IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JOHN DOE, an individual,

Plaintiff,

vs.

DAVID H. BAUM, SUSAN PRITZEL, TABITHA BENTLEY, E. ROYSTER HARPER, AND NADIA BAZZY, employees of the University of Michigan, sued in his or her personal and official capacities, jointly and severally,

Defendants

Case No. 16-cv-13174
Hon. George Caram Steeh
Mag. Stephanie Dawkins Davis

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DEFENDANTS' OPPOSITION TO PLAINTIFF'S EMERGENCY MOTION FOR EVIDENTIARY HEARING

Defendants respectfully submit this Opposition to Plaintiff's Emergency Motion for Evidentiary Hearing, filed September 19, 2016.

1. Plaintiff withdrew from the University of Michigan in June 2016, and waited until September 1, 2016, to file this action along with a motion for a TRO and/or preliminary injunction seeking an order that Defendants immediately reinstate him as a student. The Court held a telephone conference regarding the motion for injunctive relief on September 6. During that conference, counsel for both parties agreed that the motion for emergency injunctive relief could be resolved on the basis of the undisputed exhibits, along with legal argument by counsel. The Court agreed that the undisputed exhibits and legal arguments of counsel would be adequate to resolve the motion.

2. Pursuant to the agreed plan adopted at the September 6 conference, Defendants presented their opposition to the motion two days later, on September 8. Plaintiff filed a lengthy reply on September 12, with numerous new exhibits and citations to additional authority. The Court held a hearing on the motion on September 14, which lasted more than three hours.

3. On September 19, the Court conducted a telephonic status conference on the record. During that conference, the Court stated that as a result of factual and legal issues in the case, which the Court did not identify further, the Court had decided that Plaintiff could not establish a strong likelihood of success on the merits,

and that the Court intended to deny the motion for emergency injunctive relief. The Court stated a written decision would issue within a week or two. Plaintiff's counsel affirmed during the telephonic conference that a written decision was not needed more expeditiously. Shortly after the conference, Plaintiff filed the instant Emergency Motion for Evidentiary Hearing.

4. Plaintiff's motion is nothing more than a thinly-veiled request for reconsideration of the Court's denial of the TRO, and Defendants respectfully submit the motion should be denied. *See* Local Rule 7.1(h)(3); *Hardy v. Birkett*, No. 2:10-CV-14310, 2012 WL 750053, at *1 (E.D. Mich. Mar. 7, 2012) (Steeh, J.) (denying motion for reconsideration concerning denial of motion for preliminary injunction).[1]

5. The parties agreed on the procedures for addressing the motion for injunctive relief; those procedures were followed; and the motion was heard and taken under advisement by the Court. The Court did not indicate that further evidence was needed to resolve the motion, for which Plaintiff bore the burden of establishing an entitlement to the extraordinary remedy he sought. *Apex Tool Grp., LLC v. Wessels*, 119 F. Supp. 3d 599, 606 (E.D. Mich. 2015) (Steeh, J.); *Livonia Prop. Holdings, L.L.C. v. 12840-12976 Farmington Rd. Holdings, L.L.C.*, 717 F. Supp. 2d 724, 731 (E.D. Mich. 2010), *order aff'd*, 399 F. App'x 97 (6th Cir. 2010).

[1] This case is attached as Exhibit A.

6. Indeed, that factual or legal disputes may exist in the case only underscores that Plaintiff has failed to establish the clear entitlement to relief that justifies the extraordinary remedy of a preliminary, mandatory injunction. *See, e.g.*, *CJPS Healthcare Supplies & Equip. v. Ansar Med. Techs., Inc.*, No. 12-CV-14885, 2013 WL 4502176, at *1 (E.D. Mich. Aug. 22, 2013) (ruling on motion for injunction) ("Because any facts in dispute are not material to the Court's resolution of the instant motion, the Court did not conduct an evidentiary hearing in this matter."). There is no reason for the Court to reopen the record now for further evidence or argument on the motion for injunctive relief, or to allow Plaintiff at this late point to seek discovery on the motion.

7. Nor is the specific discovery now sought by Plaintiff necessary for the Court to rule on the motion. Principally, Plaintiff argues that "one of the key factual disputes in this case pertains to Defendant Baum's conflict of interest." Dkt#29, Motion, at 2. Plaintiff faults Defendants for not submitting an affidavit from Baum, *id*. at 3, as if Defendants bore the burden of proof on the motion. The allegations and evidence set forth by Plaintiff do not make out any inference of actual bias that could rise to the level of a federal constitutional violation. *See, e.g., Doe v. Univ. of Cincinnati*, No. 1:15-CV-681, __ F. Supp. 2d __, 2016 WL 1161935, at *9 (S.D. Ohio Mar. 23, 2016) ("School disciplinary boards . . . are entitled to a presumption

of honesty and impartiality *absent a showing of actual bias*.") (citing *Atria v. Vanderbilt Univ.*, 142 F. App'x 246, 256 (6th Cir. 2005) (emphasis added)).

8. Plaintiff rests his claim of bias on the facts that Baum is a member of the faculty of the Law School; that another member of the faculty is an individual named J.J. Prescott; that Prescott's wife is an attorney named Sarah Prescott; and that Sarah Prescott (who formerly was associated in a law firm with Plaintiff's counsel) now is associated in a law firm with Jennifer Salvatore, who represents Complainant. There is nothing in these facts that establishes or even suggests actual bias. None of the emails Plaintiff has provided to the Court provides a shred of evidence there was an inappropriate (or even close) relationship between Baum and Sarah Prescott, much less between Baum and Jennifer Salvatore. Indeed, during oral argument Plaintiff's counsel admitted that those emails were "not a smoking gun." Plaintiff has failed to set forth any basis for further discovery or an evidentiary hearing on the issue of bias as a basis for granting a preliminary injunction. Indeed, the Sixth Circuit has held that a disciplinary board member is not disqualified even if the board member knows and had prior dealings with the *student* involved in the case, much less the tenuous connection alleged here between a board member and another lawyer in the law firm representing the complaining witness. *See McMillan v. Hunt*, 968 F.2d 1215 (6th Cir. 1992).

9. Nor is discovery or an evidentiary hearing necessary to "question Defendant Harper on the stand about the standard of review the Appeals Board was obligated to apply." Dkt#29, Motion, at 4. The standard of review the Appeals Board was obligated to apply is set forth in the Policy. *See* Dkt. 6-2 (Exhibit A), at ECF page 11 of 22. What the Appeals Board did is established in the record, in a written statement of reasons. *See* Dkt. 6-5 (Exhibit D). In voluminous papers filed before the Court, Plaintiff has never argued that it was unclear what standard of review the Appeals Board was meant to apply. To the contrary, Plaintiff has consistently (albeit wrongly) argued that the standard of review was clear and that the Appeals Board failed to apply it.

10. Ultimately, of course, Plaintiff's motion rests within the Court's discretion. If the Court orders it, Defendants will show at an evidentiary hearing there was no actual bias or impermissible conflict of interest in Baum's participation in this case and that Plaintiff's claims to the contrary are inconsistent with the facts and governing law. But as the parties previously agreed, the Court need not conduct an evidentiary hearing or reopen the record to resolve the emergency motion for injunctive relief. Plaintiff's request for a hearing now – in response to learning that his motion for a TRO will be rejected – should be denied.

Respectfully submitted,

Date: September 20, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2016, I electronically filed the foregoing Appearance with the Clerk of the Court using the ECF system which will send notification of such filing to the following attorneys:

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EXHIBIT A

2012 WL 750053
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan,
Southern Division.

David Calvin HARDY, Petitioner,
v.
Thomas BIRKETT, Respondent.

No. 2:10–cv–14310.
|
March 7, 2012.

Attorneys and Law Firms

David Hardy, Kincheloe, MI, pro se.

Linus R. Banghart, Michigan Department of Attorney General, Lansing, MI, for Respondent.

OPINION AND ORDER DENYING MOTION FOR RECONSIDERATION

GEORGE CARAM STEEH, District Judge.

***1** Pending before the Court is Petitioner's "Motion/Brief for Relief from Order" [Dkt. # 30], filed on February 16, 2012, concerning the Court's denial of his "Motion for Preliminary Injunction to Transfer" [Dkt. # 21]. *See* "Order Denying Petitioner's Motion for Preliminary Injunction to Transfer as Moot" [Dkt. # 29], Feb. 2, 2012. The Court construes Petitioner's motion as a motion for reconsideration of that order.

Local Rule 7.1(h) allows a party to file a motion for reconsideration. *See* E.D. Mich. LR 7.1(h). However, a motion for reconsideration which presents the same issues already ruled upon by the court, either expressly or by reasonable implication, will not be granted. *Ford Motor Co. v. Greatdomains.com, Inc.,* 177 F.Supp.2d 628, 632 (E.D.Mich.2001); *see also Williams v. McGinnis,* 192 F.Supp.2d 757, 759 (E.D.Mich.2002) (same). A motion for reconsideration should be granted if the movant demonstrates "a palpable defect by which the court and the parties and other persons entitled to be heard on the motion have been misled" and shows "that correcting the defect will result in a different disposition of the case." E.D. Mich. LR 7.1(h)(3); *Williams,* 192 F.Supp.2d at 759; *MCI Telecomm. Corp. v. Michigan Bell Tel. Co.,* 79 F.Supp.2d 768, 797 (E.D.Mich.1999). A palpable defect is a defect that is obvious, clear, unmistakable, manifest, or plain. *Witzke v. Hiller,* 972 F.Supp. 426, 427 (E.D.Mich.1997).

Petitioner's motion for reconsideration will be denied, because he is merely presenting issues which were already ruled upon by this Court, either expressly or by reasonable implication, when the Court ruled on his motion for preliminary injunction. *See* Order Denying Petitioner's Motion for Preliminary Injunction to Transfer as Moot, Feb. 2, 2012.

Accordingly, the Court denies Petitioner's "Motion/Brief for Relief from Order" [Dkt. # 30].

IT IS SO ORDERED.

All Citations

Not Reported in F.Supp.2d, 2012 WL 750053