UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 99-517-CIV-UNGARO-BENAGES

LILIANA CUESTA,
Plaintiff,

vs.

THE SCHOOL BOARD OF MIAMI DADE COUNTY, et al.,
Defendants.
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ORDER

THIS CAUSE is before the Court upon Defendant Michael Alexander's Motion to Dismiss Plaintiff's Complaint, filed February 19, 1999.

THE COURT has considered the Motion, the pertinent portions of the record and is otherwise fully advised in the premises. On February 19, 1999, Plaintiff filed the Complaint alleging, *inter alia*, that Defendant Michael Alexander ("Alexander") violated her First and Fourth Amendment rights by unlawfully arresting her on February 20, 1998 for her participation in the distribution of anonymous, contemptuous pamphlets to other students at Killian Senior High School.[1] Defendant Alexander files the instant Motion arguing that Plaintiff's claims against him must be dismissed based on his entitlement to qualified immunity.

LEGAL STANDARD

On a motion to dismiss the Court must view the Complaint in the light most favorable to the plaintiff, *Jenkins v. McKeithen*, 395 U.S. 411, 421-22, 89 S.Ct. 1843, 1848-49, 23 L.Ed.2d 404

[1]The Complaint also contains claims against Defendants Miami Dade County and the Miami Dade County School Board.

(1969), and may grant the motion only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which could entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957); *Bradberry v. Pinnellas County*, 789 F.2d 1513, 1515 (11th Cir. 1986). Moreover, the Court must, "at this stage of the litigation, . . . accept [the plaintiff's] allegations as true." *Hishon v. King & Spalding*, 467 U.S. 69, 73 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984); *Stevens v. Dept. of Health and Human Services*, 901 F.2d 1571, 1573 (11th Cir. 1990). Thus, the inquiry focuses on whether the challenged pleadings "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley*, 355 U.S. at 47.

LEGAL ANALYSIS

Plaintiff alleges that Defendant Alexander violated her First and Fourth Amendment rights by arresting Plaintiff for her participation in the anonymous publication "The First Amendment." Alexander moves to dismiss the Complaint against him on the ground that he is protected by qualified immunity because his arrest of Plaintiff was not objectively unreasonable under the circumstances. Plaintiff contends that the law was clearly established at the time Alexander arrested her that such an arrest violated her First and Fourth Amendment rights and therefore Defendant Alexander is not entitled to qualified immunity.

It is well settled that government officials performing discretionary functions are entitled to qualified immunity and may not be held liable in their individual capacities if their conduct violates no "clearly established statutory or constitutional right of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Siegert v. Gilley*, 500 U.S. 226, 231-33 (1991). In *Zeigler v. Jackson*, 716 F.2d 847, 849 (11th Cir. 1983), the Eleventh Circuit established a two-prong analysis to be used in applying the *Harlow* test. Under the first prong of the *Zeigler*

test, a government official must allege and prove that he acted within his discretionary authority by showing "objective circumstances which would compel the conclusion that his actions were undertaken pursuant to the performance of his duties and within the scope of his authority." *Zeigler*, 716 F.2d at 849; see also *Rich v. Dollar,* 841 F.2d 1558, 1564 (11th Cir. 1988). Once this requirement is met, the burden shifts to the plaintiff to show that the defendant violated "clearly established" law. *Zeigler,* 716 F.2d at 849; *Rich,* 841 F.2d 1558.

"Clearly established" for purposes of qualified immunity means that "the contours of the right must be sufficiently clear that a reasonable government official would understand that his conduct violates that right." *Wilson v. Layne,* 119 S.Ct. 1692, 1699 (1999); *citing Anderson v. Creighton,* 483 U.S. 635, 640 (1987)("This is not to say that an official is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent."). Thus, a plaintiff must point to case law which "pre-dates the official's alleged improper conduct, involves materially similar facts, and 'truly compels' the conclusion that the plaintiff had a right [clearly established] under federal law." *Lassiter v. Alabama A & M University, Board of Trustees,* 28 F.3d 1146, 1150 (11th Cir. 1994). For the law to be deemed "clearly established" such that qualified immunity no longer protects the government official, the law must have been developed in such a concrete and factually-defined context to make it obvious to all reasonable government actors in the defendant's place that what he is doing violates federal law. *Anderson,* 483 U.S. at 640.

In the instant case, it is undisputed that Defendant Alexander was acting within the scope of his discretionary authority when he arrested Plaintiff. *See* Plaintiff's Response at 2. The burden therefore shifts to the Plaintiff to show that Defendant Alexander violated a clearly established

statutory or constitutional right when arresting Plaintiff.

Pursuant to the second prong of the *Zeigler* test, the Court must consider whether, from an objective perspective, a reasonable police officer could have believed that arresting a student for her alleged participation in anonymous pamphleteering that contained contemptuous speech was lawful in light of clearly established First Amendment law and the information the officer possessed at the time of the arrest. *Swint v. City of Wadley,* 51 F.3d 988, 995 (11th Cir. 1995). For the reasons explained below, the Court finds that as a matter of law it was not objectively unreasonable for a police officer to arrest a student for her participation in anonymous, contemptuous pamphleteering because there was no clear statutory or constitutional violation.

Plaintiff contends that Defendant Alexander violated her First Amendment and Fourth Amendment rights by arresting her pursuant to Fla. Stats. §836.11[2] and §775.085[3], both of which

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[2] Fla. Stat. §836.11 entitled **Publications which tend to expose persons to hatred, contempt, or ridicule prohibited.**--and states in pertinent part:

> It shall be unlawful to print, publish, distribute or cause to be printed, published or distributed...any publication...which tends to expose any individual or any religious group to hatred, contempt, ridicule or obloquy unless the following is clearly printed or written thereon:
>
> (a) the true name and post-office address of the person, firm, partnership, corporation or organization causing the same to be printed, published or distributed;...

[3] Fla. Stat. §775.085 entitled **Evidencing prejudice while committing offense; enhanced penalties.**--and states in pertinent part:

> (1) The penalty for any felony or misdemeanor shall be reclassified as provided in this subsection if the commission of such felony or misdemeanor evidences prejudice based on the race, color, ancestry, ethnicity, religion, sexual orientation, or national origin of the victim:
>
> (b) A misdemeanor of the first degree shall be punishable as if it were a felony of the third degree.
>
> (3) It shall be an essential element of this section that the record reflect that the defendant perceived, knew, or had reasonable grounds to know or perceive that

Plaintiff contends are facially invalid and objectively unreasonable laws. However, Plaintiff's arguments that Fla. Stat. §836.11 and §775.085 are unconstitutional and violate "clearly established" First Amendment law of which a reasonable police officer should have known, are plainly without merit. First, in *State v. Stalder*, 630 So.2d 1072, 1077 (Fla. 1994), the Florida Supreme Court held that Fla. Stat. §775.085 is constitutional in that it punishes criminal conduct rather than expression. *See id.* With respect to §836.11, the statute was enacted in 1971, remained valid at the time of Plaintiff's arrest and has never been declared unconstitutional.

The continued validity of §836.11 is dispositive of Defendant Alexander's entitlement to qualified immunity. *See Robinson v. City of Savannah*, 1987 U.S. Dist. LEXIS 6859, *17 (S.D. Ga. 1987)(noting the impropriety of expecting a police officer to predict a court's determination regarding the constitutionality of a statute when the issue has not yet been resolved by a court of law). Nonetheless, Court will next address Plaintiff's remaining argument that pursuant to Supreme Court precedent extant at the time of her arrest, the police officer's decision to arrest her was objectively unreasonable.

Plaintiff argues that in 1995 the Supreme Court specifically held that anonymous pamphlets are protected by the First Amendment. *See McIntyre v. Ohio Elections Commission*, 514 U.S. 334 (1995). A careful analysis of *McIntyre* reveals that the Supreme Court held invalid a statute prohibiting the distribution of anonymous political campaign pamphlets which discussed governmental issues. *See id.* at 357. In contrast, the instant case does not involve mere political pamphleteering or discussion of governmental issues. *See id.* at 345-46 (noting the exacting scrutiny

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the victim was within the class delineated in this section.

to which limitations on political speech must be subjected). Consequently, *McIntyre* does not provide the "bright line" necessary to establish that Defendant's arrest of Plaintiff was objectively unreasonable.

Plaintiff also points to *Talley v. California,* 362 U.S. 60 (1960), *Lewis v. City of New Orleans,* 415 U.S. 130 (1974), *R.A.V. v. City of St. Paul,* 505 U.S. 377 (1992) and *Houston v. Hill,* 482 U.S. 451 (1987), all of which held that laws criminalizing abusive language were unconstitutional. However, these cases are all distinguishable from the instant case in that none of them deals directly with ordinances proscribing hateful and contemptuous speech contained in an anonymous pamphlet distributed in a public school.

First, *Talley* involved the Supreme Court's striking down as overbroad an ordinance which barred the distribution of all anonymous handbills in any place under all circumstances. *See* 362 U.S. at 63-64. In holding that the ordinance was unconstitutional, the Court noted that the ordinance did not limit its application to handbills that were obscene, promoted unlawful conduct or in any other respect. In contrast, §836.11 does not prohibit all anonymous handbills in any place under all circumstances but rather limits its application to those which expose individuals or religious groups to contempt or hatred.

Second, both *Lewis* and *Houston* involved ordinances prohibiting abusive language, including curse words, toward police officers during performance of their official duties. *See Lewis*, 415 U.S. at 132; *Houston*, 482 U.S. at 455. In holding the ordinances overbroad, and thus unconstitutional, the Court reasoned that the ordinances could be applied to more than just "fighting words, which are not protected under the cloak of the First Amendment, but also to a substantial amount of protected speech. *See Lewis*, 415 U.S. at (defining "fighting words" as those which inflict

injury or incite a breach of the peace); *Houston*, 482 U.S. at 462, 466-67 (noting that arrests under the ordinance will be typically made in one-on-one situations where the only witnesses are the officer and the person arrested and convictions will occur solely on the officer's testimony). In contrast, §836.11 does not broadly proscribe speech but rather is specifically limited in its application to anonymous pamphleteering tending to expose any individual or religious group "to hatred, contempt ridicule or obloquy."

Finally, *R.A.V.* involved a St. Paul, Minnesota ordinance which made it a criminal offense to place on private or public property a symbol which aroused anger or alarm on the basis of race, color, creed or religion. *See* 505 U.S. at 380. The Court recognized that it was bound by the Minnesota Supreme Court's holding that in proscribing speech that aroused anger or alarm the ordinance reached only speech that constituted "fighting words." *See id.* at 381. However, the Court reasoned that such a limitation did not save the ordinance because the ordinance proscribed only certain types of "fighting words," specifically those that aroused anger or alarm on the basis of race, color creed, religion or gender. *See id.* at 391. In striking down the ordinance, the Supreme Court stated that laws regulating "fighting words" must operate across the board and may not classify and ban only certain types of "fighting words," for instance only those directed against others on a discriminatory basis. *See* 505 U.S. at 381, 391. In contrast, §836.11 is not limited in its application to a certain subclass of speech that exposes one to hatred or riducule but by its express terms applies to any such speech directed to any person or religious group regardless of its discriminatory nature.[4]

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[4]As discussed above, to the extent Plaintiff points to *R.A.V.* to argue that Defendant Alexander should have known his arrest of Plaintiff under §775.085, Florida's hate crime statute, was objectively unreasonable because the statute was unconstitutional, the Court disagrees. *See Stalder* 630 So.2d at 1075 (discussing *R.A.V* and upholding the constitutionality of §775.085).

In short, a careful analysis of the case law relied upon by Plaintiff does not establish any type of "bright line" law regarding anonymous distribution of pamphlets containing contemptuous and hateful speech directed toward *any* individual or religious group. *See Anderson*, 483 U.S. at 640 (requiring the law to develop in such a concrete and factually similar context to make it obvious to a reasonable government actor that his actions violate the law). Moreover, those authorities make clear that the contours of the First Amendment right that Plaintiff alleges Defendant Alexander violated were not sufficiently clear when Plaintiff was arrested, and thus the alleged unlawfulness of Defendant Alexander's actions is not apparent. *See Post v. City of Fort Lauderdale,* 7 F.3d 1552, 1557 (11th Cir. 1993), *modified* 14 F.3d 583 (11th Cir. 1994)("The line between lawful and unlawful conduct is often vague. *Harlow*'s 'clearly establish' standard demands that a bright line be crossed. The line is not found in abstractions–to act reasonably, . . ., and so on–but in studying how these abstractions have been applied in concrete circumstances.").

Accordingly, viewing the Complaint in the light most favorable to Plaintiff, Defendant Alexander is entitled to the protection of qualified immunity, and Defendant Alexander's Motion to Dismiss is granted. Based on the foregoing, it is hereby

ORDERED AND ADJUDGED that Defendant Alexander's Motion to Dismiss is GRANTED and the Complaint is DISMISSED WITH PREJUDICE as to Defendant Alexander.

DONE AND ORDERED in Chambers at Miami, Florida, this 10 day of April, 2000.

URSULA UNGARO-BENAGES
UNITED STATES DISTRICT JUDGE

copies provided:
counsel of record