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United States District Court, D. North Dakota,
Northeastern Division.

Martin WISHNATSKY, Plaintiff,

v.

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

No. A2-04-01.

Sept. 3, 2004.

Martin Wishnatsky, Fargo, ND, pro se.

Douglas Alan Bahr, Attorney General's Office Civil
Litigation, Bismarck, ND, for Defendant.

Memorandum Opinion and Order Denying
Plaintiff's Motion to Alter or Amend the Judgment

ERICKSON, J.

*1 Before the Court is a motion by Plaintiff to alter or amend the judgment under Fed.R.Civ.P. 59(e) (doc. # 31). Defendant has filed a brief in opposition. In Plaintiff's motion, he requests the Court to find that it "misperceived the law in this matter, and thus erroneously entered a judgment of dismissal." Plaintiff clarified in his reply brief that his request is not for reconsideration, but to move for correction of a manifest error of law. The manifest error of law asserted by Plaintiff is that the Court resolved disputed facts in favor of the movant on a motion to dismiss. For the reasons explained below, Plaintiff's motion is denied.

"Federal Rule of Civil Procedure 59(e) was adopted to clarify a district court's power to correct its own mistakes in the time period immediately following entry of judgment." *Innovative Home Health Care, Inc. v. P.T.-O.T. Assoc. of the Black Hills*, 141 F.3d 1284, 1286 (8th Cir.1998) (citations omitted). The purpose of a Rule 59(e) motion is to correct "manifest errors of law or fact or to present newly discovered evidence." *Id.* (quotation and citations omitted).

Plaintiff argues the Court resolved disputed facts in Defendant's favor and erroneously entered a judgment of dismissal. Plaintiff's Amended

Complaint alleges Defendant violated his constitutional rights by refusing to provide legal assistance to him. The letter by Defendant declining to accept Plaintiff's case cites insufficient resources as the primary reason for its refusal to represent Plaintiff and also notes its ethical obligations under the North Dakota Rules of Professional Conduct preclude it from accepting Plaintiff's request. The Court found in its previous order and Plaintiff concedes in his motion to alter or amend judgment that these reasons are constitutionally permissible.

Nevertheless, Plaintiff contends whether or not Defendant "dressed its prejudices in the garments of professional responsibility is a fact question which cannot be resolved on a motion to dismiss. Plaintiff argues the Court erred because it is irrelevant whether there might have been otherwise valid reasons for denial of representation since Defendant cannot refuse representation simply due to irritation or aggravation with a public critic.

Plaintiff asserts Defendant declined to represent him in retaliation for exercising his First Amendment right. In order to prove a claim for retaliation under the First Amendment, Plaintiff must establish the following elements: (1) the plaintiff was engaged in a constitutionally protected activity; (2) the defendant's adverse action caused the plaintiff to suffer an injury that would "likely chill a person of ordinary firmness from continuing to engage in that activity;" and (3) the adverse action was motivated, at least in part, as a response to the exercise of the plaintiff's constitutional rights. *Bloch v. Ribar*, 156 F.3d 673, 678 (8th Cir.1998).

Even assuming that Plaintiff engaged in a constitutionally protected activity-he exercised his First Amendment right to publicly criticize the Clinic-and that Plaintiff suffered adverse action as a result-he was then denied legal representation by the Clinic, Plaintiff has not established or even alleged he suffered any injury likely to chill a person of ordinary firmness from continuing to engage in that activity. The ordinary firmness test "is designed to weed out trivial matters from those deserving the time of the courts as real and substantial violations of the First Amendment." *Garcia v. City of Trenton, Mo.*, 348 F.3d 726, 729 (8th Cir.2003). Moreover, although the test is an objective one, the

question of how Plaintiff himself reacted might be evidence of what a reasonable person would have done. *Id.*

*2 Not all adverse actions taken in retaliation for a citizen's exercise of his or her free speech rights are sufficient to support a cause of action under § 1983. *See Carroll v. Pfeffer*, 262 F.3d 847, 850 (8th Cir.2001) (finding that although the alleged retaliatory conduct was unprofessional and inappropriate, it does not rise to the level of a constitutional violation). In this case, Plaintiff has not alleged any injury or even a curtailment of his First Amendment right as a result of the alleged adverse action. In fact, the record reflects Plaintiff continued to speak out following Defendant's refusal to represent Plaintiff. Further, Plaintiff's outrage and inconvenience of finding a different attorney to represent him, if he chooses to pursue his cause of action, would not chill a person of ordinary firmness from continuing to speak out and did not chill Plaintiff's speech. Thus, Plaintiff's claim fails as a matter of law.

Viewing all of Plaintiff's allegations in a light most favorable to him, the Court finds no merit in Plaintiff's motion to alter or amend the judgment. For the foregoing reasons, Plaintiff's motion to alter or amend the judgment is DENIED.

IT IS SO ORDERED.

D.N.D.,2004.
Wishnatsky v. Rovner
Not Reported in F.Supp.2d, 2004 WL 2236415
(D.N.D.)

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. 2:04CV00001 (Docket) (Jan. 05, 2004)

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