

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

BARBARA J. LINTON and
JESSICA NUUTINEN,

Plaintiff,

v.

MEMORANDUM and ORDER
04-C-814-S

FRIEDRICK P. SCHNOOK,

Defendant.

Plaintiffs Barbara J. Linton and Jessica Nuutinen commenced this civil action under 42 U.S.C. § 1983 claiming that defendant Friedrich P. Schnook, the mayor of the City of Ashland, violated their First Amendment rights. In their complaint plaintiffs allege they were prohibited by defendant Schnook from politically campaigning in a public park.

On March 1, 2005 defendant moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of fact, conclusions of law, affidavits and a brief in support thereof. This motion has been fully briefed and is ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if

not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could 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 (1986).

FACTS

For purposes of deciding defendant's motion for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff Barbara Linton is an adult resident of Highbridge, Wisconsin who was the Republican party candidate for the Wisconsin Assembly for the 74th district in 2004. Plaintiff Jessica Nuutinen is an adult resident of Ashland, Wisconsin who was the campaign

treasurer for Barbara Linton's 2004 campaign. Defendant Friedrich P. Schnook, an adult resident of Ashland, Wisconsin, is the City's mayor.

Defendant Schnook assisted Gary Sherman in his campaign against Barbara Linton in 2004. He endorsed Gary Sherman and allowed the use of his name on Sherman's campaign literature.

On July 16, 17 and 18, 2004 a public event known as "Bay Days" was held on municipal park grounds known as Memorial Park in downtown Ashland. The "Bay Days" event is owned by a nonprofit entity and partly sponsored by the City of Ashland. Jennifer Fanucci was hired by the City of Ashland as the "Bay Days" Coordinator for festival years 2002, 2003 and 2004. She coordinated the organizational aspects of the festival and reported directly to Dale Thomas the president of the "Bay Days" committee.

Tim Zwetow, the manager of the Ashland Travel Center, paid to have a booth at the "Bay Days" event. He brought about a dozen 2 feet by 3 feet Linton campaign yard signs with him from the Ashland Travel Center to his booth on the festival grounds. He placed two of the signs in front of his booth and kept the remaining yard signs in his booth for distribution to booth visitors.

In the early evening of July 16, 2004 Fanucci requested that Zwetow remove the two yard signs from the space in front of his booth. Prior to approaching Zwetow, Fanucci had observed a little boy trip over one of the signs. She spoke with Schnook and the

"Bays Days" committee members who agreed that the signs should be removed.

Fanucci believed that Zwetow's placement of the signs violated the rules which provided that the vendor shall keep the lease space free from any condition which might be dangerous.

Zwetow removed the signs and placed them inside the booth where they were visible to a person in front of the booth. Zwetow distributed Packers' football schedules with the Linton campaign on them and Linton yard signs to booth visitors.

Shortly thereafter Jessica Nuutinen and Friedrich Schnook discussed the Linton campaign table located in the local pawn shop parking lot across the street from Memorial Park. Schnook believed the table was on the festival grounds. Nuutinen believed it to be on private property. To end the conversation with Schnook, Nuutinen told him she would discuss the matter further with him when he was sober and turned to walk away. Schnook said "You can go screw yourself."

The next day Barbara Linton discussed the campaign table with Fanucci and decided that she would continue to campaign from the table. Linton was unsure whether she could campaign on the festival grounds. At 10:45 a.m. she called Rodney Maiwald, a City of Ashland Council member, to discuss her conversation with Fanucci. About 1:15 p.m. Maiwald advised Linton that she could distribute campaign literature on festival grounds which she did.

It is disputed whether Schnook told Fanucci that political literature should not be allowed at "Bays Days" and whether Fanucci conveyed this message to Linton. It is further disputed whether Linton's political signs were removed for safety or political reasons.

MEMORANDUM

Plaintiffs claim that their First Amendment rights were violated when defendant Schnook in his individual capacity prohibited them from politically campaigning in a public park. The Supreme Court has articulated a three-part, forum based test to evaluate claims of unconstitutional restriction on speech. Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 797 (1985). A Court must determine whether a plaintiff's speech is protected by the First Amendment, the nature of the forum and whether the government's justification for limiting the speech satisfies the requisite standard. Speech can be excluded from a public forum only when the exclusion is necessary to serve a compelling state interest and the exclusion is narrowly drawn to achieve that interest. Id. at 800.

Plaintiffs claim that they were prohibited from politically campaigning on the "Bays Days" festival grounds when Zwetow was asked to remove two signs from in front of his booth and when

Linton did not distribute campaign literature from 10:45 a.m. to 1:15 p.m. on July 17, 2005 on festival grounds. Factual disputes remain concerning whether Schnook required the removal of the Linton signs and prohibited her from distributing campaign literature and whether, if he did was it because of a compelling state interest. Defendant's motion for summary judgment will be denied.

Defendant also moves for judgment on the basis of qualified immunity. Factual issues remain which prevent this Court from deciding the issue of qualified immunity. See Ruffino v. Sheahan, 218 F. 3d 697, 701 (7th Cir. 2000). These factual issues are beyond the narrow legal issue of immunity which is subject to an interlocutory appeal. See Marshall v. Allen, et al., 984 F. 2d 787 (7th Cir. 1993). Defendant's motion for summary judgment on the basis of qualified immunity will be denied.

ORDER

IT IS ORDERED that defendant's motion for summary judgment is DENIED.

Entered this 6th day of April, 2005.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge