

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

MICHAEL CHOATE,

Plaintiff,

v.

UNITED STATES POSTAL SERVICE;
PATRICK R. DONAHOE, in his official
capacity as Postmaster General;
TERRENA D. MOORE, individually and
in her official capacity as Postmaster for
the Oakland Tennessee Post Office,

Defendants.

CIV NO. _____

VERIFIED COMPLAINT

Comes now Plaintiff Michael Choate and avers the following.

I.

INTRODUCTION

1. This is a civil rights action concerning the constitutional right to distribute literature on a public sidewalk. Defendants unlawfully restrict this right through vague policies and practices that allow for content-based enforcement. Because of these constitutional defects, Plaintiff challenges Defendants' policies both facially and as-applied.

II.

JURISDICTION AND VENUE

2. This action raises federal questions under the United States Constitution, particularly, violations of the Free Speech of the First Amendment, violations of due process under the Fourth Amendment, as well as federal questions under the Religious Freedom Restoration Act, 42 U.S.C. § 2000(bb) et. seq. ("RFRA"); these claims are properly challenged

pursuant to federal law, particularly 28 U.S.C. §§ 1331; 1346; 2201 – 2202; 5 U.S.C. § 702 and 39 U.S.C. § 401.

3. This court has original jurisdiction over the federal claims by operation of 28 U.S.C. §§ 1331 and 1346.

4. This Court has authority to grant the requested injunctive and declaratory relief under 5 U.S.C. § 702 and 28 U.S.C. §§ 2201 – 2202; attorney’s fees and costs under 28 U.S.C. § 2412 and the Equal Access to Justice Act; and damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

5. Venue is proper in the United States District Court for the Western District of Tennessee under 28 U.S.C. § 1391(e), because all claims arose in this District. And venue is proper in the Western Division under Local Rule 3.3 because all claims arose in Fayette County.

III.

PLAINTIFF

6. Plaintiff Michael Choate (“Choate”) is and was at all times relevant to this action a resident of Somerville, TN.

IV.

DEFENDANTS

7. Defendant United States Postal Service (“USPS”) is an independent establishment of the Executive Branch of the Government of the United States.

8. Defendant Patrick R. Donahoe is currently the Postmaster General for USPS. The Postmaster General is the chief executive officer of USPS, and has the responsibility, among other duties, to oversee all aspects of the Postal Service. This includes oversight over policies regulating expression on property and facilities controlled by the Postal Service. Postmaster Donahoe is sued in his official capacity.

9. Defendant Terrena D. Moore is and was at all times relevant to this action, the Postmaster for the Post Office located in Oakland, Tennessee. She is charged, among other duties, with interpreting and applying all Postal Service policies and regulations at the Oakland Post Office, including regulations affecting expression. Postmaster Moore is sued in her individual and official capacities.

V.

STATEMENT OF FACTS

Choate's Desired Expression

10. Choate is a Christian who adheres to historic beliefs and tenets of the Christian faith. Choate's faith compels him to share his religious beliefs with others.

11. In an effort to carry out this religious tenet, Choate frequently visits public areas, like public sidewalks, and distributes religious literature about Christianity.

12. Choate distributes literature because this means is effective and inexpensive. A passerby is able to take a pamphlet from him and consider the information later. This is important for Choate because, in his experience, most people are unwilling to stay and dialogue with him.

13. Other expressive mediums, like television and radio, are cost-prohibitive for Choate. Signs are not sufficient because they cannot convey nearly as much information as a printed pamphlet. Neither can Choate afford to send his literature through the mail. Choate knows of no practical alternative to literature distribution.

14. In sharing his message, Choate does not create nor seek a crowd. He only wants to hand out literature to individuals.

15. Choate does not attempt to solicit funds, signatures, or membership for any organization.

16. Choate does not want to leave, post, or deposit his literature anywhere. He has no need for a table.

17. Choate only wants to share his message in a peaceful manner. He does not force his literature on anyone, nor does he litter.

18. While distributing literature, Choate does not block or obstruct passageways. He is always willing to step aside and let others pass by him.

19. Occasionally, Choate tries to engage in one-on-one dialogue about Christianity with a person as he/she walks by, but if that person declines to converse with Choate, he does not pursue it any further.

Choate's Expression at Oakland Post Office

20. For almost every day during the last two weeks of July of 2010, Choate went to the sidewalk in front of the Post Office in Oakland, Tennessee and distributed religious pamphlets.

21. This Post Office is located at 14695 Highway 194. According to the latest figures, the town of Oakland has a population of 5,181.

22. Choate chose to go to this particular sidewalk he lives in close proximity and many people in the Oakland and surrounding areas visit the Oakland Post Office on a regular basis. The location guarantees Choate an excellent opportunity to present his literature to as many people as possible in that community.

23. Pursuant to a religious duty to share the "Gospel" to individuals in his community, Choate is convicted to distribute his literature in this precise location. Choate's intended audience are those individuals entering and leaving the Post Office in Oakland.

24. The sidewalk in front of the Post Office is accessible and open to the public.

25. The sidewalk is approximately three feet wide.

26. This sidewalk is shaped like an “L” turned clockwise, running in a straight line from the Post Office entrance and extending in a perpendicular fashion into the Post Office parking lot.

27. Choate has observed other people utilizing this sidewalk for expressive activity.

28. During his visits in July of 2010, Choate routinely stood next to a flagpole positioned approximately forty feet from the Post Office entrance, near the “corner” of the sidewalk, where the sidewalk makes a ninety degree turn and begins to extend toward the Post Office parking lot. At this location, Choate stands outside of the path of anyone going to or leaving from the Post Office.

29. At no point did Choate ever attempt to enter inside the Post Office to distribute literature or to post or deposit literature on any postal property.

30. Choate distributed literature by the flagpole in July of 2010 without incident.

August 6, 2010 Incident

31. Choate went back to the sidewalk outside Postal Office in Oakland on August 6, 2010, at approximately 11:00 a.m. and situated himself in his usual place: on the sidewalk near the flagpole. Once there, he began to peacefully distribute literature.

32. Approximately one hour later, Postmaster Terrena Moore came outside and frantically ordered Choate to leave the property or face arrest. Choate tried to calm Postmaster Moore down, and explained that he would wait for the police.

33. A few minutes later, two police officers arrived on the scene. One of the officers told Choate he was trespassing and ordered him to leave. Choate was confused since he was standing on the public sidewalk. He questioned how he could be trespassing on public property.

According to the police officers, if the Postmaster says you are trespassing on postal property, you are trespassing, and must leave.

34. Choate did not want to be arrested, but firmly believed he had the right to express his beliefs on public property. Choate remained and was soon arrested for trespassing.

35. These criminal charges were later dropped. Choate was not required to pay a fine or serve any jail time.

Basis for Censorship

36. Following the arrest, Choate still wanted to return to the Post Office sidewalk and distribute his religious literature, but was afraid to do so. He returned to the Post Office a few weeks later to find out why Postmaster Moore considered him a trespasser.

37. Choate found Postmaster Moore and inquired of the basis preventing him from distributing literature on the sidewalk outside of the Post Office. Postmaster Moore directed Choate's attention to a poster in the Post Office setting out some regulations. According to Postmaster Moore, Choate violated the provision against "Disturbances." Postmaster Moore elaborated to Choate that he could not pass out literature anywhere on postal property because some customers were "annoyed" by his expressive activities.

38. This provision specified by Postmaster Moore is 39 C.F.R. § 232.1(e). The regulation reads in pertinent part as follows:

Disturbances. Disorderly conduct, or conduct which creates loud and unusual noise, or which impedes ingress to or egress from post offices, or otherwise obstructs the usual use of entrances, foyers, corridors, offices, elevators, stairways, and parking lots, or which otherwise tends to impede or disturb the public employees in the performance of their duties, or which otherwise impedes or disturbs the general public in transacting business or obtaining the services provided on property, is prohibited.

39. As a result of his conversation with Postmaster Moore and her reference to the postal regulation, Choate realized that he could not return to the Post Office sidewalk and peacefully distribute literature without subjecting himself to criminal arrest.

Confirmation of Unconstitutional Policy

40. In an effort to avoid litigation, Choate, through counsel, wrote the Postal Service to obtain their official position regarding Choate's peaceful literature distribution on sidewalks of postal property.

41. This letter, dated November 18, 2010, clarified that Choate did not block ingress or egress, nor did he have any intention to do so. The letter explained that Choate has a right to distribute literature because he wants to distribute and not deposit literature, and because he wants to engage in peaceful literature distribution without creating any type of disturbance. This letter requested assurance that Choate be allowed to peacefully distribute literature on the outside sidewalk in the future.

42. On December 1, 2010, an attorney with the Postal Service responded to the letter from Choate's counsel. The Postal Service rejected Choate's request for assurance:

You have asked for assurances that Mr. Choate will not be impeded in the distribution of literature outside the Post Office location of Oakland, Tennessee. For reasons discussed below, the Postal Service is unable to provide such assurances.

43. The Postal Service letter then proceeded to explain the application of 39 C.F.R. § 232.1(e) to Choate's activities, specifically, that Choate would not be allowed to distribute literature if he "*tends to impede or disturb* Postal Service employees or customers...." (emphasis supplied).

44. Knowing that his activity does not actually impede the ingress or egress of any employees or patrons to the Post Office, and remembering being told that his speech "annoyed"

some customers, Choate realized that the Postal Service believes his activity tends to “disturb” some employees and/or patrons.

Continuing Impact of Postal Regulation

45. Choate was disappointed with the official response from the Postal Service. Though Choate’s counsel clarified Choate’s desire to engage only in peaceful, non-disruptive literature distribution, the Postal Service refused to provide any assurance to Choate that he could conduct these activities. Rather, the Postal Service confirmed that 39 C.F.R. § 232.1(e) would continue to apply to and restrict Choate’s peaceful literature distribution in the future.

46. 39 C.F.R. § 232.1(e) remains in place and still serves to chill and deter Choate’s expression.

47. Choate is afraid that, because the language in 39 C.F.R. § 232.1(e) is vague and unclear, postal employees will continue to use 39 C.F.R. § 232.1(e) in arbitrary ways to prevent his peaceful literature distribution, just as Postmaster Moore did in August 2010. Choate is afraid that postal employees will take advantage of the vague language in 39 C.F.R. § 232.1(e) and utilize their unbridled discretion to prohibit peaceful literature distribution anytime they or a customer finds Choate’s message or viewpoint objectionable. There are no standards to guide postal employees in enforcing 39 C.F.R. § 232.1(e) or to prevent postal employees from making viewpoint and content-based applications of 39 C.F.R. § 232.1(e).

48. As a result of the vague regulation and his interactions with Postal Service officials, Choate has not returned to the Post Office in Oakland and attempted to engage in peaceful literature distribution on the Post Office sidewalk for fear of arrest. If not for Postal

Service regulation, and the actions of Defendants in enforcing and interpreting the regulation, Choate would immediately return to the Post Office sidewalk in Oakland and engage in peaceful literature distribution.

49. The fear of arrest severely limits Choate's constitutionally-protected expression at the Post Office sidewalk in Oakland.

50. The impact of chilling and deterring Choate from exercising his constitutional rights at the Post Office sidewalk in Oakland constitutes irreparable harm to Choate.

51. Choate does not have an adequate remedy at law for the loss of his constitutional rights.

VI.

FIRST CAUSE OF ACTION:

VIOLATION OF THE RIGHT TO FREEDOM OF SPEECH UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

52. Choate's religious speech is protected speech under the First Amendment.

53. Postal Service regulations, policies and practices, and enforcement thereof, including, but not limited to 39 C.F.R. § 232.1(e):

- a. are vague and overbroad;
- b. restrain constitutionally-protected speech in advance of its expression, without appropriate guidelines or standards to guide the discretion of officials charged with enforcing the policy;
- c. chill the free speech and free exercise of religion of Choate and of other third party citizens;
- d. allow the exercise of unbridled discretion;
- e. allow for viewpoint and content-based decisions;

f. are not narrowly tailored to achieve any legitimate government purpose and do not leave open alternative avenues for expression.

54. Defendants' regulation, policies and practices, and the enforcement thereof, thus violate the Free Speech Clause of the First Amendment to the United States Constitution.

WHEREFORE, Choate respectfully prays the Court grant the equitable and legal relief set forth in the prayer for relief.

VII.

SECOND CAUSE OF ACTION:

VIOLATION OF THE RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

55. Defendants' regulation, on its face and as-applied, is vague and lacks sufficient objective standards to curtail the discretion of postal officials. This allows Defendants ample opportunity to enforce the regulation in an *ad hoc*, arbitrary, and discriminatory manner.

56. Defendants have no compelling or legitimate reason that can justify their vague regulation.

57. The regulation, and Defendants' enforcement thereof, violate the Due Process required by the Fifth Amendment to the United States Constitution.

WHEREFORE, Choate respectfully requests that the Court grant the relief set forth hereinafter in the prayer for relief.

VIII.

THIRD CAUSE OF ACTION:

VIOLATION OF THE RELIGIOUS FREEDOM RESTORATION ACT, 42 U.S.C. § 2000(bb) et. seq.

58. Defendants' policies, including 39 C.F.R. § 232.1(e), are subject to RFRA. And federal laws which substantially burden one's exercise of religion, even if neutral and generally

applicable, must be in furtherance of a compelling governmental interest and be the least restrictive means of furthering that interest.

59. Defendants' regulation, 39 C.F.R. § 232.1(e), and its enforcement, substantially burden Choate's exercise of his religion.

60. Defendants cannot produce a compelling governmental interest for 39 C.F.R. § 232.1(e) and the enforcement.

61. Defendants cannot demonstrate that 39 C.F.R. § 232.1(e), and the corresponding enforcement, is the least restrictive means of furthering a compelling governmental interest.

WHEREFORE, Choate respectfully requests that the Court grant the relief set forth hereinafter in the prayer for relief.

IX.

PRAYER FOR RELIEF

WHEREFORE, Choate respectfully requests that the Court:

- a) Assume jurisdiction over this action;
- b) Enter a judgment and decree declaring 39 C.F.R. § 232.1(e) to be unconstitutional on its face and as applied to Choate's desired religious expression because it violates Choate's rights and the rights of third parties not before the Court, as guaranteed under the First and Fifth Amendments to the United States Constitution and under RFRA;
- c) Enter a preliminary and permanent injunction enjoining defendants, their agents, officials, servants, employees, and all persons in active concert or participation with them, or any of them, from applying 39 C.F.R. § 232.1(e) on its face and from applying 39 C.F.R. § 232.1(e) so as to prevent Choate's constitutionally and statutorily protected religious expression at the Post Office sidewalk at Oakland;

- d) Grant to Choate an award of attorneys fees in an amount deemed appropriate by this Court in accordance with the Equal Access to Justice Act;
- e) Grant to Choate an award of his costs and expenses of litigation in accordance with the Equal Access to Justice Act;
- f) Grant to Choate an award of nominal damages in an amount deemed appropriate by this Court; and,
- g) Grant such other and further relief as this Court deems just and proper.

VERIFICATION OF COMPLAINT

I, Michael Choate, a citizen of the United States, a resident of Fayette County, Tennessee, hereby declare that I have read the foregoing Verified Complaint and the factual allegations therein, and the facts as alleged therein are true and correct.


Michael Choate

Respectfully submitted,

<p>s/ Nathan W. Kellum NATHAN W. KELLUM TN BAR #13482; MS BAR # 8813 JONATHAN SCRUGGS BAR # 025679 Alliance Defense Fund 699 Oakleaf Office Lane, Suite 107 Memphis, TN 38117 (901) 684-5485 telephone (901) 684-5499 – Fax Attorneys for Plaintiff</p>	<p>GARRY J. RHODEN BAR# 024815 The Rhoden Firm 1661 International Place Dr., # 400 Memphis, Tennessee 38130 (901) 818-3226 telephone (901) 202-9321 – Fax Attorney for Plaintiff</p>
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