

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROBERT MULGREW	:	
	:	
Plaintiff,	:	CIVIL ACTION
	:	
vs.	:	NO. 03-CV-5039
	:	
VINCENT J. FUMO, individually	:	
as a Pennsylvania State Senator	:	
	:	
Defendant	:	

MEMORANDUM AND ORDER

JOYNER, J.

June 20, 2005

Defendant has filed a motion to dismiss plaintiff's First Amendment claim and for stay of discovery pending disposition of qualified immunity defense. For the reasons which follow, the motion shall be denied.

Factual Background

According to the allegations set forth in the complaint, Plaintiff was hired to work in Defendant's constituent services office in December 1992. (Compl., ¶ 5). Plaintiff's job responsibilities involved "taking telephone calls and meeting with Defendant's constituents who had questions about state government issues, such as driver licensing." (Id. at ¶ 8). Plaintiff's responsibilities did not include any work relating to Defendant's "legislative agenda," such as advocating for or against pending legislation or assisting Defendant in such activities. (Id. at ¶ 9). Plaintiff never made any "public

appearances where he held himself out to be a representative of Defendant." (Id. at ¶ 10). During the course of his employment, Plaintiff infrequently interacted with Defendant, and neither spoke nor met with Defendant on a regular basis. (Id. at ¶ 11). Defendant did not exercise day-to-day supervision over Plaintiff's work. (Id. at ¶ 12). While employed in Defendant's constituent services office, Plaintiff was "never disciplined or criticized for poor job performance." (Id. at ¶ 12).

On May 13, 2002, in anticipation of the upcoming Pennsylvania gubernatorial primary, Plaintiff and Defendant attended a cocktail party organized by the Philadelphia Democratic Committee. (Id. at ¶¶ 15, 17). When Plaintiff entered the cocktail party, then-gubernatorial candidate Edward Rendell handed Plaintiff a campaign sticker reading "RENDELL GOVERNOR." (Id. at ¶ 18). Subsequent to Plaintiff placing the sticker on his jacket lapel, Defendant approached Plaintiff and demanded that Plaintiff remove the sticker. (Id. at ¶¶ 19, 20). When Plaintiff did not comply with Defendant's demand, Defendant told Plaintiff that his employment in Defendant's office was terminated. (Id. at ¶¶ 21, 22). Defendant terminated Plaintiff solely because Plaintiff did not remove the campaign sticker, and Defendant told several party attendees that Plaintiff was terminated because he would not remove the sticker. (Id. at ¶¶ 23, 25). Defendant terminated Plaintiff with "reckless, willful, and knowing disregard to Plaintiff's constitutional rights to

freedom of speech and expression." (Id. at ¶ 24). Plaintiff's termination proximately caused him "loss of wages, medical insurance, retirement benefits and other forms of remuneration associated with Plaintiff's employment." (Id. at ¶ 29).

Plaintiff instituted this lawsuit on September 8, 2003. Plaintiff's First Cause of Action alleged violations of Plaintiff's rights under the First and Fourteenth Amendments of the United States Constitution, for Defendant's termination of Plaintiff's employment in retaliation for Plaintiff's exercise of protected political speech. (Id. at ¶ 30). Plaintiff's Second Cause of Action asserted state law claims for free speech violations under the Pennsylvania Constitution and intentional infliction of emotional distress. (Id. at ¶¶ 31, 32). On November 7, 2003, Defendant filed a motion to dismiss Plaintiff's Second Cause of Action, pursuant to Fed.R.Civ.P 12(b)(6). On July 29, 2004, the court declined to exercise supplemental jurisdiction and dismissed without prejudice Plaintiff's state constitutional law claims, as the matter raised a novel issue of state law. By agreement of the parties, the court also dismissed Plaintiff's claim for intentional infliction of emotional distress. Following the court's decision on the Motion to Dismiss, Defendant filed an Answer to the Complaint and the court entered an Order governing pre-trial practice, including discovery. Now, Defendant moves to dismiss Plaintiff's First

Cause of Action, arising under the federal Constitution.¹

Moreover, Defendant moves for stay of discovery pending disposition of the qualified immunity defense.

Standards Governing A Rule 12(b)(6) Motion to Dismiss

It has long been the rule that in considering motions to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), the district courts must "accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom." Allah v. Seiverling, 229 F.3d 220, 223 (3d Cir. 2000) (internal quotations omitted); See also Ford v. Schering-Plough Corp., 145 F.3d 601, 604 (3d Cir. 1998). A motion to dismiss may be granted only where the allegations fail to state any claim upon which relief may be granted. See Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997). The inquiry is not whether plaintiff will ultimately prevail in a trial on the merits, but whether they should be afforded an opportunity to offer evidence in support of their claims. In re Rockefeller Ctr. Props., Inc., 311 F.3d 198, 215 (3d Cir. 2002). Dismissal is warranted only "if it is certain that no relief can be granted under any set of facts which could be proved." Klein v. General Nutrition Cos., 186 F.3d 338, 342 (3d Cir. 1999) (internal quotations omitted).

¹ Although the law is unsettled, this Court strongly prefers that, where possible, all Rule 12(b)(6) arguments be filed simultaneously in one Motion to Dismiss. Defendant in this action filed the second Motion to Dismiss nearly a year and a half after filing the first Motion to Dismiss. Moreover, the second Motion to Dismiss occurred after both Defendant's Answer and the Court's Order governing pre-trial practice.

It should be noted that courts are not required to credit bald assertions or legal conclusions improperly alleged in the complaint, and legal conclusions draped in the guise of factual allegations may not benefit from the presumption of truthfulness. In re Rockefeller, 311 F.3d at 236; In re Burlington Coat Factory Secs. Litig., 114 F.3d 1410, 1426 (1997); See also Angstadt v. Midd West Sch. Dist., 377 F.3d 338, 342 (3d Cir. 2004).

Discussion

A. Qualified Immunity Defense

Generally, government officials performing "discretionary functions" are immune from liability for civil damages. Harlow v. Fitzgerald, 457 U.S. 800, 816 (1982). However, an official is not shielded from liability where his conduct violates "clearly established" constitutional or statutory rights of which a "reasonable person" would have known. Id. at 818.

The law in this area is clear. Political belief and association are fundamental rights protected by the First Amendment. See Elrod v. Burns, 427 U.S. 347, 356 (1976). Accordingly, a public employee may "act according to his beliefs" and "associate with others of his political persuasion." Id. The U.S. Supreme Court has held that discharging a public employee solely on the basis of political patronage violates First and Fourteenth Amendment rights to freely associate with the political party and/or candidate of that employee's choice. Id. at 360. Courts consistently reject the argument that

political patronage is needed to insure effective government and the efficiency of public employees. See e.g. Elrod, 427 U.S. at 364. Although political loyalty among employees is necessary to produce optimal implementation of policies sanctioned by the public official, courts have found this goal adequately served by limiting patronage dismissals to "policymaking positions." Id. at 367.

The distinction between a policymaking and non-policymaking position is clear. While courts consider the amount of responsibility delegated to the employee, "the nature of the responsibilities is critical." Id. Even a supervisor is not a policymaker if his responsibilities have "limited and well-defined objectives" that do not involve legislative duties. Id. at 368. Moreover, an at-will employee without "legal entitlement to continued employment" may not be terminated on the basis of political patronage where the employee does not engage in policymaking or policy-enforcement, represent the public official, or regularly interact with the public official. See Rutan v. Republican Party of Ill., 497 U.S. 62, 72 (1990) (finding First Amendment rights violated where public employees were denied employment, transfers, and promotions due to their political beliefs); Elrod, 427 U.S. at 359-60 (holding that non-civil service employees may not be discharged solely due to their political associations).

When the law is clearly established, "the immunity defense

ordinarily should fail, since a reasonably competent official should know the law governing his conduct." Harlow, 457 U.S. at 818-19. Moreover, the boundaries of qualified immunity are defined objectively and consequently provide "no license to lawless conduct." Id. at 819. Therefore, a public official will not receive qualified immunity where he "knew or reasonably should have known that the action he took . . . would violate the constitutional rights of the [plaintiff]." Id. at 815 (quoting Wood v. Strickland, 420 U.S. 308, 322 (1975)). Because clearly established law finds it unconstitutional to discharge non-policymaking public employees for purely political reasons, Defendant in this action should have known the illegality of his conduct and therefore is not granted qualified immunity.

B. First Amendment Claim

Accepting as true all facts alleged in Plaintiff's Complaint, Plaintiff in this action states a valid claim for violation of First Amendment rights. To demonstrate a First Amendment violation, Plaintiff must prove that he was (1) a non-policymaking public employee, (2) engaged in protected conduct such as maintaining an affiliation with a particular political candidate, and (3) fired primarily due to his political association. DeFiore v. Vignola, 857 F. Supp. 439, 443 (E.D. Pa. 1994) (citing Asko v. Bartle, 762 F. Supp. 1229, 1231 (E.D. Pa. 1991)). Plaintiff in this action alleges that he was a non-policymaking employee who rarely interacted with Defendant, never

made public appearances on behalf of Defendant, and did not perform work related to Defendant's legislative agenda. (Compl., ¶¶ 9-11). Moreover, Plaintiff alleges that he was engaged in protected conduct by wearing the "RENDELL GOVERNOR" sticker. (Id. at ¶¶ 18, 30). Finally, Plaintiff alleges that he was discharged solely because he did not remove the campaign sticker. (Id. at ¶ 23). Therefore, Plaintiff's First Amendment claim is valid, and Defendant's Motion to Dismiss is Denied.

An order follows.

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VINCENT J. FUMO, individually	:	
as a Pennsylvania State Senator	:	
	:	
Defendant	:	

ORDER

AND NOW, this 20th day of June, 2005, upon consideration of Defendant Vincent J. Fumo's Motion to Dismiss Plaintiff's First Amendment Claim and for Stay of Discovery Pending Disposition of Qualified Immunity Defense (Document No. 20), and Plaintiff's response thereto (Document No. 21), it is hereby ORDERED that the Motion is DENIED.

BY THE COURT:

s/J. Curtis Joyner
J. CURTIS JOYNER, J.