

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

Greg Stewart and Stillman Stewart; Lisa)
Blakey and Janet Rodriguez; and Todd)
Vesely and Joel Busch,)
)
Plaintiffs,)

Case No. 13-3157

v.)

Dave Heineman, in his official capacity)
as Governor of Nebraska; Kerry)
Winterer, in his official capacity as the)
Chief Executive Officer of the Nebraska)
Department of Health and Human)
Services; and Thomas Pristow, in his)
official capacity as Director of the)
Nebraska Division of Children and)
Family Services,)
)
Defendants.)

***BRIEF IN SUPPORT OF
DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT***

Defendants, Dave Heineman, Kerry Winterer, and Thomas Pristow, in their official capacities only, in support of their Motion for Summary Judgment, hereby submit the following brief for the court's consideration.

INTRODUCTION

The Plaintiffs bring this action alleging that the Defendants' policies unconstitutionally violate their rights to equal protection and due process under the United States and Nebraska Constitutions. Plaintiffs have alleged that Administrative Memorandum #1-95 is facially unconstitutional. On the uncontroverted facts of this case, and even after drawing all interferences in Plaintiffs' favor, it is simply not possible to find a facial constitutional violation. As explained below, Defendants always follow the "best interests of the child" standard when making any decisions for placement of foster children in out-of-home care. Furthermore, Plaintiffs' could not succeed on an as-applied challenge, because Defendants' practices do not

violate any constitutional rights. There is simply no evidence Plaintiffs can point to in order prove a constitutional violation. As this brief explains, under any theory, the State Defendants are entitled to summary judgment as a matter of law.

STATEMENT OF FACTS

Based upon the Plaintiffs' Complaint and for the purposes of this motion only, the following facts are submitted for the Court's consideration:

1. The Department of Health and Human Services ("DHHS") has "legal custody of all children committed to it" and "shall afford temporary care and shall use special diligence to provide suitable homes for such children." Neb. Rev. Stat. § 43-905.
2. Within DHHS, the Division of Children and Family Services ("CFS") is responsible for Nebraska's child welfare, juvenile services, economic assistance plans, and the foster care and adoption program.
3. Defendant Kerry Winterer was the Chief Executive Officer of DHHS at the time of the filing of this lawsuit. (Winterer Dep. 6:21-22).
4. Defendant Thomas Pristow was the Director of Children and Family Services for DHHS at the time of the filing of this lawsuit. (Pristow Dep. 8:20-22).
5. Vicki Maca is the Deputy Director of Protection and Safety for CFS. (Maca Dep. 5:11-13).
6. Plaintiffs have brought this action to challenge Administrative Memorandum—Human Services #1-95 ("Admin Memo # 1-95") as facially unconstitutional. (Complaint ¶ 1; Exhibit 1 to Plaintiffs' Complaint).
7. Admin Memo # 1-95 was issued in 1995 by Mary Dean Harvey, the director of the then Nebraska Department of Social Services. (Exhibit 1 to Plaintiffs' Complaint).

8. Plaintiffs Greg Stewart and Stillman Stewart, have been in a committed relationship for over thirty years, and were married in California in 2008. (Complaint ¶ 42).
9. Greg Stewart and Stillman Stewart have not applied to be foster parents in Nebraska. (Complaint ¶¶ 51-52).
10. Plaintiffs Lisa Blakey and Janet Rodriguez have been in a committed relationship for over eight years. (Complaint ¶ 54).
11. Lisa Blakey and Janet Rodriguez have not applied to be foster parents in Nebraska. (Complaint ¶¶ 59, 60).
12. Plaintiffs Todd Vesely and Joel Busch have been in a committed relationship for over nine years. (Complaint ¶ 62).
13. In July 2008, Todd Vesely and Joel Busch began the licensing process to become foster parents in Nebraska by completing training, undergoing a home study, and submitting background checks. (Complaint ¶ 66).
14. In June 2010, Todd Vesely and Joel Busch wrote to DHHS to inquire about the status of their application for a joint foster care license. (Complaint ¶ 67).
15. In June 2010, Todd Reckling, the Director of Children and Family Services for DHHS at that time, wrote to Todd Vesely and Joel Busch to inform them that DHHS policy prohibits issuing a joint license to unrelated, unmarried adults. (Complaint ¶ 68).
16. When an application is made for a foster care license, one will be issued in accordance with Nebraska Department of Health and Human Services regulations, if the applicant meets the licensing requirements. (Pristow Dep. 15: 17-22).

17. Within the Nebraska Regulations, 395 NAC Chapter 3 sets forth the licensing requirements for foster parents, and “[a] foster care license is the State’s authorization to provide care for children placed with the licensee, when the applicant has met the licensing standards.” 395 NAC 3-001.
18. DHHS licensing rules do not allow for two unmarried adults to receive a joint foster care license. (Winterer Dep. 24:15-18).
19. The Regulations specify that “[i]f legally married, both spouses must be licensed, and meet all regulations in this section.” 395 NAC 3-001.02B.
20. With regards to placement decisions, in approximately the summer of 2012, Thomas Pristow clarified that Admin Memo #1-95 was not the practice of DHHS. (Pristow Dep. 33:18-28).
21. All foster care or adoption placement decisions are made on a case-by-case basis, based on the best interests of the child. (Pristow Dep. 21: 13-16; Winterer Dep. 16:15-16; Maca Dep. 73:7-15).
22. DHHS does not prohibit foster or adoptive placement with (a) gay or lesbian persons, (b) same-sex couples, and/or (c) unrelated, unmarried persons residing together, if such placement is consistent with the best interests of child. (Pristow Dep. 21:13-16; Winterer Dep. 42:7-14; Maca Dep. 74:5-9).
23. There is no DHHS policy or practice that treats persons who identify as homosexual any differently than people who are unmarried residing together. (Winterer Dep. 42:7-14; Maca Dep. 73:10-15).
24. In general, it’s DHHS’s view that a person’s sexual orientation is irrelevant for the purposes of determining placement of foster children. (Winterer Dep. 49:8-11).

25. Admin Memo #1-95 does not constitute current DHHS practice. (Winterer Dep. 63:9-11).
26. Pristow reminded DHHS staff on several occasions of the need to make placement decisions based on the best interests of the child standard. (Maca Dep. 88:17-25).
27. Pristow encouraged staff to pursue placements which were in the best interest of the child. (Maca Dep. 88:19-23).

STANDARD OF REVIEW

“Summary judgment is proper when the pleadings and evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law.” *Blue Cross and Blue Shield v. Dailey*, 268 Neb. 733, 745 (2004).

The evidence presented at a hearing on the motion for summary judgment may include depositions, answers to interrogatories, answers, stipulations and affidavits. NEB. REV. STAT. § 25-1332 (Reissue 2008).

After the movant for summary judgment makes a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence was uncontroverted at trial, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion.

Dresser v. Union Pac. R.R. Co., 282 Neb. 537, 542 (2011) (internal citations omitted).

On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists. *Melick v. Schmidt*, 251 Neb. 372, 377-78, 557 N.W.2d 645, 650 (1997). “Where the facts are undisputed or are such that reasonable

minds can draw but one conclusion therefrom, it is the duty of the trial court to decide the question as a matter of law rather than submit it to the jury for determination.” *Sweem v. American Fidelity Life Assurance Co.*, 274 Neb. 313, 319, 739 N.W.2d 442, 447 (2007) (internal citations omitted).

ARGUMENTS

I. PLAINTIFFS CANNOT SUCCEED ON A FACIAL CHALLENGE OF ADMIN MEMO #1-95.

Plaintiffs cannot succeed on their claim that Admin Memo #1-95 is a facially unconstitutional policy of DHHS when it is not the policy of DHHS. Plaintiffs state their claim of a facial violation as follows: “Administrative Memo #1-95 is a facially discriminatory classification because the policy expressly prohibits gay and lesbian individuals as well as same-sex unrelated, unmarried adults who reside together from ever being considered as potential foster or adoptive parents.” (Complaint ¶ 110). Because Plaintiffs have asserted a facial claim, they must prove “that no set of circumstances exists under which an act will be valid, i.e., that the law is unconstitutional in all of its applications.” *Linder v. Kindig*, 285 Neb. 386, 391 (2013). Facial challenges are an extreme remedy and are “generally disfavored.” *State v. Kelley*, 249 Neb. 99, 108 (1996).

Plaintiffs have not and cannot prove that Admin Memo #1-95 is always applied unconstitutionally. *See N.Y. State Club Ass’n v. City of New York*, 487 U.S. 1, 11 (1988). In fact, Plaintiffs cannot prove that Admin Memo #1-95 is applied at all. As stated by Pristow and Winterer, Admin Memo #1-95 is not followed by DHHS. (Pristow Dep. 29:8-15; Winterer Dep. 63:2-11). In fact, of the 15 instances in which Director Pristow has reviewed placements with

foster parents who self-identify as homosexual, Director Pristow approved all the placements. (Pristow Dep. 25:16-22). It cannot be argued that Admin Memo #1-95 is always applied unconstitutionally, when it is not applied or followed at all. It cannot be proven that it is an unconstitutional policy when it is not the policy of the Department.

As Winterer explained, administrative memorandums typically involve explanations of how staff should respond to certain situations. (Winterer Dep. 86:17-24). These types of practices evolve, and explanations of any changes come from the Director. (Winterer Dep. 64:21-24). These changes can happen verbally or in writing. (Pristow Dep. 33:19-20; Maca Dep. 78:21-25, 79:2-4). In this case, the most recent explanation came from Director Pristow who informed his staff that they can and should make placements with unmarried, unrelated adults living together when it is in the best interest of the child. (Pristow Dep., 34:13-19). Director Pristow clarified the placement review process by verbally informing his staff of his expectations. (Pristow Dep., 34:13-25; 35:2-19).

Furthermore, Admin Memo #1-95 does not have the force of law, and DHHS has correctly followed the laws of the state of Nebraska. In Admin Memo #1-95, it states that Mary Dean Harvey would direct “staff of the Human Services Division to immediately begin the process of drafting proposed program and licensing regulation” surrounding the placement of foster children with same sex couples and homes with unrelated, unmarried adults residing together. (Ex. 1 to Plaintiffs’ Complaint). There has been no evidence that Mary Dean Harvey took any steps to draft regulations. Instead of applying, and following, a document that has no force of law, DHHS has followed state statutes and rules and regulations. As stated by Director Pristow, DHHS finds appropriate homes for foster children by using the best interests of the

child standard. (Pristow Dep., 21: 10-16). Furthermore, as stated by Vicki Maca, DHHS has a “workforce that advocates very hard for the best interests of children.” (Maca Dep. 88:12-13).

This practice is entirely consistent with the fully promulgated rules and regulations of the state of Nebraska. There are numerous times under which the regulations use the term “bests interest of the child.” Caseworkers must consider best interests when determining permanency objectives. 390 NAC 6-001. Adoption plans must always be in the best interest of the child. 390 NAC 6-002. Out-of-home placement will be made with necessary and “determined to be in the best interest of the child.” 390 NAC 7-000. The regulations further state that “[t]he primary role of the Protection and Safety worker in the placement process is to locate and use the least intrusive placement possible that is in the best interest of the child.” 390 NAC 7-001.02A. Despite Plaintiffs’ contentions, there is no evidence that Defendants are following any standard other than the “best interests of the child standard” as required under Nebraska law. Therefore, because Plaintiffs cannot meet the standard of proof for a facial constitutional challenge, Defendants respectfully request that this Court grant Defendants’ Motion for Summary Judgment and dismiss Plaintiffs’ action with prejudice.

**II. THE CURRENT PRACTICES OF THE DEPARTMENT OF HEALTH
AND HUMAN SERVICES DO NOT VIOLATE PLAINTIFFS’ RIGHTS TO
EQUAL PROTECTION.**

The facts and evidence adduced have shown that Defendants have not and are not violating Plaintiffs’ rights to equal protection. In order to maintain an action for a violation of Plaintiffs’ right to equal protection, Plaintiffs would need to prove (1) that they are treated differently than similarly situated people, and (2) that they are a part of a suspect class. “[T]he

Equal Protection Clause requires the government to treat similarly situated people alike.” *State v. Atkins*, 250 Neb. 315, 320 (1996), citing *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985). Absent the threshold showing that one has been treated differently than others similarly situated, “one lacks a viable equal protection claim.” *Id.* at 321.

Assuming, *arguendo*, that Plaintiffs are members of a suspect class, the evidence in this case shows that they are not being treated any differently. Nothing in the discovery has revealed that individuals who self-identify as homosexual have been treated any differently from individuals who self-identify as heterosexual. As stated by Thomas Pristow, gay and lesbian applicants are treated by DHHS exactly the same way as heterosexual applicants, and placement decisions are always made “in the best interest for that child, and to make sure that there is a fit for that child to be safe so that [DHHS] can secure safety, permanency, and well-being.” (Pristow Dep. 23: 9-19). In fact, in instances in which placements with individuals who self-identify as homosexual have been considered, if the placement was determined to be in the best interests of the child, the child was placed in that foster home. (Pristow Dep. 25: 16-22).

Furthermore, Mr. Pristow informed his staff that “all foster parents that are licensed should be considered for placement within the best interests of the child.” (Pristow Dep. 35:16-19). Mr. Winterer also explained that there are no DHHS policies which treat persons who identify as homosexual any differently than people who are unmarried residing together when he stated “[t]hey are issued licenses, and placements are made when it’s in the best interest of the child.” (Winterer Dep. 42: 12-14). Because there is no evidence of discrimination on the basis of sexual orientation, Defendants’ request that this court grant their Motion for Summary Judgment and dismiss Plaintiffs’ action.

**III. THE CURRENT PRACTICES OF THE DEPARTMENT OF HEALTH
AND HUMAN SERVICES DO NOT VIOLATE PLAINTIFFS' RIGHTS TO
DUE PROCESS.**

Likewise, there have been no facts or evidence adduced that shows the Defendants have violated Plaintiffs' rights to substantive due process in any way. The Due Process Clause of the Fourteenth Amendment contains a substantive component that provides at least some protection to a person's right of privacy. See, *Lawrence v. Texas*, 539 U.S. 558 (2003); *Carey v. Population Services International*, 431 U.S. 678 (1977); *Roe v. Wade*, 410 U.S. 113 (1973). Cf. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (suggesting right to privacy rooted in penumbra of specific guarantees in Bill of Rights rather than Due Process Clause). If a State enacts legislation that infringes upon fundamental rights, courts will review the law under a strict scrutiny test and uphold the law only when it is "narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 302 (1993). When a statute does not implicate fundamental rights, the inquiry is limited to whether the law is "rationally related to legitimate government interests." *Glucksburg*, at 728. Because no Nebraska case recognizes a right to privacy, based on the State Constitution, broader than the narrow federal constitutional right (see, *Robotham v. State*, 241 Neb. 379 (1992)), the state and federal law based arguments against Plaintiffs' Third and Fourth Claims for Relief are combined for the purposes of this Motion for Summary Judgment.

However, in this case, there is no DHHS practice which could infringe on an individual's fundamental rights, so this Court does not need to inquire any further. There is no evidence that the Plaintiffs have applied to be foster parents and been denied the right to foster children. As explained above, if Plaintiffs were to apply to be foster parents and self-identify as homosexual, they would be treated the same as any other potential foster parents. Defendants have not

deprived Plaintiffs' of any fundamental rights. There has been no deprivation of Plaintiffs' rights because there are no DHHS policies which deprive Plaintiffs of their rights. Plaintiffs cannot maintain an action against DHHS on the basis of a violation of their rights to due process because their rights have not been violated. Therefore, because Plaintiffs cannot meet their burden of proof, Defendants respectfully request that this court grant Defendants' Motion for Summary Judgment.

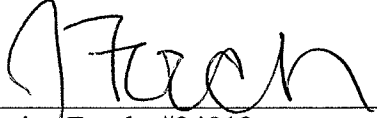
CONCLUSION

For all the reasons stated above, Defendants respectfully requests that this court grant State Defendants' Motion for Summary Judgment, and dismiss Plaintiffs' action with prejudice.

DATED this 13th day of February, 2015.

Dave Heineman, in his official capacity as Governor of Nebraska; Kerry Winterer, in his official capacity as the Chief Executive Officer of the Nebraska Department of Health and Human Services; and Thomas Pristow, in his official capacity as Director of the Nebraska Division of Children and Family Services, Defendants.

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CERTIFICATE OF SERVICE

It is hereby certified that on February 13, 2015, a true and accurate copy of the foregoing Brief in Support of Defendants' Motion for Summary Judgment was served on the Plaintiffs herein by e-mail and United States Mail, first class postage prepaid, addressed to their attorneys of record:

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