001-188-00

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

TERRENCE JOHNSON, JIM HARRIS, ALEXANDER FRIEDMANN, and JOSHUA ROBERTS, Plaintiffs, v. PHIL BREDESEN, Governor of the State of Tennessee; BROOK THOMPSON, Coordinator of Elections; RILEY DARNELL, Secretary of State of Tennessee; JAMES JOHNSON Administrator of Elections for Shelby County; KIM BUCKLEY, Administrator of Elections for Madison County; and RAY BARRETT, Administrator of Elections for Davidson County, in their official capacities Defendants.	)	No. 3-08-0187 Hon. Thomas A. Wiseman, Jr U.S. District Court Judge Hon. Juliet Griffin U.S. Magistrate Judge

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT KIM BUCKLEY'S MOTION FOR SUMMARY JUDGMENT

Defendant Kim Buckley, by and through counsel, submits this memorandum of law in support of her motion for summary judgment.

BACKGROUND

In their Amended Complaint, Plaintiffs Terrence Johnson, Jim Harris, Alexander Friedmann, and Joshua Roberts allege that they are convicted felons who wish to vote in upcoming elections but are ineligible for restoration of their voting rights because of outstanding legal financial obligations. (Docket Entry ["D.E."] 57, Am. Compl., ¶¶ 4-7). Plaintiffs allege that the 2006 amendments to Title 40, Chapter 29 of the Tennessee Code, specifically Tenn.

Code Ann. §§ 40-29-202(b) and (c), which require that convicted felons who seek to have their voting rights restored must first pay all restitution to the victims of their crimes as ordered by the sentencing court and to not have any outstanding child support payments, violates both the United States and Tennessee Constitutions. (D.E. 57, Am. Compl., ¶¶ 1; 14-18; 26-55). Plaintiffs, seeking declaratory and injunctive relief, as well as nominal damages, have brought this action against Governor Phil Bredesen; Brook Thompson, the Coordinator of Elections for the State of Tennessee; Riley Darnell, the Secretary of State for the State of Tennessee; and James Johnson, Kim Buckley, and Ray Barrett, who are the administrators of elections for Shelby, Madison, and Davidson counties, respectively. (D.E. 57, Am. Compl., ¶¶ 8-13).

With regard to the claims against Defendant Buckley, who is the duly appointed administrator of elections for Madison County under Tenn. Code Ann. § 2-12-116, Plaintiff Jim Harris (Plaintiff) alleges that he is a convicted felon residing in Madison County, Tennessee who has completed his terms of imprisonment, parole, and probation for all of his felony convictions, but owes approximately $2,500.00 in outstanding child support payments. (D.E. 57, Am. Compl., ¶ 5). Plaintiff alleges that he wishes to vote in upcoming elections but is ineligible to have his voting rights restored because of outstanding child supports payments for which he is responsible.[1] (D.E. 57, Am. Compl., ¶ 5) Plaintiff does not allege that any action has been taken by Defendant Buckley concerning any restoration of his right to vote. (*See generally* D.E. 57, Am. Compl.). Other than stating that she is being sued in her official capacity, Plaintiff makes no further allegations concerning Defendant Buckley. (D.E. 57, Am. Compl., ¶ 12; generally). Nonetheless, Plaintiff seeks declaratory and injunctive relief and nominal damages against

[1] In response to the State Defendants' First Set of Interrogatories and Request for Production of Documents Propounded to Plaintiff Jim Harris, Plaintiff states that, since filing this action, he has satisfied his outstanding child support obligations. (*See* Pl. Jim Harris' Resp. to Defs.' First Set of Inter. and Req. for Prod. of Docs., p. 3, Resp. No. 7 [submitted as Ex. 2]).

Defendant Buckley, in her official capacity, for the alleged violation of his constitutional rights. (*See generally* D.E. 57, Am. Compl.).

Defendant Buckley now moves this Court for summary judgment in her favor with respect to all of Plaintiff's claims asserted against her in the Amended Complaint.

SUMMARY JUDGMENT STANDARD

Federal Rule of Civil Procedure 56(c) states that a "judgment sought should be rendered forthwith 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 a judgment as a matter of law." There is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party; if the evidence is merely colorable or is not significantly probative, summary judgment may be granted. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252 (1986). When ruling on a motion for summary judgment, mere existence of a scintilla of evidence in support of the plaintiff's position will not be sufficient; there must be evidence on which the jury could reasonably find for the plaintiff. *Id.*

Federal Rule of Civil Procedure 56(e) states that, "when a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party." Rule 56(e) requires the opposing party to go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986).

ARGUMENT

Plaintiff has brought suit against Defendant Buckley in her official capacity as the administrator of elections for Madison County, Tennessee. The United States Supreme Court has stated that official capacity suits "generally represent only another way of pleading an action against an entity of which an officer is an agent." *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) (quoting *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690, n.55 (1978)); *see also Alkire v. Irving*, 330 F.3d 802, 810 (6th Cir. 2003). Plaintiff, therefore, has the burden to show that Madison County is liable for the alleged violation of his constitutional rights.

To establish liability under § 1983 against Madison County, Plaintiff has the burden to show that a constitutional violation occurred and that Madison County was responsible for that violation. *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 120 (1992). It is a separate inquiry to establish whether a constitutional violation occurred and whether a municipality bears responsibility. *Id.* at 117. The first question to be examined is whether a constitutional violation occurred. *Ford v. County of Oakland*, 35 Fed. Appx. 393, 396 (6th Cir. 2002). If a constitutional violation occurred, then the second question is whether the municipality bears responsibility under § 1983 for the alleged constitutional deprivation. *See Collins*, 503 U.S. at 121. Here, the Court should find that Plaintiff cannot satisfy either of these inquiries to establish liability under §1983 against Madison County.

I. Plaintiff cannot show that a violation of his constitutional rights has occurred.

Plaintiff alleges that Tenn. Code Ann. §§ 40-29-202(b) and (c), and its subsequent enforcement by Madison County, violates his constitutional rights. Summary judgment is appropriate for Defendant Buckley because Plaintiff has failed to establish a deprivation of his

constitutional rights as a matter of law, and, alternatively, any possible constitutional deprivation that Plaintiff might have suffered was not caused by Defendant Buckley.

A. Plaintiff has failed to establish a constitutional violation as a matter of law.

Defendant Buckley joins in Defendants Phil Bredesen, Brook Thompson, and Riley Darnell's motion for judgment on the pleadings and memorandum of law in support, and incorporates all arguments contained therein as if reprinted in its entirety in this memorandum. (D.E. 58-59). For the reasons set forth in Defendants Phil Bredesen, Brook Thompson, and Riley Darnell's motion for judgment on the pleadings and their supporting memorandum of law, the Court should find that Defendant Buckley is entitled to judgment as a matter of law because Plaintiff cannot show that a violation of his constitutional rights occurred. *See Los Angeles v. Heller*, 475 U.S. 796, 799 (1986); *see also Meals v. City of Memphis*, No. 03-2077, 2008 U.S. Dist. LEXIS 20811 (W.D. Tenn. Mar. 13, 2008).

B. Alternatively, any possible constitutional deprivation Plaintiff might have suffered was not the result of any action on the part of Defendant Kim Buckley.

The Court should also grant summary judgment to Defendant Buckley on the ground that she took no action to deprive Plaintiff of any of his constitutional rights. Tennessee state law vests the ultimate authority of rejecting a certificate of restoration for person who has been convicted of an infamous crime with the State Coordinator of Elections, and not a county election administrator such as Defendant Buckley. Tenn. Code Ann. § 2-11-202(a)(17) (2008) provides that it is the State Coordinator of Elections' duty to "[i]nstruct the administrators in each county that they are to purge the registration of any person appearing on the infamous crime list . . . who is registered to vote in their county". Thus, by statute, it is the State Coordinator of Elections' duty and decision to order that non-qualified voters, such as Plaintiff, are purged from

a county's registered voter database. While the present lawsuit involves the restoration of a person convicted of an infamous crime right to vote, this statute illustrates that decisions regarding the disenfranchisement and re-enfranchisement of a person convicted of an infamous crime lie with the State Coordinator of Elections, and not county election administrators.

Furthermore, the statute outlining the procedure for a person convicted of an infamous crime to follow to have his voting rights restored explicitly states that the State Coordinator of Elections is responsible for verifying that the convicted felon has complied with all of the restoration requirements, including the payment of all restitution and overdue child support payments. Tenn. Code Ann. § 40-29-203(d) (2008) provides:

> Any person issued a certificate of voting rights restoration pursuant to this section shall submit the certificate to the administrator of elections of the county in which the person is eligible to vote. The administrator of elections shall send the certificate to the *coordinator of elections* who shall verify that the certificate was issued in compliance with this section. Upon determining that the certificate complies with the provisions of this section, the *coordinator* shall notify the appropriate administrator of elections and, after determining that the person is qualified to vote in that county by using the same verification procedure used for any applicant, the administrator shall grant the application for a voter registration card. The administrator shall issue a voter registration card and the card shall be mailed to the applicant in the same manner as provided for any newly issued card.

(emphasis added). Based upon this statute, the Court should find that Defendant Buckley, as well as all similarly situated court election administrators, does not have the discretion to deny a convicted felon's certificate of restoration, but instead, is directed to approve or reject such a certificate by the State Coordinator of Elections. The Court may infer that for a county election administrator to approve a certificate of restoration without the approval of the State Coordinator of Election would be in violation of Tennessee state law.

It is the State Coordinator of Elections who makes the final decision of whether a person convicted of an infamous crime may have their voting rights restored, and not a county election

administrator. By its terms, 42 U.S.C. § 1983 imposes civil liability upon any individual "who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . ." Apparent from the language of section 1983, however, is the condition that liability will be imposed only upon those individuals who "subject" or "cause to be subjected" another to a deprivation of constitutional rights. *Tate v. Alexander*, 527 F.Supp. 796, 800 (M.D. Tenn. 1981). For Buckley to be held liable under § 1983, then she must have somehow violated or caused to be violated Plaintiffs' Constitutional rights. That determination is itself dependent on whether Buckley actually can be held responsible for the acts that Plaintiffs claim violated their Constitutional rights. *Tate*, 527 F.Supp. at 800. This is the essence of § 1983's causation requirement. Before a government official can be held liable under § 1983 for violating an individual's Constitutional rights, it must first be shown that the official was legally responsible for the allegedly unconstitutional act itself. *See Monell v. Department of Social Services*, 436 U.S. 658 (1978). If it cannot be said that the official was responsible for the act, then clearly no liability will attach, regardless of whether another's constitutional rights were violated by that act. *See Monell*, 436 U.S. 658; *Rizzo v. Goode*, 423 U.S. 362 (1976); *Tate*, 527 F.Supp. at 800.

Plaintiff has failed to allege any action on the part of Buckley, let alone any actions that were violative of his Constitutional rights. Without an allegation of any wrongdoing on Buckley's part, Plaintiff has failed to allege a claim against her. Furthermore, Tennessee state law clearly provides that it is the State Coordinator of Elections' responsibility to make the final determination of whether a convicted felon, such as Plaintiff, may have their voting rights

restored, and not a county election administrator. For these reasons, Plaintiff has failed to allege, let alone prove, that Defendant Buckley took any action to allegedly deprive him of his constitutional rights.

II. Plaintiff cannot show that any policy or custom of Madison County was the moving force behind any alleged violation of his constitutional rights.

Even if the Court were to find, for purposes of this motion only, that a question exists as to whether a violation of Plaintiff's constitutional rights did occur or that any alleged violation resulted from Kim Buckley's actions, Madison County is entitled to summary judgment because Plaintiff cannot show that any County policy or custom, or lack thereof, was the moving force behind any alleged constitutional violation. *City of Canton*, 489 U.S. at 389. Before a local governmental unit can be held liable for injuries pursuant to § 1983, "a plaintiff must show that his injuries were the result of some 'policy or custom' attributable to the governmental entity." *Leach v. Shelby County Sheriff,* 891 F.2d 1241, 1245 (6th Cir. 1989). Municipal liability cannot be based on the theory of *respondeat superior*. *Monell*, 436 U.S at 691. Specifically, a municipality is not liable under § 1983 for an injury inflicted solely by its employees or agents, but rather only when the "execution of the government's policy or custom . . . inflicts the injury." *City of Canton v. Harris*, 489 U.S. 378, 385 (1989); *Alkire v. Irving*, 330 F.3d 802, 814-15 (6th Cir. 2003) (stating that "[d]espite being 'persons' for the purposes of § 1983, municipalities are not 'liable for every misdeed of their employees and agents.'"). In this regard, a municipality may be held liable under § 1983 only if the municipality itself caused or if its policies were the "moving force" behind a constitutional deprivation. *Graham*, 473 U.S. at 166; *Monell*, 436 U.S. at 690. In other words, to prove that Madison County was responsible for an alleged constitutional violation, Plaintiff must show that the inadequacy of the County's policies and

procedures were the "moving force behind the constitutional violation." *City of Canton*, 489 U.S. at 389; *see also Monell,* 436 U.S. at 694.

Here, Plaintiff cannot show that any policy, procedure, or practice of Madison County caused or otherwise was the moving force behind any such alleged violation. Furthermore, Plaintiff has failed to allege or present any evidence that Madison County has a custom or practice of applying its policies and procedures for restoring voting rights to convicted felons in a non-uniform, selective, or otherwise discriminatory manner. On the contrary, the undisputed evidence clearly shows that Madison County has adequate and appropriate policies and procedures in place in accordance with state law for addressing the restoration of voting rights to individuals who have been convicted of an infamous crime.

The undisputed evidence shows that Madison County applies its policies and procedures in a uniform manner. In particular, when the Madison County Election Commission (election commission) receives an application to vote by mail or through a National Voting Rights Act agency and it is discovered that the applicant has a felony conviction, the election commission, pursuant to its policy and practices, sends the applicant a letter informing the applicant that the application can not be processed. (Fact No. 4). This letter explains what forms the applicant must submit in accordance with his/her conviction date in order for the applicant's voting rights to be restored. (Fact No. 5). In addition, the letter furnishes the applicant with the telephone number and address of the Tennessee Board of Pardons and Paroles and explains that the State Coordinator must approve the required documents. (Fact No. 5). Finally, the letter provides the applicant with the deadline for completing the procedure so that the applicant may be registered in time for the next election. (Fact No. 5). Applicants are instructed to contact the election commission if they have any further questions. Moreover, it is the practice of the election

commission office to provide any person who personally appears at the commission office with the same information referenced above as well as the Restoration of Rights form. (Fact No. 6). The Commission staff also attempts to answer any questions that any applicant or concerned citizen might have. (Fact No. 7).

Based on the undisputed evidence, Plaintiff cannot show that any Madison County policy or custom, or any lack thereof, was or is the moving force behind the alleged violation of his constitutional rights. In fact, Plaintiff, in his Complaint, has failed to allege, and cannot now show, that any specific policy or practice of Madison County or its election commission is the cause in fact or proximate cause of the alleged deprivation of his rights. (*See generally*, D.E. 57, Am. Compl.); *Powers v. Hamilton County Pub. Defender Comm'n*, 501 F.3d 592, 608 (6th Cir. 2007) (holding traditional tort concepts of causation, such as cause in fact and proximate causation, inform the causation inquiry on a § 1983 claim). Furthermore, Plaintiff can present no evidence to show that Madison County or its election commission has a policy or practice of applying its policies or procedures in a discriminatory or non-uniform manner. Finally, Plaintiff cannot present any evidence to show that Madison County lacks appropriate policies or procedures for handling the restoration of voting rights for convicted felons or that any such policy deficiency is the moving force behind the deprivation of his rights. (*See generally*, D.E. 57, Am. Compl.). Therefore, Plaintiff has failed to satisfy his burden of proof to establish liability under § 1983 against Madison County. Accordingly, the Court should grant summary judgment in favor of Defendant Buckley, in her official capacity as the administrator of elections for Madison County, Tennessee.

CONCLUSION

For the reasons set forth above, the Court should find that Defendant Kim Buckley, in her official capacity as the administrator of elections for Madison County, Tennessee, is entitled to summary judgment in her favor.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I have served a copy of this pleading via the Court's ECF Notification system upon:

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This the 3d day of September, 2008.

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