UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JON EPSTEIN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 81-0336
	)	
FEDERAL ELECTION COMMISSION,	)	
	)	
Defendant.	)	

DEFENDANT FEDERAL ELECTION COMMISSION'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This is an action for declaratory and injunctive relief filed by the plaintiff, Jon Epstein, against the defendant Federal Election Commission ("FEC" or "Commission") pursuant to 2 U.S.C. § 437g(a)(8). Plaintiff's original court complaint sought a declaration from this court that the Commission had acted in a manner which was "contrary to law" by failing to take final agency action on plaintiff's administrative complaint (FEC Exhibit 1) within 120 days after that complaint had been filed with the Commission.

Plaintiff's original court complaint was rendered moot when, on March 24, 1981, the Commission took final agency action on plaintiff's complaint by closing the file and finding no reason to believe the Federal Election Campaign Act of 1971, as amended, ("FECA") was violated. (FEC Exhibit 5). See generally Common Cause v. Federal Election Commission, 489 F. Supp. 738 (D.D.C. 1980). Subsequently, plaintiff filed a motion to file a supplemental pleading which would change the nature of his court complaint to an action seeking a declaration that the Commission's dismissal of plaintiff's administrative complaint was contrary to law because the dismissal was arbitrary and capricious. 2 U.S.C. § 437g (a)(8). The court granted plaintiff's motion to file a supplemental pleading on May 15, 1981.

BACKGROUND

Plaintiff's administrative complaint (FEC Exhibit 1) was filed with the Commission on August 28, 1980. The complaint alleged that the respondent, Reader's Digest Association, Inc. ("RDA"), a corporate entitly, violated 2 U.S.C. § 441b and 11 C.F.R. § 114.2 by making a prohibited expenditure in connection with the November 1980 Congressional elections, by placing an advertisement in the Washington Post on August 27, 1980. The complaint alleged that the advertisement expressly advocated the election of clearly identified candidates, specifically, all Republicans in one section of the advertisement, and all Democrats in another section of the advertisement as defined by the Commission's regulation. 11 C.F.R. § 109.1(a); 11 C.F.R. § 109.1 (b)(2). The complaint goes on to allege that the advertisement constitutes an illegal independent expenditure under 2 U.S.C. § 441b and 11 C.F.R. § 114.2 which make it illegal for corporations to make any contribution or expenditure as defined in 11 C.F.R. § 114.1(a) in connection with elections to any political office, and under 11 C.F.R. § 109.1 (d)(1) which treats as an expenditure the financing of the dissemination, distribution or republication of any campaign material prepared by a candidate. The plaintiff's administrative complaint then concludes with the allegation that the advertisement represents, "... on its face, a prohibited lesson in public civics rather than an inducement to buy the periodical".[1/]

STANDARD OF REVIEW

The standard of judicial review in actions brought pursuant to 2 U.S.C. § 437g(a)(8) has been discussed by the courts many times. Section 437g (a)(8) is the sole exception to the

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1/ The original administrative complaint was followed by a supplemental filing, by Mr. Epstein, wherein the complainant argues that the debate regulations found at 11 C.F.R. § 110.13 and 11 C.F.R. § 114.4(e)(2) do not exempt the advertisement from constituting an illegal corporate contribution. (FEC Exhibit 2).

Congressional grant of exclusive jurisdiction, conferred upon the Commission, for the civil enforcement of FECA's provisions. 2 U.S.C. §§ 437c (b)(1); 437d(e). The court's role in reviewing a Commission dismissal of an administrative complaint is limited to a determination of whether the dismissal was "contrary to law". 2 U.S.C. § 437g(a)(8)(C). In light of the Commission's specialized knowledge, cumulative experience and its exclusive jurisdiction in these matters, courts have accorded Commission decisions great deference by holding that only those Commission actions which are so irrational as to be arbitrary and capricious are to be considered as contrary to law.[2/]

In Hampton, supra, at 50,439-50,440, Judge Parker stated:

> Congress has vested the FEC with exclusive primary jurisdiction with respect to the civil enforcement of FECA and has given it broad discretionary power in determining whether to investigate a complainant's claim, or to bring a civil action under the statute. Consequently, this Court's review of the FEC's dismissal of plaintiff's first complaint is limited. The Court may not substitute its judgment for that of the Commission. Only if the agency acted in a manner which was arbitrary or capricious, was an abuse of discretion or was otherwise contrary to law, should its action be set aside by this court. (footnotes ommitted).

The Hampton case reflects the judicial approach Congress intended for it when reviewing Commission actions. Subsequent cases, while adopting the arbitrary and capricious standard of review, have expanded on the factors that can be considered by the Commission when determining whether to conduct an investigation with regard to a given complaint. In In re

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2/ Hampton v. Federal Election Commission, Fed. Elec. Camp. Fin. Guide (CCH), ¶ 9036 at 50,439-40 (D.D.C. 1977); aff'd. No. 77-1546 (D.C. Cir. July 21, 1978)(unpublished opinion); In re Federal Election Campaign Act Litigation, 474 F. Supp. 1044, 1046, (D.D.C. 1979); Common Cause v. Federal Election Commission, 489 F. Supp. 738 (D.D.C. 1980); International Association of Machinists and Aerospace Workers v. Federal Election Commission, No. 80-0354 (D.D.C. filed December 16, 1980); Archie Brown v. Federal Election Commission, No. 79-0940 (D.D.C. filed July 17, 1980), appeal docketed, No. 80-2108 (D.C. Cir. October 21, 1980); National Republican Senatorial Committee v. Federal Election Commission, No. 80-2266 (D.D.C. filed March 5, 1980).

Federal Election Campaign Act Litigation, supra at 1045-1046 Judge Richey stated:

> The issue of whether a particular charge merits an investigation is a sensitive and complex matter calling for an evaluation of the credibility of the allegation, the nature of the threat posed by the offense, the resources available to the agency, and numerous other factors. Congress has wisely entrusted this matter to the discretion of the Federal Election Commission and instructed the courts to interfere only when the Commission's actions are contrary to law ... The sensitive nature of the Commission's decision certainly calls for judicial deference to the expertise of the agency which Congress has empowered to enforce the election laws. By reversing only those decisons which are arbitrary or capricious, the Court provides this deference.

Even in instances where the court has decided that a particular FEC decision cannot be accorded deference, the court has required that a plaintiff show some positive basis for the refusal to accord the Commission with the usual deference - i.e. a direct statutory command which the FEC has not complied with or an inconsistancy in the treatment of the issue by the agency. Democratic Senatorial Campaign Committee v. Federal Election Commission, No. 80-2074 (D.C.Cir., Oct. 9, 1980)(Pet. for Cert. granted March 2, 1981).[3/] In the present case, however, there has been a clearly consistent interpretation and treatment of a given situation and the Commission's decision should be accorded full deference. See National Republican Senatorial Committee v. Federal Election Commission, supra, fn. 13, 14.

Finally, the issue of what constitutes the proper administrative record in section 437g(a)(8) suits was recently answered in Archie Brown v. Federal Election Commission, supra, where Judge Gasch stated that it is the General Counsel's Report which constitutes the record for review when determining whether

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3/ The Commission believes that the court erred in concluding that the statute or prior Commission decisions supported a a different interpretation of the law. The Commission has petitioned for and has been granted a writ of certiorari to have the Supreme Court review the Court of Appeal's refusal to accord the Commission deference in this case.

the Commission's dismissal of an administrative complaint was arbitrary and capricious.

In light of the foregoing the Commission will demonstrate that the dismissal of plaintiff's administrative complaint was neither arbitrary or capricious; that there is no genuine issue as to any material fact; and therefore the Commission's motion for summary judgment should be granted. 4/

THE COMMISSION'S DISMISSAL OF THE ADMINISTRATIVE COMPLAINT WAS NEITHER ARBITRARY NOR CAPRICIOUS AND THEREFORE NOT CONTRARY TO LAW

The Administrative Complaint

Plaintiff alleged in his administrative complaint that an advertisement, placed in the Washington Post by a corporate entity, constituted an illegal corporate independent expenditure under 2 U.S.C. § 441b and 11 C.F.R. § 114.2. Section 441b makes it unlawful for any corporation to make a contribution or expenditure in connection with any election to any political office. Plaintiff alleges that the advertisement constitutes an independent expenditure under 11 C.F.R. § 109.1 by expressly advocating the election of all Republicans in one section of the advertisement and the election of all Democrats in another section of the advertisement.

Plaintiff also alleges that if the advertisement, or any part of it, is considered as campaign material prepared by a candidate for federal office, his authorized committee or agents, then RDA, by financing the distribution of the material

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4/ It is well settled that "... the proper focus of this Court's concern when considering a party's motion for summary judgment is, of course, whether his opponent has successfuly created ... a genuine issue as to a material fact. Rule 56(c) of the Federal Rules of Civil Procedure." Peroff v. Manuel, 421 F. Supp. 570, 575 (D.D.C. 1976).

made an illegal contribution to the candidate who prepared the material under 11 C.F.R. § 109.1(d)(1).[5/]

Finally, in a supplemental submission to the Commission, plaintiff argued that the FECA's debate regulations, permitting certain expenditures in debate situations, were inapplicable to the advertisement at issue.

The General Counsel's Report

The Commission voted, five to one, to find no reason to believe RDA violated 2 U.S.C. § 441b(a) and to close the file at an executive session meeting on March 24, 1981 (FEC Exhibit 5). At that meeting, the Commission had before it a General Counsel's Report dated March 12, 1981. (FEC Exhibit 4). Attached to the report was plaintiff's administrative complaint with a copy of the complained of advertisement; plaintiff's amendment to his original administrative complaint; and a response by the respondent, RDA.

The General Counsel's Report focused on the primary purpose of the advertisement as the Commission had consistently done on previous occasions when a complaint alleged that the purpose of an advertisement was to make a direct corporate contribution or expenditure for a candidate rather than for the purpose of ordinary advertising or promotion of an upcoming issue of the periodical. After first noting that the advertisement contained introductory and concluding paragraphs promoting Reader's Digest, and that the words "Readers Digest" appeared at the

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5/ 11 C.F.R. § 109.1(d)(1) states in relevant part:

> The financing of the dissemination, distribution, or republication, in whole or in part, of any broadcast, or of written, graphic, or other form of campaign materials prepared by the candidate, his campaign committees, or their authorized agents shall be considered a contribution.

bottom of the advertisement in bold print, the General Counsel's Report went on to state:

> In cases similar to the present one, the Commission has viewed such advertisements with a "purpose" standard. Namely, what was or is the purpose of the advertisement (see MURs 296, 1051, 1235). The Commission has also used a "purpose" standard in certain Advisory Opinions in determining whether a particular activity would be considered a contribution to a candidate or party. AO's 1978-15, 1978-4, 1977-54 and 1977-42.

A brief review of these other cases referred to in the General Counsel's Report clearly demonstrates the Commission's consistent approach in essentially similar factual contexts. In Matter Under Review ("MUR") 296 (FEC Exhibit 6) an advertisement for Penthouse magazine appeared in several newspapers which appeared to advocate the defeat of Jimmy Carter. The General Counsel's Report stated, however, that "... the ad is most logically construed on its face as an effort, albeit suggestive, to promote a commercial venture -- namely, the selling of a magazine with a controversial article regarding Mr. Carter." The report in MUR 296 concluded, citing Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), that given the overriding protection of the First amendment in this area, further inquiry was unwarranted.

In MUR 1051 Scientific American (FEC Exhibit 7), a commercial magazine, took out an advertisement in the Washington Post promoting the sale of the publication by referring to an article appearing in an upcoming issue written by a U.S. Congressman. The General Counsel's Report determined, using the "major purpose" standard that the ad did not violate 2 U.S.C. § 441b because "the major purpose of the advertisement is not connected with [the Congressman's] election but the promotion of a magazaine .... The Report went on to note that the ad did not urge the election of the Congressman nor did it solicite contributions to his campaign.

In MUR 1235 (FEC Exhibit 8) a Committee organized to support a state initiative placed advertisements on California television and radio stations, financed by corporate funds, which favorably mentioned the name of a U.S.. Congressman who supported the state initiative. The General Counsel's Report stated, in part, that:

> The Commission has made it quite clear that a [sic] in-kind contribution would not necessarily occur in certain specific circumstances where the major purpose of the advertisement was not to influence a Federal election. This is especially true where there is an absence of any communication expressly advocating the election or defeat of a candidate or the solicitation of a campaign contribution. (attachment "D" AO's 1978-15, 1978-4, 1977-54, 1977-42 and MUR #1051).

The advisory opinions referred to in MUR 1235 all adopt the previously explained "major purpose" test but add two conditions: (1) that there is no communication expressly advocating the election or defeat of the candidate involved and (2) that there is no acceptance or solicitation or the making of any contribution. AO's 1978-15, 1978-4, 1977-54, 1977-42. (FEC Exhibit 9). On seven previous occassions, therefore, the Commission, in recognition of a delicate First Amendment area, has clearly and consistently stated that advertisements, containing material of a political nature, but placed in the media for the primary purpose of advancing a commercial venture shall not be considered a violation of 2 U.S.C. § 441b.

Most recently, in another case involving RDA and the Commission, the U.S. District Court for the Southern District of New York stated that in situations involving an ad placed in the media to promote the sale of a magazine, FECA's media exemption provisions may apply to the corporate funding of such an ad thereby taking the expenditure outside the reach of the general

ban on corporate contributions and expenditures. 2 U.S.C. § 431(9)(B)(i).[6/] Reader's Digest Association v. Federal Election Commission, 509 F. Supp. 1210, 1215 (S.D. N.Y. 1981). The test applied by the court is whether the magazine, by placing the ad, is acting in a manner relating to its publishing function. Speaking of the section 431 media exemption the court stated:

> On the other hand, if RDA was acting in its magazine publishing function, - if, for example, the dissemination of the tape to television stations was to publicize the issue of the magazine containing the Chappaquiddick article, then it would seem that the exemption is applicable and that the FEC would have no occasion to investigate whether the dissemination or the publication constituted an attempt to influence an election. RDA v. FEC, supra at 1215.

Examined against this background, plaintiff's administrative complaint was properly dismissed by the Commission. The ad itself, attached to plaintiff's administrative complaint (FEC Exhibit 1) contains excerpts from two articles which appear, in full, in the upcoming issue of Reader's Digest. The ad expressly states that the excerpts, written by two congressmen, are excerpts from articles appearing in the upcoming issue of Reader's Digest. There is no intent or effort, expressed or implied, that the content of either excerpt, in whole or in part is the opinion of the Reader's Digest Association, Inc. As stated in the General Counsel's Report, the ad does not advocate one political view point over another. On its face there is no express advocacy for any particular candidate and there is no solicitation for contributions contained in the ad. As stated in the General Counsel's Report:

> ... it appears the purpose of the advertisement is to sell the magazine by enticing potential readers with excerpts

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6/ 2 U.S.C. § 431(9)(B)(i) states:
(B) The term "expenditure" does not include-
(i) any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate;

from the articles and to promote Reader's Digest as a magizine which deals with issues of political importance.

For these reasons the Commission's determination that the ad in question was not a prohibited corporate expenditure was neither arbitrary or capricious or contrary to law.

CONCLUSION

Based upon past Commission practice, the analysis contained in the General Counsel's Report, the argument in the foregoing memorandum of points and authorities, and the arguments of the plaintiff contained in his administrative complaint the Commission's action in dismissing plaintiff's administrative complaint was neither arbitrary nor capricious and as a result was not contrary to law. Therefore, there being no genuine issue with regard to any material fact the Commission respectfully requests that this court grant the Commission's motion for summary judgment in this action.

Respectfully submitted,

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FEDERAL ELECTION COMMISSION,

Defendant.

ORDER

The court having fully considered the motion of defendant Federal Election Commission for summary judgment, defendant's memorandum of points and authorities in support thereof and exhibits; defendant's Local Rule 1-9(h) statement of material facts as to which there is no genuine dispute and the arguments of the plaintiff Jonathan Isaac Epstein, it is this_____day of_____, 1981,

ORDERED, that the motion of the Federal Election Commission for summary judgment is hereby granted.

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JON EPSTEIN, Plaintiff,	)	
v.	)	Civil Action No. 81-0336
FEDERAL ELECTION COMMISSION, Defendant.	)	

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed, first class, postage prepaid, the foregoing motion of defendant Federal Election Commission for summary judgment; memorandum in support thereof; Local Rule 1-9(h) statement; exhibits; and proposed order to the following individual on May 31, 1981:

Jonathan Isaac Epstein
6355 Utah Ave., N.W.
Washington, D.C. 20015

R. Scott Rinn
R. Scott Rinn