

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JOHN PETSINGER,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	No. 98-3377
	:	
J. MATTHEW WOLFE, Chief Counsel,	:	
Department of Labor and Industry, in his	:	
individual capacity, and OFFICER	:	
ROBERT J. ELAND, Pennsylvania State	:	
Capital Police Department, in his individual	:	
capacity,	:	
Defendants.	:	

MEMORANDUM-ORDER

GREEN, S.J.

July 30, 1999

Presently before the court is Defendants Wolfe and Eland's Motion for Summary Judgment, Plaintiff's Response thereto and Defendants' Reply. For the following reasons, Defendants' Motion will be granted with respect to Counts I and II of the Complaint.¹

I. FACTUAL BACKGROUND

On March 3, 1988, the Office of Vocational rehabilitation ("OVR"), a subdivision of the Pennsylvania Department of Labor and Industry, terminated Plaintiff from his employment as a vocational rehabilitation counselor. After his termination, Plaintiff sought rehabilitative services from OVR as a client. From early 1994 into 1997, Plaintiff sent numerous faxes to the OVR offices, most of which expressed his dissatisfaction regarding the termination of his employment and/or the services which he was receiving from OVR as a client. Defs.' Exs. A and B to Selders Dec.; Exs. E, F, N, O and P to Eland Dec. Some of the faxes/letters sent by Plaintiff contained profane language and sexually explicit material. Defs.' Ex. A and Ex. F to Eland Dec.

¹ Count III of the Complaint was dismissed on September 22, 1998.

Plaintiff sent a postcard on September 22, 1994 to Mr. Selders which read “Enjoying the last of my freedom one way or another.” Defs.’ Ex. A to Selders Dec. On October 6, 1994, Mr. Selders met with a Capitol police officer to report the prior events involving Plaintiff and to notify the police that Plaintiff stated that he would be in to see Selders on October 7, 1994. Defs.’ Ex. B to Eland Dec. Fred Foster, Director of Administrative Services, requested police protection for October 7, 1994. Defs.’ Ex. C to Eland Dec. There is no evidence that Plaintiff ever came to see Selders on that day.

On Friday, November 18, 1994, the capitol police were again notified in response to an alleged fax sent by Plaintiff indicating that he would be at the Labor and Industry Building the following Monday. Defs.’ Ex. D to Eland Dec. On November 21, 1994, an Information was prepared for all capitol police personnel which described Plaintiff and noted that a defiant trespass warning was given to Plaintiff on October 21, 1994. Defs.’ Ex. A to Eland Dec. There is no evidence that Plaintiff came to the Labor and Industry Building on the Monday of November 21, 1994.

On January 20, 1995, Plaintiff sent Mr. Selders a fax which read “DREAD MONDAY.” Defs.’ Ex. E to Eland Dec. OVR employees and Labor and Industry employees state that as a result of this fax and other faxes, they feared for their safety. Declarations of Nancy Dutchko, ¶5; Bernadette Heckman, ¶¶ 6-10; Gil Selders, ¶ 9; David Vanwyne, ¶¶ 6-10; Frederick Foster, ¶ 5; Bruce McClintick, ¶¶ 5-10. On Monday, January 23, 1995, office furniture had been rearranged to restrict Plaintiff’s access and Capitol Police were present. Dutchko Dec., ¶ 7. There is no evidence that Plaintiff came to the Labor and Industry Building on that day.

On February 1, 1995, Selders and another OVR official, Kendall J. Fleming, signed

written complaints against Plaintiff and provided these complaints to the Capitol Police. Defs.' Exs. G and H to Eland Dec. Plaintiff was charged by Defendant Eland, a corporal with the Capitol Police, with harassment by communication, and at a hearing before Dauphin County District Justice Joseph Solomon, Plaintiff pled guilty to disorderly conduct. Eland Dec. at ¶13; Pl.'s Dec. ¶8. District Justice Solomon also ordered Petsinger to stop sending faxes to Messrs. Selders and Fleming and to seek professional help.

Plaintiff continued to receive services from OVR as a client. Plaintiff states that between 1990 and 1996 he complained to OVR about their delay in developing a rehabilitation program, and in January 1996, Plaintiff filed several OVR appeals. Plaintiff had requested a change of counselors, and said request was denied by OVR. Plaintiff appealed the denial of his request, and OVR forwarded the appeal to the State-wide impartial Hearing Service. Prior to the scheduled hearing, Mr. Selders withdrew the plaintiff's request for a hearing, and the hearing was eventually canceled. Pl.'s Dec. ¶¶ 5, 7. On June 17, 1996, the plaintiff filed suit against OVR and the Executive Director of OVR under § 1983 for their failure to comply with the mandates for appellate review prescribed in the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.* See Petsinger v. Office of Vocational Rehabilitation, 1997 WL 634505 (E.D. Pa. 1997), *rev'd*, 172 F.3d 41 (3d Cir. 1998).²

In March of 1997, Plaintiff sent a fax to John Butler, Secretary of the Department of

² On September 29, 1997, this court granted Plaintiff's Motion for Summary Judgment finding that the defendants did arbitrarily deny the plaintiff due process in withdrawing his appeal from the State-wide Impartial Hearing Service, and said ruling was reversed by the Third Circuit Court of Appeals on November 3, 1998.

Labor and Industry, stating that he was planning to go to the Secretary's office on April 3, 1997.³ Ex. N to Eland Dec. Defendant Wolfe, former Chief Counsel of the Pennsylvania Department of Labor and Industry, forwarded this fax to the Capitol Police and asked for protection for Secretary Butler. Ex. M to Eland Dec. Once again, there is no evidence that Plaintiff actually went to Secretary Butler's office on April 3, 1997.

On May 15, 1997, Defendant Eland was aware that Plaintiff had begun faxing materials to Messrs. Selders and Fleming once again, and copies of the faxes were provided to him. Eland Dec., ¶ 21; Ex. P to Eland Dec. Defendant Eland believed that these were the types of materials Plaintiff was ordered by District Justice Solomon not to send, and therefore, filed new charges against Plaintiff on May 15, 1997 for harassment by communication. Eland Dec., ¶ 22. Plaintiff states that on September 17, 1997, Plaintiff went to an OVR office and was told he had no business being there. Pl.'s Dec., ¶ 16.

The hearing on the charge for harassment by communication was held on October 1, 1997 before District Justice Solomon. The charge was changed by District Justice Solomon from harassment by communication to harassment, and Plaintiff was found guilty. On appeal, the conviction was reversed. Eland Dec., ¶¶ 24, 30. Immediately following the October 1 hearing, Defendant Eland told Plaintiff that he was not to go on Labor and Industry property without permission and without a police escort. Eland Dec., ¶ 25. Eland states that Defendant Wolfe did not direct him to give the warning to Plaintiff, but Wolfe was present when it was given. Eland Dec. ¶ 26. Defendant Eland states that he gave Plaintiff the warning because he was told by Department of Labor and Industry officials that Plaintiff had no legitimate business at the

³ John Butler was dismissed as a defendant from this action on September 22, 1998.

Department's offices and because of the threats Plaintiff had sent to Department personnel in the past. Defendant Eland also states that he gave the warning because he knew that a number of employees in the Department were in fear of Plaintiff and that placing conditions on Plaintiff's presence in Labor and Industry offices would alleviate those fears and provide protection for employees. Eland Dec. ¶ 25. Michael Spates, an attorney with the Department of Labor and Industry, later sent a letter to Plaintiff advising him that he was not to visit the OVR without written consent of the Commonwealth of Pennsylvania, and any attempt to visit the OVR would be viewed as a defiant trespass which could result in his arrest. Ex. A to Pl.'s Complaint.

II. DISCUSSION

Summary judgment shall be awarded "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A dispute regarding a material fact is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). The evidence presented must be viewed in the light most favorable to the non-moving party. Lang v. New York Life Ins. Co., 721 F.2d 118, 119 (3d Cir. 1983).

While Rule 56(c) does not expressly allocate the burden of proof in summary judgment motions, the movant has the initial burden of showing an absence of genuine issues of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has carried the initial burden of showing that no genuine issue of material fact exists, the nonmoving party cannot rely upon conclusory allegations in its pleadings or in memoranda and briefs to establish a

genuine issue of material fact. Pastore v. Bell Telephone Co. of Pa., 24 F.3d 508, 511 (3d Cir. 1994). The nonmoving party, instead, must establish the existence of every element essential to his case, based on the affidavits or by the depositions and admissions on file. Id. (citing Harter v. GAF Corp., 967 F.2d 846, 852 (3d Cir. 1992)); see also Fed. R. Civ. P. 56(e).

A. Freedom of Expression

Plaintiff argues that the limitations placed on his access to OVR offices deprived him of his right to freedom of expression under the First and Fourteenth Amendments because he was prohibited from communicating with OVR. The extent to which the government can control access depends on the nature of the relevant forum. Traditional public fora, such as public streets and parks, are those places which by long tradition or by government fiat have been devoted to assembly and debate, and the government can exclude a speaker from a traditional public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. Arkansas Educational Television Com'n v. Forbes, 523 U.S. 666, (1998). The government is free to open additional properties for expressive use by the general public or by a particular class of speakers, thereby creating designated public fora, and any action on the part of the government to exclude a speaker who falls within the class to which a designated public forum is made generally available is subject to strict scrutiny. Id. Where the property is not a traditional public forum and the government has not chosen to create a designated public forum, the property is either a nonpublic forum or not a forum at all. Access to a nonpublic forum can be restricted as long as the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker's view. Id.

In the present action, Plaintiff argues that the actions of Defendants Wolfe and Eland in limiting his access to OVR offices deprived him of his right to express himself concerning his opinions/complaints about OVR services. Defendants argue that the OVR offices are not traditional public fora or government-designated public fora because the offices are used by the Commonwealth employees who implement OVR programs and are not used to advise clients. See Selders Dec. ¶ 7. Plaintiff argues that the OVR offices are not a non-public fora because applicants and clients routinely would visit the Philadelphia office to obtain information and see their counselor. Notwithstanding the fact that Plaintiff has failed to provide this court with any evidence that clients do visit the OVR offices routinely, even if client visits did occur, this court concludes that the OVR offices do not constitute public fora under the law. Therefore, any restrictions on Plaintiff's access to the OVR offices need only be reasonable and may not be made in an effort to suppress expression merely because Defendants oppose Plaintiff's view.

Plaintiff argues that the chronology of events in this case demonstrates that Defendants limited his access to OVR in retaliation for Plaintiff's complaints about OVR and for his suing OVR. Plaintiff filed appeals from OVR counselor determinations between January and April 1996. Plaintiff filed his lawsuit against OVR on June 16, 1996. Plaintiff states that he was told to stay away from OVR property on September 17, 1997 and, thereafter, on October 1, 1997. In the absence of any evidence to support Plaintiff's argument, this court fails to see how the limitations on Plaintiff's access to OVR are related to the appeals he filed in early 1996 or the filing of his complaint against OVR one year and three months prior to the limitations being placed on him. Plaintiff also presents the declaration of Frederick Dorfman who states that Defendant Wolfe demonstrated a personal dislike and animosity toward the Plaintiff. This

evidence also does not create a genuine issue of material fact that any actions on the part of Defendant Wolfe were in retaliation for Plaintiff filing a lawsuit or for any other improper purpose. It should be further noted that Plaintiff has failed to come forward with any evidence to rebut Defendant Eland's statement that Defendant Wolfe did not direct him to issue the defiant trespass warning.

With regard to Defendant Eland's decision to issue the warning, Plaintiff has failed to produce any evidence that the warning was given for an improper purpose. Plaintiff alleges in his Complaint at ¶ 30 that he sought access to OVR to discuss his right to an appeal process, however, Plaintiff had already filed his lawsuit against OVR to litigate the issue of his right to an appeal process. Therefore, there is no evidence to suggest that Plaintiff had any legitimate purpose to be on the OVR premises. Furthermore, Plaintiff was not denied all access to OVR. Rather, he was prevented from entering the OVR premises without permission and without an escort. Given Plaintiff's apparent animosity toward certain employees of OVR, the prior requests by OVR for police protection, the anxiety Plaintiff aroused among employees of OVR and the Department on prior occasions, and the fact that Plaintiff had no legitimate purpose to be at the OVR offices, this court concludes that Defendant Eland's actions in limiting Plaintiff's access to OVR were entirely reasonable and were not made for an improper purpose, and Plaintiff has failed to produce any evidence to suggest otherwise. Accordingly, Defendants' Motion for Summary Judgment on Plaintiff's claim under the First Amendment will be granted.

B. Malicious Prosecution

In Count II of the Complaint, Plaintiff brings a claim for malicious prosecution under § 1983 alleging that Defendants Wolfe and Eland intentionally and maliciously filed the criminal

charges against him without probable cause and for a purpose unrelated to the administration of justice, thereby violating his rights under the Fourth and Fourteenth Amendments. (Compl. at ¶ 37). Plaintiff brings this cause of action based on the charge of Harassment by Communication brought by Defendant Eland on May 17, 1997. Plaintiff was found guilty of harassment by District Justice Solomon, and that conviction was later reversed on appeal.

To state a claim for malicious prosecution under § 1983, a plaintiff must demonstrate that (1) he has satisfied the requirements of a state law cause of action for malicious prosecution; (2) the malicious prosecution was committed by state actors; and (3) he was deprived of liberty. Sneed v. Rybicki, 146 F.3d 478, 480 (7th Cir. 1998). Pennsylvania law requires the plaintiff to demonstrate that (1) the defendants initiated a criminal proceeding; (2) the criminal proceeding ended in the plaintiff's favor; (3) the proceeding was initiated without probable cause; and (4) the defendants acted maliciously or for a purpose other than bringing the plaintiff to justice. Hilferty v. Shipman, 91 F.3d 573, 579 (3d Cir. 1996).

In the present case, Plaintiff argues that the criminal complaint filed against him was brought to punish him for his outspoken criticism of OVR, its staff, and the defendants. Defendant Eland states that he filed the complaint on May 17, 1997 because Plaintiff had once again begun faxing materials to Mr. Selders and Mr. Fleming in violation of District Justice Solomon's order to Plaintiff to stop sending faxes to Messrs. Selders and Fleming. According to Defendant Eland, Defendant Wolfe never directed him to file charges against Plaintiff and he never discussed any lawsuit filed by Plaintiff against OVR with Defendant Wolfe or anyone else employed by the Department of Labor and Industry. Defendant Eland states that he had no knowledge of the proceedings in the lawsuit filed by Plaintiff against OVR. Eland Dec. ¶¶ 22-

29.

Plaintiff has failed to present any evidence that Defendant Wolfe played any role in the initiation of criminal proceedings against Plaintiff on May 17, 1997. With regard to Defendant Eland, Plaintiff has failed to present any evidence that the charge was brought without probable cause or that the charge was made with malice or for an improper purpose. Accordingly, Defendants' Motion for Summary Judgment on Plaintiff claim in Count II of the complaint for malicious prosecution will be granted.

An appropriate Order follows.

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

JOHN PETSINGER,	:	
Plaintiff,	:	CIVIL ACTION
	:	
v.	:	No. 98-3377
	:	
J. MATTHEW WOLFE, Chief Counsel,	:	
Department of Labor and Industry, in his	:	
individual capacity, and OFFICER	:	
ROBERT J. ELAND, Pennsylvania State	:	
Capital Police Department, in his individual	:	
capacity,	:	
Defendants.	:	

ORDER

AND NOW, this 29th day of July 1999, upon consideration of Defendants Wolfe and Eland's Motion for Summary Judgment, Plaintiff's Response and Defendants' Reply, IT IS HEREBY ORDERED that:

1. Defendants' Motion is GRANTED with respect to Plaintiff's claim in Count I of the Complaint for a violation of his right to freedom of expression under the First and Fourteenth Amendments; and

2. Defendants' Motion is GRANTED with respect to Plaintiff's claim in Count II of the Complaint for malicious prosecution.

Judgment will be entered in favor of Defendants Wolfe and Eland under separate order.

BY THE COURT:

CLIFFORD SCOTT GREEN, S.J.