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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JOHN BOHMAN AND JUAN DIAZ, Plaintiffs,	)	No. 4-02-CV-70610
vs.	)	
THERESA PETERSEN, DAVID KLINE, KELLY BENNETT, AND MICHAEL MAHAFFEY Defendants.	)	BRIEF IN RESISTANCE TO MOTION FOR SUMMARY JUDGMENT FILED BY DEFENDANTS THERESA PETERSEN and DAVID KLINE

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INTRODUCTION

In this case the Plaintiffs, John Bohman and Juan Diaz, students at Grinnell College, have sued challenging the Iowa Desecration of Flag Statute, Chapter 718A of the Code of Iowa. Specifically, in September 2002, the two defendant police officers came to the dorm room of the Plaintiffs who at the time were displaying an American flag upside down out their window as a political protest. The police officers told them that if they didn't take the flag down they would be arrested and prosecuted under Chapter 718A.

Plaintiffs filed this civil rights suit against the police officers and the prosecutors who gave them advice. The Plaintiffs have sought injunctive and declaratory relief in addition to nominal and punitive damages. On December 3, 2002, the Plaintiffs filed for preliminary injunctive relief. At the time of the hearing on that request, the parties reached a temporary non-prosecution agreement. The defendants agreed that during the pendency of the lawsuit they would not arrest or prosecute the Plaintiffs for publicly displaying the flag of the United States in an upside down position. [Appx. 22].

The two Defendant police officers have now filed a Summary Judgment Motion They present two claims. First, they claim they should be immune to any damage action as they relied on the advice of counsel, specifically that of assistant County Attorney Kelly Bennett. Secondly, they argue that the whole suit should be dismissed because there is no live controversy given their agreement (which was only to temporarily suspend enforcement of Ch.718A against only the Plaintiffs, in reference only to such use as Plaintiffs had previously made of the flag [*Id.*).

SUMMARY JUDGMENT STANDARD

The standard for granting summary judgment is firmly established. Federal Rule of Civil Procedure 56 provides that summary judgment is proper only if

> "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Wabun-Inini v. Sessions, 900 F.2d 1234, 1238 (8th Cir.1990)…; Woodsmith Publishing Co. v. Meredith Corp., 904 F.2d 1244, 1247 (8th Cir.1990). {*footnote omitted}*

A court considering a motion for summary judgment must view all the facts in the light most favorable to the non-moving party, and give that party the benefit of all reasonable inferences that can be drawn from the facts. Matsushita v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986) (*quoting* United States v. Diebold, Inc., 369 U.S. 654, 655, 82 S.Ct. 993, 993, 8 L.Ed.2d 176 (1962)); Burk v. Beene, 948 F.2d 489, 492 (8th Cir.1991).

The Eighth Circuit recognizes "that summary judgment is a drastic remedy and must be exercised with extreme care to prevent taking genuine issues of fact away from juries." Wabun-Inini, 900 F.2d at 1238. The Eighth Circuit, however, also follows the principle that "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Id*. (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S.Ct. 2548, 2554- 55, 91 L.Ed.2d 265 (1986)); Hartnagel v. Norman, 953

F.2d 394, 396 (8th Cir.1992).

One question for the Court in connection with this Motion is whether there is any disputed material fact with regard to the issues submitted by Defendant police officers. A second question is whether if you resolve all of those disputed facts in favor Plaintiffs, are the police officers entitled to judgment as a matter of law.

ARGUMENT

I. DEFENDANT POLICE OFFICERS ARE NOT ENTITLED TO QUALIFIED IMMUNITY AS A MATTER OF LAW IN THIS CASE.

A. Qualified Immunity will not Insulate Defendants from Equitable Remedies

Plaintiffs' claims for injunctive and declaratory relief against Officers Petersen and Kline are premised upon most of the same facts as those supporting their claims for damages. However, there is no qualified immunity defense with respect to Plaintiffs' claims for injunctive and declaratory relief. Grantham v. Trickey, 21 F. 3d 289, 295-6 (8th Cir. 1994); Cannon v. City and County of Denver, 998 F.2d 867, 874 (10th Cir. 1993) {"The protesters also seek declaratory and injunctive relief against the officers. Unlike the claim for money damages, there is no qualified immunity to shield the Defendants from claims for these types of relief. …The summary judgment dismissing the constitutional claim is being reversed and on remand the district judge should reconsider the prayer for declaratory and equitable relief with respect to the officers."}

B. General Standards with Regard to Qualified Immunity

In Harlow vs. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L.Ed. 2d 396, (1982) the Supreme Court articulated the standard for qualified immunity, which is an immunity from civil damages. In the Harlow case, the Supreme Court said officials lose their qualified immunity when their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." The Supreme Court found that something was a clearly established right where the contours of the right are "sufficiently clear that a reasonable official would understand that what he is doing violates that right." See also Anderson vs. Crighton, 483 U.S. 635, 640, 107 S. Ct. 3034, 3039 , 97 L. Ed. 2d 523 (1987). Under *Harlow*, a court inquires not into the subjective understandings of the officials, but into what they objectively should have known as "reasonably competent public officials." *Harlow*, 457 U.S. at 818.

C. Constitutional Protection for Hanging a Flag Upside Down was Clearly Established.

The claim for damages in this case is based on the fact that Plaintiffs hung an American flag out their dorm window as a political protest. The Defendants made them take it down. The law was crystal clear in September of 2002 that the behavior of the Plaintiffs was protected by the First Amendment Free Speech Clause. In 1973 the Iowa Supreme Court had decided State vs. Kool, 212 N.W. 2d 518 (Iowa 1973)—holding that the action of hanging an American flag upside down out a window was constitutionally protected. *Kool* involved a prosecution under the very same statute, Section 718A. The only way that the facts of that case differed from the facts of this case is that Kool occurred in Jasper rather than Poweshiek County.

In 1982 the United States Supreme Court reversed the conviction of a Washington State resident charged under language virtually identical to alternative portions of Iowa Code Section 718A.2 for hanging a U.S. flag "upside down" with a peace symbol attached. Spence v. Washington, 418 U.S. 405, 94 S. Ct. 2727, 41 L. Ed. 2d 842 (1974). Concurring, in the *Spence* majority decision. J. Douglas stated he "would affirm the judgment for substantially the same reasons given by the Iowa Supreme Court in State v. Kool…[*citation omitted*]."

In 1989, the United States Supreme Court made it clear that even the act of burning a flag as a political protest was constitutionally protected. In Texas v. Johnson, 491 U.S. 397 (1989), the Supreme Court set aside a criminal conviction for burning the flag as a political protest. The Court found the behavior protected by the First Amendment. The case was sufficiently controversial that it touched off a number of attempts to amend the constitution to change the results of the decision. None of those attempts, obviously, were successful. A reasonable police officer or prosecutor in 2002 would have been aware of the flag-burning case. Indeed John Bohman was aware of that case and discussed it with the officers when they came to his room. The officers seemed aware of the case but said it only applied to burning flags in private. [Affidavit of John Bohman, paragraph 5, Appx. 17-18]. If burning a flag is constitutionally protected, it stands to reason that displaying a flag out the window upside down would be constitutionally protected. There should be no serious argument that in 2002 the law was clear that the law protecting the behavior of the Plaintiffs was clearly established.

D. <u>Defendant Police Officers cannot establish Qualified Immunity Based on the Fact that they relied on the Advice of the Assistant County</u>

1. *Lack of Factual Basis*

The Defendant Officers seek to establish qualified immunity based on an inference that they received the advice of counsel. The Defendants should not be entitled to summary judgment with regard to this issue for two reasons. First, there remain material issues of fact with regard to what advice was given by Mr. Bennett to the police officers. Furthermore, the facts as presented by the Defendants do not establish the kind of extraordinary circumstances that justify denying qualified immunity in the face of clearly established rights.

The facts with regard to any legal advice given in this case are not clear. It seems certain that some consultation went on. Both sets of defendants in their Answers admit paragraph 10 from the Amended Complaint. [Appx. pp.10,14].. That paragraph in the Amended Complaint said that the Assistant County Attorney told the police officers that hanging the flag out the window was "in violation of Section 718A.1 " of the Iowa Code. [Appx. p. 4]. The police officers for their Motion rely on the pleadings submitted by the Plaintiffs, specifically paragraph 17 of the Amended and Substituted Complaint. [Appx. p. 5]. That paragraph said Mr. Bennett had told the police officers he would criminally prosecute the Plaintiffs if they did not take the flag down. The Defendant Officers Kline and Petersen, however, in the Answer, denied that paragraph. [Appx. p.10]. Defendant Prosecutors Mahaffey and Bennett in their Answer to the Amended and Substituted Complaint also denied that paragraph. [Appx. p. 15]. It seems like all of the Defendants are claiming that there was a consultation. They are admitting that Mr. Bennett confirmed that the behavior of flying the flag upside down violated the statute. All

Defendants deny that there was any advice that the Plaintiffs would be criminally prosecuted if they did not take the flag down. Reluctance to prosecute, viewed favorably to the Plaintiffs, raises an inference that prosecutors had doubts about the constitutional legitimacy of the statute.

Defendant police officers did not submit any affidavits in connection with their Motion for Summary Judgment. They did not come forward with a statement indicating what advice was received. Under all of these circumstances, it is hard to imagine that the Court could conclude the Defendants have established the extraordinary circumstances necessary to get an exception to the qualified immunity normal rules.

2. *"Exceptional Circumstances" do Not Apply.*

In the face of clearly established law, qualified immunity can still exist under certain extraordinarily limited circumstances. In the Harlow case, the Supreme Court established this principle by stating the following:

> "If the law was clearly established, the immunity defense ordinarily should fall since a reasonably competent public official should know the law of governing misconduct. Nevertheless, if in the official pleading the defense claims extraordinary circumstances and can prove that he neither knew nor should have known of the relevant legal standard, the defense should be sustained. But again the defense would turn primarily on objective factors."

Harlow 102 S. Ct. at 2738

The Eighth Circuit has, on a number of occasions, considered whether the advice of counsel constitutes an extraordinary circumstance under Harlow. In Watertown Equipment Co. vs. Norwest Bank of Watertown, 830 F. 2d 1487 (8th Cir. 1987), the Eighth Circuit rejected the defense that defendants had relied on counsel, noting the somewhat equivocal nature of the

advice. They also noted that the case did not present a "unique factual situation or a perilous one which clearly demanded prompt action".

In Tubbesing vs. Arnold, 742 F. 2d 401 (8th Cir. 1984) the court accepted the fact that the Defendants relied on counsel. The court noted the following:

> "While **reliance on the advice of counsel alone will not satisfy an official's burden of acting reasonably**, in the instant case **whether the policy** manual **will apply** to directors **is not clear** and the board members acted in good faith in following their attorney's advice."

742 F. 2d at 407. [*emphasis supplied*]

Finally, in Kincaid vs. City of Blue Springs, Missouri, 64 F. 3d 389 (8th Cir. 1995) the court first determined that the legal claim was in fact clearly established. The court then noted:

> [*R*]eliance on the advice of counsel is a factor to be weighed in assessing whether a public official is entitled to qualified immunity. See Tubbesing vs. Arnold, 742 F. 2d 401, 407 (8th Cir. 1984). However, we conclude that Tubbesing is not relevant at this stage because we agree with the Magistrate Judge that a factual dispute remains about whether counsel's advice was given before or after the vote to terminate Kincaid.

It is clear from these cases, as well as other circuits that have wrestled with this ***Harlow*** exception, that it is a narrow exception and applies only rarely. Cannon v. City and County of Denver, 998 F. 2d 867, 874 (10th Cir. 1993). Reliance on counsel is just simply one factor in deciding whether qualified immunity exists. Apparently, if there is some confusion about what to do, then reliance on counsel is more justified. In Hollinswoth vs. Hill, 110 F. 3d 733 (10th Cir. 1997), the case cited by Defendants, for example, there was an *ex parte* judicial order that the police officer was enforcing. The Court recognized that the order itself was a unclear. Under those circumstances, reliance on advice of counsel was reasonable.

It is not enough for Defendants to merely point out (as they have here) to some contact or advice session that they have had with counsel. *See,* Cannon, at 874. Reliance on counsel "is not inherently extraordinary, for few things in government are more common that the receipt of legal advice." Davis v. Zirkelbach, 149 F.3d 614, 620 (7th Cir. 1998): *In accord*, Buonocore v. Harris, 134 F.3d 245 (4th Cir. 1998).

To establish "exceptional circumstances" defendants must, on the "**undisputed evidence**" make not just a "substantial," but "an **overwhelming showing**" as to factors such as those recited in V-1 Oil Co. v. Wyoming Dep't of Envtl. Quality 902 F.2d 920 (10th Cir. 1991) (*en banc*):[1]

a) How unequivocal, and specifically tailored to the particular facts giving rise to the controversy, the advice was,

b) Whether complete information had been provided to the advising attorney,

c) How soon after the advice was received the disputed action was taken.

"The circumstances must be such that the defendant was so 'prevented' from knowing that his actions were unconstitutional that he should not be imputed with knowledge of a clearly established right." *Id*. at 874. Courts have considered the clarity or notoriety of the right involved in making this latter determination. Thus, in Zirklebach where the officers sought advice in the legally complex and specialized area of permissible uses of wiretap evidence, the court gave them credit for relying heavily on the opinions of a narcotics division lawyer with assigned responsibility for giving such advice.

[1] This also appears to be the rule in the Seventh Circuit. Davis v. Zirkelbach, 149 F.3d 614, 620 (7th Cir. 1998).

By contrast, in this case, the advice that was given concerned a constitutional scenario that could hardly be more famous. The decisions in cases such as Texas v. Johnson[2] has over the years spawned endless public debate and calls throughout the country for a constitutional amendment to outlaw flag desecration based on the commonly held perception that flag desecration laws cannot be constitutionally enforced. It is hard to imagine how any advice could have been given in this case without some discussion of *Johnson* case or the need for caution.

In order to find refuge in "exceptional circumstances," the officers' understanding of the law must be both subjectively and objectively reasonable. ***Harlow***, 457 U.S. at 818-819, 102 S. Ct. at 2738 , 73 L. Ed. 2d 396 (1982)[3]. This Court cannot disregard what the officers either "knew or should have known" about enforcement of flag desecration statutes given the assumption that "a reasonably competent public official should know the law governing his conduct." *Id.* The Officers told the Plaintiffs they were familiar with the U.S. Supreme Court's ruling on flag desecration. *Compare, Cannon,* at 871 {Officers were noted to have "violated the paramount principle that 'above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.'"}

This Court should reject the Defendant Officers' claim to qualified immunity based on their "advice" from Mr. Bennett. It has not been established what "advice" was given that could have so blinded the officers to clearly established law given the nature of the right and its notoriety.

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[2] Texas v. Johnson, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989).

[3] This contrasts with the purely objective test applied to the threshold question of whether law is "clearly established." for purposes of denying qualified immunity. *Id.*

II. PLAINTIFF'S CLAIMS ARE NOT MOOT.

To be heard in federal court there must be a genuine controversy in any case. This is required by Article III of the United States Constitution. The Defendants in their Motion for Summary Judgment request that the Court dismiss the case as moot. They make two arguments which are obviously related. First they say there is no showing of a threat of prosecution at this point. The basis for this is the "Promise of Non-Prosecution" filed at the time of the hearing on the preliminary injunction request. Second they argue that there is no further relief available from the Defendant police officers, again, apparently given the no prosecution agreement. They assert that the only remaining issue is whether the statute is unconstitutional on its face. They assert that they did not make the statute and do not have the power to revoke it or agree it is unconstitutional. Defendants are wrong on both the facts and the law with regard to this matter.

A. There was a Clear Controversy at the Inception of the Case.

First of all, at least for the purpose of this Motion it is absolutely clear that Plaintiffs were threatened with prosecution. See affidavits of John Bohman and Juan Diaz. Appx. pp. 18, 21. This threat of prosecution should satisfy any requirement for an actual controversy under Babbot v. United Farm Worker's National Union, 442 U.S. 289, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979) or Doe v. Duling, 782 F. 2d 1202 (4th Cir. 1986). Furthermore, the Defendant police officers made the Plaintiffs take down their upside down flag. It remained down until the non-prosecution agreement was made in December. The fact that Defendant police officers suppressed the free speech of the Plaintiffs for over two months is a direct injury establishing a controversy under Article III.

B. The Damage Claim is not Subject to the Mootness Defense.

Plaintiffs have sought nominal and punitive damages in connection with this matter. Those claims result from an actual injury. The damage claim is not moot. In fact, the Defendant police officers do not make that claim.

C. The Equitable Claims are Not Moot.

Plaintiffs seek declaratory and injunctive relief. First as to whether the statute was unconstitutionally as applied to their expressive display of the flag upside down out their dorm room window in September of 2002 and in the future. But also they seek relief regarding whether the statute is unconstitutional on its face. Such relief is necessary to their plans of future protest in order to allow themselves and those who might join with them to use the flag in other expressive displays that the statute attempts to punish. [*Amended Complaint* ¶'s 20-23].

In December the Plaintiffs obtained a limited no prosecution agreement from the Defendants. A few things should be made clear however, with regard to that agreement:

First of all, the no prosecution agreement was only "during the pendency of the litigation". There is still a controversy about whether the Plaintiffs will or can be prosecuted at the conclusion of the case. If the Defendants want to agree to make the temporary non prosecution agreement permanent then maybe they can reassert there mootness argument as to the part of the complaint seeking equitable relief as to the "as applied" claim.

Second the Defendant police officers insisted on paragraph three of that agreement. That paragraph provided essentially that the Plaintiffs cannot use the agreement to prevent any defense. That language does not suggest a complete acknowledgment by the defendants that the behavior complained of in the lawsuit about the upside down flag was constitutionally protected.

Finally, the Plaintiffs in this case intend to engage in other expressive behavior with regard to the U.S. flag. That behavior may very well put them at risk, particularly in Poweshiek County, given the explicit language of the flag desecration statute. There is a genuine Article III controversy that extends over the entire range of the statute's reach and facial invalidity.

The Defendants may argue that now they are aware of the authority of the Iowa Supreme Court in State vs. Kool, and that we can trust that the Plaintiffs will not be prosecuted for displaying an inverted U.S. flag. As long as there is the threat of active involvement from this Court it may indeed be far less likely that these particular police officers will not arrest the Plaintiffs for hanging the flag out their window, but previous court cases were not sufficient to proscribe their behavior in the first instance.

Moreover, the Defendant Officers have been sued in their representative capacities expressly for the purpose of binding their successors as well as themselves. In this regard it must be observed that the Iowa flag desecration statute does have a unique self-actuating clause: Iowa Code Section 718A.6 affirmatively requires enforcement of the flag desecration statute, and provides that officers can be removed from their positions if they fail to do so. Given that language, Plaintiffs may have no protection by simply relying on the presently presumed intentions of these named officers, and the Plaintiffs certainly have no protection from the officers' successors should they be replaced. Even now—with this case in progress and in the news—there ispending prosecution in another county under the same statute.[4]

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[4] State v. Gerald Dean Clemens, Jr. Iowa District Court for Appanoose County, Criminal Number SMSM044682. Defendants is charged with a violation of Iowa Code 718A.1 on or about 25th February, 2003 by writing on and defacing a U.S. Flag.

Certainly the Plaintiffs have no permanent protection under the temporary non-prosecution agreement. That accord is only a temporary measure adopted for the pendency of this action. Even if you characterize the Defendants' current position as a voluntary cessation of their prior behavior, this court is not deprived of its jurisdiction under any mootness doctrine. In Friends of the Earth, Inc. vs. Laidlaw Environmental Services, Inc., 528 U.S. 167, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000), the Supreme Court had this to say about Defendants' voluntary change in conduct:

> "It is well settled that a Defendant's voluntary cessation of a challenged practice does not deprive a Federal Court of its power to determine the legality of the practice unless it is 'absolutely clear that the alleged wrongful behavior could not reasonably be expected to reoccur'."

Without injunctive and declaratory relief it is clear that the Defendants would be free to flaunt court decisions once again or otherwise resume their wrongful behavior. There remains a live controversy despite the temporary non prosecution agreement.

The Defendants also argue that the Plaintiffs have achieved all the relief they can as to the police officer defendants. As mentioned before this argument overlooks the damage claim. That claim is obviously available relief against these defendants. Moreover the fact that the officers did not create Chapter 718A does not insulate them from being subject to suit about its enforcement. They can be permanently enjoined from enforcing the statute. They can be defendants in a suit seeking declaratory relief that the statute is unconstitutional on its face and as applied. There is power in the federal court to address the statute after actions of police officers even though the legislature was the body that created the statute. In fact the legislature probably cannot be sued about the statute given legislative absolute immunity. See Bogan v. Scott- Harris, 523 U.S. 44, 118 S.Ct. 966, 140 L.Ed 2d 79 (1998).

CONCLUSION

The Plaintiffs have brought suit to challenge the Iowa Flag Desecration Statute. The Defendant police officers want to be dismissed from the case for two reasons. The Court should overrule their Motion. First the fact that they may have relied on some legal advice from the Assistant County Attorney cannot excuse their objectively unreasonable behavior in light of clearly established law. Second the temporary non prosecution agreement does not make the suit moot. There still is the claim for damages. There still is the claim that the statute is facially unconstitutional that will afford needed relief to the Plaintiffs.

—∞—

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