IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

VICKIE BESHIRES, KATHY MANESS and SANDRA TUCKER	)	
Plaintiff,	)	
VS.	)	No. 01-1096
CHESTER COUNTY TENNESSEE; and BEVERLY MORTON	)	
Defendant.	)	

ORDER DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs, Vicki Beshires, Kathy Maness, and Sandra Tucker, brought this action pursuant to 42 U.S.C. § 1983 alleging violation of their First Amendment right of political association. In addition, Plaintiff Maness also alleges violation of her right to intimate association.

Plaintiffs were employees of the Chester County Property Assessor's Office while Jackie Maness was the Chester County Property Assessor. See Complaint, ¶¶ 5, 6. Plaintiffs assert that they were very involved in Mr. Maness' failed re-election bid in the 2000 election. See id. ¶¶ 6, 7. After the election, Mr. Maness' successor, Beverly Morton, terminated Plaintiffs' employment with the Chester County Property Assessor's Office. See

id. ¶ 9. Plaintiffs allege that they were terminated due to their association with Mr. Maness. See id. ¶ 10. Plaintiff Maness also alleges that the she was terminated because of her intimate association with Mr. Maness, her husband. See id. ¶ 10. Plaintiffs also allege that Defendant Morton intentionally inflicted emotional distress upon them. See id. ¶¶ 15, 17, 19.

Defendants have now moved for summary judgment. Plaintiffs have responded in opposition to the motion.

Summary Judgment Standards

Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure. To prevail on a motion for summary judgment, the moving party has the burden of showing the "absence of a genuine issue of material fact as to an essential element of the nonmovant's case." Street v. J.C. Bradford & Co., 886 F.2d 1472, 1479 (6th Cir. 1989). The moving party may support the motion with affidavits or other proof or by exposing the lack of evidence on an issue for which the nonmoving party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). The opposing party may not rest upon the pleadings but, "by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

"If the defendant . . . moves for summary judgment . . . based on the lack of proof of a material fact, . . . [t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find

for the plaintiff." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). The court's function is not to weigh the evidence, judge credibility, or in any way determine the truth of the matter. Anderson, 477 U.S. at 249. Rather, "[t]he inquiry on a summary judgment motion . . . is . . . `whether the evidence presents a sufficient disagreement to require submission to a [trier of fact] or whether it is so one-sided that one party must prevail as a matter of law.'" Street, 886 F.2d at 1479 (quoting Anderson, 477 U.S. at 251-52). Doubts as to the existence of a genuine issue for trial are resolved against the moving party. Adickes v. S. H. Kress & Co., 398 U.S. 144, 158-59 (1970).

Motivation for Plaintiffs' Dismissals

Defendants argue that Plaintiffs cannot prove a prima facie case of retaliation for political affiliation. Claims seeking redress for retaliatory actions motivated by the exercise of First Amendment rights come in various forms. Two are particularly relevant to Plaintiffs' case. The first is the First Amendment right to political association. See Branti v. Finkel, 445 U.S. 507 (1980). This right includes the right to support a particular candidate for elected office. See Sowards v. Loudon County, 203 F.3d 426, 432 (6th Cir. 2000) (citing Elrod v. Burns, 427 U.S. 347, 356-57 (1976)). The second is the right to intimate association. This right extends to "highly personal relationships [deserving] a substantial measure of sanctuary from unjustified interference by the State." Roberts v. U.S. Jaycees, 468 U.S. 609, 618 (1984). Though the Supreme Court has not delineated whether this right is a fundamental right or a right of association under the First Amendment, the Sixth Circuit

has evaluated the right as a First Amendment right. See Sowards, 203 F.3d at 432.

A claim of retaliation for the exercise of First Amendment rights contains three elements. See Cockrel v. Shelby County School Dist., 270 F.3d 1036, 1048 (6th Cir. 2001). First, a Plaintiff must demonstrate that she engaged in an activity protected by the First Amendment. See id. Second, a plaintiff must establish that the defendant took an adverse action against her. See id. The action taken against a plaintiff must be more than a de minimus act; indeed, the action must be one which would "likely chill a person of ordinary firmness from continuing to engage in that activity." Id. Finally, a plaintiff must demonstrate that the adverse action taken against her was motivated in part by the exercise of her First Amendment rights. See id. If a plaintiff establishes these three elements, the burden then shifts to defendants to prove, by a preponderance of the evidence, that it would have taken the same adverse action in the absence of the plaintiff's protected conduct. See id.

Defendants' motion for summary judgment does not contest Plaintiffs' ability to prove the first two elements of a First Amendment retaliation claim. Instead, Defendants specifically contest Plaintiffs' ability to prove the third element—motivation. To this end, Defendants argue that Plaintiffs' terminations were not motivated by the exercise of their First Amendment rights and that their termination was motivated by numerous other reasons. See Defendants' Memorandum in support of Motion for Summary Judgment, at 7.

In order for Plaintiffs to prove the motivation element, Plaintiffs need not prove that

the exercise of the Plaintiffs' First Amendment rights was the sole motivation for their termination. Indeed, Plaintiffs need only prove that Defendants' adverse action was motivated in part by Plaintiffs' exercise of their First Amendment rights. See Cockrel, 270 F.3d at 1048. In response to Defendants' motion, Plaintiffs present evidence of various explanations provided by Ms. Morton for the dismissal of the Plaintiffs. For instance, Plaintiff Tucker alleges that she called Ms. Morton after the election to inquire as to whether her employment would continue. Plaintiff Tucker states that "Ms. Morton told me that she would not be comfortable working with me because 'I know where your loyalty lies.'"[1] See Affidavit of Sandra Tucker, ¶ 6. The actual dismissal letter sent by Defendant Morton did not state a reason; it merely stated that Plaintiffs need not come to work on September 1, 2000, since Ms. Morton would not continue their employment during her term. See Complaint and Answer, ¶ 9. After the filing of this suit, Defendants have stated numerous reasons for Plaintiffs' dismissals and these reasons have increased throughout discovery in this case. Compare Plaintiffs' Exhibit F, at Interrogatory No. 5, with Plaintiffs' Exhibit G, at Interrogatory No. 5. The nature of Defendants' explanations indicates that a factfinder could find that Defendant Morton may have fired Plaintiffs due to their association with Mr. Maness and is now offering a pretext for their terminations. See Smith v. Chrysler Corp., 155 F.3d 799, 809 (6th Cir. 1998).

Aside from Defendants' explanations concerning the motivation of Ms. Morton in

[1] Of course this statement alone, though self serving, constitutes disputed evidence concerning the motivation of Defendant Morton in terminating Plaintiffs.

terminating Plaintiffs, Plaintiffs also present evidence of temporal proximity between the protected conduct and Plaintiffs' dismissals. To be sure, a fact finder can consider temporal proximity when determining the motive of a defendant in a retaliation case. See Johnson v. University of Cincinnati, 215 F.3d 561, 583 (6th Cir. 2000) (noting that temporal proximity alone is insufficient to support a conclusion of retaliatory motive, but temporal proximity is relevant and may be indicative of motive). In this case, it is undisputed that Ms. Morton terminated Plaintiffs' employment before she had officially taken office. See Complaint and Answer, ¶ 9. The fact that Defendant Morton terminated Plaintiffs before assuming office and shortly after winning the election indicates that Defendant Morton may have been trying to clear the property assessors' office of Maness supporters.

Given the forgoing evidence, the court concludes that a reasonable jury could find that Plaintiffs' terminations were motivated in part by their association—be it intimate or political—with Mr. Maness.

Employment Classifications of Plaintiffs

Defendants argue that, even if this court finds that Plaintiffs can present evidence of retaliatory motive, the Elrod-Branti line of cases would allow Defendant Morton to consider political affiliation when making employment decisions regarding Plaintiffs. It is true that the Supreme Court has permitted the use of political affiliation as a litmus test for certain governmental employment. See Branti v. Finkel, 445 U.S. 507 (1980); Elrod v. Burns, 427 U.S. 347 (1976). When determining whether an elected official can consider political

affiliation when making employment decisions, "the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." See Branti, 445 U.S. at 518.

Although the Supreme Court has not classified the types of positions subject to the Elrod-Branti exception, the Sixth Circuit has established four classes of employees that are not protected from retaliatory termination for their political affiliations. See McCloud v. Testa, 97 F.3d 1536, 1557 (6th Cir. 1996). The four classes are:

Classification one positions are defined as:

> positions specifically named in relevant federal, state, county, or municipal law to which discretionary authority with respect to the enforcement of that law or the carrying out of some other policy of political concern is granted.

McCloud, 97 F.3d at 1557. Classification two positions are defined as:

> positions to which a significant portion of the total discretionary authority available to category one position-holders has been delegated; or positions not named in law, possessing by virtue of the jurisdiction's pattern or practice the same quantum or type of discretionary authority commonly held by category one positions in other jurisdictions.

McCloud, 97 F.3d at 1557. Classification three positions are defined as:

> confidential advisors who spend a significant portion of their time on the job advising category one or category two position-holders on how to exercise their statutory or delegated policymaking authority, or other confidential employees who control the lines of communications to category one positions, category two positions or confidential advisors.

McCloud, 97 F.3d at 1557. Classification four positions are defined as:

> positions that are part of a group of positions filled by balancing out political party representation, or that are filled by balancing out selections made by

different governmental agents or bodies.

McCloud, 97 F.3d at 1557.

The Sixth Circuit has determined that particular evidence should be reviewed when determining if a position is within the four categories established in McCloud. See Feeney v. Shipley, 164 F.3d 311, 319 (6th Cir. 1999) (applying the test established in Faughender v. City of North Olmsted, 927 F.2d 909, 913 (6th Cir. 1991)). It is well established that the court is to examine the actual duties of the position and should not just defer to the title of the position. See Hall v. Tollet, 128 F.3d 418, 423 (6th Cir. 1997). In Feeney, the Sixth Circuit put forth a two-prong test for determining the actual duties of the position.[2] See Feeney, 164 F.3d at 319 (citing Faughender, 927 F.2d at 913). Under this test, the court must consider the inherent duties of that position and the duties that the position will entail in the future. See id.

Defendants have based their argument upon the statutory grant of authority to County Deputy Property Assessors in Tennessee. This statute grants deputy assessors the same powers, duties, and liabilities as the county assessor in appraising, classifying, and assessing property.[3] See Tenn. Code Ann. § 67-1-506 (a)(2). This section is not a mandatory assignment of duty to deputy property assessors, but rather an authorization to allow a deputy

[2] Feeney also modified the test for instances in which a plaintiff is terminated, but no replacement was hired. In those circumstances, the court need only apply the first prong of the Faughender test. See Feeney 164 F.3d at 319.

[3] Of course this statute would have no impact on Plaintiffs Tucker and Maness as they were not deputy assessors. See Aff. of Jacky Maness, ¶ 5.

assessor to have binding authority. This section does not prove that Plaintiff Beshires position was granted this authority by Mr. Maness. Although Defendants allege that Plaintiff Beshires was very involved in the assessment of property and audits, Defendants have submitted no evidence which shows the actual duties and obligations of Plaintiff Beshires' position.

Although Defendants' motion in this regard would fail by its own terms, Plaintiff's have attached evidence in the form of an affidavit from Jacky R. Maness, the former county assessor. See Aff. of Jacky Maness. Mr. Maness' affidavit describes Plaintiffs' jobs as not involving policy making decisions or facilitating Mr. Maness' communications. Accordingly, the court finds that genuine issues of material fact exist concerning whether Plaintiffs' positions are within the Elrod-Branti exception.

Deference to the Decisions of Executive Officials

Defendant argues that the decisions of executive officials are subject to heightened deference "when close working relationships are essential to fulfilling public responsibilities . . .." See Defendants Memorandum in Support of Motion for Summary Judgment, at 10 (quoting Faughender, 927 F.2d at 914 (Judge Bertelsman, concurring)). The court does not read Faughender as broadly as Defendants. In Faughender, the new mayor of North Olmsted, Ohio, refused to re-appoint the plaintiff to serve as the secretary to the mayor. See id., at 910. The plaintiff argued that her position had not involved any "political or policy-related duties." Id., at 911. The defendants responded by alleging that, even if the

secretary position was not used as a confidential advisor position, the new mayor intended to use the future secretary as a close confidante and advisor. See id.

The Faughender Court held that elected officials are granted great leeway in re-organizing their offices to suit their individual needs. See id., at 915. Essentially, the holding in Faughender allows an elected official to change the duties of a position. Of course, changing the duties of a position might change the position from one not covered under the Elrod-Branti exception to one covered by the exception. See id. Thus, when Defendants seek to invoke the protection provided by Faughender, the relevant question is not what the position has entailed thus far, but what the position will encompass in the future.

Defendants argue that Faughender extended the Elrod-Branti exception to any position that requires a close working relationship with the elected official. Though the concurrence in Faughender embraced such an extension, the court did not. Viewing Defendants' motion under the majority holding in Faughender, the court must deny summary judgment. Defendants have not presented any evidence to suggest that Defendant Morton intended to use Plaintiffs' positions in a confidential or advisory manner.

After-acquired Evidence

Defendants argue that the after-acquired evidence doctrine should apply in this instance to bar recovery. The court need not elaborate upon the factual allegations presented by the parties since Defendants' reliance on this doctrine is misplaced.

The after-acquired evidence doctrine, as currently applied by the courts, is not a relief

from liability, but rather is only a relief from damages accruing after the legitimating reasons for the adverse action are discovered. See McKennon v. Nashville Banner Pub. Co., 513 U.S. 352, 361 (1995). In McKennon, the plaintiff alleged that she had been terminated due to her age in violation of the Age Discrimination in Employment Act.[4] See id., at 355. For summary judgment purposes, the defendant stipulated to discrimination and argued that plaintiff would have been terminated anyway due to her copying of confidential documents. See id. The defendant argued that it would have terminated plaintiff sooner if it had known that she was copying confidential documents. Since she would have been fired anyway, Defendant argued that it cannot be liable for age discrimination. See id. The district court granted summary judgment and the Sixth Circuit affirmed. See McKennon v. Nashville Banner Pub. Co., 9 F.3d 539 (6th Cir. 1993).

The Supreme Court reversed, holding that the after-acquired evidence doctrine was not a bar to liability. See McKennon, 513 U.S. at 363. The Court stated that after-acquired evidence could not relieve the employer of liability for the damages incurred in the interim between the wrongful termination and the discovery of the legitimate reason to terminate the employee. See id. Although the Court held that after-acquired evidence cannot relieve liability, the Court did find that such evidence could reduce the amount of backpay which a plaintiff can recover.

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[4] Thought this is an age discrimination case, the after-acquired evidence doctrine applies to cases in which the plaintiff was fired for exercise of First Amendment rights as well. See Venters v. City of Delphi, 123 F.3d 956 (7th Cir. 1997).

Applying McKennon to the case at hand, the court finds that, even if the evidence were undisputed, Defendants would not be entitled to summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

Qualified Immunity

Defendant argues that Ms. Morton is entitled to qualified immunity. In modern legal parlance, qualified immunity represents the concept that government officials have an affirmative defense for discretionary functions. See Collins v. Village of New Vienna, ___ F.3d ___ (6th Cir. 2002). Although qualified immunity is an affirmative defense which must be pled by the defendant, the Sixth Circuit applies a burden shifting analysis when determining the applicability of qualified immunity. See Black v. Parke, 4 F.3d 442, 449 (6th Cir. 1993). "Although defendants bear the initial burden of coming forward with facts to suggest that they were acting within the scope of their discretionary authority during the incident in question," plaintiffs ultimately bear the burden of disproving entitlement to qualified immunity. Id.

Qualified immunity provides government officials with broad protection. When a government official is covered by qualified immunity, the official is immune from liability and civil damages resulting from the official's action even if the action violates a plaintiff's statutory or constitutional rights. See Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The protection of qualified immunity is more than a mere protection from liability. Qualified immunity is also a right to avoid the burden of pre-trial discovery. See Behrens v. Pelletier,

516 U.S. 299, 314 (1996).[5]

Although qualified immunity is broad in its protection, its application is not without limits. Qualified immunity covers the official conduct of government officials when "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818. In determining whether a statutory or constitutional right is "clearly established," district courts in this circuit must review decisions of the Supreme Court, the Sixth Circuit, other courts within the Sixth Circuit, and the other federal courts of appeal. See Walton v. City of Southfield, 995 F.2d 1331, 1336 (6th Cir. 1993). For a decision other than a Supreme Court decision or Sixth Circuit decision to clearly establish a statutory or constitutional right, the decision must clearly demarcate the applicability of the right to the conduct complained of so that no doubt can be left. See id.

In a recent opinion, the Sixth Circuit provided a three-step inquiry to determine if the government official's conduct is covered by qualified immunity. See Risbridger v. Connelly, 275 F.3d 565, 569 (6th Cir. 2002). This requires a court to inquire as to "(1) whether the facts taken in the light most favorable to plaintiff could establish a constitutional violation; (2) whether the right was a "clearly established" right of which any reasonable officer would

[5] The Supreme Court has allowed interlocutory appeals of a denial of qualified immunity under the collateral order doctrine. See Mitchell v. Forsyth, 472 U.S. 511, 530, (1985); Ray v. Wolters, 2002 WL 343403 (6th Cir. 2002). In the event "the legal question of qualified immunity turns upon which version of the facts one accepts, the jury, not the judge, must determine liability." Sova v. City of Mount Pleasant, 142 F.3d 898, 903 (6th Cir.1998). Accordingly, in that instance, interlocutory appeal will not lie. See Johnson v. Jones, 515 U.S. 304, 319-20 (1995).

have known; and (3) whether the official's actions were objectively unreasonable in light of that clearly established right." See id. (citing Williams, 186 F.3d at 691).

Applying this three-step analysis to the case at hand, the court finds that the issue of qualified immunity depends upon a factual determination that the court is unable to make at this time. Considering the first step—whether plaintiff can establish a constitutional violation—the court finds that evidence is in dispute. If the evidence regarding Defendant Morton's motive in terminating Plaintiffs and the evidence concerning Plaintiffs' job duties is accepted in the light most favorable to Plaintiffs, a jury could reasonably conclude that Defendants violated Plaintiffs' constitutional rights.

Considering the second step—whether the right was clearly established—the court finds that the right to political association and intimate association are both clearly established. See Sowards v. Loudon County, 203 F.3d 426, 431 (6th Cir. 2000). The only issue raised by the parties in this step is the amount of factually specificity required for a right to be clearly established. Defendants argue that Ms. Morton could have reasonably believed that the Elrod-Branti exception applied, and thus, in this situation, Plaintiffs' rights were not clearly established. Essentially, Defendants seek to define the actions in this case very specifically, and then argue that no court has passed upon these specific factual circumstances. Accordingly, Defendants would conclude that the Plaintiffs' rights were not clearly established. Plaintiffs respond by arguing for a broad application of the rights established in previous cases.

Appellate courts have done little to explain the specificity required to clearly establish a statutory or constitutional right. Although vague, the cases considering this issue have held that the exact conduct of an official does not have to have been declared illegal in a judicial proceeding. See Risbridger v. Connelly, 275 F.3d 565, 569 (6th Cir. 2002). Instead, the conduct of the official must be apparently illegal in light of the caselaw. See id. Thus, it appears that the Sixth Circuit does not require a factually parallel case to find a plaintiff's right to have been clearly established. Rather, a plaintiff's right is clearly established if, under the circumstances, a defendant could have reasonably extrapolated from the case law the illegality of the conduct.

In the case at hand, the exact nature of Plaintiffs' positions is unknown. If the finder of fact accepts the plaintiffs' version of their job duties, the Elrod-Branti exception would not apply. Further, Defendant Morton would have been able to extrapolate from McCloud that the Elrod-Branti exception does not apply to these Plaintiffs. Accordingly, the resolution of this step of the qualified immunity analysis depends disputed facts. Until these facts are finally resolved by a finder of fact, the court cannot rule upon qualified immunity.

Concerning the last step—the objective reasonableness of Defendants' conduct—the court finds that the resolution of this step in the analysis requires the resolution of facts in dispute. Accordingly, the court must reserve judgment on the issue of qualified immunity until the factual disputes in this case are resolved.

Defendants also argue that qualified immunity should apply because Defendant

Morton sought advice from an attorney, was advised that she could dismiss Plaintiffs without violating their rights, and relied upon that advice when dismissing Plaintiffs. In attempting to prove this, Defendants have attached affidavits from county attorney K. Don Bishop and Defendant Morton. See Aff. of K. Don Bishop, ¶¶ 3-6; Aff. of Beverly Morton,¶¶ 14-17. These affidavits essentially state that Defendant Morton sought advice from Mr. Bishop, and told Mr. Bishop all "the relevant facts surrounding the proposed terminations." Aff. of K. Don Bishop, ¶ 5.

In Harlow, the Supreme Court stated that even when a right is clearly established, extraordinary circumstances can justify a finding of qualified immunity. See Harlow, 457 U.S. at 818-19. In an unpublished opinion, the Sixth Circuit considered when reliance on an attorney's advice can constitute an extraordinary circumstance foreseen by the Court in Harlow. See York v. Purkey, 2001 WL 845554 (6th Cir. 2001). In that case, the court stated that four factors have been considered, they are:

1) whether the advice was unequivocal and specifically tailored to the particular facts giving rise to the controversy;
2) whether complete information was provided to the advising attorney(s);
3) the prominence and competence of the advising attorney(s); and
4) how soon after the advice was received the disputed action was taken.

See id. (citing V-1 Oil Co. v. Wyoming, 902 F.2d 1482, 1489 (10th Cir. 1990)).

Considering these four factors, the court concludes that it cannot determine from the pleadings whether Defendant Morton's reliance on Mr. Bishop's advice could constitute an extraordinary circumstance under Harlow. Although Mr. Bishop states that he was informed

of all relevant facts surrounding the potential termination, the facts that Defendant Morton related to Mr. Bishop may have been incomplete. The court simply does not know what facts were disclosed to Mr. Bishop and which were not disclosed to Mr. Bishop. In any event, there is not sufficient evidence for the court to determine whether the advice provided by Mr. Bishop was unequivocal and sufficiently tailored to the facts in this matter. Accordingly, the court determines that Defendants have not proven that the advice from Mr. Bishop was an extraordinary circumstance entitling them to qualified immunity.

Miscellaneous Issues

Defendants argue that Chester County cannot be held liable for punitive damages and cannot be sued for intentional infliction of emotional distress. Plaintiffs' complaint does not assert a claim of intentional infliction of emotional distress against Defendant Chester County. As a result, Defendants' motion in this regard is unnecessary. Concerning punitive damages, Plaintiffs have agreed that they cannot receive punitive damages from Chester County. Accordingly, the court will deem Plaintiffs' response as a stipulation that they do not seek punitive damages against Chester County.

Conclusion

Defendants have failed to presented any basis for relief under Rule 56 of the Federal Rules of Civil Procedure. Accordingly, Defendants' motion is DENIED.

IT IS SO ORDERED.

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JAMES D. TODD
UNITED STATES DISTRICT JUDGE

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DATE