plaintiff's arrest (for alleged battery). The Prosecuting Attorney declined prosecution of the case. Complaint, ¶¶ 62, 92, 118, 125.

12. On March 10, 2004, PHS notified Plaintiff that IDOC was requesting a replacement for Plaintiff, to provide services at IDOC facilities. Complaint, ¶¶ 126-128.

13. On April 9, 2004, the *Idaho Statesman* published an article of an interview of

Beauclair in which Beauclair allegedly complained about communication and accountability issues with PHS and announced that IDOC had launched three separate investigations into employees of PHS. Complaint, ¶¶ 162-163.

14. On May 6, 2004, the DEA certificates and unused 222 forms issued to Plaintiff were returned to an Idaho Board of Pharmacy representative and it was confirmed that Plaintiff's unused prescription pads were destroyed. Complaint, ¶¶ 159-161, 167-169, 175.

15. On June 9, 2004, the Board of Medicine sent a letter of concern to Plaintiff, citing his lack of control and judgment in interactions with difficult patients. Complaint, ¶ 176.

III.

STANDARDS TO GRANT A MOTION TO DISMISS

The State Defendants are entitled to a dismissal of Plaintiff's Complaint under Fed. R. Civ. P. 12(b)(6) if the complaint "fail[s] to state a claim upon which relief can be granted," *i.e.*, this rule "authorizes a court to dismiss a claim on the basis of a dispositive issue of law." Neitzke v. Williams, 490 U.S. 319, 326, 109 S. Ct. 1827, 1832, 104 L. Ed. 2d 338 (1989). All well-pleaded facts in a complaint should be accepted as true and construed in the light most favorable to the non-moving party. Watson v. Weeks, 436 F.3d 1152, 1157 (9th Cir. 2006). In considering a motion to dismiss, a complaint should not be dismissed on the pleadings "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Gillespie v. Civiletti, 629 F.2d 637, 640 (9th Cir. 1980). In evaluating a complaint, any doubts should be construed in favor of the pleader. *Id.*

The factual allegations of a complaint must be accepted as true when considering a Rule 12(b)(6) motion, but neither defendants nor the court are bound by legal conclusions cast by a complaint as allegations of fact. Papasan v. Allain, 478 U.S. 265, 285, 106 S. Ct. 2932, 2944, 92 L. Ed. 2d 209 (1986); Cholla Ready Mix, Inc. v. Civish, 382 F.3d 969, 973 (9th Cir. 2004). Also, a liberal interpretation may not supply essential elements of a claim that have not been pled. Ivey v. Bd. of Regents of the University of Alaska, 673 F.2d 266, 268 (9th Cir. 1982).

IV.

ARGUMENT

A. The Court Does Not Have Diversity Jurisdiction Pursuant to 28 U.S.C. § 1332

The Complaint alleges federal diversity jurisdiction in this case pursuant to 28 U.S.C. § 1332. Complaint, ¶ 2. 28 U.S.C. § 1332(a)(1) grants diversity jurisdiction only where plaintiffs and defendants are citizens of different states. The statute requires complete diversity of citizenship. Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1067 (9th Cir. 2001). "The diversity jurisdiction statute, as construed for nearly 200 years, requires that to bring a diversity case in federal court amongst multiple defendants, each plaintiff must be diverse from each defendant." Lee v. American Nat. Ins. Co., 260 F.3d 997, 1004 (9th Cir. 2001).

There is no federal diversity jurisdiction in this case. IDOC is a state agency and thus is not a citizen. Complaint, ¶ 17. Accordingly, IDOC and Plaintiff are not citizens of different states. "If a party is not a citizen of a state at all, then it is not a citizen of a different state and it would be inappropriate to allow that party to bring a case or be subject to federal jurisdiction based only on diversity of citizenship." Batton v. Georgia Gulf, 261 F. Supp. 2d 575, 582 (M.D. La. 2003) (presence of state agency as a codefendant destroyed diversity). *See also* Beck v. Atlantic Richfield Co., 62 F.3d 1240, 1243-44 (9th Cir. 1995) (holding inclusion of a Montana state agency destroyed diversity jurisdiction); Long v. District of Columbia, 820 F.2d 409, 416 (D.C. Cir. 1987) (finding no diversity jurisdiction, absent dismissal of the District of Columbia).

Second, there is no complete diversity between Plaintiff and each individual Defendant. Plaintiff alleges he and several individual Defendants are residents of Idaho. Complaint, ¶¶ 7, 12, 16, 18-20. On these alleged facts, there is no basis for federal diversity jurisdiction.

B. Plaintiff's Claims Under 42 U.S.C. § 2000(e) Against the State Defendants Should Be Dismissed

Counts II and IV of the Complaint allege violations of 42 U.S.C. § 2000(e), which codifies Title VII of the Civil Rights Act of 1964. Title VII prohibits unlawful discrimination in employment relationships; Title VII does not protect independent contractor relationships like

the one here between IDOC and Plaintiff. Lutcher v. Musicians Union Local 47, 633 F.2d 880, 883-84 (9th Cir. 1980). However, a Title VII claim can be stated if a defendant's actions interfered with the plaintiff's employment with another employer. Equal Employment Opportunity Commission v. Pacific Maritime Ass'n, 351 F.3d 1270, 1274 (9th Cir. 2003) (to state interference claim, defendant must have some "peculiar control" over the plaintiff's employment with the direct employer and engage in "discriminatory interference").

As pled in the Complaint, PHS (not IDOC) was Plaintiff's employer. Complaint, ¶ 7. Therefore, Plaintiff's Title VII claim against the State Defendants must be stated, if at all, as an interference claim. However, this claim fails on the allegations in the Complaint.

First, to establish the court's jurisdiction over a Title VII claim, a plaintiff must exhaust his administrative remedies prior to filing a lawsuit. B.K.B. v. Maui Police Dept., 276 F.3d 1091, 1099 (9th Cir. 2002). "Under Title VII, a plaintiff must exhaust her administrative remedies by filing a timely charge with the EEOC [Equal Employment Opportunity Commission] or the appropriate state agency, thereby affording the agency an opportunity to investigate the charge." *Id.*, citing 42 U.S.C. § 2000e-5(b). Where a plaintiff does not plead that he has exhausted his administrative remedies under Title VII, his complaint should be dismissed. Karim-Panahi v. Los Angeles Police Dept., 839 F.2d 621, 626 (9th Cir. 1988).

Here, Plaintiff has failed to allege that he filed a charge of discrimination with the EEOC or the Idaho Human Rights Commission. Unless Plaintiff pleads that he exhausted his administrative remedies (which, in fact, he has not), his Title VII claims should be dismissed.

Second, Plaintiff cannot state a Title VII claim against Beauclair, Haas or Wolf. Title VII does not impose individual liability. Holly D. v. California Institute of Technology, 339 F.3d 1158, 1179 (9th Cir. 2003); Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587-88 (9th Cir. 1993).

Third, Title VII prohibits employment discrimination against an individual because of his "race, color, religion, sex, or national origin." Oncale v. Sundowner Offshore Serv. Inc., 523 U.S. 75, 78, 118 S. Ct. 998, 1001, 140 L. Ed. 2d 201 (1998) (quoting 42 U.S.C. § 2000e-2(a)(1)). Title VII also prohibits retaliation against an individual because he opposed unlawful

discrimination or participated in proceedings governed by Title VII. Learned v. City of Bellevue, 860 F.2d 927, 931-33 (9th Cir. 1988) (discussing Title VII's opposition and participation clauses at 42 U.S.C. § 2000e-3). To plead a Title VII claim, a plaintiff need not plead a prima facie case but must at least plead a "short and plain statement of his claim showing that he is entitled to relief." Ortez v. Washington County, 88 F.3d 804, 808 (9th Cir. 1996).

In the Complaint, Plaintiff has not alleged facts that he was discriminated against because of his race, color, religion, sex, or national origin, or that he engaged in a protected activity under Title VII's anti-retaliation provisions. Because Plaintiff has failed to state a claim upon which relief can be granted under 42 U.S.C. § 2000e, this claim should be dismissed.

C. The Eleventh Amendment Bars Plaintiff's 42 U.S.C. § 1983 and 42 U.S.C. § 1985 Claims Against IDOC and Beauclair, Haas and Wolf in Their Official Capacities

In Counts II and IV of the Complaint, Plaintiff alleges claims against the State Defendants under 42 U.S.C. § 1983 and 42 U.S.C. §§ 1985(2) and (3). However, the Eleventh Amendment to the United States Constitution bars these claims.

The Eleventh Amendment provides immunity to a state against an individual's lawsuit for money damages, absent that state's consent. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54, 116 S. Ct. 1114, 1122, 134 L. Ed. 2d 252 (1996). The Eleventh Amendment bars lawsuits for money damages against states under 42 U.S.C. § 1983 and 42 U.S.C. § 1985. Will v. Michigan State Police, 491 U.S. 58, 64-67, 71, 109 S. Ct. 2304, 2308-10, 2312, 105 L. Ed. 2d 45 (1989). States and state officials are not "persons" subject to money damage claims within the meaning of these civil rights statutes. *Id.*

In the Complaint's plea for relief on Counts II and IV, Plaintiff seeks money damages — compensatory damages, nominal damages, costs and attorneys fees. Complaint, Relief Requested (Count II (¶ c), Count IV (¶ a)). The Eleventh Amendment bars Plaintiff's claims for money damages under 42 U.S.C. § 1983 and 42 U.S.C. § 1985 against IDOC, a state agency.

The Eleventh Amendment further bars lawsuits for money damages under 42 U.S.C. § 1983 or 42 U.S.C. § 1985 brought against state officials acting in their official capacities. Will

v. Michigan State Police, 491 U.S. at 64, 71, 109 S. Ct. 2304 at 2308, 2312. A suit against a state official in his "official capacity" is actually a suit against the state. Cortez v. County of Los Angeles, 294 F.3d 1186, 1188 (9th Cir. 2002).

Therefore, the Eleventh Amendment bars Plaintiff's federal claims under 42 U.S.C. § 1983 and 42 U.S.C. § 1985 against Beauclair, Haas and Wolf in their official capacities.[2]

D. Plaintiff Has Failed to State a Claim Under 42 U.S.C. § 1983

Counts II and IV of Plaintiff's Complaint contain claims for violations of federal law under 42 U.S.C. § 1983. This statute provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . 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.

42 U.S.C. § 1983 "'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.'" Graham v. Connor, 490 U.S. 386, 393-94, 109 S. Ct. 1865, 1870, 104 L.Ed.2d 443 (1989) (citation omitted). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege: (1) the violation of a right secured by the Constitution or laws of the United States; and (2) that the alleged violator acted under the color of state law. Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006).

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[2] On the face of the Complaint, Plaintiff's 42 U.S.C. § 1983 and 42 U.S.C. § 1985 claims against Beauclair, Haas or Wolf are only in their official capacities. The caption of the Complaint names these three individuals specifically in their job capacities with IDOC. Additionally, in the text of the Complaint, Plaintiff alleges that these Defendants acted as the agents, servants and/or employees of IDOC and that IDOC is liable for their actions pursuant to ratification, *respondeat superior*, actual and/or implied agency and apparent authority. Complaint, ¶ 1. *See* Anderson v. Warner, 451 F.3d 1063, 1069-70 (9th Cir. 2006) (holding where a defendant is sued in his individual capacity for acting outside of the scope of his authority but under color of law, his state employer *cannot* be held liable on a *respondeat superior* theory).

Even if the Eleventh Amendment does not bar Plaintiff's claims under 42 U.S.C. § 1983 in their entirety, the Complaint fails to state a claim under 42 U.S.C. § 1983, as discussed below.

1. Plaintiff Cannot State Claims Under Title VII and 42 U.S.C. § 1983 Arising Out of the Same Rights

To the extent that Counts II and IV allege violations of Title VII as a federal statutory basis for Plaintiff's claims under 42 U.S.C. § 1983, Plaintiff's § 1983 claims fail as a matter of law. "Violation of rights created by Title VII cannot form the basis of section 1983 claims." Learned v. City of Bellevue, 860 F.2d at 933. "[A] plaintiff must 'have an independent basis for claims outside of Title VII, 'lest Congress' prescribed remedies under Title VII be undermined.'" Notari v. Denver Water Dept., 971 F.2d 585, 587 (10th Cir. 1992) (citations omitted).

Count II of the Complaint alleges violations of Title VII and 42 U.S.C. § 1983 arising out of the same facts. Complaint, ¶¶ 194-201. Count IV does the same. Complaint, ¶¶ 205-208. To the extent that Plaintiff asserts violations of Title VII as the basis for his 42 U.S.C. § 1983 claims, his § 1983 claims should be dismissed.

2. Plaintiff Has Failed to State a 42 U.S.C. § 1983 Claim Against the State Defendants Based Upon the Equal Protection Clause

In Counts II and IV of the Complaint, Plaintiff pleads a claim under 42 U.S.C. § 1983 based upon alleged violations of the Equal Protection Clauses of the Fifth and Fourteenth Amendments.[3] But neither Count states a claim upon which relief can be granted.

The Equal Protection Clause requires states to treat persons similarly situated alike. *See* Lee v. City of Los Angeles, 250 F.3d 668, 686 (9th Cir. 2001). To state this claim, a plaintiff must show that the defendants "acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class." If a suspect class is not involved, the state's action is reviewed under rational basis review, which requires a mere "rational relation to some legitimate end." Brandwein v. The California Bd. of Osteopathic Examiners, 708 F.2d

[3] The equal protection requirements of the Fifth Amendment apply to the federal government; the equal protection requirements of the Fourteenth Amendment apply to the states. Abdul-Adbar v. McKelvie, 239 F.3d 307, 316 (3d Cir. 2001).

1466, 1470 (9th Cir. 1983); Tucson Woman's Clinic, 379 F.3d 531, 543 (9th Cir. 2004).

In Counts II and IV, Plaintiff does not allege membership in any particular class. In the factual allegations of the Complaint, Plaintiff does claim that Haas wanted the State of Idaho to return to "in-house medical services" and to get "private medical contractors fired." Complaint, ¶¶ 18, 30, 195. Assuming Plaintiff's membership in a class of private physicians is the basis for his equal protection claim, the State Defendants' actions are subject to mere rational basis review. Brandwein, 708 F.2d at 1470, Tucson Woman's Clinic, 379 F.3d at 545.

Rational basis review is easily satisfied on the allegations in the Complaint. Plaintiff fails to allege that *any* treatment of state-employed physicians occurred that was more favorable than treatment of PHS private physicians. Put plainly, Plaintiff has not alleged any discriminatory treatment. Also, Haas' alleged intent to bring medical services back "in-house" cannot support an equal protection claim. Under Plaintiff's rationale, a state agency could never terminate outside contracts to bring work back "in-house" without violating the United States Constitution.

On the allegations in the Complaint, IDOC's request that PHS replace Plaintiff was furthermore rationally related to a legitimate end — IDOC's concern about Plaintiff's handling of a prisoner and his interactions with medical staff, as documented in witness statements. Complaint, ¶¶ 58-59, 127-128. On the face of the complaint, the Board of Medicine and ACSO were similarly concerned about Plaintiff's actions — the Board of Medicine issued a letter of concern and ACSO referred the matter for criminal prosecution. Complaint, ¶¶ 62, 92, 118, 125, 176. In sum, Plaintiff's 42 U.S.C. § 1983 claim based upon the Equal Protection Clause fails.

3. Plaintiff's Breach of Contract and Defamation Claims Do Not Rise to the Level of Constitutional Violations Under the Due Process Clause

Plaintiff alleges that he was an employee of PHS, which had a contract with IDOC to provide medical services. Complaint, ¶¶ 7, 24-25. In Count II, Plaintiff alleges that IDOC violated his due process rights by interfering with his at-will employment with PHS.

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Plaintiff cannot state a claim for a property interest protected by the Due Process Clause based upon the PHS/IDOC contract. To begin with, not every interference with a government contract constitutes a deprivation of a protected property interest. San Bernardino Physicians' Services Medical Group v. County of San Bernardino, 825 F.2d 1404, 1408 (9th Cir. 1987). "It is neither workable nor within the intent of section 1983 to convert every breach of contract claim against a state into a federal claim." *Id.* Also, an interest in private employment does not rise to the level of a property interest protected by the Due Process Clause. *Id.* at 1409-10.

In San Bernardino Physicians' Services Medical Group, the Ninth Circuit Court of Appeals rejected a due process claim arising out of a county medical center's termination of a physicians' services contract. *Id.* at 1410. The Court rejected the plaintiffs' claim that they had employment rights at stake that were akin to public employment rights. *Id.* at 1409-10.

San Bernardino Physicians' Services Medical Group is on point. Here, Plaintiff alleges that the State Defendants wrongfully interfered with his employment by PHS. However, Plaintiff's alleged private employment relationship with PHS does not create a property interest akin to public employment. IDOC's request that PHS replace Plaintiff's services at IDOC facilities under the PHS/IDOC contract does not implicate any property interest sufficient to support Plaintiff's claim for violation of due process under 42 U.S.C. § 1983.

The allegations in the Complaint also do not implicate a liberty interest or any other fundamental right protected by the Due Process Clause. Plaintiff alleges that the State Defendants made defamatory statements and wrongfully interfered with his employment with PHS. However, defamatory statements do not, by themselves, establish a cause of action under 42 U.S.C. § 1983 or 42 U.S.C. § 1985. Williams v. Gorton, 529 F.2d 668 (9th Cir. 1976). Additionally, the loss of *private* employment due to defamation does not implicate a liberty interest. *See* Pendleton v. City of Haverhill, 156 F.3d 57, 63 (1st Cir. 1998). Likewise, damage to the reputation of a private business alone does not rise to the level of a constitutionally protected interest. WMX Technologies, Inc. v. Miller, 197 F.3d 367, 376 (9th Cir. 1999). To hold otherwise "would constitutionalize the state law tort of defamation . . ." *Id.*

Thus, neither Plaintiff's loss of alleged private employment with PHS due to alleged defamatory statements nor Plaintiff's claim that alleged defamatory statements harmed his business reputation as a physician, without more, are enough to implicate a liberty interest or fundamental right protected by 42 U.S.C. § 1983. This claim should be dismissed.

E. Plaintiff Lacks Standing to Bring Claims Under 42 U.S.C. §§ 1985(2) or (3)

In Counts II and IV of the Complaint, Plaintiff alleges that the State Defendants engaged in conspiracies to violate his constitutional rights in violation of 42 U.S.C. §§ 1985(2) and (3). These sections of the statute provide:

> (2) Obstructing justice; intimidating party, witness, or juror
>
> If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;
>
> (3) Depriving persons of rights or privileges
>
> If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is

> injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. §§ 1985(2) and (3). Plaintiff's 42 U.S.C. § 1985 claims fail, as a matter of law.

1. Plaintiff Has Not Pled a Claim Under 42 U.S.C. §§ 1985(2) or (3) With the Requisite Specificity

"To state a claim for conspiracy to violate constitutional rights, 'the plaintiff must state specific facts to support the existence of the claimed conspiracy.'" Olsen v. Idaho State Board of Medicine, 363 F.3d 916, 929 (9th Cir. 2004), quoting Burns v. County of King, 883 F.2d 819, 821 (9th Cir. 1989). The plaintiff must show an agreement, or "meeting of the minds," to violate constitutional rights. United Steelworkers of America v. Phelps Dodge Corp., 865 F.2d 1539, 1540-41 (9th Cir. 1989). The claim must "allege facts to support the allegation that defendants conspired together." Karim-Panahi v. Los Angeles Police Dept., 839 F.2d at 626 (upholding dismissal of 42 U.S.C. § 1985 claim, where the complaint contained "legal conclusions but no specification of any facts to support the claim of conspiracy").

Counts II and IV of the Complaint allege mere legal conclusions to support Plaintiff's claim of a conspiracy by the State Defendants. Complaint, ¶¶ 194-201, 205-08. Plaintiff has not alleged specific facts to support his claim that the State Defendants conspired and reached a meeting of the minds to violate his constitutional rights. Absent the requisite specificity, Plaintiff's claims under 42 U.S.C. §§ 1985(2) and (3) should be dismissed.

2. Plaintiff Does Not Satisfy the Standing Requirement for a Claim Under 42 U.S.C. § 1985(2)

To state a claim under 42 U.S.C. § 1985(2), Plaintiff must demonstrate that (1) there was a conspiracy, (2) to deter a witness by force, intimidation, or threat from attending court or testifying freely in any pending matter, which (3) results in injury to him. *See* David v. United States, 820 F.2d 1038, 1040 (9th Cir. 1987).

Here, Plaintiff has not alleged the essential elements of a claim under 42 U.S.C. § 1985(2). Plaintiff does not allege that any attendance or testimony was required of any witness

in any court proceeding. Instead, there was no court testimony because, as Plaintiff alleges, no criminal charge against him was prosecuted. Complaint, ¶ 125. As no witness was deterred from attending court or testifying by force, intimidation or threat, Plaintiff did not suffer any injury within the meaning of 42 U.S.C. § 1985(2).

To the extent that Plaintiff intends to state his 42 U.S.C. § 1985(2) claims based upon alleged violations of the Equal Protection Clause, those claims fail for the reasons discussed above in this brief. *See also* Olson v. Idaho State Board of Medicine, 363 F.3d at 930 (dismissing claim under 42 U.S.C. § 1985 based upon the plaintiff's failure to state a cognizable claim under 42 U.S.C. § 1983).

3. Plaintiff Does Not Satisfy the Standing Requirements for a Claim Under 42 U.S.C. § 1985(3)

To meet the standing requirements for an action under 42 U.S.C. § 1985(3), a plaintiff must demonstrate "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Griffin v. Breckenridge, 403 U.S. 88, 102, 91 S. Ct. 1790, 1798, 29 L. Ed. 2d 338 (1971). In the Ninth Circuit, treatment of 42 U.S.C. § 1985(3) is extended beyond race "only when the class in question can show that there has been a governmental determination that its members 'require and warrant special federal assistance in protecting their civil rights.'" Sever v. Alaska Pulp Corp., 978 F.2d 1529, 1536 (9th Cir. 1992) (citations omitted); *see also* Maynard v. City of San Jose, 37 F.3d 1396, 1403 (9th Cir. 1994).

Nowhere in Plaintiff's Complaint does he allege that he has been discriminated against because of his race or that he otherwise belongs to a protected class within the meaning of the statute. Plaintiff has failed to state a claim under 42 U.S.C. § 1985(3). *See also* Olson v. Idaho State Board of Medicine, 363 F.3d at 930 (dismissing claim under 42 U.S.C. § 1985, where no cognizable claim was stated under 42 U.S.C. § 1983).

F. Plaintiff's Supplemental State Claims Should Be Dismissed Based Upon the Lack of Federal Subject Matter Jurisdiction

Plaintiff has also brought supplemental state claims before this Court pursuant to 28

U.S.C. § 1367(a), which allows a federal district court to exercise supplemental jurisdiction over state law claims that are so related to the federal claims in the action that they form part of the same case or controversy. 28 U.S.C. § 1367(a).

Pursuant to 28 U.S.C. § 1367(c)(3), a district court may decline to exercise supplemental jurisdiction over a claim if the court has dismissed all claims over which it has original jurisdiction. In such a circumstance, the court's exercise of discretion to retain supplemental jurisdiction over the state claims is balanced with the underlying objective of most sensibly accommodating the values of economy, convenience, fairness and comity. O'Connor v. State of Nevada, 27 F.3d 357, 362 (9th Cir. 1994). Where a plaintiff's federal law claims are eliminated before trial, these values generally point toward declining jurisdiction over the remaining state law claims. *Id.* at 363. *See also* Medrano v. City of Los Angeles, 973 F.2d 1499, 1506 (9th Cir. 1992), *cert. denied*, 508 U.S. 940, 113 S. Ct. 2415, 124 L. Ed. 2d 638 (1993).

Here, Plaintiff's federal claims should be dismissed because Plaintiff has failed to state a claim upon which relief may be granted. Therefore, pursuant to 28 U.S.C. § 1367(c)(3) Plaintiff's state law claims against the State Defendants should be dismissed, particularly as this federal lawsuit is at an early stage. The proper forum for Plaintiff's claims is the state court system, not federal court.

G. Plaintiff Should Be Required to Replace His 118-Page Complaint With a More Definite Statement of His Claims, Pursuant to Federal Rule of Civil Procedure 12(e)

This federal action should be dismissed in its entirety. If, however, Plaintiff is allowed to maintain any part of this action in federal court, he should be required pursuant to Fed. R. Civ. P. 12(e) to replace his 118-page Complaint with an amended complaint that provides a short, definite statement of his claims. Fed. R. Civ. P. 12(e) allows a party to move for a more definite statement before interposing a responsive pleading if a complaint is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading.

The standard for pleading a definite statement is provided in Fed. R. Civ. P. 8(a)(2), which requires a plaintiff to give a "short and plain statement" of his claims. Fed. R. Civ. P.

8(e)(1) further requires that "[e]ach averment of a pleading shall be simple, concise, and direct." *See* McHenry v. Renne, 84 F.3d 1172, 1177, 1179-80 (9th Cir. 1996) (upholding dismissal of a 43-page complaint pursuant to Fed. R. Civ. P. 12(e), where the complaint was replete with redundancy, argument and irrelevant allegations); Jacobson v. Schwarzenegger, 226 F.R.D. 395, 397 (C.D. Cal. 2005); Martinez v. Snow, No. CV-F-04-6285-AWI, 2005 WL 1899513, **5-6 (E.D. Cal. August 5, 2005).

Here, Plaintiff's Complaint is 118 pages — the factual allegations alone are 184 paragraphs. The Complaint is replete with a lengthy factual narrative, legal arguments and irrelevant facts such as the "independent medical judgment" of physicians and Plaintiff's alleged accomplishments. Complaint, ¶¶ 18-19, 24-31. Plaintiff's 118-page Complaint would impose a hefty burden upon the State Defendants to form a paragraph-by-paragraph answer.

Additionally, despite the Complaint's extensive factual narrative, Plaintiff fails to connect the alleged facts to Counts I, II, IV, V, VI and VIII in a manner sufficient to provide the State Defendants with notice of his legal claims. In Count I, Plaintiff pleads claims for defamation, defamation *per se* and false light but fails to identify which alleged statements referred to in the 184 paragraphs of factual allegations are allegedly defamatory or place him in a false light.

It is not up to the State Defendants to guess which statements form the basis of Plaintiff's defamation claims. *See* Freeman v. Bechtel Construction Co., 87 F.3d 1029, 1031 (8th Cir. 1996) ("unless the complaints set forth the alleged defamatory statements . . . Bechtel is unable 'to form responsive pleadings'"); Nanavati, M.D. v. Burdette Tomlin Memorial Hosp., 857 F.2d 96, 109 (3rd Cir. 1988) ("a plaintiff must be required to set forth allegedly actionable statements with particularity"); Asay v. Hallmark Cards, Inc., 596 F.2d 692, 698 (8th Cir. 1979) (notice of the exact language used is necessary to form a responsive pleading to a defamation claim).

Similarly, identification of the alleged statements is needed for the Defendants to respond to Plaintiff's false light claims. Under Idaho law, an invasion of privacy claim may be stated upon "publicity which places the plaintiff in a false light in the public eye." Hoskins v. Howard, 132 Idaho 311, 316, 971 P.2d 1135, 1140 (1999). Unless Plaintiff identifies the alleged

wrongful statements, the Defendants cannot determine whether they placed Plaintiff in a false light or whether there was a public disclosure.

Therefore, if Plaintiff is allowed to maintain any part of this action in federal court, he should be required to replace the 118-page Complaint with an amended complaint that provides a concise and more definite statement of his claims and identifies, with specificity, each alleged statement that Plaintiff claims support his state law defamation, false light and other tort claims.

V.

CONCLUSION

For the reasons discussed above, each of the State Defendants respectfully requests an order from the Court dismissing the Complaint as to them, with prejudice. Should any part of Plaintiff's action against the State Defendants be allowed to continue in federal court, the State Defendants request that Plaintiff be required to amend the Complaint to provide a more definite statement.

DATED this 7th day of August, 2006.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By/s/ *Emily A. Mac Master*
EMILY A. MAC MASTER
Deputy Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of August, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent a Notice of Electronic Filing to the following:

Lois Weston Hart
GROBER & HART
loishartlawyer@cableone.net

/s/ Emily A. Mac Master
EMILY A. MAC MASTER

John F. Noak, M.D. vs. Prison Health Services, Inc.
And
Idaho Department of Correction; Richard D. Haas,
Does 1-10

Supreme Court Case No. 37788
District Court Case No. CV-OC-0623517

Exhibit B
to

Respondents' Motion to Augment the
Appellate Record and Request for Judicial Notice

Kevin E. Dinius
Dennis P. Wilkinson
WHITE PETERSON, P.A.
5700 East Franklin Road, Suite 200
Nampa, Idaho 83687-7901
Telephone: (208) 466-9272
Facsimile: (208) 466-4405
ISB No. 5974, 6023
ked@whitepeterson.com
dwilkinson@whitepeterson.com

John A. Bush
COMSTOCK & BUSH
199 N. Capitol Blvd., Suite 500
P.O. Box 2774
Boise, Idaho 83701-2774
Telephone: (208) 344-7700
Facsimile: (208) 344-7721
ISB No. 3925
jabush@comstockbush.com

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

JOHN F. NOAK, Plaintiff, -vs- PRISON HEALTH SERVICES, INC., a subsidiary of AMERICAN SERVICES GROUP, INC.; SECURE PHARMACY PLUS, INC., a subsidiary of AMERICAN SERVICES GROUP, INC.; RICHARD D. DULL; RODNEY D. HOLLIMAN; NORMA HERNANDEZ; JANA BETH NICOLSON; VICTORIA M. WEREMECKI; KAREN BARRETT; LISA MAYS; IDAHO DEPARTMENT OF CORRECTION; THOMAS J. BEAUCLAIR, Director; RICHARD D. HAAS, Medical Services	Case No. CV-06-39-S-BLW JUDGMENT

Manager; STEVEN WOLF, Office of Professional Standards IDOC; and DOES 1-10.

Defendants.

Pursuant to the Order of Dismissal filed concurrently herewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiff's federal claims shall be dismissed with Prejudice and the state claims shall be dismissed without Prejudice. This matter is hereby deemed closed.

DATED: **November 17, 2006**

B. LYNN WINMILL
Chief Judge
United States District Court