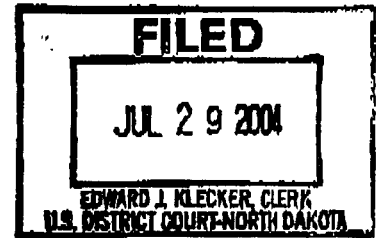


IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHEASTERN DIVISION



Martin Wisnatsky,
Plaintiff,

vs.

Laura Rovner, Director,
Clinical Education Program,
University of North Dakota School
of Law, in her individual and
official capacity,
Defendant.

ORDER GRANTING JUDGMENT
ON THE PLEADINGS

Case No. A2-04-001

Before the Court is a motion by Defendant for judgment on the pleadings filed pursuant to Fed.R.Civ.P. 12(e) (doc. #7). Plaintiff has filed a brief in opposition (doc. #22). The Court has also reviewed *Amicus Curiae* briefs filed by the Clinical Legal Education Association and the Society of American Law Teachers as well as The Association of American Law Schools (docs. # 25 and #26).

Summary of Decision

Plaintiff has failed to show his constitutional rights were infringed upon when his request for legal assistance was denied by Defendant because of insufficient resources and ethical considerations. Accordingly, Defendant's motion for judgment on the pleadings is **GRANTED**.

Background

On October 29, 2003, Plaintiff made a written request to the Clinical Education Program ("Clinic") at the University of North Dakota School of Law for assistance in a lawsuit challenging, as an unconstitutional establishment of religion, the statue of the goddess Themis perched atop the Grand Forks County Courthouse. On behalf of the Clinic, Laura Rovner declined to represent Plaintiff by letter dated November 12, 2003. Plaintiff brings this lawsuit

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under 42 U.S.C. § 1983, alleging Defendant Rovner's refusal to represent him violates his right to free speech and equal protection.

Legal Discussion

In analyzing a Fed.R.Civ.P.12(c) motion to dismiss, the Court accepts all factual allegations set out in the complaint as true and construes the complaint in a light most favorable to the plaintiff. Faibisch v. University of Minnesota, 304 F.3d 797, 803 (8th Cir. 2002). "Judgment on the pleadings is appropriate where no material issue of fact remains to be resolved and the movant is entitled to judgment as a matter of law." Id. The court may consider, in addition to the pleadings, materials embraced by the pleadings and materials that are part of the public record. Porous Media Corp. v. Pall Corp., 186 F.3d 1077, 1079 (8th Cir. 1999); Parnes v. Gateway 2000, Inc., 122 F.3d 539, 546 n.7 (8th Cir. 1997); GFF Corp. v. Associated Wholesale Grocers, Inc., 130 F.3d 1381, 1384 (10th Cir. 1997); Nat'l Ass'n of Pharmaceutical Mfrs. Inc. v. Averst Laboratories, 850 F.2d 904, 910 n.3 (2d 1988). Because Defendant's letter dated November 12, 2003, is referenced in Plaintiff's complaint, in part, and is central to Plaintiff's claim, the Court is entitled to consider the letter in its entirety without converting the motion to dismiss into a motion for summary judgment. Id. Further, the articles and commentary referenced in Plaintiff's Amended Complaint and appearing in the Grand Forks Herald are matters of public record which the Court can properly consider on a motion to dismiss. Stahl v. United States Dep't of Agriculture, 327 F.3d 697, 700 (8th Cir. 2003); Porous Media Corp., 186 F.3d at 1079.

Plaintiff alleges Defendant's refusal to represent him is based on his public criticism of the Clinic and its director, in violation of his constitutional right to free speech and equal protection. The Clinic has responded to Plaintiff's claims, asserting it is an education program,

not a legal aid office; therefore, representation by the Clinic does not constitute a governmental benefit. Further, Defendant contends Plaintiff's request for representation was permissibly denied because of insufficient resources and ethical obligations.

In Plaintiff's Amended Complaint, he incorporated by reference only part of the letter he received from Laura Rovner rejecting his request for legal assistance. Although Plaintiff contends he was denied legal representation in violation of his rights to free speech and equal protection, the letter cites insufficient resources as the primary reason for the Clinic's decision. In the letter, Rovner informed Plaintiff that "due to the high demand for [the Clinic's] legal services coupled with [the] current caseload and limited resources, the [Clinic] is unable to accept any new cases at this time." Plaintiff concedes in his brief and it is apparent by the application process at the Clinic that not every applicant for legal services at the Clinic will receive assistance. Plaintiff, seeking representation for a civil rights claim, is a possible recipient of services from the Clinic, but it does not follow that there is a right to such assistance, especially when the Clinic is restricted by finite resources. See Nabke v. United States Dep't of Housing & Urban Dev., 520 F.Supp. 5, 8 (W.D. Mich. 1981) (noting that the plaintiff is one of a class of possible beneficiaries for assistance from legal aid, but there is no federal right to such assistance where there is an allocation of inadequate resources). Thus, the Clinic was not obligated to accept Plaintiff's request for legal assistance.

The Clinic also noted in the letter that even if its lack of resources did not preclude the Clinic from representing Plaintiff, it had ethical concerns about accepting Plaintiff's case. The letter explained that the ethical concerns arose because Plaintiff has engaged in "persistent and antagonistic" actions against the Clinic and its faculty which would adversely affect its ability to establish an effective attorney-client relationship. These actions set out by Plaintiff in the

Amended Complaint include a phone conversation, public letters, and commentary in the Grand Forks Herald.

Prior to requesting the Clinic's assistance, Plaintiff wrote a letter, which appeared in the Grand Forks Herald, criticizing the Clinic's involvement in a case seeking removal of the Ten Commandments monument located in front of City Hall (Def. Exh. 4). Nearly a year later, Plaintiff wrote the letter at issue in this case to the Clinic seeking assistance "in developing a lawsuit on the same basis as that granted to the atheistic North Dakota State University professors" in the Ten Commandments case (Def. Exh. 6). Plaintiff provided a copy of his letter to the Grand Forks Herald, which featured a story on Plaintiff's request for legal representation entitled "Goddess gotcha." (Def. Exh. 7). When contacted by the Grand Forks Herald for comment, Rovner stated that she had no comment because she just opened Plaintiff's letter. The next day another story ran in the Grand Forks Herald, in which Rovner said she would treat Plaintiff's request as she would any other request for assistance (Def. Exh. 8). A few days later, prior to receiving a response from the Clinic, Plaintiff submitted his own editorial to the Herald in which he was again critical of the Clinic's representation of the opponents of the Ten Commandments monument and stated: "[t]he suspicion therefore arises that Rovner is abusing her position as head of the Clinical Education Program at UND to further her own political agenda." (Def. Exh. 10).

Fundamental to the attorney-client relationship is basic trust and confidence. See Wall v. Lewis, 393 N.W.2d 758, 762-63 (N.D. 1986) (quoting Siegel v. Kranis, 288 N.Y.S.2d 831 (N.Y. 1968)). Trust and confidence enable an attorney and a client to form a relationship in which the client confides in the attorney and the attorney zealously represents the client's interests. An attorney is supposed to be the client's zealous advocate and a hostile attitude

toward a client can be hard to overlook. See Condren v. Grace, 783 F.Supp. 178, 186 (S.D.N.Y. 1992). Plaintiff's public criticism of some of the Clinic's clients, the Clinic itself, and Laura Rovner personally is indicative of the lack of trust and confidence Plaintiff has in the Clinic and the Clinic would have in Plaintiff. Defendant's letter declining Plaintiff's request for representation seeks to convey this point to Plaintiff.


Furthermore, an attorney should not be compelled to represent a client when the attorney believes it would violate the attorney's ethical obligations. Cf. United States v. Oberoi, 331 F.3d 44, 47-48 (2d Cir. 2003). (stating it would be an abuse of discretion not to grant a motion to withdraw if representation will cause a violation of the Code of Professional Responsibility). Based on the circumstances present in this case, the Court finds the alternative basis for denying Plaintiff's request for representation was because of the Clinic's legitimately perceived inability to establish a productive attorney-client relationship with Plaintiff and effectively represent his interests. Accordingly, Defendant is entitled to judgment as a matter of law.

Conclusion

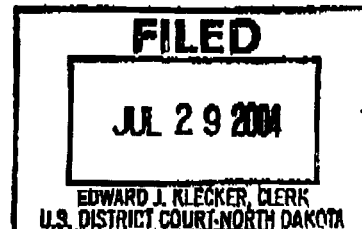
Viewing the Amended Complaint in a light most favorable to Plaintiff, the Court finds no material issues of fact remain to be resolved and Defendant is entitled to judgment as a matter of law. Defendant's motion for judgment on the pleadings is GRANTED.

IT IS SO ORDERED.

Dated this 29th day of July, 2004.


Ralph R. Erickson, District Judge
United States District Court

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JUDGMENT

Pursuant to the Court's Order of the 29th day of July, 2004, in which the Court granted Defendant's motion for judgment on the pleadings, thereby dismissing this case;

IT IS ADJUDGED that this case is **DISMISSED** with prejudice.

Dated this 29th day of July, 2004.

Edward J. Klecker
Clerk

[Signature]
By Deputy Clerk

NOTICE OF ENTRY

Take notice that the original of this
copy was entered in the office of the
clerk of the United States District
Court for the District of North Dakota
on the 29th day of July 2004

EDWARD J. KLECKER, CLERK

By: [Signature]
Deputy