United States Court of Appeals
For the First Circuit

No. 15-2079

ROBERT L. COUSINS; JUDY A. COUSINS,

Plaintiffs - Appellants,

v.

KEITH HIGGINS, Chief, Tremont Fire Department; HEATH HIGGINS, Captain; TADD JEWETT, Assistant Chief; MATTHEW TETREAULT; MATTHEW LINDSLEY,

Defendants - Appellees,

DUDLEY PORIER, Lieutenant; JAMES LAPRADE; DAVID KELLY; WILLIAM WEIR; TRACY PATTON; WAYNE PATTON; COLTON SANBORN; THOMAS CHISOLM; SAMUEL CHISOLM; HUGH GILLEY, JR.; JOHN DOE 1; JOHN DOE 2; JOHN DOE 3; JOHN DOE 4; JOHN DOE 5,

Defendants.

Before

Howard, Chief Judge,
Torruella and Thompson, Circuit Judges.

JUDGMENT

Entered: September 7, 2016

The appellants challenge the district court's dismissal of their 42 U.S.C. § 1983 claims against municipal firefighters and its denial of their request to file a proposed amended complaint. We review the district court's dismissal decision de novo, see Guerra-Delgado v. Popular, Inc., 774 F.3d 776, 780 (1st Cir. 2014), cert. denied, 135 S. Ct. 2380 (6/1/15), and its denial of leave to amend for abuse of discretion. See Chiang v. Skeirik, 582 F.3d 238, 244 (1st Cir. 2009). We affirm in part and vacate in part for the following reasons.

1. The district court supportably dismissed the appellants' First Amendment claim on the ground that their fact allegations did not indicate that the defendants had acted under color of law when they took the appellants' sign critical of the fire department. See Saldivar v. Racine, 818

F.3d 14, 18 (1st Cir. 2016) (§ 1983 "provides a cause of action when an individual, acting under color of state law, deprives a person of constitutional rights"). On appeal, the appellants present highly generalized arguments that fail to show that the court's ruling was erroneous.

2. In view of the appellants' allegations, we conclude that the district court's reliance on Jackson v. Byrne, 738 F.2d 1443, 1446 (7th Cir. 1984) (the Constitution "creates no positive entitlement to fire protection"), in dismissing the appellants' substantive due process claim was misplaced. The appellants claimed that, due solely to personal malice, the defendant firefighters had purposely fought the fire on the appellants' property in a manner that would ensure its complete destruction. The appellants alleged that before the fire, the fire captain defendant had stated several times that they would let the appellants' property burn if it caught fire; that the day after the fire, the fire chief had told one firefighter that they would have to find another way to run the appellants out of town; and that while fighting the fire, the defendants had avoided putting water directly onto the fire, allegations that suffice to allege a plausible substantive due process claim. See Meléndez-García v. Sánchez, 629 F.3d 25, 37 (1st Cir. 2010) (substantive due process claim requires "stunning evidence of arbitrariness and caprice that extends beyond mere violations of state law, even violations resulting from bad faith to something more egregious and more extreme").

3. Furthermore, if the appellants, who alleged that they had been treated less favorably than other municipal taxpayers whose property had caught on fire, and who had called upon the fire department to extinguish it, can prove that the defendants intentionally failed to fight the fire on their property effectively due solely to personal malice, and without reference to any distinguishing characteristic of their property or fire, they would appear to satisfy this court's requirement that equal protection claimants show "substantial similarity" between them and their comparators. See Cordi-Allen v. Conlon, 494 F.3d 245, 250-51 (1st Cir. 2007) ("the proponent of the equal protection violation must show that the parties with whom he seeks to be compared have engaged in the same activity vis-à-vis the government entity without such distinguishing or mitigating circumstances as would render the comparison inutile"); cf. Geinosky v. City of Chicago, 675 F.3d 743, 747-49 (7th Cir. 2012) (it makes no sense to require the plaintiff to identify a specific similarly situated individual who was treated differently if the facts alleged show such an extraordinary pattern of baseless and discriminatory harassment that it is "highly unlikely to have been a product of random mistakes").

4. We also find that the district court prematurely relied on the ruling in Engquist v. Oregon Dep't of Agric., 553 U.S. 591 (2008), as an alternative basis for denying the appellants' equal protection claim. See Hanes v. Zurick, 578 F.3d 491, 495 (7th Cir. 2009) (rejecting the conclusory ruling in Flowers v. City of Minneapolis, 558 F.3d 794, 799–800 (8th Cir. 2009), and concluding that when a citizen complains about maliciously motivated unequal treatment, "it is not possible to dismiss a complaint based on broad generalities").

To avoid confusion whether the defendants are to respond to the allegations in the original complaint, or to the allegations in the proposed amended complaint, on remand the district court may wish to require the Cousinses to file a single amended complaint, in which they conclusively set out the specific fact allegations on which their claims against the defendants depend.

Affirmed in part and vacated and remanded in part for the reasons given herein.

By the Court:

/s/ Margaret Carter, Clerk

cc:
Robert Cousins
Judy Cousins
Robert Bower, Jr.
Devin Deane

Honorable D. Brock Hornby
Christa K. Berry, Clerk, USDC-MEBA