NO. 3-92-243-CV

IN THE COURT OF APPEALS

FOR THE THIRD COURT OF APPEALS

DISTRICT OF TEXAS

MICA ENGLAND, Appellee

VS.

THE CITY OF DALLAS, and MACK VINES, Chief of Police Appellants

APPELLANTS' BRIEF

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TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Appellants City of Dallas and Mack Vines filing this brief in support of their request that the district court's Order and Final Judgment of February 8, 1992, be reversed.

I.

NATURE OF THE CASE

Plaintiff, a lesbian, filed this suit against the State of Texas regarding the constitutionality of §21.06 of the Texas Penal Code, and against the City of Dallas and its former Chief of Police, Mack Vines, regarding the City's policy of not hiring as police officers persons who admit violating §21.06 of the Texas Penal Code.

On February 8, 1992, the district court signed its Order and Final Judgment that:

a. the State of Texas is dismissed from this case because the court has no jurisdiction over it;

b. §21.06 of the Texas Penal Code is unconstitutional;

c. because §21.06 is unconstitutional, the City of Dallas is permanently enjoined from denying employment as police officers to persons solely because they violate §21.06 or are homosexual; and

d. Mack Vines' motion for summary judgment on the basis of qualified immunity is denied.

II.

POINTS OF ERROR

A. THE DISTRICT COURT ERRED IN RULING THAT §21.06 IS UNCONSTITUTIONAL BECAUSE IT WAS NOT NECESSARY AND APPROPRIATE TO THE DISPOSITION OF THE CASE.

1. THE COURT DID NOT HAVE JURISDICTION TO DECIDE THE ISSUE WHETHER THE STATUTE IS CONSTITUTIONAL.

2. SUCH RELIEF WAS NOT PRAYED FOR AGAINST THE ONLY REMAINING DEFENDANTS.

3. THE ISSUE WAS NOT PROPERLY BRIEFED.

4. THERE HAS BEEN NO HEARING OR TRIAL ON THE ISSUE.

B. THE DISTRICT COURT ERRED IN GRANTING A PERMANENT INJUNCTION AGAINST THE CITY BECAUSE THE DECISION WAS BASED ON AN ERRONEOUS PREDICATE.

C. THE DISTRICT COURT ERRED IN DENYING MACK VINES' MOTION FOR SUMMARY JUDGMENT BECAUSE HE IS ENTITLED TO QUALIFIED IMMUNITY.

III.

ARGUMENT

A. THE DISTRICT COURT ERRED IN RULING THAT §21.06 IS UNCONSTITUTIONAL BECAUSE IT WAS NOT NECESSARY AND APPROPRIATE TO THE DISPOSITION OF THE CASE.

The constitutionality of a statute will be considered only when the question is properly raised and a decision becomes necessary and appropriate to the disposition of the case. Wood v. Wood, 320 S.W.2d 807, 813 (Tex. 1959). If a proper disposition of the case can be made without considering the constitutional issue, courts will not pass on the constitutionality of a statute. Taylor v. State, 358 S.W.2d 124, 125 (Tex.Crim.App. 1962) reh. denied.

In this case, the only allegation against the City and its former Chief of Police is that its policy of refusing to hire

homosexuals as police officers is unlawful. For the reasons set forth below, the district court committed reversible error in declaring that the policy cannot be utilized.

1. The court did not have jurisdiction to decide the issue of the constitutionality of the statute. The state successfully argued that the court did not have jurisdiction. Primarily, the state's Plea to the Jurisdiction relied on the well accepted principle that the constitutionality of a statute is the province of criminal courts, unless (1) the Plaintiff faces irreparable harm, and (2) the statute is unconstitutional on its face. There is no such threat of irreparable harm to Plaintiff in this case. She has not been arrested, charged, or prosecuted under §21.06, nor is there any evidence that she will be. Her suit against the City Defendants is merely a failure-to-hire case for which any damages can be remedied by appointment, back pay and adjustments to seniority. The court's order granting the state's Plea to the Jurisdiction is an affirmation that it did not have jurisdiction over the state regarding the constitutionality of the statute. The court may not say in one breath that it has no jurisdiction against the state regarding the constitutionality of the statute, and then rule on the issue anyway.

The district court had no jurisdiction over the issue whether the penal statute is constitutional, and the judgment should be reversed.

2. Such relief was not prayed for against the only remaining defendants. Plaintiff is not entitled to relief against the City which she did not plead for. Rogers v. GMAC, 567 S.W.2d 576-577 (Tex.Civ.App. - Beaumont 1978). Plaintiff never alleged that the City was accountable on the issue of the statute's constitutionality. As counsel for Plaintiff argued,

> There is a statute adopted by the State Legislature. It wasn't adopted by the City of Dallas. For all we know, the City of Dallas didn't want this statute. ... It is a state statute and the only person that can properly defend the constitutionality of this statute is the State.
> . . . .
> The State is the author of the Statute ... and the proper party to defend it.

S.F. p. 16, 20.

The hearing which resulted in the district court's February 8, 1992, Order and Final Judgment was convened to hear cross motions for summary judgment. Plaintiff's Motion for Summary Judgment, page 9, prays that the court:

> (1) enter summary judgment against the State of Texas declaring Texas Penal Code §21.06 unconstitutional and enjoining the State of Texas from enforcing that statute;
> (2) enter partial summary judgment against the City of Dallas and Mack Vines declaring their refusal to hire Plaintiff because she is lesbian to be unconstitutional, enjoining the City from enforcing its policy of not hiring lesbians and gay men, and ordering that Plaintiff be permitted to complete the application process for employment with the Dallas Police Department without retaliation or discrimination based on her sexual orientation.

The court granted the state's Plea to the Jurisdiction. Thus, the only remaining issue concerned the City's employment practice. A ruling on the constitutionality of the Texas Penal Code provision was not properly before the court once the party

sought to be held accountable for the state's action was dismissed. Plaintiff lost her ability to obtain declaratory relief on the issue involving the state's statute when the district court ruled, "The court does not have jurisdiction as to the state." S.F. p. 53. Therefore, the judgment should be reversed.

3. The court erred in ruling on the constitutionality of the statute because the issue has not been properly briefed. If the issue of the constitutionality of a state statute is not properly briefed, the court should not decide it. Wood v. Wood, 320 S.W.2d 807, 813 (Tex. 1959). Plaintiff sued the State of Texas regarding the constitutionality of the statute. Since the City Defendants were not even alleged to be accountable for the state's law, it never briefed the issue. The City reasonably believed that the only issue it need defend was the only issue which Plaintiff raised against it, the lawfulness of the employment practice. The state did not file any brief on the merits. Therefore, the court improperly decided a law was unconstitutional without the issue being properly briefed.

4. The district court erred in ruling that §21.06 is unconstitutional because there has been no trial or hearing on the issue. Plaintiff sued the State of Texas regarding the constitutionality of §21.06, a seemingly appropriate way to assert her challenge. The state did not defend the statute because the court granted its Plea to the Jurisdiction.

> THE COURT [to counsel for the State of Texas]: Are you taking a position on the [legality of the] statute?
>
> MR. GUILLORY: No, sir, Your Honor...

S.F. p. 12. After hearing argument on the state's Plea to the Jurisdiction, Plaintiff's counsel argued, "And I would point out however the court rules on the jurisdiction [issue], there was a gaping silence when it came to defending this statute." S.F. p. 25. The district court's judgment should be reversed, because there has been no final trial or hearing on the constitutionality of the statute. If the court finds that it was appropriate to require the City Defendants to defend the State Legislature, at least they should have notice and an opportunity to be heard on the issue.

B. THE DISTRICT COURT ERRED IN GRANTING A PERMANENT INJUNCTION AGAINST THE CITY BECAUSE THE DECISION WAS BASED ON AN ERRONEOUS PREDICATE.

The injunctions against the City are predicated on a finding that §21.06 is unconstitutional. Because the judgment declaring the statute unconstitutional should be reversed for the reasons stated above, there is no basis for an injunction.

C. THE DISTRICT COURT ERRED IN DENYING MACK VINES' MOTION FOR SUMMARY JUDGMENT BECAUSE HE IS ENTITLED TO QUALIFIED IMMUNITY.

The denial of Vines' qualified immunity defense is immediately appealable pursuant to § 51.014(5), Texas Civil Practice & Remedies Code.

Public officials who act within the course of their official responsibilities are entitled to the defense of qualified immunity. This immunity shields them from suit as

well as liability for civil damages, where their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Davis v. Scherer, 468 U.S. 183, 191 (1984), quoting, Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).*

Qualified immunity rests partly on the theory that the duty of public officials is to the public at large, not to individuals. Scheuer v. Rhodes, 416 U.S. 232 (1974). It is also based on the idea that it is better to risk error on the part of municipal officials, rather than to discourage them from decision making entirely by the threat of lawsuits. Id. at 240.

A plaintiff who sues a public official must plead facts with particularity and specificity to overcome the official's claim of qualified immunity. Elliott v. Perez, 751 F.2d 1472, 1476, 1482 (5th Cir. 1985); Jacquez v. Procunier, 801 F.2d 789, 792 (5th Cir. 1986); Brown v. Glossip, 878 F.2d 871, 874 (5th Cir. 1989). The specificity requirement is best illustrated by the following:

> [O]nce a complaint against a defendant state [officer] raises the likely issue of immunity ... the district court should on its own require of Plaintiff a detailed complaint alleging with particularity all material facts on which he contends he will establish his right to recovery, which will include detailed facts supporting the contention that the plea of immunity cannot be sustained.

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* The following Texas cases are in accord: Carpenter v. Barner, 797 S.W.2d 99, 101-102 (Tex.App.--Waco 1990, writ denied); Dent v. City of Dallas, 729 S.W.2d 114, 117 (Tex.App.--Dallas 1986, writ ref'd n.r.e.), cert denied, 485 U.S. 977 (1988); Wyse v. Department of Public Safety, 733 S.W.2d 224, 227 (Tex.App.--Waco 1986, writ ref'd n.r.e.).

Elliott, 751 F.2d at 1482. A complaint which fails to allege sufficiently that the defendant public official reasonably should have known that his particular actions violated clearly established law should be dismissed as a matter of law. Brown, 878 F.2d at 874. To survive this defense, Plaintiffs must demonstrate that no reasonable public official could have misunderstood the law regarding the constitutional protection of homosexual conduct, and that Defendant's actions violated that law. Brown, 878 F.2d at 874. Plaintiffs' complaint wholly fails to provide a factual basis to state a claim against Defendant Vines in his individual capacity.

In fact, Plaintiff admits that she does not allege any action by Defendant Vines was outside the scope of his employment as Chief of Police. Exhibit E to Defendants' Motion for Summary Judgment, p. 3.

Any claim that Defendants knew or should have known that their actions were against clearly established law must fail. The undeniable fact is that Texas statutes and prior case law on point established that (1) there was no constitutional protection for homosexual conduct, (2) that it is reasonable to expect police officers to obey all state laws, and (3) that ministerial officers, such as a chief of police, do not have the right to pass upon the constitutionality of a statute. See, Defendants' Motion for Summary Judgment, passim. Thus, Defendant Vines is entitled to be dismissed from this case as he is sued only in his capacity as the (then) chief of police.

IV.

CONCLUSION AND PRAYER

The district court's judgment should be reversed for several reasons. First, the City is not a proper party to defend the State Legislature's actions. Second, the party sued on that issue has been dismissed on grounds that Plaintiff is not in a position to challenge the statute in this civil action. Third, the relief granted Plaintiff regarding the statute was not prayed for against the remaining Defendants in this case. Fourth, there has been no trial or final hearing on the constitutionality of the statute. Plaintiff's attempt to obtain such a trial or hearing was thwarted by the State's successful Plea to the Jurisdiction.

At a minimum, the judgment should be reversed on the issue of the former Chief of Police's qualified immunity. He violated no clearly established law in 1989, and in fact acted consistent with every then-existing Texas and Federal precedent and law.

WHEREFORE, Appellants pray that the district court's Order and Final Judgment be reversed, that Mack Vines be dismissed, and for such other relief to which Appellants may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this the 23 day of June, 1992, a true and correct copy of the foregoing document was mailed by certified mail, return receipt requested, to Ed Tuddenham, Wiseman, Durst, and Tuddenham, 600 West 7th Street, Austin, Texas 78701, Evan Wolfson, Lambda Legal Defense and Education Fund, Inc., 666 Broadway, New York, New York 10012, and David Guillory, Supreme Court Bldg., P.O. Box 12548, Austin, Texas 78711-2548.

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