
NO. SC87360

SUPREME COURT OF MISSOURI

MILDRED JAMISON, et al.,

Respondents,

v.

**STATE OF MISSOURI,
DEPARTMENT OF SOCIAL SERVICES,
DIVISION OF FAMILY SERVICES**

Appellants.

**Appeal from the Circuit Court of Cole County,
The Honorable Richard G. Callahan, Judge**

APPELLANTS= REPLY BRIEF

**JEREMIAH W. (JAY) NIXON
Attorney General**

**JOEL E. ANDERSON
Missouri Bar No. 40962
Assistant Attorney General
Joel.Anderson@ago.mo.gov
P. O. Box 899
Jefferson City, MO 65102-0899
(573) 751-3321**

**ATTORNEYS FOR APPELLANTS
DEPARTMENT OF SOCIAL SERVICES,
DIVISION OF FAMILY SERVICES**

TABLE OF CONTENTS

TABLE OF AUTHORITIES 3

ARGUMENT..... 4

I. Respondents fail to satisfy the Astigma plus@ test for due process protection..... 5

II. Chapter 210 exceeds any process that may be required by the due process
clause 7

Timeliness..... 8

Rules of Evidence and Procedure..... 10

CONCLUSION..... 12

CERTIFICATE OF COMPLIANCE AND SERVICE 14

TABLE OF AUTHORITIES

CASES

Call v. Heard, 925 S.W.2d 840 (Mo. banc 1996)..... 6

Cleveland Board of Educ. v. Loudermill, 470 U.S. 532 (1985) 8, 9

Dupuy v. Samuels, 397 F.3d 493 (7th Cir. 2005) 5

Goldberg v. Kelly, 397 U.S. 254 (1970)..... 8, 11

In re Preisendorfer, 719 A.2d 590 (N.H. 1998) 11, 12

Valmonte v. Bane, 18 F.3d 992 (2nd Cir. 1994) 5, 8

STATUTES AND OTHER AUTHORITIES

' 210.110(14) 9

ARGUMENT

Respondents' brief offers nothing that is new. The controlling federal law is cited in both briefs, although Respondents include a number of citations to decisions from other state courts that do not address Missouri's statutes or Missouri's constitution. With respect to the federal constitutional issues, Respondents simply obfuscate by first acknowledging the applicability of well-established U.S. Supreme Court principles, but then drawing conclusions that are plainly inapposite to those rulings. Respondents seek to have this Court declare that inclusion of a name on the abuse and neglect registry that is made available to employers in the child care field, in and of itself, infringes on a protected property or liberty interest. Respondents make this request while tacitly admitting that U.S. Supreme Court decisions make clear that government imposed stigma or defamation is not sufficient to implicate the due process clause. Respondents' Brief, pp. 21-23. Respondents then insist that the full range of due process procedures must be made available to a person before her name is placed in the registry, even though it is undisputed that no alleged perpetrator of child abuse or neglect is required to suffer the kind of deprivations that might require such processes (such as welfare recipients). In sum, Respondents simply conclude that government defamation is sufficient to infringe on a protected right, in spite of U.S. Supreme Court rulings to the

contrary, and that this right is compelling, requiring the full range of adversarial process.

I. Respondents fail to satisfy the Astigma plus@ test for due process protection.

Respondents= primary argument appears to be that the Aplus@ prong of the test for due process protection may be satisfied if the defamation or stigma is sufficiently strong, citing *Valmonte v. Bane*, 18 F.3d 992 (2nd Cir. 1994) and *Dupuy v. Samuels*, 397 F.3d 493 (7th Cir. 2005). But neither these cases, nor any other, make such an assertion. The only clear feature of Missouri law with which Respondents take issue is the fact that the list is Adisseminated@ to certain employers. But the fact that this presumably negative information (i.e., being on a list of persons against whom a probable cause finding has been made relating to child abuse and neglect) is provided to certain employers does not move the matter beyond a stigma. And even if there is an intent to discourage employers from hiring individuals on the list, such an intent is purely hypothetical: It is not borne out by any provision of law that burdens an employer who chooses to hire that individual.

The lack of a burden to a prospective (or existing) employer is what distinguishes Missouri law from the laws of states that have had full appellate review and discussion of their registry laws.¹ These differences are fully discussed in Appellants= opening brief (pp. 26-31).

¹New York and Illinois, specifically. These were the statutes discussed in the *Valmonte* and *Dupuy* decisions.

Respondents offer oneBand only oneBargument that Missouri law goes beyond stigmatizing those on the list. Respondents cite ' 210.025.3(1) as an example of a burden on employment. That section deals with reimbursement for child care expenses that can be submitted to and paid by the government. An applicant for such funds may be denied those funds if the applicant or an adult in the home has had a probable cause finding of child abuse. But Respondents never claimed any damage under this provision, or even its applicability to them. Having never raised this provision of the statute at the trial court, Respondents have not preserved it for appeal. *Call v. Heard*, 925 S.W.2d 840, 847 (Mo. banc 1996). This failure is not a mere technicality: This provision is closely tied to federal law which may or may not affect employment. By its terms, this provision is not simply a feature of the Missouri Central Registry.² It applies to persons against whom a probable cause finding has been made. But Respondents explicitly do not complain about the investigative finding itself. They complain about their names being in the registry and available to potential employers prior to a full due process hearing. If they now complain about an agency finding whether available to employers or not, then they are complaining about more on appeal than they raised in the trial court. They cannot do this.

² Additionally, this statute does not necessarily refer only to employers or employees.

In spite of the fact that the U.S. Supreme Court has ruled and reiterated that something akin to an alteration of a legal status must accompany government inflicted defamation in order to involve the Due Process Clause, Respondents= argument leads to the absurd conclusion that this "something more" can be just about anything. Respondents= interpretation of law would require due process protection to all government imposed or inflicted defamation so long as the ill effect involved employment. This is an untenable reading of the law.

II. Chapter 210 exceeds any process that may be required by the due process clause.

Respondents do not offer anything new in their discussion of the process that is due, assuming that there is a protected right at stake. In fact, Respondents discuss the same cases as Appellant, but draw different conclusions from them.

Although the parties disagree as to whether there is any protected right at stake, such a right must be presumed for the purposes of a discussion of the process that would be due. But Respondents go much further than assuming a protected right for the purposes of discussion: Respondents= errorBand the error of the court belowBis to assume, without discussion, not only the existence of the right, but to also assume that the right at stake amounts to a compelling interest. Respondents devote 23 pages of text to an analysis of what process they believe is due when the liberty or property interest at stake is compelling.

But even if it is assumed that a protected right is at stake, the undisputed fact

remains that Missouri law does not compel the discharge of an employee, the refusal to hire an employee, or special actions to be taken by an employer in order to hire or retain an individual whose name appears on the central registry. Accordingly, the alleged deprivation resulting from Missouri law, not social prejudice or convention is not severe, or necessarily even significant. While some employers might take action against an employee whose name appears in the central registry, and in some instances such action might include an outright termination from employment, these are the negative effects from defamation or injury to reputation that are not cognizable under the Due Process Clause. These would normally include the impact that defamation might have on job prospects[.]@ *Valmonte*, 18 F.3d at 1001. Even if it is assumed that some right is at stake, Respondents have failed to demonstrate that it is a compelling one, and cannot rely upon cases that address important survival issues like the actual loss of a job (*Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532 (1985)), or the loss of government subsistence benefits (*Goldberg v. Kelly*, 397 U.S. 254 (1970)); and certainly not the ability to work at all (such as in the case of an imprisoned felon). Therefore, Respondents lengthy discussion of complaints with the process afforded under Missouri law is entirely directed towards showing that Missouri=s pre trial *de novo* process is not akin to a full adversarial hearing. Absent the predicate showing that this is the process that is due, Respondents= complaints are not well taken.

Timeliness

Respondents commence their discussion of Missouri=s process by listing their

issues with the timeliness of the process afforded. Respondents= overarching claim is that the alleged perpetrator is not able to get a meaningful hearing for over 6 months.

Respondents make a number of obvious errors:

First, an alleged perpetrator of child abuse is not only afforded an opportunity to talk directly to the investigator, but the investigator is mandated by statute to consider all available evidence.³ ' 210.110(14). This is similar to an employee who is to be discharged being afforded an opportunity to tell his side of the story before the deprivation. See, e.g., *Cleveland Board of Educ. v. Loudermill*, 470 U.S. 532 (1985).

Second, Respondents claim that six and one-half months pass before an appeal to the CANRB can be made. What Respondents fail to point out is that half of that time consists of periods in which an aggrieved person has to act (the 60 day period in which an alleged perpetrator has to request administrative review, together with the 30 day period

³ Appellants discuss the probable cause standard with regard to the investigation and how that standard affects the process that is later afforded. Respondents disagree, but do not refute Appellants= arguments, so they will not be repeated here. See Appellants= Brief, pp. 37-44.

in which an alleged perpetrator must request a hearing before the CANRB).

Respondents= Brief, p. 38.

More accurately, then, in the three, not six and one-half, months after the initial report, an alleged perpetrator has had an opportunity to be heard by the investigator before a decision is made, and an almost immediate administrative review by the county director, after which a hearing with the CANRB can be requested. And following all of this Areview,@ an alleged perpetrator is afforded a full trial on the merits where the state bears the burden of proof.

Respondents reiterate that their concern is with the defamatory nature of the information, not restrictions the law directly or indirectly places on employment. In their brief, Respondents refer to the Amulti-year time period@ in which a name remains on the registry as a time period in which they are irreparably damagedBnot by their inability to work or to engage in their chosen professionBbut instead by being labeled as Apersons who abuse or neglect children,@ a bell that, according to Respondents, cannot be unrung. Respondents= Brief, p. 40. In other words, Respondents= complain of the effects of defamation.

Rules of Evidence and Procedure

Similarly to the previous arguments offered by Respondents, their comments relating to the degree to which Missouri Rules of Civil Procedure are not followed prior to the *de novo* trial assumes that the right at stake is compelling, a showing that Respondents have not made. Unlike the welfare recipients and beneficiaries of disability

payments, the losses Respondents claim are mere possibilities, or potential deprivations under other statutes that provide process of their own.⁴

Respondents= complaints about procedures related to the *de novo* trial, like Respondents= other arguments, cite to rules that they cannot show are properly applied to persons in situations similar to that of Respondents. For example, Respondents cite *Goldberg v. Kelly*, 397 U.S. 254 (1970) for the proposition that cross-examination of all witnesses is essential. As discussed in Appellants= Brief (p. 48), the plaintiff in *Goldberg* was a welfare recipient, and the Court correctly concluded that the risk of erroneous deprivation was very serious.

Respondents also devote much space to the probable cause standard as used in the investigation. Obviously, the trial *de novo* would proceed according to the rules of civil procedure where a preponderance of the evidence would apply

⁴These Apossible@ losses are not mandated by Chapter 210. And to the extent that Respondents may suffer some loss with their current employment, they are already provided with process as outlined in Appellants= discussion in its Appellants= Brief on pages 30-36.

as a matter of course. But Respondents urge that a hearing under a preponderance standard should precede placement of a name on the list. Appellants= opening brief fully discussed this issue along with the principal cases cited by Respondents. Appellants= Brief, pp. 37-44. A comparison of the two discussions would simply be repetitive. For example, both briefs discuss *In re Preisendorfer*, 719 A.2d 590 (N.H. 1998). Respondents offer that case for the proposition that a pre-placement hearing must use a preponderance of the evidence standard. Respondents= Brief, p. 54-55. But Respondents failed to note a critical part of that court=s reasoning: The preponderance standard was constitutionally necessary Awhere that individual would be *excluded* from working in his or her profession due to that

listing[.]@ *Preisendorfer*, 719 A.2d at 595 (emphasis added). This is simply not true in Missouri.

As demonstrated in Appellants' opening brief, Missouri's statute is different from those statutes in the states in which this issue has been already considered. It is perhaps unfortunate that there is little guidance from other state courts, but Respondents have failed to show that Missouri's system for protecting children does not afford proper process. Indeed, Missouri provides very swift process, which is not a full blown evidentiary hearing in its initial stages, but is far from lacking given the fact the Missouri law does not mandate penalties for persons in the registry. Missouri provides more process than is due.

CONCLUSION

The decision of the trial court below should be reversed.

Respectfully submitted,

JEREMIAH W. (JAY) NIXON
Attorney General

JOEL E. ANDERSON
Missouri Bar No. 40962
Assistant Attorney General

P. O. Box 899
Jefferson City, MO 65102-0899
(573) 751-3321
(573) 751-9456 Facsimile

ATTORNEYS FOR APPELLANTS
DEPARTMENT OF SOCIAL SERVICES,
DIVISION OF FAMILY SERVICES

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court rule 84.06(b) and contains 2,286 words, excluding the cover, this certification, as determined by WordPerfect 9 software; and,

2. That the attached brief includes all information required by Supreme Court Rule 55.03; and,

3. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and,

4. That a true and correct copy of the foregoing brief, and a floppy disk containing a copy of this brief, were mailed, this 3rd day of July, 2006, to:

, Suite 200
05

JOEL E. ANDERSON
Assistant Attorney General