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Case No. 19-1571

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 18, 2020
DEBORAH S. HUNT, Clerk

APRIL FAKHOURY, HAKIM FAKHOURY, MICHAEL FAKHOURY, & RAY FAKHOURY,	)	
Plaintiffs-Appellees,	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN
v.	)	
JOHN B. O'REILLY, JR., DEBRA WALLING, & CITY OF DEARBORN, MICHIGAN,	)	
Defendants-Appellants.	)	

_____/

Before: MERRITT, KETHLEDGE, and WHITE, Circuit Judges

MERRITT, Circuit Judge. This appeal arises from a years-long tension between Defendant John B. O'Reilly, Jr., the Mayor of Defendant City of Dearborn, Michigan, and Plaintiffs Hakim and April Fakhoury. Plaintiff Hakim is a known real estate developer in Dearborn and entered into a development agreement with the City. O'Reilly—evidently due to animus toward Hakim—attempted to stifle the redevelopment project by partnering with another family to divest Plaintiffs of their properties, subjecting them to police harassment, selective prosecution, and aggressively citing their buildings for City code violations. Plaintiffs filed suit against

Defendant O'Reilly, Defendant Debra Walling—the City's head attorney—the City of Dearborn, and other city officials not relevant here. Plaintiffs alleged, among other things, an Equal Protection class-of-one claim and First Amendment retaliation claims. The district court denied Defendants' motions for summary judgment on qualified immunity. Defendants now appeal, claiming that there is no clearly established law applicable to Plaintiffs' claims and that they did not violate Plaintiffs' constitutional rights. There is clearly established law for each of Plaintiffs' claims, and given our limited scope of review based on the procedural posture of this case, we decline to address the remaining arguments. We dismiss Defendant Walling's appeal but otherwise affirm the district court.

I. Factual Background[1]

A. The Preferred Development Agreement And Surrounding Difficulties

In 2005, Defendant City of Dearborn, Michigan, awarded a bid to Plaintiff Hakim Fakhoury's business, Dearborn Venture Partners, for a Preferred Development Agreement. The Agreement was to lead to Plaintiff Hakim purchasing city-owned property for redeveloping the West Dearborn area.

In late 2006, the then-Mayor Guido died and O'Reilly became Mayor. Evidently, shortly after O'Reilly assumed Mayor, Plaintiff Hakim approached him about a Building and Safety Inspector who allegedly attempted to extort Hakim to obtain the City's cooperation and approval for his projects. Plaintiffs maintain that their relationship with O'Reilly then began to sour.

[1] Most of these facts are from the district court's opinion. *See Adams v. Blount Cty.*, 946 F.3d 940, 948–49 (6th Cir. 2020) (explaining that for an appeal denying summary judgment on qualified immunity grounds, the Court may "defer to the district court's determinations of fact" and "need look no further than the district court's opinion").

Plaintiff Hakim attended a City Council meeting in late 2009 to discuss an extension to the redevelopment project. Plaintiff Hakim voiced complaints at this meeting regarding delays with permits and other issues increasing his costs.

In early 2010, Plaintiff Hakim again objected to difficulties surrounding the project and to paid parking in West Dearborn, which evidently hurt businesses in the area. Plaintiffs allege that personal animus led O'Reilly to order Building and Safety employees to aggressively enforce city code violations against Plaintiffs' properties despite an agreement that the City would require that the properties be "existing nonconforming" because the buildings were to be demolished as part of the redevelopment plan. Keith Woodcock, the Chief Building Inspector at the time, testified that O'Reilly instructed city inspectors to write up all of Plaintiffs' buildings and that the City attempted to impede Plaintiffs' ability to develop West Dearborn by not issuing permits or enforcing stop-work orders on projects with permits. Plaintiffs claim that many of their tenants began moving out because of the heavy code enforcement, resulting in additional costs to Plaintiffs. Woodcock additionally testified that he believes the increased tension between Plaintiffs and O'Reilly led to conversations about stopping Plaintiff Hakim from buying new properties in the City. O'Reilly even publicly implied that Plaintiff Hakim's money came from overseas with the implication that it was dirty or crooked money.

Plaintiffs argue that the City continued to cite Plaintiff Hakim's buildings for violations and even attempted to demolish several of them. In 2011, Plaintiff Hakim filed a lawsuit seeking injunctive relief against the City to prevent demolition. The lawsuit resulted in a settlement whereby the City would refrain from demolishing the buildings and extend the Agreement. The lawsuit increased tensions between O'Reilly and Plaintiff Hakim.

B. Partnership With The Hamames

Around the same time, Plaintiffs partnered with Mike and Sam Hamame, and each family was evidently an equal owner of several properties Plaintiffs previously acquired. The Hamames also supported the removal of paid parking in the City.

In February of 2013, Plaintiff Hakim received a phone call from Marwan Haidar, who informed him of a meeting that Haidar claimed occurred at Habib Restaurant between O'Reilly, the Hamames, and others. Haidar told Plaintiff Hakim that during the meeting, O'Reilly told the Hamames that if they wanted to do business with the City, they would need to sever their relationship with Plaintiffs and divest them of their properties. Defendants deny this meeting took place and also deny giving that ultimatum.

C. Police And Prosecutorial Conduct

The Hamames and the City allegedly began working against Plaintiffs. On February 12, 2013, the Dearborn police issued a Special Intelligence Bulletin which referenced disputes between the Hamames and Plaintiffs. The Bulletin stated that "court proceedings and evictions are imminent" and Mike "Hamame feels that the possibility for violence will escalate[.]" The Bulletin also labeled Plaintiffs as suspects and indicated that officers were to give special attention to the Hamames' and Plaintiffs' jointly owned properties.

Andreas Barnette, a sergeant in the police department at the time, attended a meeting between the Hamames and Barnette's supervisor, Lieutenant Patricia Penman. Barnette's notes from the meeting evidently indicate that the Hamames' and Plaintiffs' business ventures had deteriorated such that Hamame had initiated legal action against Plaintiff Hakim in late January 2013. Hamame also claimed that some evictions would occur on February 13, 2013.

Plaintiffs allege that on February 21, 2013, O'Reilly falsely and publicly declared that Plaintiffs no longer owned any property in West Dearborn and that Hamame had started evicting Plaintiffs. O'Reilly also stated that "this is a new day and the future is bright." Plaintiffs claim that their tenants refused to pay rent because of these statements. Plaintiffs provide testimony from Thomas Tafelski, the President of the City Council, that the Mayor told tenants to pay the bank or the Hamames, but not to pay rent to Plaintiffs.

Plaintiffs maintain that around this time, because of the Bulletin, officers began following and harassing them, parking around their house at all hours of the day and night. Evidently, on one occasion, Plaintiffs exited their driveway and several officers in at least four police cars surrounded them and conducted a stop. Plaintiffs claim that several officers drew their weapons, which Defendants deny. Plaintiffs maintain that police continued to harass and intimidate them and instructed them to stay off of their own properties.

Plaintiffs began forwarding documents to O'Reilly and Defendant Debra Walling to show their ownership of the properties. Walling, as the City's counsel, advised the City on disputed property rights and would consistently favor the Hamames, even though litigation between Plaintiffs and the Hamames was ongoing and there was no court order at the time declaring the Hamames outright owners of the properties. On February 26, 2013, Plaintiffs obtained a temporary restraining order which forbade the Hamames from collecting rent from the tenants. When Plaintiffs attempted to collect rent, however, a tenant called Barnette who allegedly instructed that the properties belonged to the Hamames.

Additionally, Plaintiffs provide testimony from a former assistant prosecutor for the City, Krystal Tulacz, who said Walling directed her to aggressively prosecute Plaintiffs regardless of the circumstances and to not provide any leniency. Plaintiffs also provide evidence that from 2013

to June 2014, they pleaded with O'Reilly and Walling to stop police harassment towards them, but that they ignored Plaintiffs' requests. Walling would also ignore Plaintiffs' requests for assistance regarding property disputes but would promptly respond to similar inquiries from the Hamames.

D. Divestment of Commercial Properties

Plaintiffs maintain that the City and the Hamames successfully divested them of their properties in June 2014. Because tenants were not paying Plaintiffs rent, they were forced to settle litigation with the Hamames to mitigate damages. Plaintiffs allege that O'Reilly rewarded the Hamames for divesting Plaintiffs of their properties by eliminating paid parking in West Dearborn in October 2014. Plaintiffs claim that O'Reilly's phone records show a joint effort between the Hamames and O'Reilly, with a substantial amount of phone calls between January and June of 2014, which ceased after the Hamames and Plaintiffs reached a settlement. Defendants dispute any responsibility regarding Plaintiffs' financial collapse.

II. Procedural Background

Plaintiffs filed their First Amended Complaint on September 23, 2016, alleging a variety of claims. On December 14, 2018, the City filed a Motion for Summary Judgment. O'Reilly followed on December 16, 2018, and Walling filed her Motion for Summary Judgment on December 18, 2018. On May 14, 2019, the district court entered an order granting in part and denying in part Defendants' Motions for Summary Judgment. This timely appeal followed.

III. Discussion

We review *de novo* the denial of a summary judgment motion on qualified immunity grounds. *Stoudemire v. Michigan Dep't of Corr.*, 705 F.3d 560, 565 (2013).

A. Jurisdiction

As a preliminary matter, we must note our limited scope of review. "An order denying a motion for summary judgment is generally not a final decision within the meaning of [28 U.S.C.] § 1291 and is thus generally not immediately appealable." *Plumhoff v. Rickard*, 572 U.S. 765, 771 (2014) (citing *Johnson v. Jones*, 515 U.S. 304, 309 (1995)). But that rule does not apply to summary judgment motions "based on a claim of qualified immunity" because "qualified immunity is an immunity from suit rather than a mere defense to liability." *Id.* at 771–72 (internal citations, internal quotations, and alterations omitted). "[P]retrial orders denying qualified immunity" thus "generally fall within the collateral order doctrine." *Id.* at 772 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 671–72 (2009)).

A denial of qualified immunity, "to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of [§ 1291.]" *Adams*, 946 F.3d at 948 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)). Contrarily, questions of "'evidence sufficiency,' *i.e.*, which facts a party may, or may not, be able to prove at trial[,]" are not immediately appealable. *Plumhoff*, 572 U.S. at 772 (quoting *Johnson*, 515 U.S. at 313). Defendants must limit their ''argument to questions of law premised on facts taken in the light most favorable to the plaintiff.'" *Adams*, 946 F.3d at 948 (quoting *Phillips v. Roane Cty., Tenn.*, 534 F.3d 531, 538 (6th Cir. 2008)).

"There are two narrow circumstances in which an interlocutory appeal record may contain some dispute of fact." *Id.* First, we "may overlook a factual disagreement if a defendant, despite disputing a plaintiff's version of the story, is 'willing to concede the most favorable view of the facts to the plaintiff for purposes of appeal.'" *Id.* (quoting *Barry v. O'Grady*, 895 F.3d 440, 443 (6th Cir. 2018). Second, "in exceptional circumstances," this Court "may decide an appeal

challenging the district court's factual determination if that determination is 'blatantly contradicted by the record, so that no reasonable jury could believe it.'" *Id.* (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)).

Here, Defendants make some legal arguments, such as whether there is clearly established law for Plaintiff's Equal Protection class-of-one claim and whether Plaintiff April Fakhoury may bring a First Amendment retaliation claim based on the protected speech of her husband. Defendants, however, disingenuously claim that they accept Plaintiff's version of the facts and then challenge the district court's factual findings and inferences at every chance in their briefs. They suggest that some of the district court's factual determinations are "blatantly contradicted by the record," but the exceptional circumstances permitting such a challenge are absent here. *See Scott*, 550 U.S. at 380 (relying on video footage in the record because it "utterly discredited" the plaintiff's version of events).

Despite Defendants constantly disputing the facts, we may separate Defendants' "'reviewable challenges from [their] unreviewable'" challenges. *Adams*, 946 F.3d at 948 (quoting *Diluzio v. Vill. of Yorkville, Ohio*, 796 F.3d 604, 610 (6th Cir. 2015)). "In doing so, 'we ignore [Defendants'] attempts to dispute the facts and nonetheless resolve the legal issue, obviating the need to dismiss the entire appeal for lack of jurisdiction.'" *Id.* (quoting *Diluzio*, 796 F.3d at 611). "We therefore defer to the district court's determinations of fact." *Id.*

B. Qualified Immunity

"'A defendant enjoys qualified immunity on summary judgment unless the facts alleged and the evidence produced, when viewed in the light most favorable to the plaintiff, would permit a reasonable juror to find that: (1) the defendant violated a constitutional right; and (2) that right was clearly established.'" *Schulkers v. Kammer*, 955 F.3d 520, 532 (6th Cir. 2020) (quoting *Kovacic*

v. Cuyahoga Cty. Dep't of Children & Family Servs., 724 F.3d 687, 695 (6th Cir. 2013)). We have "discretion to choose which prong of the qualified immunity inquiry to consider first." *Id.* Because of our limited jurisdiction, we consider only whether Plaintiffs' constitutional rights were clearly established at the time of the alleged violations.

i. Equal Protection Class of One Claim

Defendants maintain that they are entitled to qualified immunity because there is no clearly established law regarding Plaintiff's Equal Protection class-of-one claim. Plaintiffs contend that Defendants forfeited these arguments because they did not make them below. While O'Reilly did not use the phrase "clearly established law," he raised the same legal argument in his summary judgment brief as he does on appeal: that class-of-one claims are not cognizable for state actions that are subjective and discretionary. Walling, however, never made a similar argument below and has thus forfeited her "clearly established law" argument. *See United States v. Huntington Nat'l Bank*, 574 F.3d 329, 332 (6th Cir. 2009) ("To preserve the argument, then, the litigant not only must identify the issue but also must provide some minimal level or argumentation in support of it.") Walling's only other argument—that she did not commit an Equal Protection violation—is purely factual. We therefore dismiss Walling's appeal for lack of jurisdiction.

Defendants argue that there is no clearly established law because, after *Engquist v. Or. Dep't of Agric.*, 553 U.S. 591 (2008), class-of-one claims are not cognizable for challenges to state actions that are "inherently subjective and discretionary." Defendants contend that O'Reilly's actions here were inherently subjective and discretionary.

O'Reilly's actions—at least, as the district court describes them—are far removed from the type of legitimate discretion exercised in *Engquist*. *Id.* at 594 (noting that defendant, a public employer, eliminated plaintiff's position because of reorganization within the department). The

district court determined there was evidence that O'Reilly, driven by animus, purposely sabotaged Plaintiffs' ability to collect rent—and ordered police to bar them from their properties—with no legal basis, in an effort to rid Plaintiffs from the City and place their property into the hands of a rival family, the Hamames. No mayor has the discretion—or power—to take these actions. The only route to finding that O'Reilly was merely exercising legitimate discretion is to accept his version of the facts, which we cannot do in this procedural posture. Because Plaintiffs' version of the facts shows that O'Reilly did not engage in legitimate discretionary decisionmaking, we need not determine the scope of *Engquist*'s rationale, nor whether that scope was clearly established in 2013-2014.

We have recognized on several occasions that an individual has the constitutional right to be treated similarly to those similarly situated unless the government has a rational basis for not doing so. *See, e.g., Rondingo, L.L.C. v. Twp. of Richmond*, 641 F.3d 673, 682 (6th Cir. 2011). Moreover, the Supreme Court, in *Vill. of Willowbrook v. Olech*, 528 U.S. 562 (2000), and *Engquist*, 553 U.S. at 603–04 (2008), recognized land-use as a specific situation where class-of-one claims are cognizable. At bottom, this case involves Plaintiffs' right to challenge arbitrary and unequal interference with their rights as property owners. It falls squarely within the type of property-based challenges that *Olech* and *Engquist* both recognize as cognizable under the class-of-one theory. *See Engquist*, 553 U.S. at 602, 604 (emphasizing that *Olech* and the cases it relied on "involved the government's regulation of property," and contrasting a public employer's discretionary functions with those of a zoning official).

Defendants remaining arguments are purely factual. Defendants contend that Plaintiffs and the Hamames were not similarly situated because of Plaintiffs' history of financial troubles with the City and that Plaintiffs evaded responsibility for their financial woes, neither of which apply

to the Hamames. Further, Defendants maintain that Plaintiffs produced no admissible evidence that O'Reilly treated the two families differently; dispute that he falsely declared that Plaintiffs did not own their property; dispute that O'Reilly told tenants to withhold rent from Plaintiffs; dispute that O'Reilly instructed tenants to pay the Hamames with no legal basis; and dispute that O'Reilly told Dearborn police to prevent Plaintiffs from entering their properties. Defendants do nothing more than challenge the district court's view of the evidence—which it viewed in the light most favorable to Plaintiffs. We reject these arguments. *See Plumhoff*, 572 U.S. at 772.

ii. Plaintiff Hakim's First Amendment Retaliation Claim

Defendants argue that they are entitled to qualified immunity on Plaintiff Hakim's First Amendment retaliation claim. A First Amendment retaliation claim has three elements:

> (1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two—that is, the adverse action was motivated at least in part by the plaintiff's protected conduct.

Thaddeus-X v. Blatter, 175 F.3d 378, 394 (6th Cir. 1999). Defendants dispute the first element, specifically that it is not "clearly established" that a citizen has the right to criticize public officials. Defendants cite cases from the Third, Seventh, and Eighth Circuits. But the Sixth Circuit "clearly stated that private citizens have a First Amendment right to criticize public officials and to be free from retaliation for doing so" almost three decades ago. *See Holzemer v. City of Memphis*, 621 F.3d 512, 520 (6th Cir. 2010) (citing *Zilich v. Longo*, 34 F.3d 359 (6th Cir. 1994)).

Defendants also contend that Plaintiffs cannot establish an adverse action or causation. Both issues are ordinarily factual questions for a jury. *See Holzemer*, 621 F.3d at 524 (adverse action); *Davignon v. Hodgson*, 524 F.3d 91, 101 (6th Cir. 2008) (causation). Because these are

factual questions, and Defendants continue to dispute the record, we do not address these arguments.

iii. Plaintiff April's First Amendment Retaliation Claim

Plaintiff April brought a First Amendment Retaliation claim relying on her filing of a citizen's complaint against Andreas Barnette. The district court found that, although her complaint was not protected, April's claim could proceed based on her husband's protected speech, criticizing O'Reilly. Defendants claim that the right to bring a First Amendment retaliation claim by way of a relative is not clearly established.

As the district court correctly noted, the cases of *Nailon v. Univ. of Cincinnati*, 715 F. App'x 509 (6th Cir. 2017), and *Henley v. Tullahoma City Sch. Sys.*, 84 F. App'x 534 (6th Cir. 2003), clearly establish that a plaintiff may bring a First Amendment retaliation claim through a relative's protected speech. Ten years before the relevant time period here, in *Henley*, we recognized the right of children to bring claims based on their parents' protected speech, filing race discrimination complaints against school officials. 84 F. App'x at 540. And although we decided *Nailon* after the relevant time period for this case, we recognized the right of an aunt to bring a claim premised on her niece's protected speech, complaints of racial discrimination by an office at the University of Cincinnati. 715 F. App'x at 510. We do not decide how closely related the plaintiff must be to the person whose protected speech is the basis for the claim, but a husband and wife certainly suffice.

Like Plaintiff Hakim's First Amendment retaliation claim, Defendants' arguments challenging the adverse action and causation elements of Plaintiff April's claim are purely factual. *See Holzemer*, 621 F.3d at 524; *Davignon*, 524 F.3d at 101. We thus do not address these arguments.

IV. Conclusion

For the reasons stated above, we dismiss Walling's appeal for lack of jurisdiction, and affirm the district court with respect to denying summary judgment for O'Reilly.