

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

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HOWARD WILSON, SR., CLERK  
U.S. DISTRICT COURT  
WESTERN DISTRICT MICH  
BY HW

E. STEPHEN DEAN,  
Plaintiff,

v.

Case No. 5:01-CV-40

THOMAS K. BYERLY,  
Defendant.

HON. GORDON J. QUIST

OPINION

The Court has before it Plaintiff's objections regarding the January 8, 2002, report and recommendation issued by Magistrate Judge Brenneman recommending that Defendant's motion for summary judgment be granted with respect to Plaintiff's First Amendment claim and that Plaintiff's state law claims be dismissed pursuant to 28 U.S.C. § 1367(c)(3). In recommending summary judgment on the First Amendment claim, the magistrate judge assumed, for purposes of the motion, that Defendant was acting under color of state law as an employee or agent of the State Bar of Michigan during the alleged altercation outside of Defendant's house on March 27, 2001. The magistrate judge concluded that summary judgment was proper because Plaintiff had no First Amendment right to engage in targeted residential picketing under the Supreme Court's holding in Frisby v. Schultz, 487 U.S. 474, 108 S. Ct. 2495 (1988). Thus, the magistrate judge concluded, the alleged threats by Defendant could not have chilled Plaintiff's First Amendment right to picket elsewhere.

In his objections, Plaintiff contends that the magistrate judge erred because he incorrectly interpreted Frisby as holding that targeted residential picketing is, per se, unprotected speech. After conducting a de novo review of the report and recommendation and considering Plaintiff's objections,

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the Court concludes that Defendant's motion for summary judgment should be granted with respect to the claim under 42 U.S.C. § 1983, but on different grounds than those cited by the magistrate judge. Specifically, the Court concludes that Defendant was not acting under color of state law when he made the alleged statements to Plaintiff.

In order to prove a claim under 42 U.S.C. § 1983, a plaintiff must show: (1) that he has been deprived of a right secured by the laws or constitution of the United States; and (2) that the defendant deprived the plaintiff of this right while acting under color of state law. Flagg Bros. v. Brooks, 436 U.S. 149, 155-56, 98 S. Ct. 1729, 1733 (1978). A person acts under color of state law when he exercises power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." West v. Atkins, 487 U.S. 42, 49, 108 S. Ct. 2250, 2255 (1988)(quoting United States v. Classic, 313 U.S. 299, 326, 61 S. Ct. 1031, 1043 (1961)). "Thus, generally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." Id. at 50, 108 S. Ct. at 2255; accord Waters v. City of Morristown, 242 F.3d 353, 359 (6th Cir. 2001)(noting that § 1983 is generally only implicated where the state actor's conduct occurs in the course of performing an actual or apparent duty of his office or where "the conduct is such that the actor could not have behaved as he did without the authority of his office"). "[A] person does not act under color of state law solely by virtue of [his] relationship to the state,' instead, liability depends on the nature of his conduct." Doe v. Claiborne County, 103 F.3d 495, 512 (6th Cir. 1996)(quoting Doe v. Rains County Indep. Sch. Dist., 66 F.3d 1402, 1411 (5th Cir. 1995)(second alteration in original). Thus, "a defendant's private conduct, outside the course or scope of his duties and unaided by any indicia of actual or ostensible state authority, is not conduct occurring under color of state law." Waters, 242 F.3d at 359.

