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Of Attorneys for Defendant The City of Ashland

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

AMERICAN BUDDHA, an Oregon Nonprofit Corporation,)	No. 06-CV-3054-PA
)	
Plaintiff,)	DEFENDANT THE CITY OF
)	ASHLAND’S MEMORANDUM
v.)	IN SUPPORT OF MOTION FOR
)	SUMMARY JUDGMENT
THE CITY OF ASHLAND AND THE WASHINGTON POST COMPANY,)	
)	
Defendants.)	

INTRODUCTION

The issue in this case is whether the disconnection of a modem hosting plaintiff’s website violated its procedural due process rights, or violated a First Amendment right. Plaintiff brings a claim under 42 U.S.C. § 1983 against defendant The City of Ashland (herein “defendant”). Plaintiff alleges that the disconnection of the modem hosting its website violated the First Amendment because the disconnection was based on content posted on the website (Complaint, ¶¶ 12-13) and violated its due process rights because the modem was disconnected without notice and an opportunity to be heard (Complaint, ¶ 14).

As set forth below, defendant is entitled to judgment on both claims because (1) plaintiff has no property right in internet service; and (2) no First Amendment considerations exist, as the

City of Ashland does not regulate access to its fiber network by internet service providers based on content posted on websites by the customers of the internet service provider.

FACTS

The City of Ashland operates the Ashland Fiber Network (“AFN”) (Concise Statement, ¶ 1). AFN has contracts with various internet service providers permitting them access to AFN’s telecommunications system (Concise Statement, ¶ 2). The internet service providers that have contracts with AFN in turn contract with individual end-users (Concise Statement, ¶ 2).

The City of Ashland never had a contract with plaintiff to provide it internet access (Concise Statement, ¶ 3). The only contracts AFN has are with internet services providers, not with internet providers’ customers (Concise Statement, ¶ 3).

On August 1, 2006, Richard Holbo of AFN received an email from Kathleen Parker, a syndicated columnist, complaining that a website known as American-Buddha.com had taken her column picture and “doctored” it to create a pornographic picture (Concise Statement, ¶ 4, Holbo Aff., Ex. 2). Parker claimed that the image was a copyright violation (Concise Statement, ¶ 4). Holbo contacted the internet service provider hosting that website, Infostructure (Concise Statement, ¶ 5). Holbo told Infostructure about the copyright claim, and the name of the website of which Parker was complaining (Concise Statement, ¶ 5).

The next day, after speaking with an Infostructure employee, John Dowd, Holbo disconnected the modem which provided internet access to the American-Buddha website (Concise Statement, ¶ 6). The modem was reconnected approximately an hour later (Concise Statement, ¶ 6). The disconnection of the service was not due to the content of the website (Concise Statement, ¶ 7). It was done because of the copyright infringement claim (Concise Statement, ¶ 7). The contracts between the City and the internet service providers do not include any content-based limitations (Concise Statement, ¶ 7).

LEGAL ARGUMENT

1. Plaintiff Has No Property Interest in Internet Service.

The Fourteenth Amendment protects against the deprivation of property without procedural due process. *Brady v. Gebbie*, 859 F.2d 1543, 1547 (9th Cir. 1988). In order to state a claim under 42 U.S.C. § 1983, plaintiff must establish as a threshold matter that he had a property right in internet access. *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 33 L. Ed. 2d 548 (1972). Any entitlement alleged to be a property interest must be granted by state law. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430, 102 S. Ct. 1148, 1154-55, 71 L. Ed. 2d 265 (1982).

It is well settled that property interests are not created by federal constitutional law, but “are created and their dimensions defined by existing rules or understandings that stem from an independent source, such as state law.” *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). However, federal constitutional law determines whether the interest constitutes property protected by the Fourteenth Amendment. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9, 98 S. Ct. 1554, 56 L. Ed. 2d 30 (1978).

Plaintiff does not allege the existence of any state statute or common law decision holding that it has a constitutionally protected property right in internet service. Plaintiff instead alleges it had a right to publish its website to the internet via Ashland Fiber Network and this was a property right acquired by plaintiff’s “payment of consideration” (Complaint, ¶ 14). Plaintiff then alleges that by depriving it of access to the internet without notice and an opportunity to be heard, defendant violated plaintiff’s rights under the Fourteenth Amendment (Complaint, ¶ 14).

First, plaintiff had no contract with the City of Ashland to receive internet access (Concise Statement, ¶ 3). The City does not contract with individual end-users to provide internet services. Instead, the City provides fiber network access to internet service providers who in turn provide internet access to end-users (Concise Statement, ¶ 2). The City has an

agreement with Infostructure, the internet service provider for plaintiff, but has no contract with plaintiff (Concise Statement, ¶¶ 2, 5). Therefore, as a threshold matter, plaintiff has no contract with a public entity on which to base a property right protected by a procedural due process requirement.

As plaintiff has no property right in internet service by virtue of contract or state law or statute, plaintiff has no procedural due process claim under 42 U.S.C. § 1983. For this reason, The City of Ashland is entitled to summary judgment on this claim.¹

2. No First Amendment Rights are Implicated in This Case.

There is no ordinance or rule enacted by the City which imposes content-based restrictions on the internet service providers with whom it contracts, nor is there any ordinance or rule enacted or enforced by the City which imposes content-based restrictions on internet access or website content (Concise Statement, ¶ 7). Plaintiff does not plead that such an ordinance or rule exists. There is, therefore, no issue in this case about whether the City has enacted any ordinance regarding website content that violates the First Amendment.

Plaintiff instead alleges that the act of disconnection violated the First Amendment because the decision to disconnect was based on content (Complaint, ¶ 12). Factually, the only reason the modem was disconnected was due to the copyright infringement claim (Concise

¹ Even if such a contract existed, it would not be subject to procedural due process protections in any event because there is no individual right equivalent to a civil liberty at stake. Not every contract with a governmental entity creates a property interest protected by due process rights. *San Bernadino Physicians' Services Medical Group, Inc. v. County of San Bernardino*, 825 F.2d 1404, 1408 (9th Cir. 1987) (contract to provide medical services to county not subject to due process rights before termination). The court in that case held that “the farther the purely contractual claim is from an interest as central to the individual as employment, the more difficult it is to extend it constitutional protection without subsuming the entire state law of public contracts.” *Id.* at 1409-10. *See also, Oceanside Golf Institute, Inc. v. City of Oceanside*, 876 F.2d 897 (9th Cir. 1989) (Agreement to operate golf course for City not a contract subject to procedural due process protections); *Loehr v. Ventura County Community College District*, 743 F.2d 1310 (9th Cir. 1984) (right to performance of a contract is not a “property interest” protected by the Fourteenth Amendment).

Statement, ¶ 7). Assuming for purposes of this motion that the City’s disconnection amounted to “state action” and the plaintiff’s website posting of Ms. Parker’s doctored photograph without her permission constituted “speech,” there was no First Amendment violation because no action was taken based on the content of the website. In the absence of content-based restrictions, there can be no First Amendment violation. *Committee for Independent P-I v. The Hearst Corp.*, 704 F.2d 467, 483 (9th Cir. 1983) (anti-trust exemption in Newspaper Preservation Act which did not affect the content of newspapers, but was an economic regulation, did not invoke First Amendment protections); *Ellwest Stereo Theatres, Inc. v. Wenner*, 681 F.2d 1243, 1246 (9th Cir. 1982) (ordinance requiring open booths in picture arcade of theater which did not prohibit showing of films based on content did not invoke First Amendment analysis).

Plaintiff also alleges that the fiber network owned by the City constitutes a “public forum” for purposes of the First Amendment (Complaint, ¶ 22). The court does not need to address this issue, because the City took no action based on content of speech, required as a threshold matter for any First Amendment claim. However, even assuming that the City’s action was somehow a restriction on speech, it was permissible under First Amendment “forum” analysis in any event.

The constitutionality of government restriction on free speech activity depends on the nature of the forum and then on the type of restriction. *Perry Educ. Ass’n v. Perry Local Educ. Ass’n*, 460 U.S. 37, 44-46, 103 S. Ct. 948, 74 L. Ed. 2d 794 (1983). There are three distinct categories of government “fora” recognized for free speech activities: (1) traditional public fora; (2) designated public fora; and (3) nonpublic fora. *Perry, supra*, 460 U.S. at 45-47.

No case has held that the operation of a fiber network by a municipality establishes a “public forum” under the First Amendment. However, as a matter of law, a governmental entity does not create a public forum when it establishes an internet connection, even if that connection is accessed in a public building, and open for use by the public. *United States v. American*

Library Association, Inc., 539 U.S. 194, 205, 123 S. Ct. 2297, 156 L. Ed. 2d 221 (2003) (internet access in libraries is neither a “traditional” nor a “designated” public forum); *Putnam Pit Inc. v. City of Cookeville, Tennessee*, 221 F.3d 834, 843 (6th Cir. 2000) (City’s website, which established links to other websites, is a nonpublic forum under the First Amendment). In this case, the City of Ashland simply provides access to its fiber network to internet services providers, who in turn sell access to the internet to end-users. Since this is steps removed from providing internet access at a public building for public use, such as a library, or establishing a website specifically controlled by the City, the fiber network is a nonpublic forum (if it is a forum at all) for purposes of the First Amendment.

In a nonpublic forum, the government can restrict free speech, so long as any restrictions are reasonable in light of the function served by the forum and are viewpoint neutral. *Perry, supra*, 460 U.S. at 49. In reviewing the reasonableness of any restrictions, a court does not impose its views regarding the ideal use of the forum. The government’s decision to restrict access need not be the most reasonable, or the only reasonable, limitation. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 808, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985). A nonpublic forum can restrict speech based on content, so long as the restriction is viewpoint neutral. *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 829, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995) (a nonpublic forum may prohibit speech on certain subjects, but may not prohibit the expression of particular views about such subjects).

Further, nonpublic forums can totally ban certain speech activities. *Arkansas Educational Television Comm. v. Forbes*, 523 U.S. 666, 682, 118 S. Ct. 1633, 140 L. Ed. 2d 875 (1998) (television station could exercise broad discretion and exclude certain candidates from televised debates based on determination by station executives so long as exclusion was not based on speaker’s viewpoint); *Hazelwood v. Kuhlmeier*, 484 U. S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988) (high school newspaper nonpublic forum; control of published material by school

officials was reasonable); *Greer v. Spock*, 424 U.S. 828, 840, 96 S. Ct. 1211, 47 L. Ed. 2d 505 (1976) (military base nonpublic forum, military commander had discretion to disapprove of literature distributed on base due to content); *Cogswell v. City of Seattle*, 347 F.3d 809, 818 (9th Cir. 2003) (city restriction of candidate statements in voter’s pamphlets was constitutional; voter pamphlet was nonpublic forum, and city was not required to allow free exchange of ideas). Under these cases, the only relevant inquiry is whether the exclusion of the speech is based on the speaker’s viewpoint on a subject, not the subject itself.

The sole reason that the modem was disconnected was because of the copyright infringement claim. The modem was not turned off because of the content of the website posting or due to plaintiff’s viewpoint regarding the posting. The City took action because of a claim of violation of federal law. Such an action is not based on viewpoint, or content, and was reasonable under a nonpublic forum analysis. Even if the court assumes that the City created a “forum” by owning a fiber network, that forum is nonpublic. Even if the court assumes that the disconnection of the modem was a restriction on speech in a nonpublic forum, that restriction was reasonable. No First Amendment violation occurred. The City is entitled to summary judgment on plaintiff’s freedom of speech claim.

3. Plaintiff’s Claims Are Moot.

Plaintiff’s internet service was turned back on one hour after being turned off. Since there is no actual controversy between the parties regarding access to the internet, plaintiff’s claims are moot in any event. *Johnson v. Hawe*, 388 F.3d 676, 687 (9th Cir. 2004) (claim that Washington Code violated plaintiff’s First and Fourth Amendment rights moot after defendants dismissed counterclaims based on Washington statute); *Sims v. Bush*, 2005 W.L. 3337501 (W.D. Tex. 2005) (Air Force’s correction of software filtering configuration applied to computer equipment and facilities used by plaintiff rendered her claims for declaratory and injunctive relief moot in face of challenge that she could not access religious sites; citing *McCorvey v. Hill*, 385

F.3d 846, 849, n.3 (5th Cir. 2004), *cert. denied* 125 S. Ct. 1367 (2005).

4. Plaintiff Failed to Properly Bring a Claim Under 42 U.S.C. Section 1983.

The elements of a Section 1983 action are: (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States. 42 U.S.C. § 1983; *Johnson, supra*, at 681. There is no vicarious liability for an employee's actions under 42 U.S.C. § 1983. *Monell v. Dept. of Soc. Servs.*, 436 U.S. 658, 690, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978). Plaintiff failed to sue any individual alleged to have been acting under the color of state law at the time the service was disconnected.

While a plaintiff can proceed against an entity alone if there is evidence of a policy on the part of the City to violate First Amendment or due process rights, plaintiff here has not done so. Because plaintiff failed to sue any individual City employee allegedly acting under the color of state law, and failed to plead the existence of any City of Ashland policy to violate citizens' First Amendment or due process rights, plaintiff has failed to properly allege a claim under 42 U.S.C. § 1983.

CONCLUSION

For all of the above reasons, defendant The City of Ashland is entitled to summary judgment on all claims brought by plaintiff.

Dated this 1st day of December, 2006.

HOFFMAN, HART & WAGNER, LLP

By: /s/ Karen O'Kasey
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Of Attorneys for Defendant The City of Ashland

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of December, 2006, I served the foregoing
DEFENDANT THE CITY OF ASHLAND'S CONCISE STATEMENT OF FACTS IN
SUPPORT OF MOTION FOR SUMMARY JUDGMENT on the following party:

Charles Carreon
Online Media Law, PLLC
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Ashland, OR 97520

by electronic means through the Court's Case Management/Electronic Case File system.

/s/ Karen O'Kasey
Karen O'Kasey