IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

AARON TOBEY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 3:11CV154–HEH
	)	
JANET NAPOLITANO, *et al.*,	)	
	)	
Defendants.	)	

MEMORANDUM ORDER
(Granting in Part and Denying in Part Defendants' Motion to Stay Discovery)

THIS MATTER is before the Court on a Motion for Stay of Discovery Pending a Decision on Interlocutory Appeal (Dk. No. 60) filed on October 5, 2011 by Defendants Rebecca Smith and Terri Jones ("Defendants"). On August 30, 2011, this Court granted in part and denied in part Defendants' motion to dismiss. Of particular relevance here, the Court denied Defendants qualified immunity as to Plaintiff's First Amendment individual-capacity claims. In their instant Motion, Defendants request that this Court stay discovery and all other pre-trial deadlines until October 31, 2011, or until the United States decides whether to appeal the Court's partial denial of their motion to dismiss. For the reasons below, that Motion is GRANTED IN PART and DENIED IN PART.

I.

The decision whether to stay proceedings is committed to the sound discretion of the district court. *United States v. Georgia Pac. Corp.*, 562 F.2d 294, 296 (4th Cir. 1977) (citing *Landis v. North American Co.*, 299 U.S. 248, 254 (1936)). "The party seeking a

stay must justify it by clear and convincing circumstances outweighing potential harm to the party against whom it is operative." *Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983). The court must "exercise [its] judgment to balance the various factors relevant to the expeditious and comprehensive disposition of the causes of action on the court's docket." *Georgia Pac. Corp.*, 562 F.2d at 296. Here, three considerations counsel against a complete stay of discovery and other pre-trial deadlines.

First, a stay would unduly delay the progress of this case. As Defendants acknowledge, "[b]ecause a stay of discovery necessarily affects the other pre-trial deadlines set by the Court," (Defs.' Mot. 6 n.3), a grant of the present Motion would require the Court to revisit the entirety of its current Scheduling Order (Dk. Nos. 37, 41). In the interest of judicial efficiency, the Court declines to do so.

Second, the Court is cognizant of the fact that all other parties to this action oppose the Defendants' request. (Defs.' Mot. 5.) Where there is "even a fair possibility" that a stay will disadvantage another party, the movant "must make out a clear case of hardship or inequity in being required to go forward." *Williford*, 715 F.2d at 127. Defendants have failed to make such a showing here.

Finally, as the Court made clear in its Order denying dismissal, discovery is necessary in this case to determine whether Defendants are, in fact, properly entitled to qualified immunity. If the evidence uncovered in discovery discredits Plaintiff's allegation that the Defendants acted because "of the message Plaintiff sought to convey, as opposed to Plaintiff's admittedly bizarre behavior or because of some other reasonable restriction on First Amendment activity," then Defendants may reassert their qualified

immunity claim in a motion for summary judgment. *Tobey v. Napolitano*, No. 3:11CV154, 2011 WL 3841929, at *17 n.24 (E.D. Va. August 30, 2011) ("Of course, the Federal Defendants may renew their claim of qualified immunity following discovery."). Indeed, the Fourth Circuit has noted that, "[o]rdinarily, the question of qualified immunity should be decided at the summary judgment stage." *Willingham v. Crooke*, 412 F.3d 553, 558 (4th Cir. 2005).

As Defendants correctly assert, qualified immunity aims "to protect public officials from the broad-ranging discovery that can be peculiarly disruptive of effective government." *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) (internal quotations omitted). Thus, "even such pretrial matters as discovery are to be avoided *if possible*." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). As the Supreme Court has observed, however, "discovery may be necessary before [a pre-trial motion] on qualified immunity grounds can be resolved." *Anderson*, 483 U.S. at 646 n.6. Likewise, the Fourth Circuit has stated that:

> In instances where there is a material dispute over what the defendant did, and under the plaintiff's version of the events the defendant would have, but under the defendant's version he would not have, violated clearly established law, it may be that the qualified immunity question cannot be resolved without discovery. In such circumstances, it may simply be impossible to protect the defendant from all of the burdens that attend the pretrial process.

DiMeglio v. Haines, 45 F.3d 790, 795 (4th Cir. 1995); *see, e.g.*, *Swagler v. Neighoff*, 398 F. App'x 872, 877–78 (4th Cir. Oct. 18, 2010) (per curiam) (affirming denial of qualified immunity prior to discovery because determination as to defendants' "subjective motivation" for action was "highly fact-dependent"). In such cases, however, "discovery

should be tailored specifically to the question of ... qualified immunity." *Anderson*, 483 U.S. at 646 n.6.

This is such a case. Having already found that Plaintiff's Complaint asserts unrebutted facts which, if true, would overcome Defendants' qualified immunity claim, discovery is an appropriate and necessary next step. However, in order to avoid "the burdens of broad-ranging discovery," *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), discovery in this case shall be limited to issues underlying Defendants' claim of qualified immunity. This restriction on discovery shall remain in effect until October 31, 2011.

III.

For the foregoing reasons, Defendants' Motion is GRANTED IN PART and DENIED IN PART. Defendants' request for a complete, albeit temporary, stay of discovery and other pre-trial deadlines is DENIED. Until October 31, 2011, however, Plaintiff and Defendants are HEREBY ORDERED to restrict the scope of their discovery requests to the question of Defendants' qualified immunity. All other deadlines set forth in this Court's previous Scheduling Orders (Dk. Nos. 37, 41) shall remain effective.

The Clerk is DIRECTED to send a copy of this Order to all counsel of record.

It is so ORDERED.

/s/
Henry E. Hudson
United States District Judge

Date: Oct. 12, 2011
Richmond, VA