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United States Court of Appeals
Tenth Circuit

October 20, 2021

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

DEBRA GOTOVAC; BRAD BOLEN,

Plaintiffs - Appellants,

v.

IZZY TREJO, Executive Director, New Mexico Racing Commission,

Defendant - Appellee.

No. 20-2143
(D.C. No. 1:19-CV-00783-JB-LF)
(D. N.M.)

ORDER AND JUDGMENT*

Before **MATHESON**, **PHILLIPS**, and **CARSON**, Circuit Judges.

Debra Gotovac and Brad Bolen sued Izzy Trejo, the executive director of the New Mexico Racing Commission ("Commission"), under 42 U.S.C. § 1983, alleging due-process and equal-protection violations. The district court dismissed Gotovac and Bolen's claims. Having jurisdiction under 28 U.S.C. § 1291, we affirm.

BACKGROUND

On August 9, 2019, the Commission suspended horse trainer Trey Woods after one of his horses tested positive for albuterol, a Class 3 controlled substance. According to Gotovac and Bolen, horses trained by individuals suspected of illegally

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

drugging their horses are usually ineligible to be transferred to other trainers.[1] But because of a delay in receiving the positive test results, Trejo allowed the transfer of Woods's horses to other trainers "in the spirit of fairness." R. at 7. Two of the transferred horses then competed alongside Gotovac and Bolen's horse in the qualifying race for the All American Futurity Race ("the Futurity").[2] The two transferred horses placed in the top five, which qualified them to race in the Futurity. Gotovac and Bolen's horse did not.

Afterward, Gotovac and Bolen sued Trejo under 42 U.S.C. § 1983. They alleged that Trejo deprived them of their procedural and substantive due process rights, as well as equal protection of the law. They also alleged that Trejo violated §§ 15.2.1.9(B)(8) and 15.2.5.12(A)(5)[3] of the New Mexico Administrative Code[4] when he allowed the transfer of horses trained by Woods to other trainers, thus

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[1] We note that the New Mexico Administrative Code does not prohibit the transfer of horses trained by an individual suspected of illegal drugging.

[2] The Futurity is an annual race in Ruidoso Downs, New Mexico. It has a purse of three million dollars—the highest prize for two-year-old horses in North America.

[3] Gotovac and Bolen cite § 15.2.5.12(E) in their complaint, but no such section exists. We assume, as the district court did, that Gotovac and Bolen were referring instead to § 15.2.5.12(A)(5) because they cite its language in their complaint and in their Opening Brief. They also cite § 12.2.1.9(B)(8) in their complaint, which we assume was a typographical error as they only refer to § 15.2.1.9(B)(8) elsewhere in their complaint and briefing.

[4] Section 15.2.1.9(B)(8)(b) states that "[t]he transfer of a horse to avoid application of a commission rule or ruling is prohibited." Section 15.2.5.12(A)(5) provides that a horse is ineligible to race if "it is wholly or partially owned by a disqualified person or a horse is under the direct or indirect training or management of a disqualified person[.]"

enabling the transferred horses to compete in the Futurity. Trejo's decision, they argued, caused their horse to be "kicked out of the top five" because, had Trejo barred the transferred horses from racing, Gotovac and Bolen's horse would have placed in the top five. R. at 8. Thus, Gotovac and Bolen alleged that Trejo's decision impacted their "ability to earn a living." R. at 8.

Trejo moved to dismiss Gotovac and Bolen's claims under Fed. R. Civ. P. 12(b)(6), asserting qualified immunity. The district court granted the motion, holding in part that qualified immunity barred their claims because Gotovac and Bolen had not alleged that Trejo violated a constitutional right, let alone one that was clearly established.

DISCUSSION

We review de novo the district court's grant of a Rule 12(b)(6) motion to dismiss for failure to state a claim. *Gee v. Pacheco*, 627 F.3d 1178, 1183 (10th Cir. 2010). When resolving a Rule 12(b)(6) motion, we accept as true all well-pleaded factual allegations and view them in the light most favorable to the non-movants. *Straub v. BNSF Ry. Co*., 909 F.3d 1280, 1287 (10th Cir. 2018). And we disregard any conclusory statements of law. *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1214 (10th Cir. 2011).

"The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (cleaned up). When a defendant

invokes qualified immunity as a defense, the plaintiff must establish that "(1) the defendant violated a federal statutory or constitutional right and (2) the right was clearly established at the time of the defendant's conduct." *Ullery v. Bradley*, 949 F.3d 1282, 1289 (10th Cir. 2020). "[I]f the plaintiff fails to establish either prong of the two-pronged qualified-immunity standard, the defendant prevails on the defense." *A.M. v. Holmes*, 830 F.3d 1123, 1134–35 (10th Cir. 2016). We may consider the prongs in either order, as a defendant is entitled to qualified immunity if a plaintiff fails to plausibly allege either requirement. *VDARE Found. v. City of Colorado Springs*, 11 F.4th 1151, 1175 (10th Cir. 2021). Here, we restrict our analysis to the clearly established prong because the case is more readily decided on that prong.

A constitutional right is clearly established if it is "sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (quoting *Reichle v. Howards*, 566 U.S. 658, 664 (2012)). "Ordinarily, in order for the law to be clearly established, there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Toevs v. Reid*, 685 F.3d 903, 916 (10th Cir. 2012) (internal quotation marks omitted). The Supreme Court has advised lower courts "not to define clearly established law at a high level of generality." *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). Although Supreme Court precedent "does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory

or constitutional question beyond debate." *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (quoting *Mullenix*, 577 U.S. at 12) (cleaned up).

In their Opening Brief, Gotovac and Bolen frame the right at issue as the "right to engage fairly in one's profession." Opening Br. at 3. In arguing that such a right is clearly established, they cite *Barry v. Barchi*, 443 U.S. 55 (1979) and *State Racing Comm'n v. McManus*, 82 N.M. 108 (1970). In *Barry*, the Supreme Court held that a horse trainer or owner has a constitutionally protected property interest in his license. 443 U.S. at 64. In *McManus*, the New Mexico Supreme Court established a horse's jockey, owner, or trainer's "right to engage in his chosen profession" and his entitlement "to due process of law if he is to be lawfully denied an opportunity to do so." 82 N.M. at 112.

We do not dispute that Gotovac and Bolen have a right to their license to own horses and a right to engage in the horse-racing profession. But Trejo deprived them of neither here. They competed in the qualifying race for the Futurity—they simply failed to place in the top five. The relief they are truly requesting here, as evidenced by the language in their complaint, is a recognition of a right to the "opportunity to race in" and "to win" a specific race—the Futurity. R. at 10. But they have cited no Supreme Court or Tenth Circuit case that clearly established such a right. Thus, we affirm the district court's dismissal of Gotovac and Bolen's claims based on qualified immunity.

CONCLUSION

For these reasons, we affirm.

Entered for the Court

Gregory A. Phillips
Circuit Judge