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DISTRICT OF NEBRASKA
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Norbert H. Ebel, Clerk
By ______ Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

PAUL BONACCI, Plaintiff,	)	4:CV91-3037
vs.	)	MEMORANDUM AND ORDER ON DEFENDANTS' MOTION TO DISMISS ON BASIS OF QUALIFIED IMMUNITY
THE CATHOLIC ARCHBISHOP OF OMAHA, et al., Defendants.	)	

On October 8, 1993, defendants Wadman, Bovasso, and Hoch moved to dismiss this lawsuit based on their alleged entitlement to qualified immunity. Filing 118. On February 8, 1994, I stayed the motion to dismiss and ordered the plaintiff to file a second amended complaint, clearly alleging which constitutional rights, civil rights, and federal statutes have been violated. Filing 137. On February 17, 1994, the plaintiff filed a second amended complaint, and the City of Omaha, Hoch, Bovasso, and Wadman filed an answer on March 14, 1994. Filings 139 and 140. I shall now consider the defendants' motion to dismiss.

I. FACTUAL ALLEGATIONS

The second amended complaint alleges that former Police Chief Wadman and officers Hoch and Bovasso intentionally and deliberately established and maintained a practice of allowing prostitution-for-pay for certain prominent homosexuals, including four defendants named in this lawsuit. It is further alleged in count three that as a result of this practice several defendants in this action as well as others were able to solicit young males for prostitution, to corrupt them, and to use force and intimidation to keep young males, including Bonacci, inside homosexual prostitution-for-pay circles.

The plaintiff has alleged that defendant Wadman personally attended parties in 1983, in which he participated in illegal sexual activity and allowed illegal drug use and sexual activity to occur. Then later in November 1989, when Bonacci was arrested on sexual assault charges, he alleges that defendants Hoch and Bovasso subjected him to long hours of brutal interrogation, involving threats, intimidation, physical and mental abuse, and other outrageous conduct. Bonacci claims that this unconstitutional conduct by officers Hoch and Bovasso was designed to prevent the plaintiff from disclosing information he had regarding the illicit conduct of prominent Omaha citizens, several of whom are defendants in this lawsuit.

146

It is further alleged that officers would pick up the plaintiff and force him to have sex with them, "point pistol barrels and threaten to kill him," which he inferred was a way of enforcing the plaintiff's silence about illegal activity of Larry King, Alan Baer, and Harold Anderson.

II. STANDARD OF REVIEW

"[A] motion to dismiss a complaint should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief." Morton v. Becker, 793 F.2d 185, 187 (8th Cir. 1986). In resolving such motions, I "must take the well-pleaded allegations of the complaint as true, and construe the complaint, and the reasonable inferences arising therefrom, most favorable to the pleader." Id. On a motion to dismiss I must rely solely on the face of the pleadings in determining whether a claim is legally sufficient. Upon review of the newly amended pleadings, the defendants' motion to dismiss shall be denied.

III. LEGAL DISCUSSION

To state a cause of action under 42 U.S.C. § 1983 the United States Court of Appeals for the Eighth Circuit has ruled that a plaintiff must show that the defendants were "directly and personally involved" in the alleged deprivation of a federally protected right. Rasmussen v. Larson, 683 F.2d 603, 605 (8th Cir. 1988)(citing Rizzo v. Goode, 423 U.S. 362, 375-76 (1976)). The Eighth Circuit has also declared that "[l]iability may be found only if there is personal involvement of the officer being sued." Wilson v. City of North Little Rock, 801 F.2d 316, 322 (8th Cir. 1986 (quoting Watson v. Interstate Fire & Casualty Co., 611 F.2d 120, 123 (5th Cir. 1980)). Having carefully reviewed the second amended complaint, I find that the plaintiff has sufficiently alleged that defendants Wadman, Hoch, and Bovasso were directly and personally involved in depriving Bonacci of his federally protected rights.

Defendants Wadman, Hoch, and Bovasso contend that even if Bonacci's federal constitutional rights were violated, they are shielded from liability under 42 U.S.C. § 1983 by the doctrine of qualified immunity. The test for qualified immunity is whether a reasonable law enforcement officer would have believed the conduct to be lawful, in light of clearly established law and the information the officer possessed. Anderson v. Creighton, 483 U.S. 635, 641 (1987).

Ordinarily, the issue of qualified immunity is a question of law for the court and requires a tripartite inquiry. First, I must determine whether Bonacci has asserted a violation of a constitutional right; second, I must determine whether the

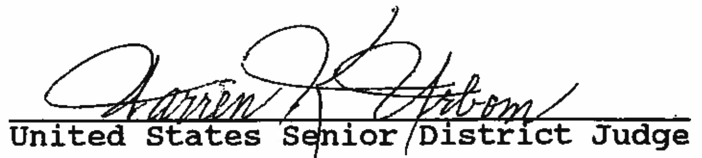
alleged constitutional right was clearly established; and, third, I must determine if, given facts most favorable to the plaintiff, there is no genuine issue of material fact as to whether a reasonable law enforcement officer would have known that the alleged actions violated the right. Foulks v. Cole County, Mo., 991 F.2d 454, 456 (8th Cir. 1993).

Bonacci has alleged multiple constitutional violations in Count III of the second amended complain, including unreasonable seizure and excessive force claims under the Fourth Amendment as well as a denial of equal protection claim and deprivation of due process under the Fourteenth Amendment. See Filing 139, Count III. Moreover, the law prohibiting this alleged conduct by law enforcement officers is clearly established. Finally, I find that a genuine issues of material fact exists as to whether reasonable law enforcement officers would have known that the alleged conduct violated the plaintiff's constitutional rights. Because I may not resolve material issues on a dispositive motion, I cannot decide the question of qualified immunity and must deny the defendants' motion to dismiss.

IT IS THEREFORE ORDERED that the defendants' motion to dismiss, filing 118, is denied.

Dated May 13, 1994.

BY THE COURT



United States Senior District Judge

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U. S. DISTRICT COURT
DISTRICT OF NEBRASKA
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NORBERT H. EBEL
CLERK

218

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

PAUL A. BONACCI,	)	4:CV91-3037
	)	
Plaintiff,	)	
	)	
vs.	)	MEMORANDUM AND ORDER ON
	)	MOTION FOR SUMMARY JUDGMENT
CITY OF OMAHA, et al.,	)	OF DEFENDANTS CITY OF OMAHA,
	)	ROBERT WADMAN, AND MICHAEL
Defendants.	)	HOCH

Counts III and IV state the claims against the City of Omaha, former Police Chief Robert Wadman and Police Officer Michael Hoch. Count III alleges deprivation of civil rights of due process, equal protection, and unreasonable seizures; Count IV alleges conspiracy.

Three subparagraph of paragraph 49 of the second amended complaint, filing 139, describe the plaintiff's claim of due process violations:

> "a. The rights under the due process clause of the 14th Amendment the Fourth Amendment, and the 'self-incrimination clause' of the Fifth Amendment to be free of the objectively unreasonable, intentional and unjustified infliction of extreme emotional distress, deliberate and unjustified assaults, detentions, and coercive, heavy handed and outrageous custodial interrogations;
>
> . . . .
>
> d. The right under the Due Process Clause of the 14th Amendment to be free of deliberate police department policy to refuse to enforce laws prohibiting child prostitution and pornography, delinquency, drug abuse when youths such as Plaintiff were the targets of special police department attention;
>
> e. The right under the Due Process Clause of the 14th Amendment to be free of deliberate police department policy to prevent the Plaintiff from alternative means of escaping his circumstances of child prostitution, pornography, drug and sex abuse . . ."

The equal protection claim is stated in subparagraphs of paragraph 49 as follows:

> "b. The right under the Equal Protection Clause of the 14th Amendment to be

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21

free from arbitrary, discriminatory and unjustified mistreatment because Plaintiff was a member of a group of youths the police department wanted to stay under the control of Larry King and Alan Baer;

c. The right under the Equal Protection Clause of the 14th Amendment to receive from law enforcement officials their protection from child abuse, neglect and delinquency which Plaintiff suffered because he belonged to the group of children the Police Department wished to stay under the control of Larry King and Alan Baer;

. . . .

f. The right to be free under § 1985 of Title 42 of the United States from conspiracies against him that have the purpose of depriving the Plaintiff of his equal protection from the laws of the United States . . ."

In support of the motion these moving defendants have submitted filing 204, consisting of defendant's Exhibit A, an indictment in the ***State of Nebraska v. Paul A. Bonacci***, in the District Court of Douglas County, Nebraska, Docket 127, p. 193; and defendant's Exhibit B, comprising excerpts from the deposition of the plaintiff, Paul Bonacci. The plaintiff has submitted the declaration of plaintiff, Paul A. Bonacci, dated March 29, 1996.

Count IV recites the plaintiff's claims of conspiracy, pursuant to 42 U.S.C. § 1985(3) and § 1986. Second Amended Complaint ¶¶ 50-54.

Rule 56 of the Federal Rules of Civil Procedure in subparagraph (b) says:

"A party against whom a claim . . . is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof."

In subparagraph (c) the rule says:

". . . The judgment sought shall be rendered forthwith 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 a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

Subparagraph (e) includes the following:

"Supporting and opposing affidavits shall be made on personal knowledge, shall

set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. . . . When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. . . ."

In *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 at 250 (1986), the Court said:

"There is no requirement that the trial judge make findings of fact. The inquiry performed is the threshold inquiry of determining whether there is the need for a trial--whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."

I. WHETHER THE PLAINTIFF'S TESTIMONY HAS CREDIBILITY

In an earlier memorandum on a motion for summary judgment by the defendant Alan Baer I reviewed the plaintiff's testimony by deposition, the only testimony offered that could be considered to have been in support of the plaintiff's position. The plaintiff's testimony was that he had been hypnotized sometime between November 18, 1989, and October 21, 1992, when he was incarcerated, which was at least three and one-half years after he claims to have been last sexually abused. He also testified that he was hypnotized once or perhaps twice after that. I make the same observations now as I did relative to Baer's motion.

The plaintiff's testimony by deposition includes this as to his having been hypnotized:

"Q. At some period of time when you were incarcerated, you were hypnotized; is that correct?

A. Yes.

Q. Tell me about that.

A. I believe the first time was one -- about the week after Dr. Mead had diagnosed me with MPD, he -- the next week he came in, he wanted to, wanted me to close my eyes, and when he did, he said -- I don't know, I can't remember what he said, but it brought out one of the other personalities.

And I didn't know that that's what he was trying to do, but -- and I guess he spoke to the personality for a while.

And then later on, I was hypnotized with, I think it was -- Detective Hoch was

2

there, and I think there was another lady, but I'm not sure.

Q. Do you have any particular recollection of those circumstances?

A. Not really. Detective Hoch wanted to find out how accurate some of the things that I had related to him were, how -- not whether they were the truth or not, but how much of them may have been added in, you know, stuff may have been added in by personalities that maybe don't deal completely with reality, you know, may have added stuff, like things that happened that didn't really happen, but to them, they did. And -- 'cause there was distortions and stuff, which I guess happens quite a bit with MPDs when they're first trying to go through the memories.

Q. And you have not been hypnotized since then --

A. No.

Q. -- that you're aware of?

A. Well, yes, and it was with Densen-Gerber, and that was in Lincoln."

Bonacci Deposition 1874:18-1876:5

"Q. You did an interview with Judith (phonetic) Densen-Gerber?

A. Yeah."

Id. 1876:16-18.

Q. I'm sorry, thank you. And you were hypnotized during part of that?

A. I think, yeah, at one point, I was put under hypnosis. I --

Q. Have you ever been told, Paul, that you give different responses under hypnosis than you do when you're in a nonhypnotic state?

A. No.

Q. Do you believe that you give different answers when you're under the influence of hypnosis?

A. Humm. I believe some of the stuff that was given under hypnosis may have been more, more accurate, because it takes out a lot of the, more of the distortions that happen by the different personalities all coming out at the same time. They can

2

specifically go to one personality. You know, they used to be able to do that, anyway, and get things -- ' cause it slows your mind down a little bit."

Id. 1877:1-20

"Q. And other than the incident you described where Dr. Mead -- or, not Dr. Mead, Dr. Densen-Gerber supposedly hypnotized you which was recorded on videotape, had you been actually hypnotized by the psychiatrists up till then?

A. By Dr. Mead, I know I was. Dr. Stoller, I remember very little of that meeting, though.

Q. What's your definition of hypnotized?"

Id. 2006:16-24

"THE WITNESS: I'm not sure.

BY MR. DeCAMP:

Q. So far as you understand, what does hypnotized mean?

A. When the psychiatrists or whatever kind of make you, like, ah, close your eyes, and then it's like all of a sudden -- you listen to whatever they're saying. All of a sudden, it seems like you just go somewhere else. That's the way it felt to me, like I went somewhere else, like I was --

Q. What exactly did Dr. Mead do that you understood was hypnotizing you?

A. Oh, basically, he had me close my eyes, and he would talk and count, and he, he told me that because of the MPD and stuff, that it wasn't really him hypnotizing me, that MPDs were able to do that all on their own without really too much help, they're very easy to hypnotize or something, I guess. And that's about all I , I know. I don't understand what he did.

Q. When he told you to close your eyes, was it then that the other personalities would come out?

A. No, it wasn't right then. He would talk for a little while and stuff, and then he would -- I don't, I don't know. It's like -- 'cause it's -- there's a point where I just -- I can't remember, ' cause it's like I lose track of what went on after that."

Id. 2007:1-2008:5.

2

That raises the flag of ***Sprynczynatyk v. General Motors Corp.***, 771 F.2d 1112 (8th Cir. 1985), which said at page 1122-23:

> "We adopt a rule which requires the district court, in cases where hypnosis has been used, to conduct pretrial hearings on the procedures used during the hypnotic session in question and assess the effect of hypnosis upon the reliability of the testimony before making a decision on admissibility. The proponent of the hypnotically enhanced testimony bears the burden of proof during this proceeding. In addition, we adopt a version of the [***State v. Hurd***, 86 N.J. 525, 432 A.2d 86 (1981)] safeguards to the extent that the district court should consider whether and to what degree the safeguards were followed when making its determination that the hypnotically enhanced testimony is sufficiently reliable. Other factors the district court should take into account are the appropriateness of using hypnosis for the kind of memory loss involved, and whether there is any evidence to corroborate the hypnotically enhanced testimony. The district court must then determine whether in view of all the circumstances, the proposed testimony is sufficiently reliable and whether its probative value outweighs its prejudicial effect, if any, to warrant admission. Ultimately the district court must decide whether the risk that the testimony reflects a distorted memory is so great that the probative value of the testimony is destroyed.
>
> By our ruling today we place this hypnosis evidentiary problem directly within the control of the district court. We think the better approach is for the district court and not the jury to make the preliminary determination of admissibility as is the case with other evidentiary questions. ***See*** FED.R.EVID. 104(a). It is our hope that this case-by-case method of determining the admissibility of hypnotically enhanced testimony will guard against the problems of hypnosis, especially undue suggestiveness and confabulation, but also allow for the inclusion of reliable refreshed memory which hypnosis can at times under certain circumstances produce. In sum, we hold that the district court should, before trial, scrutinize the circumstances surrounding the hypnosis session, consider whether the safeguards we have approved were followed and determine in light of all the circumstances if the proposed hypnotically enhanced testimony is sufficiently reliable and not overly prejudicial to be admitted."

There is no evidence before me of the details of the hypnosis. There is no way that I can tell the effect, if any, of the hypnosis upon the reliability of the testimony of the plaintiff. I do not know what safeguards were utilized. The burden is upon the plaintiff and there has been no evidence presented on his behalf to the effect that his testimony was either unaffected or affected to such a small extent that the probative value of his testimony was not destroyed.

The plaintiff cites ***United States v. Reynolds***, 77 F.3d 253 (8th Cir. 1996), in connection with his argument that expert testimony is not necessary when expert evaluation of the credibility of the testimony is not called for or relevant. That statement is true enough, but does not apply, because in the present case without ***some*** evidence to the effect that Bonacci's testimony was

either unaffected or nominally affected I cannot reasonably determine the effect of his hypnosis, if any, upon the reliability of Bonacci's testimony. I do not know what safeguards were taken during the hypnotic session or sessions. I might be highly benefited by expert testimony on the subject; perhaps lay testimony on the subject would be helpful. There simply is none, unless it be the declaration of Bonacci that was attached to the plaintiff's brief.[1] In the plaintiff's declaration he says, "Dr. Mead however had little to do with refreshing any memories involving the police department." That is of little value to the plaintiff. The question is the reliability of the plaintiff's testimony, which includes both his deposition and his declaration, which were given after the occasions when he was hypnotized by Dr. Mead and again by Dr. Densen-Gerber and, possibly, by Dr. Stoller. With one, two or three sessions of hypnosis involved, with my having no information from any of those doctors as to the safeguards taken or the techniques used, and with the plaintiff's acknowledging that Dr. Mead brought out one of the other personalities[2] and acknowledging that personalities do contradict others, the unsupported testimony of Paul Bonacci after hypnotism is of doubtful reliability. It should be noted, also, that there were, according to Bonacci's testimony, dozens of persons involved in the matters he brings before the court as claims against these moving defendants, yet there has been not one word of evidence by any of those persons to support Bonacci's claims. That does not mean that the claims are all false, but it does mean that Bonacci's hypnotized testimony is highly problematic.

There are also other reasons to question the credibility of the plaintiff's testimony.

Bonacci was addicted to illegal drugs, according to his testimony, extending into 1984. He said:

> "Q. Well, going back to this little chronology of what you were involved with between the period of 1980 and '84, as I understand your testimony, at some -- during this period of time, you were acting as a drug runner at the behest of Larry King; is that correct?
>
> A. Yes.
>
> Q. And you took hundreds of trips which you've described in your earlier testimony.
>
> A. Yes.

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[1] NELR 7.1(a)(2) requires that evidentiary materials in support of motions be filed with the clerk and not be attached to a brief, because briefs are not filed. The declaration of the plaintiff was attached to a brief and has not been filed, but I shall cause it to be filed.

[2] The plaintiff is a victim of Multiple Personality Disorder (MPD).

21