S 20-354

IN THE SUPREME COURT OF THE UNITED STATES

LORCAN KILROY
Plaintiff and Petitioner,

v.

Los Angeles Unified School District Board of Education, *et al*.,
Defendants and Respondents.

On Review From the United States Court of Appeals For the Ninth Circuit, Case No. 19-5537
After An Appeal From the United States District Court, Central District of California, Judge Dolly M. Gee
Case Number: District Court Case 16-CV-09068-DMG (JDE)

BRIEF IN OPPOSITION TO PETITION FOR EXTRAORDINARY WRIT OF MANDAMUS

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INTRODUCTION

Respondents Los Angeles Unified School District, Justo Avila, Monica Ratliff, Scott Schmerelson, George Mckenna, Michel Vezina, Paula Greene, John Plevack and Ref Rodriguez, Defendants in the matter below ("Defendants"), respectfully submit the following opposition to the petition for extraordinary writ of mandamus submitted by *pro se* Petitioner Lorcan Kilroy, Plaintiff in the case below ("Plaintiff").

According to Plaintiff, the "core" of his petition is his argument that the Ninth Circuit ruled against him due to "gruesome political bias" in the panel's efforts to protect Kamala Harris from alleged exposure of wrongdoing. (See Plt's Pet., pp. 15, 29-33.) However, Plaintiff's allegations are completed unsupported by the record. *Indeed, Kamala Harris is not a party to this case.*

Rather, this matter is a wrongful termination action brought by Plaintiff, a former teacher with the Los Angeles Unified School District ("LAUSD"). The Plaintiff was fired following an investigation of sexual misconduct allegations against him by female students. The Ninth Circuit properly affirmed the defense judgment entered in the district court.

Defendants respectfully submit there are no grounds for the extraordinary remedy of a petition for writ of mandamus in this case. Moreover, Plaintiff's petition is based upon pure speculation and is not supported by the record below. Plaintiff has not set forth any legal issue which would warrant review by this Court, by way of his petition. Accordingly, the petition should be denied.

STATEMENT OF THE CASE

On December 7, 2016, Plaintiff, proceeding *pro se*, filed the operative First Amended Complaint ("FAC"). (SER 1036-1110.) Therein, Plaintiff named as Defendants LAUSD, the Individual LAUSD Defendants, Michel Vezina (father of a student), Does 1-10 and Jane Doe. (SER 1036.) In the FAC, Plaintiff alleged his due process rights were denied following allegations of sexual misconduct against him. (SER 1037.)

The FAC asserted ten causes of action. (SER 1036.) The following state law claims were brought against LAUSD and the Individual LAUSD Defendants in their official capacities: (1) Intentional Interference with Contractual Relations; (2)

Intentional Interference with Prospective Economic Relations; (3) Negligent Interference with Prospective Economic Relations; (4) Breach of Employment Contract – Wrongful Termination; (5) Breach of Contract; (6) Defamation Per Se (Libel and Slander); and (7) Violation of Right to Privacy – False Light. (SER 1086-1100.) Moreover, Defendant Vezina was named as a defendant in the foregoing state law claims, with the exception of claims (4) and (5). (SER 1086-1100.) In addition, Plaintiff alleged a 42 U.S.C. § 1983 *Monell* claim against LAUSD based upon alleged due process violations (8). (SER 1100-1102.) Furthermore, Plaintiff alleged 42 U.S.C. § 1983 claims against the Individual LAUSD Defendants, based upon: (9) a violation of Plaintiff's Fourteenth Amendment procedural due process rights in connection with his termination; and (10) a violation of Plaintiff's Fourteenth Amendment procedural due process rights in connection with alleged damage to Plaintiff's liberty/reputational interests. (SER 1102-1107.)

On March 22, 2017, LAUSD and the Individual LAUSD Defendants filed a motion to dismiss the FAC. (SER 1000-1035.) On May 26, 2017, the magistrate judge issued a Report and

Recommendations on Defendants' motion to dismiss the FAC. (SER 40-60.)

On October 3, 2017, the district court issued an order accepting the Report and Recommendation of the magistrate judge regarding Defendants' motion to dismiss, as follows: the motion to dismiss the state claims against LAUSD (claims 1-7) and the 42 U.S.C. § 1983 claim against LAUSD (claim 8) was granted, without leave to amend; and the motion to dismiss the state claims against the Individual LAUSD Defendants (claims 1-7) in their official capacities was granted, without leave to amend. (SER 38-39.) Moreover, the motion to dismiss the federal claims (claims 9-10) against the LAUSD Individual Defendants in their individual capacities was denied. (SER 38-39.)

On June 22, 2018, Defendants filed a motion for summary judgment (SER 786-818), along with a statement of uncontroverted facts and law (SER 676-704) and supporting declarations (SER 627-669, 714-785). On August 29, 2018, Plaintiff filed an opposition (SER 599-626), statement of genuine disputes (SER 465-598), evidentiary objections (SER 394-454), and a supporting declaration (SER 307-393.)

On November 7, 2018, Plaintiff filed a supplemental memorandum in opposition to the summary judgment motion. (SER 280-298) On November 21, 2018, Defendants filed their Reply (SER 249-279), together with a request for judicial notice (SER 218-250), evidentiary objections (SER 120-151), and a reply to Plaintiff's separate statement (SER 152-217).

On December 6, 2018, the magistrate judge recommended that the district court grant Defendants' motion for summary judgment as to the federal claims (9-10) alleged against the Individual LAUSD Defendants, and decline to exercise supplemental jurisdiction over the remaining state law claims. (SER 5-37.)

On March 29, 2019, the district court issued an order accepting the report and recommendations. (SER 3-4.) On the same date, judgment was entered on behalf of the Defendants. (SER 1-2.)

Also on March 29, 2019, Plaintiff filed a Notice of Appeal. (SER 67-80.)

On June 23, 2020, the Ninth Circuit issued its decision affirming the defense judgment, in an unpublished memorandum. In its decision, the Ninth Circuit explained:

> The required notice provided to Kilroy satisfied the requirements of due process because it included (1) a statement of charges, (2) identified all of the grounds for termination, and (3) informed him he would be dismissed in thirty days if he did not request a hearing. See *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 546 (1985) ("The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."); *Roybal*, 871 F.3d at 933. As noted by the district court, "Plaintiff does not dispute that he received these notices and did not request a hearing." He was not terminated until approximately one month after the expiration of the period to request a hearing. Kilroy also received sufficient notice and opportunity to be heard prior to his suspension. See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (in determining what procedures are sufficient to comport with due process, court must weigh private interest at stake, risk of erroneous deprivation, and government interest).

(Plt's App. Ex. A.)

STATEMENT OF FACTS

The Plaintiff was a fine arts teacher at Van Nuys High School from 2003 through 2013. (SER 677, 820, 833-834.) In

2013, LAUSD placed Plaintiff in the substitute teacher pool. (SER 677, 8 20.) In August 2015, Plaintiff was assigned to teach at Millikan Middle School. (SER 677, 858.)

On October 6, 2015, two female seventh grade students accused Plaintiff of leering at their buttocks and looking into the girls' dressing room as they changed clothes, when Plaintiff was a substitute teacher for a dance class at Millikan. (SER 16, 629, 631-641, 645, 677, 858, 861-863.) As of that date, Plaintiff stopped instructing students at the school. (SER 16, 309-310, 645, 678, 858.)

On October 6, 2015, Defendant Greene, Vice Principal of Millikan, began drafting an incident report regarding the allegations. (SER 16, 678, 858, 861-863.)

On October 8, 2015, Irene Hyland, the Lead Operations Coordinator, Local District Northeast with LAUSD, met with Plaintiff and informed him that he was being reassigned to home duty on paid status, pending an investigation. (SER 16, 679, 865.) On October 12, 2005, Ms. Hyland held a conference with Plaintiff to discuss the ongoing investigation and the reason Plaintiff was being reassigned to home duty. (SER 17, 680, 865.) Plaintiff was given a copy of a memorandum entitled, "Employee

Notice of Reason for Temporary Reassignment Pending Investigation." (SER 17, 680, 865-866.)

Also, on October 12, 2015, Michael Voight of LAUSD's Employee Relations Department sent Plaintiff a notice informing him that LAUSD was reporting the recent allegations of misconduct to the Commission on Teacher Credentialing, pursuant to LAUSD's statutory duties to do so. (SER 17, 681, 772-775.)

On October 23, 2015, Ray Jordan and Julie Padilla of the LAUSD Student Safety Investigation Team ("SSIT") opened an investigation into the allegations against Plaintiff. (SER 17, 628, 681, 777, 859.) Their investigation was completed on December 3, 2015. (SER 17, 683, 629, 631-641.) The investigation found that nine students reported seeing Plaintiff look into the girls' dressing room when he substituted on October 6, 2015. (SER 18, 628, 631-640, 683, 778.)

On December 11, 2015, Defendant Plevack, the principal at Millikan, held a conference with Plaintiff and Dr. Frank Serrato, the Staff Relations Field Director. (SER 18, 645-646, 684, 715, 717, 734736.) During that meeting, Mr. Plevack discussed the following issues: (1) the October 6, 2015 allegations; (2) publicly

posting the Incident Report prepared by Greene; and (3) refusing to cooperate with the SSIT investigation. (SER 18, 645-646, 347-350, 684.) A summary of the conference was sent to Plaintiff, and provided Plaintiff with an opportunity to respond. (SER 18, 646, 649, 652 685-686.)

LAUSD attempted to schedule additional meetings on December 14, 15, 16, and 18, 2015, but because he reported an illness and took a personal day, Plaintiff did not attend these meetings. (SER 18, 350-360, 646, 685-687, 746, 780-785.) On December 15, 2015, Mr. Plevack issued a Notice of Suspension of Certificated Employee, which informed Plaintiff that he would be receiving a 15-day suspension. (SER 18, 646-647, 654-656, 685, 739-740.) On the same date, Mr. Plevack sent Plaintiff a Notice of Unsatisfactory Service or Act of Certified Employee, recommending his suspension and dismissal. (SER 18-19, 647, 661-664, 685.)

On or about December 18, 2015, Defendant Avila, LAUSD's Chief Human Resources Officer, prepared a Statement of Charges, recommending to the LAUSD Board of Education that Plaintiff be immediately suspended without pay and terminated. (SER 19, 688, 820, 835-842.)

On January 12, 2016, Plaintiff was given the following notification: "[p]ursuant to action taken by the Board of Education of the Los Angeles Unified School District (LAUSD) at a Closed Session meeting on October 13, 2015 you are hereby notified that written charges, duly signed and verified, were filed with the Board of Education charging that there exist cause(s) for your dismissal." (SER 19.)

On January 14, 2016, a Statement of Charges, along with an Amended Notice of Board of Education Intention to Dismiss and Placement on Immediate Unpaid Suspension clarifying the closed session meeting was on January 12, 2016, were sent to Plaintiff. (SER 19, 689-690, 820-821, 843-852.) Plaintiff was advised by the documents that he was being suspended without pay, and the Board intended to dismiss him "at the expiration of thirty (30 days) from the date of service of this notice unless [he] demand[ed] a hearing as provided in Section 44930 through 44988 of the Education Code." (SER 19, 689-690, 750-751, 820-821, 844, 843-852 (emphasis added).) The Board had adopted the Statement of Charges on January 12, 2016. (SER 19, 34, 820.)

Plaintiff did not elect a hearing and he was terminated on February 17, 2016. (SER 19, 690, 821, 751 ("I deliberately did

not elect to go to OAH and have an OAH hearing." (emphasis added).) Defendant Avila sent Plaintiff a Final Dismissal Notice dated February 17, 2016 stating that, "Pursuant to action taken by the Board of Education on January 12, 2016, you are hereby notified that you are dismissed as a certificated employee of the Los Angeles Unified School District effective the date of this letter." (SER 19-20, 690, 753-754, 821, 853-856.)

REASONS FOR DENYING THE PETITION

I. PLAINTIFF'S PETITION DOES NOT MEET THE REQUIREMENTS FOR THE EXTRAORDINARY REMEDY OF A WRIT OF MANDAMUS.

A petition for a writ of mandamus is a drastic remedy, reserved for "really extraordinary causes," and this Court will not use them as a substitute for an appeal. *Ex parte Fahey*, 332 U.S. 258, 260 [67 S.Ct. 1558, 1559, 91 L.Ed. 2041] (1947). A petition for a writ of mandamus requires a showing of a "clear and indisputable" right to the issuance of the writ. *Miller v. French*, 530 U.S. 327, 339 [120 S.Ct. 2246, 2254, 147 L.Ed.2d 326] (2000). Where a court exercises its jurisdiction to decide issues properly

before it, the remedy is not a petition for writ of mandamus, regardless of whether the petition claims the district court exceeded its legal powers or erred in making its ruling. *Bankers Life & Cas. Co. v. Holland,* 346 U.S. 379, 382–383 [74 S.Ct. 145, 147–148, 98 L.Ed. 106] (1953) (the trial court's decision against petitioner, even if erroneous—which we do not pass upon—involved no abuse of judicial power).

Here, Plaintiff does not argue the Ninth Circuit exceeded its jurisdiction in ruling on Plaintiff's appeal from the final district court judgment. In this regard, there is no basis for an extraordinary writ of mandamus in this case. Certainly, Plaintiff has not shown a ***clear and indisputable right*** to issuance of a writ.

II. PLAINTIFF'S PETITION SHOULD BE DISREGARDED AS PLAINTIFF MISREPRESENTS THE PROCEEDINGS BELOW AND HIS CLAIMS ARE UNSUPPORTED BY THE RECORD.

Without any citation to the record and without any support other than his own mere speculation, Plaintiff claims the Ninth

Circuit's decision affirming the defense judgment was somehow related to political bias pertaining to Kamala Harris. *There is absolutely nothing in the record to support Plaintiff's speculative statements to this Court.* Indeed, Ms. Harris is not even a party to this lawsuit.

Importantly, an appellate court will not consider any claims that are not supported by the record. *N/S Corp. v. Liberty Mut. Ins. Co.*, 127 F.3d 1145, 1146 (9th Cir. 1997); FED. R. APP. P. 28(a)(8)(A). Moreover, *pro se* litigants are required to follow court rules. *See Wilcox v. C.I.R.,* 848 F.2d 1007, 1008 n.2 (9th Cir. 1988) (citations omitted). In *Acosta-Huerta v. Estelle*, 7 F.3d 139 (9th Cir. 1992), the Ninth Circuit found the *pro se* petitioner had abandoned his claims on appeal, stating:

> The federal rules require the brief to contain the contentions of the appellant with respect to the issues presented, and the reasons therefore, with citations to the authorities, statutes and parts of the record relied on. Fed. R. App. P. 28(a)(4).

Id. at 143 (citations omitted).

There is nothing to support Plaintiff's theory that the Ninth Circuit's ruling on appeal was the result of any alleged "gruesome political bias" (Plt's pet., at p. 15) or that the panel's decision was

due to "ninth circuit democrat political bias") (Plt's pet., at p. 17.) The Plaintiff's allegations throughout his petition are completely unsupported, and have nothing to do with the Plaintiff's allegations in the operative complaint. Respectfully, as the claims in Plaintiff's petition are based solely upon his own speculation and are unsupported by the record in this matter, his petition must be denied.

Moreover, aside from his references Kamala Harris throughout his entire petition, Plaintiff improperly makes factual representations that are unsupported by the record. (See Plt's Pet., at pp. 17-22.) Moreover, Plaintiff further makes unsupported references to the record in another case. (Plt's Pet., at pp. 3-7.) In this regard, his petition should be denied.

Also, it should be noted that under Supreme Court Rule 20(2)(b), a petition for writ of mandamus shall be served on every party to the proceeding with respect to which relief is sought. According to the Proof of Service filed with this Court, it does not appear Plaintiff served the petition to the Ninth Circuit judges against whom he claims bias.

III. THE PLAINTIFF CANNOT CHALLENGE THE COURT'S RULINGS WHICH ARE NOT IN EXCESS OF ITS AUTHORITY, BY WAY OF A PETITION FOR AN EXTRAORDINARY WRIT OF MANDAMUS.

A petition for a writ of mandamus is used to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Mallard v. U.S. Dist. Court for Southern Dist. of Iowa*, 490 U.S. 296, 308–309 [109 S.Ct. 1814, 1822, 104 L.Ed.2d 318] (1989). A petition must demonstrate the lower court committed an extraordinary act, such as the usurpation of the judicial power. *Id.* (citations omitted). "To ensure that mandamus remains an extraordinary remedy, petitioners must show that they lack adequate alternative means to obtain the relief they seek . . . and carry 'the burden of showing that [their] right to issuance of the writ is 'clear and indisputable.'" *Id.* Extraordinary writs cannot be used as substitutes for an appeal. *Id.*; *Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 380–381 [124 S.Ct. 2576, 2587, 159 L.Ed.2d 459] (2004) (a petition for a writ of

mandamus cannot be used as a substitute for the regular appeals process).

Based upon the foregoing, it is improper for Plaintiff to attempt to challenge the merits of the Court of Appeals' decision by way of a petition for an extraordinary writ of mandamus. Thus, the petition should be denied.

CONCLUSION

For the foregoing reasons, the petition for a writ of mandamus should be denied.

DATED: October 13, 2020

Respectfully submitted,

HURRELL CANTRALL LLP

/s/ Melinda Cantrall

By: _____

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