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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Mark Reed,

Plaintiff,

v.

Helen Purcell, et al.,

Defendants.

No. CV 10-2324-PHX-JAT

MOTION TO DISMISS

Pursuant to Fed. R. Civ. P. 12(b)(6), defendants Helen Purcell, Karen Osborne and Maricopa County (collectively, "Defendants") move to dismiss plaintiff Mark Reed's claims for damages because plaintiff was not damaged and the individual Defendants are entitled to qualified immunity. This Motion is supported by the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

Preliminary Statement

Plaintiff's damages claims in this § 1983 action are subject to prompt dismissal for two fundamental reasons. First, Reed claimed to be damaged prematurely, and the harm alleged in his Complaint never came to pass. Specifically, based on this Court's November 1, 2010 Order, plaintiff was allowed to wear a shirt bearing the message "Tea

Party, Principles not Politicians" into his polling place on November 2, 2010. Second, the individual Defendants, Maricopa County Recorder Helen Purcell and Elections Director Karen Osborne (the "Elections Officials") are entitled to qualified immunity because they did not "violate clearly established constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In particular, in the days leading up to the 2010 general election, it was not clearly established that enforcing Arizona's prohibition on display of "political or electioneering materials" within 75 feet of a polling place with respect to "Tea Party" apparel would violate plaintiff's First or Fourteenth Amendment rights. Consequently, the Elections Officials acted reasonably when they instructed election day board workers to request voters remove or cover up Tea Party and other political apparel.

For these reasons, as discussed more fully below, plaintiff's claims for compensatory and punitive damages should be dismissed.

Factual and Procedural Background

Arizona law has long prohibited electioneering in and near polling places. *See* A.R.S. §§ 16-515(A), 16-1018 (setting the 75-foot limit); *see also* 1993 Ariz. Legis. Serv. ch. 98, § 68 (amending A.R.S. § 16-1018 to reduce electioneering limit from 150 feet to 75 feet). In 2006, the Legislature amended A.R.S. § 16-515(A) to add the viewpoint-neutral prohibition of "political and electioneering materials" within 75 feet of the entrance to a polling place. In accordance with their duty to enforce Arizona election laws, Defendants have implemented this statute for years.

As in previous elections, Defendants planned to restrict the display of any political or electioneering material within 75 feet of a polling place on November 2, 2010, in compliance with A.R.S. § 16-515(A) and the Secretary of State's Procedures Manual. [*See* Doc. 13-1, Osborne Aff., ¶ 2-3, Ex. 1-2] This included asking voters not to wear

apparel bearing political or electioneering messages to polling places. Accordingly, Defendants trained election day board workers that voters are not permitted to wear into polling places apparel that other voters would view as political or electioneering materials. A.R.S. § 16-515(A).

Because parties, candidates, and issues change from election to election, what constitutes "political or electioneering material" is not static. In view of the meteoric rise of the Tea Party movement in 2010 – nationwide and within Maricopa County – Defendants reasonably determined that Tea Party apparel constituted "political or electioneering materials" falling within the 75-foot prohibition set forth in A.R.S. § 16-515(A). Indeed, though the words "tea party" did not appear on general election ballots in Maricopa County, several non-partisan general election candidates were widely identified as "Tea Party" candidates. [*See* Osborne Aff., ¶ 6, Ex. 3] Defendants also determined that apparel that could be viewed as supportive of other items on the ballot – such as apparel bearing an image of a marijuana leaf – or exhorted voters to vote like Jesus would should not be permitted at the polls. [Compl. ¶¶ 26, 29]

With just two business days before the 2010 general election, plaintiff filed this lawsuit, seeking prospective injunctive relief, and compensatory and punitive damages, although his claims arise from a state law that has been in effect since 2006 that has been enforced without incident for the 19 elections that had occurred since its enactment. *See* 2006 Ariz. Legis. Serv. ch. 44, § 9. [Osborne Aff. ¶ 2] Moreover, plaintiff seeks damages for a harm that had not occurred when he filed is Complaint.

On November 1, 2010, the Court conducted a hearing on plaintiff's Motion for Temporary Restraining Order. After the hearing, the Court entered an Order (the "TRO") that applied to the election to be conducted the next day. The TRO permitted voters to wear Tea Party shirts or other political apparel, so long as it did "not include express

support for or opposition to: (a) a candidate appearing on the ballot, (b) a proposition appearing on the ballot, and/or (c) a political party on the ballot." [Doc. 15, at 8] In accordance with the TRO, Defendants disseminated the TRO to poll workers and suspended their plans to enforce A.R.S. § 16-515's prohibitions on apparel constituting political or electioneering materials for voters in Maricopa County. Based on plaintiff's representations in his Complaint and to the Court, presumably plaintiff wore his "Tea Party, Principles not Politicians" shirt to his polling place on November 2, 2010 and was permitted to vote while wearing the shirt.

Argument

Government officials are entitled to immunity from damages claims if (1) the facts alleged do not make out a violation of a constitutional right, or (2) the right at issue was not clearly established at the time of the officials' conduct. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001). In determining whether officials are entitled to immunity, a court may consider the these two questions in the order most appropriate for the case at issue. *Pearson v. Callahan*, 129 S. Ct. 808, 821 (2009). Here, regardless of the order in which the Court conducts the qualified immunity analysis, Defendants are entitled to that immunity and plaintiff's damages claims are ripe for dismissal.

I. IN VIEW OF THE NOVEMBER 1, 2010 TEMPORARY RESTRAINING ORDER, PLAINTIFF WAS NOT DAMAGED BY A VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

Plaintiff's Complaint alleged that if denied the opportunity to wear his "Tea Party, Principles not Politicians" shirt into his polling place on election day he would suffer "ongoing injuries, including but not limited to, emotional distress, anguish, and loss of freedom." [Compl. ¶¶ 43, 49, 54] Reed recognized, however, that the alleged harm had not occurred at the time of his Complaint, and there was only a "threat" of such alleged harm. [Id. at ¶¶ 49, 54] Moreover, Reed acknowledged that he had not voted in any

election in Maricopa County, had never been asked to cover or remove any political t-shirt, and therefore had not faced any threat of prosecution. [*See* Doc. 4-1, Declaration of M. Reed in Support of Plaintiff's Motion for TRO, ¶¶ 2, 5, 6].

As discussed more fully below, barring Reed from wearing his Tea Party shirt to the polls on November 2 would not have violated his clearly established constitutional rights. However, assuming for purposes of this Motion that he would have been harmed by not being able to express his support for the Tea Party movement at the polls, the TRO entered in this case eliminated the possibility of such harm. On November 1, 2010, this Court entered the TRO, which directed that plaintiff and any other similarly-situated Maricopa County voter be allowed to vote wearing Tea Party apparel. [Doc. 15, at 8] Following this Court's Order, Defendants instructed board workers not to enforce A.R.S. §§ 16-515(A) and -1018(1) against Reed or any other voter on November 2. Consequently, plaintiff suffered no harm compensable by an award of money damages, and his damages claims should be dismissed.

II. THE ELECTIONS OFFICIALS ARE ENTITLED TO IMMUNITY BECAUSE PLAINTIFF HAD NO CLEARLY ESTABLISHED RIGHT TO WEAR POLITICAL APPAREL TO THE POLLS.

Reed's Complaint purports to assert claims for damages under § 1983 against the Elections Officials in their individual and official capacities. In their individual capacities, the damages claims are barred by qualified immunity.[1]

The prohibition on political or electioneering materials within 75 feet of a polling place has been Arizona law since 2006. It has been enforced with respect to voter apparel

[1] Damages claims against the Elections Officials in their official capacity are essentially claims against the state, which are barred by the Eleventh Amendment and cannot be asserted under 42 U.S.C. § 1983. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). Accordingly, the damages claims against the Elections Officials in their official capacities are ripe for dismissal.

by elections officials throughout the state – including Arizona's top elections official, the Secretary of State – without incident in the intervening years. [*See* Osborne Aff., Ex. 1] Until 2010, it had not been challenged in court. As such, it was wholly reasonable for the Elections Officials to continue their previous practice for the 2010 general election.

In considering the applicability of qualified immunity from a § 1983 damages claim, the court must look not to broad constitutional guarantees, but to the specific facts to determine whether plaintiff suffered a violation of a "clearly established" right. *Fogel v. Collins*, 531 F.3d 824, 833 (9th Cir. 2008). Here, the inquiry must focus on whether plaintiff had a right to wear his Tea Party shirt to his polling place on election day, despite Arizona law's prohibition on the display of political or electioneering materials within 75 feet of a polling place. "[T]here must be some parallel or comparable factual pattern to alert an officer that a series of actions would violate an existing constitutional right." *Id.* Here, the Elections Officials were not aware of such a parallel or comparable fact pattern. In fact, existing authority from the Supreme Court and many other courts supports the constitutionality of their actions to enforce A.R.S. § 16-515.

In *Burson v. Freeman*, 504 U.S. 191, 193-94 (1992), the Supreme Court rejected a First Amendment challenge to a Tennessee law that barred "display of campaign posters, signs or other campaign materials" within 100 feet of a polling place. The Court upheld the law, even though it considered the area outside polling places to be "quintessential public forums," where restrictions on speech are the least permissible. *Id.* at 196. The Court stated, that "[t]he only way to preserve the secrecy of the ballot is to limit access to the area around the voter. Accordingly, we hold that some restricted zone around the voting area is necessary to secure the State's compelling interest." *Id.* at 207-08.

The Tennessee statute considered in *Burson* and the Arizona statute at issue here are functionally the same, although the Arizona law creates a slightly smaller zone around

polling places. Because Tennessee's statute was not content-neutral, the Court held that it must withstand strict scrutiny. The Court held that the statute was narrowly tailored enough to meet this high level of scrutiny, noting that the Court "has not employed any 'litmus-paper' test that will separate valid from invalid restriction . . . [but] it is sufficient to say that Tennessee is on the constitutional side of that line." *Id.* at 210-11.

Burson dealt only with the area outside of the polling place. Inside the polling place, however, is clearly a nonpublic forum. In *Marlin v. District of Columbia Bd. of Elections and Ethics,* 236 F.3d 716 (D.C. Cir. 2001), for example, the court evaluated the constitutionality of a prohibition on campaign stickers in polling places and found that a polling place is a nonpublic forum. The court reasoned that "[t]he forum here, the interior of a polling place, is neither a traditional public forum nor a government-designated one. It is not available for general public discourse of any sort. The only expressive activity involved is each voter's communication of his own elective choice and this has long been carried out privately – by secret ballot in a restricted space." *Id.* at 719; *see also Burson,* 504 U.S. at 214-15 (Scalia, J., concurring) (stating that Tennessee law was constitutional because polling places and the adjacent area are not traditional public fora). The court concluded that the policy was a "reasonable means of ensuring an orderly and peaceful voting environment, free from the threat of contention or intimidation." *Id.* at 719-20. Other courts, considering analogous restrictions on expressive activity around polling places, have likewise consistently concluded that polling stations are neither traditional nor designated public fora. *See United Food & Commercial Workers Local 1099 v. City of Sidney* 364 F.3d 738, 749-50 (6th Cir. 2004) (parking lots and walkways on schools and private property that led to polling places were nonpublic fora because, by "opening up portions of school and private property for use as polling places on election day, Ohio has not opened up a nontraditional forum for public discourse").

As demonstrated above, Arizona's prohibition on political or electioneering materials within 75 feet of a polling place – areas that are overwhelmingly non-public for a – is constitutionally permissible. However, even if this Court or another court were to later determine that there is a constitutionally significant difference between the term "campaign" in the Tennessee law at issue in *Burson* and "political" in A.R.S. § 16-515 or that Plaintiff's Tea Party shirt is not prohibited in polling places by the law, no such determination had been made when the Elections Officials acted. No court has addressed whether Arizona's prohibition on political materials inside the 75-foot limit is constitutional. Indeed, no court has considered Arizona's prohibition on electioneering around polling places for any reason since 1966. *See City of Phoenix v. Super. Ct.*, 419 P.2d 49 (Ariz. 1966); *Fish v. Redeker,* 411 P.2d 40 (Ariz. Ct. App. 1966).

In view of the foregoing authority, and the absence of factually similar authority declaring the conduct challenged here unconstitutional, the Elections Officials acted reasonably when they sought to enforce A.R.S. § 16-515 to prohibit Tea Party and other political apparel in Maricopa County polling places. *See Fogel*, 531 F.3d at 833 (stating that "in no case had a court held on identical or closely comparable facts that the speech was protected by the First Amendment" and concluding that the officials who arrested plaintiff were immune from suit).

Indeed, in a very similar case, the Ninth Circuit has held that elections officials were entitled to qualified immunity. In *Picray v. Sealock*, 138 F.3d 767, 769 (9th Cir. 1998), Oregon elections officials barred a voter from voting while wearing buttons with derogatory statements about an organization that sponsored a measure on the ballot. Relying on a state law that provided that "[n]o person, within a polling place, shall wear a political badge, button, or other insignia," elections officials asked Picray to remove his buttons before voting. *Id.* (quoting Or. Rev. Stat. § 260.695(4)). Picray refused and was

barred from the polling place and eventually arrested for trespassing. *Id.* In a state court action, the Oregon court of appeals held the anti-campaigning statute violated the Oregon constitution. *Id.* However, in the subsequent § 1983 action, the Ninth Circuit held that the elections officials were entitled to qualified immunity because "no judicial opinion or authoritative construction of the statute . . . indicate[d] it [could not] be enforced by excluding the violator from a polling station . . . [u]nder these circumstances, the individual defendants could have reasonably concluded that they acted lawfully when they barred Picray from the polling station for wearing a campaign button." *Id.* at 771.

It is beyond question that the Tea Party movement is a political movement. As such, a shirt stating: "Tea Party, Principles not Politicians" is political material within the meaning of A.R.S. § 16-515(A), which the Elections Officials were bound to enforce. Because plaintiff's ability to wear such political apparel into a polling place was not a clearly established right when the Elections Officials issued instructions to board workers in advance of the November 2010 general election, the Elections Officials acted reasonably, and the damages claims against them must be dismissed.

Conclusion

For the foregoing reasons, the Court should dismiss Reed's claims for damages.

RESPECTFULLY SUBMITTED this 8th day of December, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of December, 2010, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a notice of Electronic Filing to the following CM/ECF registrants:

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