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SEP 24 1981

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JON EPSTEIN,
Plaintiff,
v.
FEDERAL ELECTION COMMISSION,
Defendant.

Civil Action No. 81-0336

FILED
SEP 24 1981

MEMORANDUM

JAMES E. DAVEY, CLERK

Plaintiff brought this action to seek review of defendant's dismissal of plaintiff's administrative complaint, filed pursuant to 2 U.S.C. § 437g, alleging violation of the Federal Election Campaign Act, as amended, 2 U.S.C. §§ 431 et seq. ("the Act"). The administrative complaint alleged that the Reader's Digest Association, Inc., publisher of a magazine of the same name, violated the Act when it placed an advertisement in an edition of the Washington Post on August 27, 1980 that inter alia advocated the election of various candidates for the United States Congress in the November elections. The Commission dismissed the complaint upon finding no reason to believe that Reader's Digest had violated the Act. In the Matter of Reader's Digest Association, Inc., MUR 1283 (Mar. 24, 1981). The matter is now before the Court on defendant's motion for summary judgment.

Plaintiff claims here that dismissal of the administrative complaint was "contrary to law," see 2 U.S.C. § 437g (a)(8)(C), and that he is thus entitled to declaratory relief. The Court concludes that defendant's decision was not "contrary to law," and grants defendant's motion.

It has already been established that there are no material facts in dispute. Epstein v. Federal Election Commission, Civil Action No. 81-0336 (July 20, 1981). The advertisement in question was a large black-and-white display

that excerpted two articles published in the September 1980 edition of Reader's Digest that had been written by members of Congress. The excerpt of one article, bearing the name of a prominent Republican Congressman, recommended election of a Republican majority to the new Congress. The excerpt of another article, attributed to a leading Democratic Congressman, recommended election of a Democratic majority. A third section of the advertisement summarized material from other articles in the same issue of Reader's Digest on public affairs. Introductory and concluding copy in the advertisement called the Reader's Digest "a forum for ideas that deeply concern the community at large" and "America's biggest town meeting." Plaintiff's Exhibit 1.

The articles excerpted were clearly identified as part of the September issue of Reader's Digest. A notice at the bottom of the advertisement offered copies of the articles to readers of the Post. The excerpts themselves had the headings, "Why You Should Vote Republican" and "Why You Should Vote Democratic." They did not mention the names of particular individuals, other than President Carter and the late Adlai Stevenson. The only names of candidates for Congress mentioned in the advertisement were those of the authors, Rep. Jack Kemp, and Rep. Jim Wright, whose names appeared in the passages introducing the excerpts. The main heading of the entire display, in type twice the size of the excerpts' headings, read, "Which Political Party Should Lead the Next Congress?" and, directly underneath, "Why Bureaucrats Are Handing Out Unspent Cash So Fast." Plaintiff's Exhibit 1.

The administrative complaint claimed that the advertisement was a campaign expenditure within the terms of 11 C.F.R. § 109, and that it amounted to an illegal campaign contribution under 2 U.S.C. § 441b and 11 C.F.R. §§ 114.1, 114.2. The Commission, however, accepted the advice of a General

Counsel's Report, dated March 4, 1981, that the advertisement had the purpose of promoting the Reader's Digest among readers of the Washington Post. The General Counsel recommended that under a "purpose" test applied by the Commission in similar cases, the advertisement was therefore not an unlawful expenditure. The Commission memorandum adopting the General Counsel's proposal to dismiss plaintiff's complaint noted that the vote within the Commission was 5 to 1, but it did not offer a statement of reasons for the action and contained no statement from the dissenting Commissioner.

The standard for review of Commission decisions to dismiss administrative complaints under 2 U.S.C. § 437g (a)(8)(C) requires that a court setting aside a decision find it to be "contrary to law." Defendant's action may be overturned only if it "acted in a manner which was arbitrary or capricious" or committed "an abuse of discretion." Hampton v. Federal Election Com'n, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9036 (D.D.C. 1977), at 50,440, aff'd, No. 77-1546 (D.C. Cir., July 21, 1978). The decision whether to investigate a charge may depend upon a variety of factors, and "[t]he sensitive nature of the Commission's decision. . . calls for judicial deference to the expertise of the agency which Congress has empowered to enforce the election laws." In re Federal Election Campaign Act Litigation, 474 F.Supp. 1044, 1046 (D.D.C. 1979).

Plaintiff suggests that deference is inappropriate when, as in this case, the Commission's memorandum of decision does not explain, independently of the General Counsel's memorandum, its reasons for finding no violation of the Act. Yet the Court has before it a record as complete as that usually involved in review pursuant to 2 U.S.C. § 437g (a)(8). The General Counsel's Memorandum alone, if it is complete enough to have provided a basis for the Commission decision to accept the General Counsel's recommendation, will be adequate for judicial review under

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section 437g (a)(8). Cf. Archie Brown v. Federal Election Commission, No. 79-0940 (D.D.C., July 17, 1980), appeal docketed, No. 80-2108, slip op. at 3-4.

The General Counsel's report focused on what it deemed the primary purpose of the advertisement: promotion of the Reader's Digest magazine. In doing so, it relied upon a growing body of decisions by the Commission that remove advertisements and other forms of publicity from the Act's prohibition if they have a purpose distinct from political assistance of candidates whose campaigns are covered by the Act. An advertisement intended to sell magazines will not ordinarily be denounced under 2 U.S.C. § 441b even though it may also have political aspects. See, e.g., In the Matter of Penthouse Magazine, MUR 296 (76)(December 22, 1976). While the contours of the "purpose test" for application of section 441b remain indistinct, its intuitive appeal has been recognized by the courts. See, e.g., Federal Election Com'n v. Phillips Publishing, Inc., Fed. Elec. Camp. Fin. Guide (CCH) ¶ 9156 (D.D.C. 1981) at 51,226; Reader's Digest Ass'n v. Federal Election Com'n, 509 F.Supp. 1210, 1215 (S.D. N.Y. 1981). There seems to be no basis, given the record in the present case, to hold the purpose test inherently arbitrary. As the courts in Phillips Publishing and Reader's Digest have recognized, the Commission may reasonably determine that expenditures on publicity that have a purpose other than assistance of political candidates covered by the Act were not intended by Congress to be punished under the Act. Particularly is this so when the "major purpose" of the publicity is self-evidently not to advocate the election of candidates, but to promote the organization paying for the publicity. See generally In the Matter of Cong. Les Aspin, MUR 1051 (Nov. 16, 1979); First General Counsel's Report, MUR 1051 (October 22, 1979). The Court therefore rejects plaintiff's argument that the "purpose test" developed by the Commission is so flawed an approach to section

441b of the Act as to be "contrary to law" on its face.

Applying the "purpose test" in this case, the General Counsel found, and the Commission apparently agreed, that "the purpose of the advertisement is to sell the magazine by enticing potential readers with excerpts from the articles and to promote Reader's Digest as a magazine that deals with issues of political importance." Defendant's Exhibit 4 at 4. The General Counsel determined that the advertisement tended not to favor either of the arguments advanced in the two excerpts, and merely provided what purported to be a sample of the material available to readers of the magazine's September issue. Review of the record in this case demonstrates that the General Counsel's assessment of the advertisement was reasonable, and that his application of the "purpose test" was not arbitrary.

This conclusion is not altered by the fact that the Digest offered commentary in the advertisement only from representatives of the two major parties. The Commission appears never to have conditioned application of its "purpose test" on the narrowness, or diversity, of the political views or candidacies mentioned in publicity challenged under the Act. There is nothing unreasonable in that refusal to consider such factors, since what matters is whether the challenged publicity, whatever its content, has no partisan purpose. Furthermore, at worst, this publicity was bipartisan. Attributing to the Commission the findings and reasoning in the General Counsel's Report whose recommendation the Commission accepted, the Court has determined that the dismissal of plaintiff's administrative complaint was lawful, and that plaintiff is therefore not entitled to declaratory relief under 2 U.S.C. 437g (a)(8)(C).

An appropriate order accompanies this memorandum.

Date: *Sept. 23, 1981*

Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

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FEDERAL ELECTION COMMISSION,

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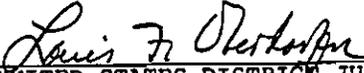
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ORDER

JAMES F. DAVEY, CLERK

For the reasons stated in an accompanying memorandum,
it is this 27th day of September 1981 hereby

ORDERED: that defendant's motion for summary judgment
is granted.


UNITED STATES DISTRICT JUDGE