IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 11-CV-01430-PAB-MEH

UNITED STATES OF AMERICA,

Plaintiff,

v.

KENNETH SCOTT and
JO ANN SCOTT,

Defendants.

UNITED STATES' OPPOSITION TO DEFENDANT KENNETH SCOTT'S RENEWED MOTION TO DISMISS

The United States of America (the "United States") hereby opposes Defendant Kenneth Scott's ("Defendant's") Renewed Motion to Dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6) ("K. Scott Mot."), Dkt. 59.

The United States brought this action pursuant to the Freedom of Access to Clinic Entrances Act ("FACE"), 18 U.S.C. § 248 (1994), because Defendant, on numerous occasions, has, through physical obstruction, intimidated and/or interfered, or attempted to do the same, with individuals providing or obtaining reproductive health services at the Planned Parenthood of the Rocky Mountains ("PPRM"). The United States has adequately pled all of the allegations against Defendant, and each allegation represents a violation of FACE, which has consistently been found to be constitutional by this nation's courts, and which proscribes conduct that is not protected by the First Amendment.

Although Defendant's Motion is captioned as a Motion to Dismiss and appears to argue that the United States has failed to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6), Defendant asserts, with little to no factual or legal support, that his Motion should also serve as Motion for Summary Judgment under Fed. R. Civ. P. 56(c). First, this Court's Civil Practice Standards require that if matters outside the pleadings are submitted on a Rule 12(b) motion, "the party should discuss whether the 12(b) motion should be converted to a summary judgment motion." Civil Practice Standards, Judge Philip A. Brimmer, III(F)(2)(a)(iii). No such discussion is contained anywhere in Defendant's Motion.

Second, the only basis for Defendant's conversion argument is circular and located in footnote 2: "This motion conforms to the 15 page length for motions to dismiss, even though affidavits are attached hereto, converting this motion to one for motion for summary judgment." (K. Scott Mot. 1). Contrary to Defendant's understanding of the summary judgment standard, more than attaching affidavits to a motion is required. It is difficult to decipher how Defendant argues, on the one hand, that he is entitled to judgment as a matter of law under FACE, and, on the other hand, argues that FACE is "defective on its face" and that FACE does not apply to his conduct. (K. Scott Mot. 3). Nevertheless, Defendant provides no argument, let alone support, in his brief that there are no genuine issues of material fact and that he is entitled to judgment as a matter of law, as required under Rule 56 and Civil Practice Standards, Judge Philip A. Brimmer, III(F)(3)(b)(i).

Regardless of whether the standards for summary judgment or for dismissal are applied, Defendant's arguments each fail, as discussed in detail below. The United States has stated a claim upon which relief can be granted. In addition, Defendant is not entitled to judgment as a matter of law under FACE based on his procedurally and substantively deficient Motion.

Defendant's Motion is without merit and therefore should be denied.

I. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) allows dismissal of a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In considering a motion to dismiss under Rule 12(b)(6), a court "must accept all the well-pleaded allegations of the complaint as true and must construe them in the light most favorable to the plaintiff." Alvarado v. KOB-TV, L.L.C., 493 F.3d 1210, 1215 (10th Cir. 2007) (quotation and citation omitted).

Federal Rule of Civil Procedure 8(a) provides that a complaint must contain only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). In two cases, Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007), and Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009), the Supreme Court clarified the standards that apply in evaluating a motion to dismiss for failure to state a claim. In Twombly, the Court held that a complaint must set forth "only enough facts to state a claim to relief that is plausible on its face." 550 U.S. at 570. The Court also instructed that the rule "does not impose a probability requirement at the pleading stage." Rather, a complaint is sufficient when it identifies "facts that are suggestive enough to render [the element] plausible." Id. at 555-56.

The Supreme Court subsequently explained that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. 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." Iqbal, 129 S.Ct. at 1949 (citation omitted). Assessing whether a claim is

"plausible" is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 1950 (citation omitted).

II. ARGUMENT

Although not entirely clear, Defendant's Motion appears to rely on four arguments: 1) Defendant's conduct is protected as expressive conduct under FACE (K. Scott Mot. 5-6); 2) Defendant's conduct is protected speech under the First Amendment (K. Scott Mot. 6-7); 3) FACE Act is unconstitutional because the civil penalty provision is penal in nature (K. Scott Mot. 7-14); and 4) the United States' Complaint fails to allege the motive element under FACE (K. Scott Mot. 14-15). We will address each argument, starting with the last argument.

A. The Complaint Sufficiently Pleads the Motive Element of the Statute

The United States has sufficiently stated a claim that Defendant violated FACE when he:

> 1) by physical obstruction; 2) intentionally; 3) injured, intimidated or interfered with, or attempted to injure, intimidate or interfere with people; and 4) because those people were or had been obtaining or providing reproductive health services. See FACE § 248(a)(1); see also Lotierzo v. A Woman's World Med. Ctr., 278 F.3d 1180, 1182 (11th Cir. 2002).

The only element that Defendant appears to claim is insufficiently pled is the fourth element – that of motive. (K. Scott Mot. 14-15). Defendant does not appear to challenge the sufficiency of the first three elements.

FACE simply does not require that the victims actually be engaging in the protected activity; rather, all that is required is that the defendant believed the victims to be doing so. In fact, the legislative history of FACE indicates that the statute covers individuals not seeking or providing services. FACE was intended to protect others, such as family, who may not in fact be seeking services, but are instead accompanying the patient or visiting staff. See H.R. Rep. No.

103-306, at 12 (1993) (covering family of patients or staff); S. Rep. No. 103-117, at 22 (1993) (same). Even if the individuals attempting to enter or exit were escorts, volunteers, or even maintenance workers at the facility, they would be covered by FACE. See, e.g., United States v. Dinwiddie, 76 F.3d 913, 927 (8th Cir. 1996) (recognizing that escorts and maintenance workers play an integral part in the business of providing patients with reproductive services); Greenhut v. Hand, 996 F. Supp. 372, 375 (D.N.J. 1998) (finding that FACE covered an "untrained volunteer" plaintiff because "nothing in the statute indicates that it covers only trained providers of reproductive services such as doctors, nurses, or social workers"); United States v. Hill, 893 F. Supp. 1034, 1039 (N.D. Fla. 1994) ("It appears that Congress was concerned not only with the safety of doctors and nurses, but also with the safety of others who are essential the provision of clinic services. . . . [E]scorts are considered an integral part of the functioning of clinics.").

Courts interpreting FACE have typically focused on the defendant's own perception, rather than the victim's actual conduct. See United States v. Balint, 201 F.3d 928, 934 (7th Cir. 2000) (finding sufficient evidence of motive in "the defendants' concession that they wanted to protect fetuses, [one of the defendants'] commitment to the pro-life cause and the Clinic's notoriety as an ongoing provider of abortion services"); New York ex rel. Spitzer v. Cain, 418 F. Supp. 2d 457, 475 (S.D.N.Y. 2006) (holding that the motivation requirement was satisfied because defendants' goal in protesting at the clinic was to discourage women from getting abortions); United States v. Gregg, 32 F. Supp. 2d 151, 157 (D.N.J. 1998) (finding defendants' statements expressing their opposition to abortion and engaging in a blockade during an anti-abortion protest to be sufficient to demonstrate motive).

The United States has adequately pled that Defendant engaged in his obstructive conduct because people were or had been obtaining or providing reproductive health services, as each

victim was attempting to enter or exit the PPRM driveway. As the Complaint alleges, the PPRM facility is the only building within a fenced-in area. (Compl. ¶ 12). PPRM houses staff and offices for the region, and provides reproductive health services, including abortion procedures. (Compl. ¶ 11). All of the incidents alleged against Defendant involve vehicles and pedestrians entering into, or exiting from, the fenced-in area. (Compl. ¶ 12). Defendant's regular activity in or near the PPRM driveway includes carrying large signs and placards expressing opposition to abortion (Compl. ¶ 13) and yelling anti-abortion rhetoric, such as "baby-killers," "murderer," "abortionist," at PPRM staff and clients as they enter and leave the facility. (Compl. ¶ 19).

Here, whether the victims of Defendant's obstruction were obtaining or providing reproductive health services is ultimately irrelevant to the fundamental issue of whether Defendant believed that his victims were engaged in such activity. The "motive" element of the statute—which requires that the defendant took the action alleged against individuals with the intent to injure, intimidate, or interfere with those individuals because they were obtaining or providing services—addresses the state of mind of the defendant. Because Defendant's purpose for his activities outside of PPRM is to prevent abortions, it is clear that when he obstructs individuals in an attempt to interfere with them, he does so because he believes they are obtaining or providing reproductive health services. (Compl. ¶¶ 8, 13, 15, 19). Thus, the United States' Complaint adequately states a claim that Defendant acted because of his subjective belief that his victims were engaged in obtaining or providing reproductive health services.

B. The United States' Complaint Targets Prohibited Conduct, not Protected Speech

Defendant argues that FACE does not apply to him because the conduct alleged against him is expressive in nature. While it is certainly true that the Complaint explains, as part of the facts related to background and motive, that Defendant carries large signs and talks to

individuals in order to express his opposition to abortion, Defendant seems to misconstrue the Complaint as alleging that these acts, in and of themselves, violate FACE. What the United States alleges, however, is that, in the course of expressing his opposition to abortion, Defendant engages in conduct that constitutes physical obstruction, which is expressly prohibited by the statute. Such conduct, which violates FACE, is not "rendered protected speech . . . merely because the actor intended to send a message, political or otherwise." United States v. Lucero, 895 F. Supp. 1421, 1425 (D. Kan. 1995) (finding no support for defendant's argument that FACE was unconstitutional as applied because he had engaged in expressive conduct).

C. The Status of the Property on Which Defendant's Conduct Occurred is Irrelevant

Defendant maintains that the FACE violations each occurred "within a public right of way," which he claims to be "exculpatory information." (K. Scott. Mot. 6-7). For support, Defendant attaches and cites to an affidavit from a surveyor. As an initial matter, this affidavit is inappropriate in the context of a motion to dismiss, where the court must accept the well-pled allegations as true and may not consider material extrinsic to the pleadings. Regardless, however, this argument is without merit, for there is no exception within FACE for conduct within a public right of way. See 18 U.S.C. § 248; Cain, 418 F.Supp.2d at 480 (citing New York v. Operation Rescue Nat'l, 273 F.3d 184, 196 (2d Cir. 2001) ("Acts of physical obstruction that are sufficient to create liability under FACE include obstructing or slowing access to driveways or parking lots."). FACE prohibits physical obstruction with the intent to intimidate or interfere with someone because that person is, has been, or will obtain or provide reproductive health services, without regard to where that physical obstruction occurs.

To the extent that Defendant's argument is that the conduct alleged constitutes protected speech in a public forum, that claim merely repeats what he has already argued, which the United States has demonstrated to be meritless in Section II.B above.

D. The Civil Penalty Element of FACE Does Not Render the Statute Unconstitutional

Defendant's argument that FACE is unconstitutional[1] because the civil penalty provided for is in fact penal in nature is meritless, as evidenced by both the text of the statute and the effect of the penalty.

As the United States Supreme Court has made clear, in order to determine whether a particular penalty is civil or criminal in nature, a court must conduct a two-part examination. First, it must "determine whether Congress, in establishing the penalizing mechanism, indicated either expressly or impliedly a preference for one label or the other." United States v. Ward, 448 U.S. 242, 248 (1980) (citation omitted). Second, where the Congressional intent is to establish a civil penalty, the court should inquire "whether the statutory scheme was so punitive either in purpose or effect as to negate that intention." Id. at 248-49 (citation omitted). To establish such a punitive statutory scheme is a high bar. Indeed, "only the clearest proof could suffice to establish the unconstitutionality of a statute on such a ground." Id. at 249 (quotation and citation omitted).

[1] Although the Tenth Circuit has not reviewed the constitutionality of FACE, the District Court for the District of Kansas has recognized that "every circuit that has addressed the issues has held that FACE passes constitutional muster," and stated that it "believe[d] that the Tenth Circuit would similarly conclude that FACE is constitutional." United States v. Burke, 15 F.Supp.2d 1090, 1094 n.5 (D. Kan. 1998) (citing Hoffman v. Hunt, 126 F.3d 575 (4th Cir. 1997), cert. denied, 523 U.S. 1136 (1998); United States v. Bird, 124 F.3d 667 (5th Cir. 1997), cert. denied, 523 U.S. 1006 (1998); Terry v. Reno, 101 F.3d 1412 (D.C.Cir. 1996), cert. denied, 520 U.S.

Here, the statute itself makes clear that, in answer to the first step of the examination, Congress intended to impose a monetary civil penalty to be available as part of a civil action, separate and distinct from the criminal penalties provided. Section (c)(2)(A) of FACE expressly allows the Attorney General of the United States to commence a civil action, and in turn, section (c)(2)(B), which refers to such civil actions, provides for civil penalties. By labeling the authorized sanction a "civil penalty," and juxtaposing that sanction with the criminal penalties established in the same statute, see 18 U.S.C. § 248(b), Congress left no doubt that it intended to impose civil penalties under FACE "without regard to the procedural protections and restriction available in criminal prosecution." Ward, 448 U.S. at 249.

As for the second step of the analysis, the effect of FACE's civil penalty is not so punitive as to negate the intention of Congress that the penalty be civil and not criminal. The cases Defendant cites for support involve penalties such as the deprivation of U.S. citizenship or the forfeiture of firearms. By contrast, the penalty at issue here is the classic civil penalty, in that it is a monetary penalty. Moreover, while Defendant argues that consideration of the Mendoza-Martinez factors[2] supports his position, that argument is directly undercut by Ward itself, the very case that Defendant cites throughout his brief. Like this case, Ward involved a monetary penalty that Congress had labeled a "civil penalty." There, the Supreme Court found that only one of the factors—whether the behavior was already a crime—aided the defendant. Even that factor, the Court said, was a weak one, because, as it had repeatedly noted, "Congress may

[2] Those factors, which are not dispositive, include "[w]hether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is already a crime, when an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned." Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963).

impose both a criminal and a civil sanction in respect to the same act or omission," and it was significant that two "separate and distinct provisions imposing sanctions" were contained within different parts of the same statute, lending support to the notion that the penalty labeled as civil was indeed not penal. Ward, 448 U.S. at 250 (quotations and citations omitted). As that is the exact circumstance here—separate criminal and civil provisions within the same statute—it is clear that the civil penalties provided for under FACE are appropriately labeled as such, and are entirely different from the more onerous criminal penalties provided for in the same statute. Thus here, as in Ward, the Mendoza-Martinez factors only reinforce the notion that what Congress labeled a civil penalty is indeed civil and not penal in nature.

Finally, even if Defendant's argument about the appropriateness of the relief sought by the United States here was meritorious—and it is not—that argument has no place in the context of a 12(b)(6) Motion to Dismiss, for such a motion must be premised upon the failure to state a claim upon which relief can be granted. Whether the specific type of relief sought by the United States is appropriate or not is an issue the Court can determine at a later stage. It is clear that the United States has stated a claim upon which *some* relief can be granted, and thus a Motion to Dismiss premised on this issue must be denied.

III. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss for Failure to State a Claim under Fed. R. Civ. P. 12(b)(6) should be denied. Even if Defendant's Motion is converted into a Motion for Summary Judgment, Defendant has failed to establish that he is entitled to judgment as a matter of law under FACE. Defendant's constitutional challenges to FACE (i.e., on its face and as applied) eliminate Rule 56(c)'s bases for finding in favor of Defendant because Defendant's arguments inherently reject the concept that genuine issues of material facts and

judgment as a matter of law are possible under FACE in this case. In any event, Defendant does not set forth any arguments regarding undisputed material facts or that he is entitled to judgment as a matter of law under FACE, in accordance with Rule 56(c).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing United States' Opposition to Defendant Kenneth Scott's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) was filed electronically using the CM/ECF system, which will provide notice of such filing to all registered parties.

Date: September _26___, 2011

/s/ Je Yon Jung_____
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