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.	)	
	)	

MOTION FOR STAY OF PROCEEDINGS
PENDING APPEAL AND BRIEF IN SUPPORT THEREOF

In its August 30, 2011 Memorandum Opinion (docket # 53), the Court granted in part and denied in part the federal defendants' motion to dismiss plaintiff's First Amended Complaint. Only plaintiff's First Amendment claim against the individual federal defendants, Rebecca Smith and Terri Jones (collectively, the Transportation Security Officers (TSOs)), is extant. Inasmuch as a Notice of Appeal has been filed, defendants Smith and Jones respectfully move this Court to stay the proceedings in this case pending appeal.[1]

BACKGROUND

The federal defendants' motion to dismiss the claims against the TSOs sued in their

[1] Counsel for Smith and Jones has conferred with counsel for the plaintiff and the Commission defendants regarding this motion. Counsel for the plaintiff, Alan Veronick, has advised that, in consideration of the costs and inconveniences to the parties and the Court that will occur if discovery is not stayed, plaintiff consents to a stay of discovery pending the resolution of the appeal. Counsel for the Commission defendants, Paul Jacobs, stated that inasmuch as an appeal has been filed and the federal defendants have indicated they would oppose depositions of the TSA personnel during the pendency of the appeal, the Commission defendants will not oppose the motion so as to avoid the cost and inconvenience of piecemeal litigation.

individual capacities raised as its primary basis the qualified immunity doctrine. On August 30, the Court dismissed plaintiff's Fifth Amendment equal protection and Fourth Amendment claims against the TSOs. The Court held, however, that plaintiff's First Amendment claim could not yet be dismissed on qualified immunity grounds. The Court identified the issue for decision as "whether the TSOs in fact radioed for assistance 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 in the security screening area." Memo Opinion at 34. The Court determined that the First Amended Complaint raised a "material dispute over what the defendants did" and, because "Plaintiff's unrebutted claim facially states a cause of action," the court concluded that "the question of qualified immunity must await further discovery." *Id*. In so ruling on the dismissal motion, the Court submitted TSOs Smith and Jones to discovery and pretrial proceedings, effectively denying their qualified immunity defense. *See, e.g., Jenkins v. Medford*, 119 F.3d 1156, 1159 (4th Cir. 1997).[2] Smith and Jones have now perfected an appeal to the Court of Appeals for the Fourth Circuit from this decision (docket # 67).

DISCUSSION

A stay of proceedings is not only appropriate here, it is a jurisdictional necessity. TSOs Smith and Jones timely appealed from this Court's August 30, 2011 order denying their qualified

[2] In reaching its decision on plaintiff's Fourth Amendment claim, the Court addressed whether the Amended Complaint supported an inference that the TSOs violated plaintiff's constitutional rights. Memo Opinion at 33. But, as to the First Amendment, the Court's opinion did not contain a similar analysis, *i.e.*, that the Amended Complaint alleged facts sufficient to support a reasonable inference that the TSOs were motivated by content discrimination in violation of the First Amendment. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

immunity defense. It is well-established that "[t]he filing of a notice of appeal is an event of jurisdictional significance–it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982); *see also Levin v. Alms & Associates, Inc*., 634 F.3d 260, 264 (4th Cir. 2011). As a number of circuits have recognized, the *Griggs* principle extends to qualified immunity appeals, which are taken from "final" district court decisions under 28 U.S.C. § 1291, *see generally Mitchell v. Forsyth*, 472 U.S. 511, 525-30 (1985). *See, e.g., Walker v. City of Orem*, 451 F.3d 1139, 1146 (10th Cir. 2006); *May v. Sheahan*, 226 F.3d 876, 879 (7th Cir. 2000); *Dickerson v. McClellan*, 37 F.3d 251, 252 (6th Cir. 1994); *Chuman v. Wright*, 960 F.2d 104 (9th Cir. 1992). When an immunity appeal is taken, jurisdiction shifts to the court of appeals, and the district court necessarily may not proceed further in the case until the appeal is rejected or the case remanded.

Qualified immunity rests on the insight that damages suits against public officials impose substantial social costs, including "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Significant among these costs is "the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" *Id*. (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d 1949) (brackets original)). Consequently, qualified immunity provides more than a mere defense to liability; it is "an *immunity from suit*," *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), designed "to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out

lawsuit." *Siegert v. Gilley*, 500 U.S. 226, 232 (1990). Suit immunity is irretrievably lost if the defense is erroneously rejected, and thus "*Mitchell* clearly establishes that an order rejecting the defense of qualified immunity at either the dismissal stage or the summary judgment stage is a 'final' judgment subject to immediate appeal." *Behrens v. Pelletier*, 516 U.S. 299, 306 (1996).

TSOs Smith and Jones moved to dismiss on qualified immunity grounds, but this Court concluded that qualified immunity does not apply to bar discovery on plaintiff's First Amendment content discrimination claim. *See* Memorandum Opinion at 34. Smith and Jones have appealed that ruling – as *Mitchell* authorizes – and, under *Griggs*, the appeal's pendency divests this Court of jurisdiction to proceed further in the action. *See, e.g.*, *May*, 226 F.3d at 879-80.

The Fourth Circuit has yet to apply *Griggs* in the context of a qualified immunity appeal. But that court has squarely recognized in an analogous context that a properly noticed appeal seeking to vindicate a right to avoid the costs and burdens of litigation necessarily divests the district court of jurisdiction to proceed in the underlying action. In *Levin v. Alms & Associates, Inc*., 634 F.3d 260, 266 (4th Cir. 2011), the Fourth Circuit held that an appeal under § 16(a) of the Federal Arbitration Act, from a district court decision denying a motion to compel arbitration, divests the district court of jurisdiction to proceed on the merits of the underlying claims for relief. Rejecting the view of a minority of circuits that had held that the only issue on appeal is the question of arbitrability itself and that district courts can proceed to the merits, the *Levin* court explained that "[t]he core subject of an arbitrability appeal is the challenged continuation of proceedings before the district court on the underlying claims." *Id*. at 264. This broader understanding of the interest at stake in an arbitrability appeal necessarily meant that

under *Griggs* a district court could not proceed with any aspect of the underlying civil dispute. "[B]ecause the district court lacks jurisdiction over 'those aspects of the case involved in the appeal,' it must necessarily lack jurisdiction over the continuation of any proceedings relating to the claims at issue." *Id*. (quoting *Griggs*, 459 U.S. at 58).

Consistent with that analysis, the Fourth Circuit explicitly rejected the argument that discovery could go forward pending the appeal. "Discovery," the court explained, "is a vital part of the litigation process and permitting discovery constitutes permitting the continuation of the litigation, over which the district court lacks jurisdiction." *Id*. In addition, "allowing discovery to proceed would cut against the efficiency and cost-saving purposes of arbitration," *id*., while perhaps significantly altering the nature of the dispute in a way that could not be undone if the appeal is successful and arbitration is required, *see id.* at 265 ("the parties will not be able to unring any bell rung by discovery, and they will be forced to endure the consequences of litigation discovery in the arbitration process"). Accordingly, the appellant was entitled to a stay of all proceedings in the district court pending the appeal.

Levin's reasoning readily translates to qualified immunity cases; indeed, the Tenth Circuit has relied on the analogy between immunity and arbitrability to reach a result similar to the Fourth Circuit's in *Levin*. *See McCauley v. Halliburton Energy Services, Inc*., 413 F.3d 1158 (10th Cir. 2005). As that court explained, "interlocutory appeals on the basis of the denial of qualified immunity are similar to § 16(a) appeals in the following respect: the failure to grant a stay pending either type of appeal results in a denial or impairment of the appellant's ability to obtain its legal entitlement to avoidance of litigation, either the constitutional entitlement to qualified immunity or the contractual entitlement to arbitration." *Id.* at 1162. It follows, then,

that when a government official appeals from a pre-discovery immunity denial, the district court lacks jurisdiction to proceed, including with discovery. Qualified immunity is "*immunity from suit*," *Mitchell*, 472 U.S. at 526, and so "the ultimate question in a *Forsyth* appeal is whether a public official should have to undergo the burdens of litigation." *May*, 226 F.3d at 879 (citation omitted)). Hence "there can be no doubt that a *Forsyth* appeal divests a district court of the authority to order discovery or conduct other burdensome pretrial proceedings." *Id*. at 880.

The Supreme Court's decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), underscores that conclusion. Rejecting a suggestion that Rule 8(a)(2)'s pleading standards might be "tempered" when courts impose discovery controls, the Supreme Court reiterated that "[t]he basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery.'" *Id*. at 1953 (quoting *Siegert*, 500 U.S. at 236 (Kennedy, J., concurring in the judgment)). Even limited or managed discovery cannot be squared with that purpose:

> It is no answer to these concerns to say that discovery for petitioners can be deferred while pretrial proceedings continue for other defendants. It is quite likely that, when discovery as to the other parties proceeds, it would prove necessary for petitioners and their counsel to participate in the process to ensure the case does not develop in a misleading or slanted way that causes prejudice to their position. Even if petitioners are not yet themselves subject to discovery orders, then, they would not be free from the burdens of discovery.

Id.

For the reasons explained above, then, a government official's appeal from a qualified immunity denial necessarily forecloses further proceedings in the district court until the appeal is rejected or the case remanded. TSOs Smith and Jones have taken a timely appeal raising a substantial question of qualified immunity appealable under *Mitchell*. Accordingly, this Court

lacks jurisdiction to proceed on the claims before it, and a stay of proceedings is necessary.

DATED this 4th day of November, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of November, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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