

No. 18-886

In the
Supreme Court of the United States

LILLIAN M. JONES, M.D.,

Petitioner,

v.

THE HAWAII RESIDENCY PROGRAMS,
INCORPORATED, A SUBSIDIARY
OF THE UNIVERSITY OF HAWAII,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL APPENDIX TO PETITION

LILLIAN M. JONES, M.D.

PETITIONER PRO SE

P.O. Box 235444

HONOLULU, HI 96823

(808) 282-0676

ADA0HA1@AOL.COM

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♦ (888) 958-5705 ♦

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INDIVIDUAL DEFENDANTS**

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII**

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LILLIAN M. JONES,

Plaintiff,

v.

HAWAII RESIDENCY PROGRAMS, INC., UNIVER-
SITY OF HAWAII; NALEEN ANDRADE, M.D.;
COURTENAY MATSU, M.D.; D. CHRISTIAN
DERAUF, M.D.; TERRY LEE, M.D.; IQBAL
AHMED, M.D.; SHEILA SCHIEL,

Defendants.

Civ. No. 07-00015 HG BMK

Before: Helen GILLMOR,
Chief United States District Judge.

Plaintiff, a former employee of the Hawaii Residency Program, commenced this civil rights action pursuant to 42 U.S.C. § 1983 challenging her dismissal from the Triple Board residency program. Plaintiff seeks damages, lost earnings, and an order directing defendants to expunge from her records all derogatory information. All Defendants, except the University of Hawaii which is dismissed as a party by separate order, now move for summary judgment on all claims.

The Court GRANTS Defendants' motions for summary judgment because Defendants' action of dismissing Plaintiff from the Residency Program does not constitute state action pursuant to 42 U.S.C. § 1983.

PROCEDURAL HISTORY

On June 8, 2007, Plaintiff Lillian Jones filed an Amended Complaint, and Exhibits A-C. (Doc. 40.)

On June 28, 2007, Defendants the Hawaii Residency Program Inc. (the "Residency Program"), Naleen Andrade, M.D., Courtenay Matsu, M.D., and D. Christian Derauf, M.D. (the "Doctors") filed Answers to the Amended Complaint.¹ (Docs. 41-44.)

On August 23, 2007, the Doctors filed a Motion for Summary Judgment As To The Individual Defendants, and a Concise Statement of Facts in support. (Docs. 47 and 48.)

On October 3, 2007, the Residency Program and the Doctors filed a Motion for Summary Judgment on All Claims Asserted in Count I of the Amended Complaint and a Concise Statement of Fact in support. (Docs. 58 and 59.)

On October 3, 2007, the Residency Program and the Doctors filed a Motion for Summary Judgment on All Claims Asserted in Count II of the Amended Complaint and a Concise Statement of Facts in support. (Docs. 55 and 56.)

On October 3, 2007, the Residency Program and the Doctors filed additional exhibits in support of their Motions for Summary Judgment on All Claims Asserted in Counts I and II of the Amended Complaint. (Docs. 57, 60-64.)

¹ Terry Lee, M.D., Iqbal Ahmed, M.D., and Sheila Schiel, although named as defendants, were never served with either the Complaint or Amended Complaint, and have not made an appearance in this matter.

On October 11, 2007, Plaintiff filed an opposition entitled "Plaintiff's Motion In Opposition to Summary Judgment for Individual Defendants and Individual Defendants and HRP's Motion For Summary Judgment on Counts I and II of Plaintiff's Complaint."² (Doc. 72.)

On October 18, 2007, the Doctors filed a Reply Memorandum in Support of the Doctors' Motions For Summary Judgment As To The Individual Defendants, and a Supplemental Concise Statement in support. (Docs. 74 and 75.)³

On October 18, 2007, the Residency Program and the Doctors filed a Reply Memorandum in Support of their Motions For Summary Judgment As To All Claims Asserted In Counts I And II Of Plaintiff's Amended Complaint, and a Supplemental Concise Statement in support. (Docs. 76 and 77.)

² Plaintiff failed to file a separate concise statement disputing or accepting the facts set forth in the Defendants' concise statement, or to set forth all material facts as to which Plaintiff contends there exists a genuine issue which necessitates trial, as required by Local Rule 56.1 of the Local Rules of the Court.

³ Defendants argue that the motion for summary judgment should be granted in favor of the Individual Defendants as Plaintiff failed to serve Defendants with Plaintiff's memorandum in opposition (Doc. 72.). The Defendants have actual knowledge of the opposition, as evidenced by the statement of Defendants' counsel that on October 15, 2007, a copy of the opposition was downloaded from the Court's electronic filing system. (Declaration of Corlis J. Chang at ¶ 3, Doc. 75.) In light of Plaintiff's *pro se* status and in the interest of a fair hearing in this matter, the Court declines to grant the motion for summary judgment based on Plaintiff's failure to complete service of the opposition.

On October 23, 2007, Plaintiff filed a supplementary Exhibit "U" in support of her memorandum in opposition to Defendants' motions for summary judgment.⁴ (Doc. 80.)

This matter came on for hearing on October 29, 2007.

BACKGROUND

I. Undisputed Facts

The material facts in this matter are not in dispute.

1. The Hawaii Residency Program, Inc

The Hawaii Residency Program, Inc. (the "Residency Program") is a private educational organization. It is incorporated as a non-profit corporation and recognized as such by the Internal Revenue Service pursuant to § 501(c)(3) of the Internal Revenue Code of 1954, as amended, 26 U.S.C. § 501(c)(3). Arthur Philpott, Chief Executive Officer and General Counsel of the Residency Program, indicates the Program is not a part of any federal or state governmental entity.⁵ (Philpott Decl. at ¶¶ 11 and 19, Doc. 59.) Apart from laws governing its status as a tax-

⁴ Plaintiff's Supplementary Exhibit "U" was filed without the permission of the Court, in violation of Rule 15 of the Federal Rules of Civil Procedure. In the interests of a fair hearing of this matter, the Court considers Plaintiff's Supplementary Exhibit "U".

⁵ The amended complaint concedes the Hawaii Residency Program "is a private non-profit corporation in the City and County of Honolulu, State of Hawaii." (Amended Compl. at 2, ¶ 7, Doc. 40.)

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exempt non-profit corporation, the Residency Program is not directly regulated by federal or state law. The Residency Program is independent of both the University of Hawaii, and of the John A. Burns School of Medicine. The Residency Program did not receive any federal or state grants or funding during the time of Plaintiff's residency training, other than pursuant to contractual obligations with state governmental agencies. (*Id.* at ¶¶ 19-20, Doc. 59.)

The Residency Program employs medical school graduates who are entering a Graduate Medical Education program accredited by the Accreditation Council for Graduate Medical Education. The Residency Program supervises and manages the training of the medical school graduates in its employ. (Philpott Decl. at 111, Doc. 59.)

The Board of Directors which governs the Residency Program is comprised of representatives of the member hospitals as well as a representative of the State Department of Health, mental health divisions. The private member hospitals include Queens Medical Center, Hawaii Pacific Health (owner of Straub Hospital and Kapiolani Medical Center), Kuakini Hospital, Hawaii Medical Center, and Wahiawa General Hospital. These representatives are the voting members of the Board, with the addition of a representative of the John A. Burns School of Medicine. Each Director has one vote on the Board. (Philpott Decl. at ¶ 21, Doc. 59.)

Each of the member hospitals reimburses the Residency Program for the costs of providing medical residents who train at their hospitals, pursuant to contract. Neither the Residency Program nor the residents it employs bill for or accept payment from

Medicare or Medicaid. (Philpott Decl. at ¶¶ 21 and 23, Doc. 59.)

The Triple Board Program is a five year residency training program by means of which a resident may achieve proficiency in Pediatrics, Psychiatry and Child Psychiatry. The goal of the Triple Board Program is to prepare residents to be eligible to take and pass the board examinations in each of the three specialties. (*Id.* at ¶ 14.)

2. Individual Defendant Medical Doctors' Status as Authorized Agents of the Hawaii Residency Program

While Plaintiff was employed by the Residency Program, Naleen Andrade, M.D., Courtenay Matsu, M.D., and D. Christian Derauf, M.D. (the "Doctors") were authorized to act as agents on behalf of the Residency Program. These Doctors were supervised by, and under the control and direction of the Residency Program's Executive Director with respect to all actions regarding decisions on the status of residents in training in the Triple Board Program. (Amended Compl. at 3-4, ¶ 9, Doc. 40; Philpott Decl. at ¶ 26, Doc. 59.)

3. Residency of Plaintiff

From July 1, 2000, to January 13, 2005, Plaintiff was employed by the Residency Program as a resident in training in the University of Hawaii Triple Board Residency Training Program. (Philpott Decl. at ¶ 2, Doc. 59.) It is undisputed that Plaintiff was dismissed from the Triple Board Residency Program when Plaintiff failed to diagnosis pneumonia in an infant. Pneumonia required admittance of the child to an intensive care unit. In explaining her action of nearly

sending the child home, Plaintiff wrote an e-mail to directors of the Program stating that she thought mostly of her image when presenting the diagnosis of a lesser illness: "In an attempt to deflect erratic behavior, I essentially sacrificed the child's condition in effect to protect my image as I started to think about her presentation differently." (April 12, 2004 E-mail from Plaintiff to training directors of the Residency Program, Def. SCSF, Exh. 3, Doc. 59.)

It is also undisputed that on October 8, 2004, Plaintiff was offered an amended contract giving her the alternative of finishing her residency training in general psychiatry, rather than in all three disciplines. Plaintiff refused the offer. (Amended Compl. at 6, ¶ 22; Matsu Decl. at ¶¶ 33-35, Doc. 59.)

II. The Complaint

The underlying amended complaint raises claims under § 1983 and state intentional tort law.

In Count One, entitled "Deprivation of Constitutionally protected property and liberty rights," Plaintiff alleges federal constitutional violations of her property and liberty interests, and violation of her procedural and substantive due process rights arising from her dismissal from the Triple Board Residency Program.

In Count Two, the complaint alleges intentional tort state law claims characterized as defamation, interference with contract, and malicious misrepresentation.

STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). There must be sufficient evidence that a reasonable jury could return a verdict for the non-moving party. *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 916 (9th Cir. 1996).

The moving party has the initial burden of "identifying for the court the portions of the materials on file that it believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Assn.*, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The moving party, however, has no burden to negate or disprove matters on which the opponent will have the burden of proof at trial. The moving party need not produce any evidence at all on matters for which it does not have the burden of proof. *Celotex*, 477 U.S. at 325. The moving party must show, however, that there is no genuine issue of material fact and that he or she is entitled to judgment as a matter of law. That burden is met simply by pointing out to the district court that there is an absence of evidence to support the non-movant's case. *Id.*

If the moving party meets its burden, then the opposing party may not defeat a motion for summary judgment in the absence of probative evidence tending to support its legal theory. *Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 282 (9th Cir. 1979). The opposing party must present admissible evidence showing that there is a genuine issue for trial. Fed.

R. Civ. P. 56(e); *Brinson v. Linda Rose Joint Venture*, 53 F.3d 1044, 1049 (9th Cir. 1995). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Nidds*, 113 F.3d at 916 (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986)).

The court views the facts in the light most favorable to the non-moving party. *State Farm Fire & Casualty Co. v. Martin*, 872 F.2d 319, 320 (9th Cir. 1989).

Opposition evidence may consist of declarations, admissions, evidence obtained through discovery, and matters judicially noticed. Fed. R. Civ. P. 56(c); *Celotex*, 477 U.S. at 324. The opposing party cannot, however, stand on its pleadings or simply assert that it will be able to discredit the movant's evidence at trial. Fed. R. Civ. P. 56(e); *T.W. Elec. Serve.*, 809 F.2d at 630. The opposing party cannot rest on mere allegations or denials. Fed. R. Civ. P. 56(e); *Gasaway v. Northwestern Mut. Life Ins. Co.*, 26 F.3d 957, 959-60 (9th Cir. 1994). Nor can the opposing party rest on conclusory statements. *National Steel Corp. v. Golden Eagle Ins. Co.*, 121 F.3d 496, 502 (9th Cir. 1997).

ANALYSIS

I. Purely Private Behavior Does Not Violate the 14th Amendment

Congress enacted 42 U.S.C. § 1983 pursuant to its power under Section 5 of the Fourteenth Amendment of the United States Constitution.⁶ *Quern v. Jordan*, 440 U.S. 332, 351 n. 3 (1979).

⁶ Civil action for deprivation of rights

To state a claim for relief under 42 U.S.C. § 1983, for the deprivation of property and liberty rights, and for the deprivation of procedural and substantive due process, Plaintiff has the burden of showing there was (1) a violation of rights protected by the Constitution or created by federal statute, (2) proximately caused (3) by conduct of a person (4) acting under colour of state law. *Crumpton v. Gates*, 947 F.2d 1418 (9th Cir. 1991); citing *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled on other grounds*, *Daniels v. Williams*, 474 U.S. 327 (1986). The elements at issue in here are (1) and (4).

At the threshold, Plaintiff must proffer substantive evidence showing that Defendants were state actors causing the deprivation of a federal right. *Id.* As the provisions of the Fourteenth Amendment limit its application exclusively to acts attributable to the state, private acts do not violate the Fourteenth Amendment. *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149, 157 (1978); *Modaber v. Culpeper Memorial Hospital, Inc.*, 674 F.2d 1023 (C.A. Va. 1982).

Plaintiff asserts the Residency Program is a state actor because it has "a monopoly on producing physicians of essentially all medical disciplines" in Hawaii,

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress[.]

42 U.S.C. § 1983.

and is sponsored by the University of Hawaii, making Defendant a state employer. (Opp. at 6, Doc. 72.) Plaintiff offers no evidence in support of these conclusions.

It is undisputed that the Residency Program in its purpose, structure and operation, is a purely private entity. As Plaintiff states in the amended complaint, the Residency Program is a non-profit educational corporation under 26 U.S.C. § 501(c)(3). The Residency Program provides a health care training program for doctors. The provision of this service is not a state function. The issue was addressed by the court in *Modaber*. There the court stated that a private health care program is not a state actor because it does not exercise powers traditionally exclusively reserved to the State. *Modaber*, 674 F.2d at 1026. "[T]he mere fact that the hospitals implement a governmental program does not establish the nexus which (the Plaintiff) requires . . . Although health care is certainly an essential public service, it does not involve the 'exercise by a private entity of powers traditionally exclusively reserved to the State.'" *Id.*, Quoting from *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352 (1974). The decision of the Program Directors to suspend Plaintiff's training was an exercise of academic judgment and discretion, not a decision directed or encouraged by any state entity.

Nor is the Residency Program a state actor by reason of funding. The Program is not funded by any federal grants, and does not bill for or accept payment from Medicare or Medicaid. While the University of Hawaii and the Hawaii State Department of Health each has a representative on the board of directors of the Residency Program, each representative has only

one vote. The rest of the Board consists of representatives from the private hospitals The Queen's Medical Center, Kuakini Medical Center, Hawaii Pacific Health (owner of Straub Clinic & Hospital and Kapiolani Medical Center for Women and Children), Hawaii Medical Center, and Wahiawa General Hospital. The Residency Program is not a subdivision of the University of Hawaii. Any payments made by entities of the Residency Board to the Residency Program consist of reimbursements for the Residency Program's expenses in providing the medical residents who train at the entities' hospitals (Philpott Decl. at ¶¶ 19-24, Doc. 59.) While the University representative has a vote on the board, and may vote with other board members on matters concerning the Program, "[m]ere state approval is not state action." *Modaber*, 674 F.2d at 1026. There is no evidence of state action in the decision of the private Residency Program to terminate the training of Plaintiff.

Plaintiff has not shown a sufficiently close nexus between the State and the challenged action of the regulated entity, the Residency Program. The action of the Residency Program can not fairly be treated as that of the State. *Jackson*, 419 U.S. at 351 (Due process clause of the Fourteenth Amendment offers no shield against private conduct, "however discriminatory and wrongful."). The Residency Program is entitled to summary judgment on all federal statutory and constitutional claims.

II. Status of the Individual Defendants as Agents of the Hawaii Residency Program

Plaintiff further asserts that the Doctors are state actors because they are employed by the Uni-

versity of Hawaii. (Opp. at 6, 12-13.) Defendants counter that the Doctors were acting as the agents of the Residency Program, a private entity, when acting to terminate Plaintiff's training. An agent cannot be held individually liable for actions taken in their capacity as an agent of an entity, unless the agent acts for their own personal advantage. *Mercado v. Allstate Ins. Co.*, 340 F.3d 824, 825-26 (9th Cir. 2003); *Moore v. Allstate Insurance Company*, 6 Haw. App. 646, 648, 651, 736 P.2d 73, 76 (1987) (the attempt to hold an agent of a company personally liable is "legally unsupportable").

It is undisputed that the Individual Defendants Naleen Andrade, M.D., Courtenay Matsu, M.D., and D. Christian Derauf, M.D. (the "Doctors") were authorized to act as agents on behalf of the Residency Program. Plaintiff acknowledges that the Doctors are agents of the Residency Program in her amended complaint, stating: "in this Complaint HRP can be used interchangeably with Dr. D. Christian Derauf, Dr. Courtenay Matsu . . . or any other employee or agent of HRP." (Amended Compl. at 3-4, Doc. 40; Philpott Decl. at ¶ 26, Doc. 59.) During Plaintiff's residency, the Doctors were Program Directors and faculty members of the Residency Program. They were appointed to their faculty positions with the concurrence and agreement of the Executive Director of the Program. In their declarations, all of the Doctors stated that as agents, they were supervised by, and under the control and direction of the Residency Program's Executive Director when deciding on the status of residents in training in the Triple Board Program. (Philpott Decl. at ¶¶ 25-32, and 35-37, Doc. 59; Matsu Decl. at ¶¶ 5-11 and 14-15, Doc. 59; Derauf Decl. at

¶¶ 2-3, 6-10, 13-21, and 23-30, Doc. 59; Andrade Decl. at ¶ 2, 5-9 and 12-13, Doc. 48.)

Plaintiff's particular claims stem from the Doctors' acts in suspending Plaintiff from clinical practice, restricting the extent of her training, and the act of placing Plaintiff on a paid leave of absence from the Triple Board residency program. It is undisputed that all of these acts were taken within the agency relationship the Doctors had with the Residency Program, and for the benefit of the Residency Program. All of the Doctors acts alleged by Plaintiff were ratified by the Residency Program. (Philpott Decl. at ¶¶ 26-32, and 35-37, Doc. 59; Matsu Decl. at ¶¶ 14-15, Doc. 59; Derauf Decl. at II 13-14, Doc. 59; Andrade Decl. at ¶¶ 9, 12, and 13, Doc. 48.) Plaintiff agrees that the Residency Program "ratified previous actions and endorsed the actions of the Individual Defendants." (Opp. at 12, Doc. 72.) There is no evidence presented that the Doctors acted as individuals or as employees of the University when terminating Plaintiff's residency training. In her deposition testimony,. Plaintiff admits that the Doctors' actions were taken in their professional capacity. (Deposition of Plaintiff taken on Sept. 17 and 19, 2007, at pp. 397:11-398:13, Defendants' SCSF, Exh. 1, Doc. 59.) The Doctors, acting in their capacity as agents of the Residency Program and at the direction of the Residency Program, are not liable for any wrongful conduct. *Davis v. Wholesale Motors, Inc.*, 86 Hawaii 405, 426, 949 P.2d 1026, 1047 (1987) ("[a] verdict against the principal alone, and not against his agents, is proper when the agents acted at the direction of the principal and the principal ratified their wrongful conduct.").

Given their position as agents of the Residency Program, and the status of the Residency Program as a private entity, the Doctors are entitled to summary judgment on the federal statutory and constitutional claims.

III. State Tort Claims

As there are no remaining federal law claims, pursuant to 28 U.S.C. § 1367(c)(3) the Court declines to exercise supplemental jurisdiction over Plaintiff's state law claims.⁷ Plaintiff's state law claims for intentional torts (Count II) are DISMISSED WITHOUT PREJUDICE.

CONCLUSION

For the foregoing reasons,

(1) Defendants the Hawaii Residency Program Inc., Naleen Andrade, M.D., Courtenay Matsu, M.D., and D. Christian Derauf, M.D.'s Motion for Summary Judgment as to Count I of Plaintiff's Amended Complaint, (Doc. 58), is GRANTED. All federal statutory and constitutional claims are DISMISSED WITH PREJUDICE.

(2) Defendants the Hawaii Residency Program Inc., Naleen Andrade, M.D., Courtenay Matsu, M.D., and D. Christian Derauf, M.D.'s Motion for Summary Judgment as to Count II of Plaintiff's Amended Complaint, (Doc. 55), is GRANTED. Plaintiff's state law

⁷ The Court has no diversity jurisdiction over this matter. Plaintiff and the Defendant Doctors are residents of the State of Hawaii. The University of Hawaii is an institution of the State of Hawaii, and the Residency Program is a private non-profit Hawaii corporation. (Amended Complaint at 2, Doc. 40.)

claims for intentional torts are DISMISSED WITHOUT PREJUDICE.

(3) Defendants Naleen Andrade, M.D., Courtenay Matsu, M.D., and D. Christian Derauf, M.D.'s Motion for Summary Judgment as to the Individual Defendants, (Doc. 47), is GRANTED. All federal statutory and constitutional claims are DISMISSED WITH PREJUDICE. Pursuant to 28 U.S.C. § 1367(c)(3) the Court declines to exercise supplemental jurisdiction over Plaintiff's state law tort claims, and these state law claims are DISMISSED WITHOUT PREJUDICE.

There being no remaining claims, this case is now closed.

IT IS SO ORDERED.

DATED: November 30, 2007, Honolulu, Hawaii.

/s/ Helen Gillmor
Chief United States District Judge