

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

MARTHA L. PIKE,)	
)	
Plaintiff,)	Civil Action No. 7:00cv00437
)	
)	
v.)	<u>MEMORANDUM OPINION</u>
)	
KERMIT L. OSBORNE, Individually,)	
and in his capacity as)	By: Samuel G. Wilson,
SHERIFF OF WYTHE COUNTY, VIRGINIA,)	Chief United States District Judge
)	
Defendant.)	

This is a consolidated action for damages pursuant to 42 U.S.C. § 1983 by two plaintiffs, former dispatchers for the Wythe County Sheriff’s Office, Cynthia J. Kincer and Martha L. Pike, against Wythe County Sheriff, Kermit L. Osborne, in his official and individual capacities.¹

Plaintiffs allege that Sheriff Osborne terminated them in violation of the First and Fourteenth Amendments to the United States Constitution because they supported his independent rival in the last election. Sheriff Osborne maintains that he has Eleventh Amendment immunity in his official capacity, that he has qualified immunity in his individual capacity, and that he is entitled to summary judgment on the merits. The court finds that the plaintiffs have waived the issue of whether they can recover damages from Sheriff Osborne in his official capacity and, therefore, dismisses the plaintiffs’ official capacity damages claim. The court also concludes, however, that Sheriff Osborne does not have qualified immunity in his individual capacity and is not entitled to summary judgment.

¹ Plaintiffs do not seek reinstatement.

I.

Sheriff Osborne's Republican predecessor in the sheriff's office, Wayne Pike, hired plaintiff, Martha Pike, as a dispatcher in 1996 and later married her. He hired plaintiff, Cynthia Kincer, in 1992 as a part-time secretary and promoted her to the position of dispatcher in January 1993.

In June 1998, Wayne Pike resigned his position as sheriff to take a position with the Virginia Parole Board, and the Circuit Court of Wythe County appointed Osborne to fill Wayne Pike's unexpired term. The following year, Osborne announced his intention to seek the Republican Party's nomination for sheriff for the November 1999 general election. Wayne Pike's son also sought that nomination. Both Martha Pike and Cynthia Kincer supported Wayne Pike's son. The Republican Party, however, nominated Osborne. Wayne Pike then resigned his position with the Virginia Parole Board and ran unsuccessfully as an independent against Osborne in the general election with Martha Pike's and Cynthia Kincer's open support. The month following his election, Sheriff Osborne notified plaintiffs that they would not be reappointed. He claims that politics played no part in his decision and claims instead that he terminated the plaintiffs because of confidential information that they allegedly released about him.

II.

Sheriff Osborne argues that he is a state official and is not subject to liability for damages in his official capacity. His argument is supported by authority within this district. *See Blankenship v. Warren County*, 918 F. Supp. 970 (W.D. Va. 1996). The plaintiffs have not responded to the argument. Under the circumstances, the court concludes that the plaintiffs have waived the claim and, therefore, declines to decide whether a sheriff in Virginia is shielded by the

Eleventh Amendment from an official capacity damages action.

III.

Sheriff Osborne maintains that he has qualified immunity because, “in December 1999, it was not clearly established that a Sheriff in the Commonwealth of Virginia could not terminate one of his employees for supporting an opposing candidate for Sheriff.” (Def’s Br. at 8). The court disagrees. The court finds that, in 1999, it was clearly established that a sheriff in the Commonwealth of Virginia could not terminate a dispatcher for supporting the Sheriff’s political opponents.

Qualified immunity protects “government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate ‘clearly established’ statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). “Qualified immunity thus affords a defendant government official broader protection than does the merits defense that no constitutional violation occurred.” *Gooden v. Howard County*, 917 F.2d 1355, 1360-61 (4th Cir. 1990). Qualified immunity affords a government official protection if the right allegedly or actually violated was not at the time “clearly established” or, if “clearly established,” a reasonable person in the official’s position could have failed to appreciate that his or her conduct violated that right. *See Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985). However, “a right can be deemed clearly established even if there is no prior decision addressing the precise conduct in issue, so long as its illegality would have been evident to a reasonable officer based on existing case law.” *Rogers v. Pendleton*, 249 F.3d 279, 285 (4th Cir. 2001).

In 1999, it was apparent from existing case law within the Court of Appeals for the

Fourth Circuit that a sheriff could not discharge a dispatcher because the dispatcher supported the election efforts of the sheriff's opponents. The *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), line of cases provides the analytical framework for judging political patronage dismissals. Ultimately, "the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti*, 445 U.S. at 518. In *Jones v. Dodson*, 727 F.2d 1329 (4th Cir. 1984), the Fourth Circuit "had its first opportunity to apply the *Elrod-Branti* exception to dismissals based on campaign activity." *Jenkins v. Medford*, 119 F.3d 1156, 1161 (4th Cir. 1997). Without engaging in a position-specific analysis, the Fourth Circuit concluded that the *Elrod-Branti* line of cases protected deputy sheriffs from partisan dismissals. When Sheriff Osborne discharged the plaintiffs, however, the Fourth Circuit's cases "[had] moved from wholesale pronouncements . . . to position-specific analyses . . ." *Id.* at 1162. Applying that position-specific analysis to the position of deputy sheriff in North Carolina and grounding its analysis on the core view that the sheriff owed "a duty to the electorate and the public at large to insure that his espoused policies [were] implemented," the court held that a "North Carolina deputy sheriff may be lawfully terminated for political reasons under the *Elrod-Branti* exception to prohibited political terminations." *Id.* at 1164. In clear and unequivocal language, the court then limited its holding:

We limit dismissals based on today's holding to those deputies actually sworn to engage in law enforcement activities on behalf of the sheriff. We issue this limitation to caution sheriffs that courts examine the job duties of the position, and not merely the title, of those dismissed. Because deputies in the instant case were law-enforcement officers, they are not protected by this limitation.

Id. at 1165. The court followed this limitation with a citation to *Zorzi v. County of Putnam*, 30 F.

3d 885, 892 (7th Cir. 1994), which held that, since *dispatchers* were not involved in law enforcement activity or policy, political affiliation was inappropriate as a job requirement.

In the present case, this court saw nothing in the job responsibilities of dispatcher that even remotely implicated the implementation of policy or that otherwise demonstrated that party affiliation was an appropriate requirement for the effective performance of the job. Accordingly, the court requested more information bearing on the question. In response, the parties submitted the following stipulation:

Plaintiffs Pike and Kincer were dispatchers for the Wythe County Sheriff's office. As dispatchers, they did not wear uniforms, did not have badges, and had no arrest authority. Kincer was sworn to serve papers within the building in the event someone came in to accept service. Pike did not serve papers.

(Joint Stipulation). In short, the plaintiffs were responsible for transmitting, receiving, and routing communications. The plaintiffs had no law-enforcement responsibilities. Nor did they have any more responsibility for implementing policy than an ordinary clerical worker would have had. Only an unreasonable reading of Fourth Circuit precedent, therefore, could have led to the conclusion that they were subject to patronage dismissal. It follows that Sheriff Osborne does not have qualified immunity.

IV.

Finally, Sheriff Osborne contends that he is entitled to summary judgment. He claims that he terminated the plaintiffs because of confidential information that they allegedly released about him. The court has reviewed the submissions of the parties and finds sufficient circumstantial evidence to create a triable issue of fact as to whether Sheriff Osborne terminated the plaintiffs on account of their protected political activities. The court, accordingly, denies the motion.

V.

For the reasons stated, the court dismisses the plaintiffs' claim against Sheriff Osborne in his official capacity, denies Sheriff Osborne's motion to dismiss on grounds of qualified immunity, and denies his motion for summary judgment.² An appropriate order will be entered this day.

ENTER: This August 17, 2001.

CHIEF UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
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² Ordinarily, a motion to dismiss on qualified immunity grounds should be decided at the first practicable opportunity. The motion, however, only recently was brought on for a hearing.

MARTHA L. PIKE,)	
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Plaintiff,)	Civil Action No. 7:00cv00437
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v.)	<u>ORDER</u>
)	
KERMIT L. OSBORNE, Individually,)	By: Samuel G. Wilson,
and in his capacity as)	Chief United States District Judge
SHERIFF OF WYTHE COUNTY, VIRGINIA,)	
)	
Defendant.)	

In accordance with the Memorandum Opinion entered this day, it is ORDERED and ADJUDGED that

- (1) plaintiffs' claim against Sheriff Osborne in his official capacity is **DISMISSED**;
- (2) defendant's motion to dismiss on grounds of qualified immunity is **DENIED**; and,
- (3) that defendant's motion for summary judgment is **DENIED**.

ENTER: This August 17, 2001.

CHIEF UNITED STATES DISTRICT JUDGE