UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM J. KELLY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Case No. 10-CV-0583**
	)	
JESSE WHITE, in his capacity as Illinois Secretary of State.	)	**Judge Pallmeyer**
	)	
Defendant.	)	

MOTION TO DISMISS

NOW COMES Defendant Jesse White, by and through his attorney, LISA MADIGAN, Attorney General of Illinois, and moves this Court to dismiss Plaintiff's Complaint, pursuant to Fed.R.Civ.P. 12, stating as follows:

I. STANDARD FOR MOTION TO DISMISS

The Supreme Court recently decided the case of *Ashcroft v. Iqbal*, 556 U.S. ___ , 129 S.Ct. 1937 (2009), and thereby fine-tuned the pleading standard as set forth in Fed.R.Civ.P. 8(a)(2), and authoritatively discussed in *Bell Atlantic, Corp. v. Twombly*, 550 U.S. 544 (2007). While reaffirming the reasoning set forth in *Bell Atlantic*, the Court has shifted the plaintiff's burden from pleading a conceivable claim for relief to a plausible claim for relief. "[Plaintiff] would need to allege more by way of factual content to 'nudge' his claim of purposeful discrimination 'across the line from conceivable to plausible.'" *Iqbal,* at 1952. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.,* at 1949. "[O]nly a complaint that states

a plausible claim for relief survives a motion to dismiss." *Id.*, at 1950. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'shown' – 'that the pleader is entitled to relief.'" *Id*. For the reasons stated below, Plaintiff's Complaint fails to allege factual content sufficient to state a claim under the standard set forth in *Iqbal* and should therefore be dismissed.

II. INTRODUCTION

Plaintiff has filed a two-count Complaint, alleging in Count I a violation of the Establishment Clause of the First Amendment and alleging in Count II a violation of the Illinois Administrative Code.

In December 2009, the Illinois State Capitol Building contained displays celebrating various observances. [Complaint,¶5]. Plaintiff complains of a sign containing a message celebrating the winter solstice. [Complaint, ¶5]. The sign was placed near various displays such as a nativity scene and a Christmas tree (or as Plaintiff disingenuously describes it "a decorated fir tree") [Complaint, ¶10].

Plaintiff alleges that the sign read "At the time of the winter solstice, let (*sic*) [actually "may"] reason prevail. There are no gods, no devils, no angels, no heaven or hell. There is only our natural world. Religion is just a (*sic*) [actually "but"] myth and superstition that hardens hearts and enslaves minds." (parenthetical corrections added). Plaintiff fails to include the remainder of the verbiage on the sign, which follows immediately below the portion quoted by Plaintiff: "**Placed by**

the Freedom From Religion Foundation on behalf of its State Members. ffrf.org" [Exhibit A]. [1]

Plaintiff takes issue with the content of the speech on the sign, as well as the fact that the sign was allowed at all, regardless of its message, because of a section of the Illinois Administrative Code which he alleges prohibits all signs.

While Plaintiff attempts to frame the issue in terms of the Establishment Clause, it is more properly analyzed as both a free speech case and an Establishment Clause case. More precisely, the question before this Court is whether the state could, in accordance with the First Amendment Freedom of Speech Clause, prevent the display of the sign based solely on the content of the speech contained on it and whether the state must, in accordance with the First Amendment Establishment Claus, bar the display of the sign because the language is allegedly hostile to religion. The analysis must take place in the context of the placement of the sign in an area set aside by the state for the purpose of allowing citizens to express their beliefs in regard to the occasion they are celebrating at that time of the year, whether it is Christmas or the winter solstice.

III. RESTRICTION ON CONTENT IS UNCONSTITUTIONAL

Plaintiff wishes for the state to restrict the free speech rights of others based solely on the content of their speech because he feels it is hostile to religion. Although he is perfectly comfortable with the use of the Capitol grounds for religious displays, Plaintiff takes issue with a display which celebrates the winter

[1] "Documents that a defendant attaches to a motion to dismiss are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to her claim." *Venture Associates Corp,. v. Zentih Data Systems Corp*., 987 F.2d 429, 431 (7th Cir. 1993).

solstice and expresses an opinion as to the validity of religious beliefs. All of the displays were placed together in the Capitol building, which is either a traditional public forum or a designated public forum.

Traditional public forums consists of places that have immemorially been held in trust for the use of the public and have been used for purposes of assembly, communicating between citizens and discussing public questions. Designated public forums consist of properties which the government has opened to expressive activity. *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 45 (1983). In either case, government restrictions on speech in such a forum require the most exacting scrutiny. A content-based restriction on expression must be necessary to serve a compelling state interest and must be narrowly drawn to achieve that end. *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753, 761 (1995).

A. The *Lemon* Test

The Supreme Court's Establishment Clause cases hold that an equal access policy will not offend the Establishment Clause if it can pass the three part *Lemon* Test[2]: does the policy have a secular purpose; does the principal effect of the policy advance or inhibit religion; does the policy foster an excessive government

[2] The Seventh Circuit has treated *Lemon* as if it had, in effect, an asterisk attached to it. In *Sherman v. Community Consolidated School District 21 of Wheeling Township*, 980 F.2d 437 (7th Cir. 1992), Judge Easterbrook recounted a list of judicial disavowals of *Lemon*, *Id*. at 445, seemed to offer some mild disapproval for the district court in "trudging through" the *Lemon* test, and refused to parse *Lemon* in ultimately deciding, based essentially on a historical analysis, that the words "under God" in the Pledge were consistent with the Establishment Clause. In later cases, however, the Seventh Circuit has applied the *Lemon* test without apparent protest. See, e.g., *Vision Church v. Village of Long Grove*, 468 F.3d 975 (7th Cir. 2006); *Kaufman v. McCaughtry*, 419 F.3d 678, 683 (7th Cir. 2005).

entanglement with religion. *Widmar v. Vincent*, 454 U.S. 263, 271 (1981)(citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971)).

1. First Prong of Test is Passed

The first prong of the *Lemon* test is clearly passed. The secular purpose of the open access policy which allows the displays in the Capitol is to provide a public forum for the free expression of the speaker's views, regardless of the speaker's viewpoint. A policy which restricts the expression of the speaker based on the message is a content based restriction.

2. Second Prong of Test is Passed

The second prong, which appears to be the thrust of Plaintiff's challenge, requires an examination of whether allowing the sign has the purpose of advancing or inhibiting religion. It is important to note that the question is not whether the speech which is allowed has the effect of advancing or inhibiting religion, but rather whether the policy advances or inhibits religion. Plaintiff's point of view, that the sign "consisted solely of language denigrating religion and specifically denigrating Christianity, Catholicism, Judaism, Islam and others that worship God and/or believe in the concepts of heaven and hell," leads him to leap to the conclusion that allowing the sign is government expression of disapproval of religion.

Such is not the case, as the Supreme Court has made clear. "By its terms [the Establishment] Clause applies only to the words and acts of *government*. It was never meant, and has never been read by this Court, to serve as an impediment to purely *private* religious speech connected to the State only through its occurrence in

a public forum." *Capitol Square,* 515 U.S. at 767. "We find it peculiar to say that government 'promotes' or 'favors' a religious display by giving it the same access to a public forum that all other displays enjoy." *Id.* at 763. There, petitioners asked the Court to find that "because an observer might mistake private expression for officially endorsed religious expression, the State's content-based restriction is constitutional." *Id*. The Court rejected that proposal, stating "The test petitioners propose, which would attribute to a neutrally behaving government *private* religious expression, has no antecedent in our jurisprudence, and would better be called a 'transferred endorsement' test." *Id.* at 764. "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a non-discriminatory basis." *Bd. of Ed. of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990)(allowing student religion club to meet on school property).

In *Widmar v. Vincent*, 454 U.S. 263 (1981), the Supreme Court held that a state university's exclusionary policy, based on the religious content of the speech, violated the fundamental principle that state regulation of speech must be content neutral. Rejecting the university's rationale that allowing religious groups to meet on campus would run afoul of the Establishment Clause, the Court stated "an open

forum in a public university does not confer any imprimatur of state approval on religious sects or practices." *Id.* at 274.

Any assertion that the speech on the sign could possibly be construed as government speech is frivolous, based on the placement of the sign among the other holiday displays and the prominent wording expressly stating who placed the sign. Indeed, it is strikingly ironic that Plaintiff attempts to use the Establishment Clause to bar non-sectarian speech in the midst of a nativity scene and Christmas tree. As the Court stated in *Capitol Square*, "Private religious speech cannot be subject to veto by those who see favoritism where there is none." *Capitol Square,* 515 U.S. at 766.

3. Third Prong of Test is Passed

The third prong of the *Lemon* test is also passed. An open access policy, devoid of any need to make decisions based upon the content of the speaker's expression, avoids any government entanglement with religion. Whether a speaker is extolling the virtues of Christianity or naturism, there is no need for the government to inquire into those beliefs, thus eliminating any possibility of a government official making judgments as to the merits of any point of view, whether they are Christian, Jewish, Muslim or naturism.

B. Pure Speech v. Symbolic Speech

Finally, Plaintiff appears to assert that the pure speech on the sign deserves less protection than the symbolic speech of the nativity scene and Christmas tree [Complaint, par. 11: "The sign was unlike any of the displays. The sign was not

symbolic . . .”]. Defendant is unable to find any case law that supports such a novel concept.

IV. COUNT II IS BARRED BY SOVEREIGN IMMUNITY

Count II of Plaintiff’s Complaint alleges a violation of the Illinois Administrative Code. Such a claim is barred by the 11th Amendment. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984). “A federal court’s grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. . . We conclude that *Young* [*Ex parte Young*, 209 U.S. 123 (1908)] and *Edelman* [*Edelman v. Jordan*, 415 U.S. 651 (1974)] are inapplicable in a suit against state officials on the basis of state law.” *Id*. at 106. “In other words, a federal court cannot ‘instruct state officials on how to conform their conduct to state law.’” *Amer. Soc. of Consultant Pharmacists v. Patla*, 138 F.Supp.2d 1062, 1071 (N.D.Ill.2001), quoting *Pennhurst*, 465 U.S. at 106. Count II of the Complaint should therefore be dismissed with prejudice.

V. CONCLUSION

Defendant moves this Court to dismiss Plaintiff’s Complaint for the reasons set forth above, and for such other relief as is just and equitable.

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CERTIFICATE OF SERVICE

The above-signed, an attorney of record, hereby certifies that a copy of the foregoing document was served this May 21, 2010, upon the individuals identified below in the manner indicated.

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BY CM/ECF