

No. 21-35324

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ERIC WEAVER,
Plaintiff - Appellant,
v.

RON GREGORY, CARMEN SMITH, and ALYSSA MACY,
Defendant - Appellant.

Appeal from the United States District Court
For the District of Oregon
D.C. 3:20-cv-00783-HZ
Hon. Judge Marco A. Hernandez

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The central question before the Court is whether Defendants¹ were acting under color of state law when they availed themselves of a state law scheme requiring tribal officers, including the executives of a tribal police agency, to be certified under Oregon’s Department of Safety Standards and Training (“DPSST”). The key and most salient facts are: Ron Gregory and Carmen Smith were both trained and certified by the State of Oregon; and Carmen Smith used his state certification to sign and submit a state form to DPPST containing statements certified to be true and correct pursuant to state statute and administrative rule.²

Respondents now seek to rely on tribal law governing internal employment matters to argue their actions were taken only under color of tribal law. However, this argument fails to account for the facts related to Gregory and Smiths’ state law certifications through DPSST, the execution of the state form using state issued identification number, and the submission of a form containing an accusation of dishonesty to the state’s law enforcement certification agency. Even if Plaintiff’s

¹ The Appellees’ Answering Brief correctly describes the status of the named Defendants. Were Plaintiff allowed to amend his Complaint he will seek relief from the failure to substitute a Personal Representative in the place of Carmen Smith. Furthermore, it is likely Plaintiff would dismiss his claims against Macy in favor of pursuing his retaliation claims against the two Defendants certified by the state’s agency.

² ECF #20-2. Appendix to Opening Brief, p. 154.

termination was not an act taken under color of state law, the Defendants' participation in and use of their own state certifications renders, at a minimum, the submission of DPSST's form an act taken under color of state law. Consequently, the trial court erred in not granting unbiased leave to amend his complaint to incorporate the DPSST form as an adverse employment action taken under color of state law for purposes of his First Amendment retaliation claim.

II. REPLY

A. **Defendants Gregory and Smith Were Acting Under Color of State Law in Investigating Plaintiff for Misconduct as Defined by State Law, Terminating Plaintiff, and Submitting a State Form to DPSST Accusing Plaintiff of Misconduct, Including Dishonesty.**

A successful claim under 42 U.S.C § 1983 requires proof the defendant was acting under color of state law.³ The Supreme Court explained the touchstone is whether the defendant exercised power “possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.”⁴ Here there can be no debate only an individual certified by the state's agency could head a law enforcement agency and only such and individual is allowed to execute the DPSST Personnel Action form.⁵

³ *West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988).

⁴ *United States v. Classic*, 313 U.S. 299, 326, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941).

⁵ ECF #20-2. Appendix to Opening Brief, p. 154; *also* Exhibit 1 to Motion to Supplement the Record.

This Circuit has held even tribal members, officers, agents, or employees can act under color of state law, and it is the source of their authority for each discrete act which informs the analysis of their legal status for purposes of 42 U.S.C § 1983.⁶ Instead of applying *Pistor's* holding, the trial court erred in relying on *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982) to conclude the Defendants in this case had merely “misused a statute statute.”⁷ Unlike *Lugar*, or any other case cited by the Defendants, the Defendants here were not outside actors merely using state process. Instead, Gregory and Smith held state certifications, and without those certifications they would have been unable to take, at least, some of the retaliatory acts against Plaintiff.

Defendants argue in their Response Brief “the mere fact that a tribal entity chooses to submit information to the State of Oregon ... does not transform the tribal employee ... into an “agent” or “actor” of the” state. Response Brief, page 21. This ignores the fact both Gregory and Smith were trained, insured, and certified under the state’s certification program. It further ignores the fact the F4 form in question requires signature by a certified individual and the signature is subject to state statute and administrative rule.⁸ This is not a case of a private party reporting information

⁶ *Pistor v. Garcia*, 791 F.3d 1104 (9th Cir. 2015).

⁷ *Id.* at 941.

⁸ ECF #20-2. Appendix to Opening Brief, p. 154; *also* Exhibit 1 to Motion to Supplement the Record.

to a public body, this is a case of state certified individuals taking action *required* of them by virtue of their state certification. Put simply, a non-state actor would not have been able to complete the reporting in question.

B. The District Court Abused Its Discretion by Denying Plaintiff Meaningful Leave to Amend.

“[L]eave to amend should be granted if it appears *at all possible* that the plaintiff can correct the defect.”⁹ If Plaintiff could have alleged facts sufficient to state a claim under 42 U.S.C § 1983, as articulated in his Opening Brief and *supra*, then the trial court ought to have granted the motion to dismiss with leave to amend.¹⁰ It was an abuse of discretion for the trial court to put its finger on the scales and tell the Plaintiff no anticipated amendment would achieve a different result.¹¹ The trial court’s misapplication of the substantive law governing 42 U.S.C § 1983 left Plaintiff in a difficult position: file a motion for leave to amend, which the trial

⁹ *Lopez v. Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000).

¹⁰ Fed. R. Civ. Pro. 15(a) (requiring leave to amend be given freely “when justice so requires”); *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962) (warning district courts “this mandate is to be heeded”); *Doe v. United States*, 58 F.3d 494, 497 (9th Cir.1995) (“a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly have been cured by the allegation of other facts”); *Bly–Magee v. California*, 236 F.3d 1014, 1019 (9th Cir.2001).

¹¹ *Doe*, 58 F.3d at 497; *Schreiber Distributing v. Serv–Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir.1986).

court had signposted would be ill taken, or seek an appeal on whether Defendants were acting under color of state law.¹²

VI. CONCLUSION

The Complaint stated sufficient facts to conclude the Defendants had acted under color of state law by intermingling their conduct with a state law system requiring tribal officers and executives to obtain training, insurance, and certification under state law. The Court need not reach a broad holding to conclude the investigation, termination, and official reporting to DPSST constituted retaliation under state law. Plaintiff was entitled to freely amend his Complaint to allege the Defendants' retaliatory use of the DPSST F4 form to report his termination in connection with an investigation into misconduct. Appellant respectfully requests this Court reverse the District Court's order, allow Plaintiff to file an amended complaint and remand the case for further prosecution.

DATED this 31st day of January 2022.

THENELL LAW GROUP, P.C.

By: /s/ Daniel E. Thenell

¹² Other than the allegations regarding Smith's signature on the DPSST form, the other salient facts were properly before the trial court. Smith and Gregory were certified by DPSST and were required to hold those certifications by state law for as long as Warm Springs maintained their participation in SB 412. The DPSST F4 Form is additional evidence of retaliation, but did not fundamentally change the factual allegations in the Complaint regarding use of state law to effect a Constitutional injury on the Plaintiff.

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CERTIFICATE OF SERVICE

I hereby certify that I filed the REPLY BRIEF OF APPELLANT with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 31, 2022.

I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

Dated: January 31, 2022

THENELL LAW GROUP, P.C.

By: /s/ Anne M. Puppo
Anne M. Puppo

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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