IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JASON GONZALES, Plaintiff, v. MICHAEL J. MADIGAN, FRIENDS OF MICHAEL J. MADIGAN, 13TH WARD DEMOCRATIC ORGANIZATION, PRISONER REVIEW BOARD, SHAW DECREMER, SILVANA TABARES, RAY HANANIA, JOE BARBOSA, and GRASIELA RODRIGUEZ, Defendants.	Case No. 1:16-CV-07915 Judge Matthew F. Kennelly

CERTAIN DEFENDANTS' MOTION TO DISMISS THE FEDERAL CLAIMS ALLEGED IN PLAINTIFF'S FIRST AMENDED COMPLAINT AND JOINT MEMORANDUM OF LAW IN SUPPORT

Defendants Michael J. Madigan, Friends of Michael J. Madigan, 13th Ward Democratic Organization, Shaw Decremer, Silvana Tabares, Ray Hanania, Joe Barbosa, and Grasiela Rodriguez (collectively "Defendants") jointly move the Court to dismiss the federal claims in plaintiff's Amended Complaint (ECF Doc. # 45, hereinafter "AC") with prejudice pursuant to Fed. R. Civ. P. 12(b)(6), and decline to exercise pendent jurisdiction over his state-law claims under 28 U.S.C. § 1367, dismissing them without prejudice. In support of this motion, Defendants state as follows:

Background

On March 14, 2017, the Court entered an order granting Defendants' motion to dismiss Plaintiff's original complaint. ECF Doc. # No. 43 (hereinafter "Order"). In the Order the Court held that Plaintiff's federal claims, brought under 42 U.S.C. § 1983, were deficient because plaintiff had not "alleged facts that connect [the alleged] conduct to any power or authority that the defendants possessed by virtue of state law." Order at 6. The Court rejected Plaintiff's claim that Defendant Michael J. Madigan's actions as a private person and as a state official are indistinguishable, observing that "[t]he Seventh Circuit has repeatedly stated that '[t]he mere assertion that one is a state officer does not necessarily mean that one acts under color of state law.'" Order at 7, quoting *Wilson v. Price*, 624 F.3d 389, 392 (7th Cir. 2010). The Court granted Plaintiff until March 29, 2017, to file an amended complaint "that contains at least one viable claim over which the Court has jurisdiction." Order at 12. In doing so, the Court said Plaintiff's amended complaint "must allege facts permitting a plausible inference that Madigan engaged in conduct *made possible by his official authority under state law* that contributed to the alleged constitutional violations." Order at 7 (emphasis added).

In the Order the Court noted that Plaintiff in his original complaint based his claims on two courses of conduct: "informing voters that he was a convicted felon and registering sham candidates to deprive him of votes." Order at 6. The AC is also based on those same two courses of conduct. Like its predecessor, the AC is still subject to the

same flaw; despite some elaboration, it still does not attribute to any of the Defendants, including Mr. Madigan, and conduct that was made possible by his position as Speaker and a Member of the Illinois House of Representatives.

The AC does reflect some changes, though none point to a different result. It contains new allegations in its "parties" section. AC ¶¶ 7-11, 13-6, 20-29, 35-39, 42-48, 51-55, 57-61, 64-69. It also expands the federal counts against Mr. Madigan in Count I, (AC ¶ 99-108) Count II (AC ¶ 113-14), Count III, (AC ¶¶ 120, 122, and 124), and Count IV (AC ¶¶ 129 and 132). None of these new allegations implicate the Court's ruling that plaintiff must allege conduct "made possible by [Mr. Madigan's] official authority under state law that contributed to the alleged constitutional violations." Order at 7. Instead, the new allegations merely attempt to expand on Plaintiff's theory that *everything* Mr. Madigan does is state action by virtue of the public offices he holds—the very theory this Court rejected in the Order.

Argument

The AC does not plead any claims based on any conduct made possible by any Defendant's official authority under state law. All Plaintiff's amended complaint does is maintain his theory, properly rejected in the Order, that Defendants engaged in private political activity in support of Mr. Madigan's candidacy and opposition to Plaintiff in the primary election for state representative. But all the conduct Plaintiff describes is the private conduct of a political candidate and his supporters, and none of it required the

authority or use of any state office to accomplish. Accordingly, this Court should dismiss Plaintiff's federal claim with prejudice pursuant to Fed. R. Civ. P. 12(b)(6), and decline to exercise jurisdiction over his state-law claims under 28 U.S.C. § 1367.

I. Plaintiff's Amended Complaint fails to allege state action.

In considering a Rule 12(b)(6) motion the Court "construes the complaint in the light most favorable to the plaintiff, taking as true all well-pleaded factual allegations and making all possible inferences from those allegations in his or her favor." *Wilson v. Price*, 624 F.3d 389, 391 (7th Cir. 2010). Defendants thus accept the allegations in the Complaint as true for purposes of this motion only, but do not admit the validity of any of them.

Plaintiff alleges Mr. Madigan is a state actor by virtue of his position as state representative and Speaker of the Illinois House. AC ¶¶ 7, 8. Plaintiff also, without elaboration, alleges that Mr. Madigan is a state actor by virtue of his position as Chairman of the Democratic Party of Illinois, AC ¶ 9, a position that is ostensibly private. But Plaintiff does not even try to explain how the authority of either position was necessary to accomplish the actions taken.

The AC adds more to Count I than any other count. Count I alleges a First Amendment claim against Mr. Madigan for depriving Plaintiff of his right to petition the government seeking redress of grievances. AC ¶¶ 95-110. His new allegations claim that Mr. Madigan "did not recognize the governmental redress of the pardon Gonzales

received by respecting the fact that Gonzales' record was made clean and instead campaigned against Jason Gonzales as being a convicted felon." AC ¶ 101. Plaintiff goes on to allege that Mr. Madigan "used commercials, campaign workers and volunteers to spread the message of Gonzales' past"; that he used "his own campaign workers and volunteers" and the "workers and volunteers of the organizations controlled by him by virtue of his political offices" to "discredit Gonzales' past"; and that Mr. Madigan "disregarded Gonzales' pardon as if it did not occur." AC ¶¶ 102-06.

In an attempt to tie these allegations to state action, Plaintiff alleges as follows:

> Gonzales' right to redress under the 1st Amendment may have been on paper but the Illinois Speaker of the House, Illinois House of Representative for the 22nd District, 13th Ward Committeeman, and Democratic Party Chairman for Illinois (all political and government offices held by Madigan) did not allow Gonzales the benefit of his pardon by the government.

AC ¶ 108. This allegation is so conclusory as to be meaningless. Even assuming that under Illinois law the purpose of a pardon is to erase a criminal past from memory—that is, to make Plaintiff's record "clean"—there is no support for the proposition that Mr. Madigan exercised state authority by supposedly "disregarding" Plaintiff's pardon.[1] Simply put, Plaintiff has not alleged that Defendants required or used any

[1] In any event, that is not the purpose or the effect of a pardon under Illinois law. The Illinois Supreme Court has held "[s]ince the very essence of a pardon is forgiveness or remission of penalty, assessed on the basis of the conviction of the offender, a pardon *implies guilt*; it does not obliterate the fact of the commission of the crime and the conviction thereof.… In other words, a pardon involves forgiveness but not forgetfulness." *Talarico v. Dunlap*, 177 Ill. 2d 185, 190 (1997) (citation and internal quotation marks omitted; emphasis added).

state authority to say, accurately and in the context of a political campaign, that Plaintiff had been convicted of a crime.

The new allegations in Plaintiff's other counts likewise fail to allege any state action. In Count II (Unconstitutional Candidate Qualification under the Fourteenth Amendment), Plaintiff adds that "Madigan insinuated that in order to be in the state legislature you cannot have any marks on your criminal record[.]"AC ¶ 113. This allegation, essentially a claim that Mr. Madigan said (or caused to be said) something in a political campaign, also would not have required any state authority to accomplish. Even if true, Mr. Madigan was not able to "insinuate" Plaintiff's criminal history disqualified him from office by virtue of the authority granted to him by holding the office of state representative and Speaker of the House. Any candidate, or even any person, could have made the same "insinuation."

In Count III (Unconstitutional Vote Dilution in violation of the Fourteenth Amendment Equal Protection Clause) Plaintiff adds the allegation that "[i]t was at Madigan's direction that [Defendant] Decremer filed nomination papers for [Defendants] Barbosa and Rodriguez to get onto the ballot." AC ¶ 122. Once again, this allegation does not describe any official conduct or conduct outside the sphere of politics and campaigning. Plaintiff, for example, himself filed nominating papers to get on the same primary ballot without the benefit of state authority.

Finally, in Count IV (Unconstitutional Vote Dilution in violation of the Fifteenth Amendment), Plaintiff adds a new allegation that "[u]pon information and belief, Gonzales would have obtained more votes had there not been other Hispanic names on the ballot." *Id*. ¶ 132. This allegation too fails to allege necessary state action because no state action was required to file candidate nomination papers, as Barbosa and Rodriguez did, or even to ask them to do so, as Plaintiff claims Mr. Madigan did. The remaining federal counts against Defendants provide no allegations of state action either; at best, they repeat similar allegations of private political conduct of the type included in AC Counts I-IV.

Plaintiff's AC thus fails to plead claims under § 1983. A cause of action under § 1983 requires that: (1) a person acting under color of state law (2) deprived the plaintiff of a right secured by the Constitution or federal law. *Parker v. Franklin County Cmty. Sch. Corp*., 667 F.3d 910, 925 (7th Cir. 2012). Under § 1983, "[n]ot every action by a state official or employee is to be deemed as occurring 'under color' of state law[.]" *Wilson v. Price*, 624 F.3d 389, 392 (7th Cir. 2010). Rather, action under color of state law "involves a misuse of power, *possessed by virtue of* state law and *made possible only* because the wrongdoer is clothed with the authority of state law[.]" *Id*. (emphasis added). Simply asserting that a defendant is a state officer—which is all Plaintiff ever does—does not mean that the defendant acts under color of state law. A state officer's conduct only constitutes acting under color of state law if it is "related in some way to the

performance *of the duties of the state office*." *Id.* (emphasis added). Thus, the acts of state officials "in the ambit of their personal pursuits are plainly excluded" from color-of-law claims. *Plaats v. Barthelmy*, 641 F.Appx. 624, 627 (7th Cir. 2016), quoting *Screws v. United States*, 325 U.S. 91, 111 (1945).

Plaintiff's amended complaint does not cure the failure of his initial complaint to allege state action. Instead, Plaintiff persists in his theory that Mr. Madigan's "authority as a private person and the authority he derives from his position are indistinguishable." See Order at 6 (quoting Pl.'s Resp. Mem. in Opp'n to Certain Defs.' Mot. to Dismiss, ECF Doc. # 38, at 6). The AC also pleads as much, alleging "Defendant Madigan's actions in his personal capacity cannot be separated from the authority he derives from the political positions that he holds." AC ¶ 10. The Court has already rejected that theory, observing that "[t]he Seventh Circuit has repeatedly stated that '[t]he mere assertion that one is a state officer does not necessarily mean that one acts under color of state law.'" Order at 7 (quoting *Wilson*, 624 F.3d at 392).

Like its predecessor, though, the AC never claims that any Defendant acted under color of state law for any reason except that Mr. Madigan held state office. Nowhere in the AC does Plaintiff allege that any Defendant acted in any way related to the performance of any public duties, as distinguished from any political role (a distinction Plaintiff simply does not accept, and essentially ignores). Rather, the AC describes actions that occurred during and as part of a political campaign, allegedly

taken by or on behalf of a political candidate. There is simply no legal support for the unspoken assumption that appears to underlie Plaintiff's "color-of-law" allegations, which is essentially that *anything* Mr. Madigan does, or that is done on his behalf, whether or not connected to his duties or obligations as Speaker or as a state representative, is action taken "under color of law." Merely alleging a candidate also holds public office is not enough to demonstrate that his alleged private political actions, or those of his supporters, taken in connection with his candidacy, are taken "under color of law."

Plaintiff's claims under § 1983 thus fail to allege that any Defendant acted under the color of state law. Accordingly, Plaintiff's federal claims should be dismissed with prejudice. This Court should decline to exercise jurisdiction to hear Plaintiff's remaining state-law claims and dismiss them without prejudice.

II. Defendants incorporate the remaining arguments in their original Motion to dismiss.

This Court's order setting the briefing schedule for this Motion to Dismiss stated the motion is to be "confined to the issue of color of state law." Order, April 5, 2017, ECF Doc. # 47. For the reasons stated above, this Court should dismiss Plaintiff's amended complaint for failure to allege conduct taken under the color of state law. If, however, the Court goes beyond the color of law issue, Defendants respectfully request the Court consider the remaining arguments Defendants raised in their original motion to dismiss. ECF Doc. # 37.

Conclusion

The federal claims in the AC (Counts I, II, III, IV, VII, VIII, IX, X, XIII, XIV, XV, XVI, XXIII, XXIV, XXV, XXVI, XXVII, XXVIII, XXXIII, XXXIV, XXXV, XXXVI, and XXXVII) should be dismissed with prejudice, and the state law claims should be dismissed without prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was filed electronically on April 19, 2017 using the Court's CMF/ECF system, which will accomplish service electronically on all counsel of record.

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