

IN THE UNITED STATES COURT FOR THE DISTRICT OF COLUMBIA

LARRY W. BRYANT

Plaintiff,

v.

DONALD H. RUMSFELD, et al.

Defendants.

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: Civ. No. 04-CV-01125-CKK
: Civ. No. 05-CV-64-CKK
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PLAINTIFF’S REPLY TO DEFENDANT’S OPPOSITION TO PLAINTIFF’S SUMMAY JUDGMENT MOTION

The First Amendment applies to *all* federal government activity, and by no means does the First Amendment not apply to the military. *Flower v. U.S.*, 407 U.S. 197-99 (1972) (where a military base makes itself fully accessible to the public, it cannot restrict civilian's leafleting on such parts of the base).

Plaintiff herein, *inter alia*, counters Defendants’ wish (1) to mischaracterize CEN’s as some sort of mere conveyances of objective information; (2) to render military publications – even their advertising pages – into First-Amendment free zones; and (3) to attack Plaintiff’s arguments that the Defendants’ applicable anti-political ad regulations are unconstitutionally vague and overbroad.

1. CEN’s Are Defendants’ Pro-Military and Pro-Government Political Propaganda Machines that Spew Political Propaganda Both in Their Advertising Pages and Their Remaining Pages

It is startling that Defendants would insist that CEN’s are nothing but some sort of mere conveyances of objective information when opposing counsels’ discovery answers admit the opposite. Specifically, in response to Plaintiff’s third Request for Production of Documents

(seeking CEN samples), Defendants have provided a pile of CEN's that amount to heavy propaganda periodicals from cover to cover, from article to advertisement. Not only is that borne out by the attached three pages from the April 5, 2005, *Pentagram* provided by the Defendants, but that is clear in the rest of that issue and in other CEN's provided by the government. (Being filed subsequently will be Plaintiff's Motion to late-file additional pages from the *Pentagram* by the next business day, seeing that Plaintiff's counsel today scanned in several more *Pentagram* pages to his computer, with technical difficulties making the total scans too large to send to the computer from which this Reply is being filed).

For instance, on page 5 of the April 5, 2005 *Pentagram* is one-sided military propaganda posing as a news article entitled "Terror War Promotes Transformation Concepts." This article essentially praises the United States military as being able to change for the better during the war on terrorism, ignores the outcry concerning military non-readiness during the war against terrorism (e.g., public outcry about the military's failure to provide sufficient protective armor to the United States troops in Iraq); and amounts to a mouthpiece for Defense Secretary Rumsfeld and his assistant Raymond F. DuBois, Jr. Another article on the same attached page amount to a Bush Administration push for updated nuclear weapons (*see* the article "Transforming Nuclear Arsenal") and improved intelligence.

Moreover, any effort by Defendants to paint CEN advertisements as nothing more than car and real estate advertisements cannot withstand the same *Pentagram* issue that contains such "political" advertisements as (1) a promotion of a booksigning at Quantico military base by former Republican Senate Majority leader and former presidential and vice presidential candidate Bob Dole, involving a book that apparently tries to paint a rosy picture of Bob Dole, the military, and his time in the military (see attached advertisement); (2) an advertisement

recruiting applicants to work for the Federal Bureau of Investigation (see attached advertisement); and (3) advertisements to join one or more branches of the military (advertisements to be submitted with motion for leave for more time from technical difficulties with file size of computer-scans from the *Pentagram*).

In other words, the *Pentagram* spews political content that the federal military likes, but eschews and bans political content (*e.g.* the FBI's ads seeking to recruit new FBI employees) it does not like (*e.g.*, Plaintiff's ads seeking to recruit whistleblowers). That such politically oriented ads as the Dole and FBI ads are published in the CEN's – while Plaintiff's are not – are particularly startling in view of the DODI's and *Pentagram* publisher's claim to forbid political ads, period. *See* DODI 5120.4, 4.11 and *Pentagram* CEN publisher John Rives' deposition at 33 (political ads “are not allowed by contract”) (attached to Plaintiff's Summary Judgment Motion).

Particularly seeing that defense counsel should know the contents of the CEN's it has provided to Plaintiffs in discovery, it would be disingenuous for defense counsel to try to distort the reality of the CEN's articles and advertisements. The refusal to print Plaintiff's ads soliciting whistleblowers clearly is content based, particularly when the same *Pentagram* to which Plaintiff submitted a rejected whistleblower ad, contains a solicitation for employees of the FBI, which clearly is not part of the military, but is part of the Bush administration that the CEN's try to prop up.

2. The CEN's Cannot Invite Paid Ads; Publish Ads Supporting Various Federal Agencies and Political Personalities; and then Reject Plaintiff's Paid Ads

It already is settled that the military must honor the First Amendment, just as every part of the government must. *Flower v. U.S.*, 407 U.S. 197-99.

With the Defendants shouting about the quantity of cases cited by Plaintiff versus the quality thereof, Plaintiffs give Defendants their wish of more caselaw, which buffers Plaintiff's arguments further that Defendants cannot accept paid advertising and still reject Plaintiff's ads. Curiously, one of the strongest cases supporting this argument is from Judge Bork, a judge reviled by so many "progressives" during his Supreme Court confirmation hearings as hostile to the Bill of Rights. In *Lebron v. WMATA*, 749 F.2d 893, 896 (DC Cir. 1984), Judge Bork demonstrates how the acceptance of "political advertising" (e.g., the *Pentagram's* publication of the FBI and Dole ads) turns a place (in the instance of a subway station) or a periodical (in the instance of Defendants' CEN publications) into public for a. *Id.*

Moreover, *Lebron* clearly shows how in that case, as well as Plaintiff's instant case, once there is a political forum, political ads cannot be rejected, even if they viciously attack the government, and how the prohibition of political ads amounts to an unconstitutional prior restraint of First-Amendment protected speech.. *Lebron v. WMATA*, 749 F.2d at 896.

Furthermore, *Lebron* clearly shows how Defendants have given utterly misplaced reliance on *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), seeing that *Shaker Heights* does not govern speech where, as in Plaintiff's case, "the state has opened [public property] for use by the public as a place for expressive activity.'". *Lebron v. WMATA*, 749 F.2d at 896 n.6 (quoting *Perry Educ. Ass'n. v. Perry Local Educator's Ass'n*, 460 U.S. at 45 (1983)).

Further supporting the severe limits on the government's picking and choosing expressive activity in government-run for a is *Stewart v. District of Columbia Armory Bd.*, 789 F. Supp. 402 (D.D.C. 1992), where the court correctly held that the government-controlled RFK Stadium could not prohibit religious displays by fans while still allowing other fans to exhibit non-religious displays (e.g. "Go Redskins" banners).

3. The Anti-Political Ad Provisions are Unconstitutionally Vague and Overbroad

Either Defendants' anti-political ad regulations are vague and overbroad, or else Defendants are being disingenuous by allowing some political ads and not others. *See* above discussion about the contents of the *Pentagram*. Even assuming, *arguendo*, that the CEN's are not public fora, the rejection of Plaintiff's paid ads is still unconstitutional for having been governed by vague and overbroad regulations. *Stewart v. District of Columbia Armory Bd.*, 789 F. Supp. 402, 406.

CONCLUSION

For all the foregoing reasons, Plaintiff's Summary Judgment Motion should be granted, and Defendants should be denied their motion to dismiss and for summary judgment.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply to Defendant's Opposition to Plaintiff's Motion for Summary Judgment was served through the Electronic Case Filing System on March 17, 2006, to

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