IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

PAUL GERLICH and ERIN FURLEIGH, Plaintiffs, vs. STEVEN LEATH, WARREN MADDEN, THOMAS HILL, and LEESHA ZIMMERMAN, Defendants.	**No. 4:14-cv-00264 – JEG** **O R D E R**

This matter comes before the Court on a Motion to Stay filed by Defendants Steven Leath, Warren Madden, Thomas Hill, and Leesha Zimmerman, which Plaintiffs Paul Gerlich and Erin Furleigh resist. Neither party requested a hearing on the Motion, and the Court finds a hearing is unnecessary. The Motion is fully submitted and ready for disposition.

I. BACKGROUND

On January 22, 2016, this Court entered an order on the merits of the parties' cross-motions for summary judgment on all claims, ECF No. 60, in which the Court held that Defendants had discriminated against Plaintiffs on the basis of viewpoint in violation of the First Amendment. An entry of partial judgment followed on January 25, 2016, ECF No. 61, leaving for further resolution only the issue of money damages and Plaintiffs' claims for fees, costs and expenses in accordance with 42 U.S.C. § 1988 and other applicable law. On February 4, 2016, Defendants filed a notice of appeal, ECF No. 70, appealing as a matter of right the Court's determination in its January 22, 2016, order that Defendants were not entitled to qualified immunity. On February 19, 2016, Defendants filed the present Motion to Stay, ECF No. 72, pursuant to Federal Rule of Civil Procedure 62.

II. DISCUSSION

Because Defendants have appealed on the issue of qualified immunity, proceedings on the issue of money damages are already effectively stayed because the Court lacks jurisdiction to conduct further proceedings as to damages until the appeal is resolved. "Generally, '[t]he filing of a notice of appeal . . . confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.'" Ahlberg v. Chrysler Corp., 481 F.3d 630, 638 (8th Cir. 2007) (quoting Liddell v. Bd. of Educ. of St. Louis, 73 F.3d 819, 822 (8th Cir.1996)); see also Griggs v. Provident Consumer Disc. Co., 459 U.S. 56, 58 (1982). The Court has thus already been divested of authority to hold additional proceedings as to the issue of money damages and Plaintiffs' claims for fees, costs, and expenses pending resolution of Defendants' appeal. Therefore, the only matter relevant to Defendants' motion to stay is the permanent injunction barring Defendants from engaging in further viewpoint discrimination.

Federal Rule of Civil Procedure 62(c) and Federal Rule of Appellate Procedure 8(a) empower the federal district courts and courts of appeals, respectively, to stay an order pending an appeal. Under both rules,

the factors regulating the issuance of a stay are generally the sbeady4,9"Ða tactors

consider the relative strength of the four factors," balancing all of them. Id. (quoting Fargo Women's Health Org. v. Schafer, 18 F.3d 526, 538 (8th Cir. 1994)).

Defendants have not made a requisite showing that a stay is warranted here. For the reasons stated in the Court's order issued January 22, 2016, Defendants have not made a strong showing they are likely to succeed in demonstrating their conduct was government speech. Gerlich v. Leath, No. 4:14-CV-00264-JEG, 2016 WL 360673, at *14-16 (S.D. Iowa Jan. 22, 2016). Furthermore, even if Defendants can demonstrate on appeal that Plaintiffs' First Amendment rights were not "clearly established" at the time of the violation, Jones v. McNeese, 675 F.3d 1158, 1161 (8th Cir.2012), such a conclusion would have no bearing on the injunction Defendants seek to stay. Qualified immunity does not shield public officials from equitable relief. See Curtiss v. Benson, 583 F. App'x 598, 599 (8th Cir. 2014) (per curiam) (noting that qualified immunity did not apply to the plaintiff's claims for declaratory and injunctive relief); Burnham v. Ianni, 119 F.3d 668, 673 n. 7 (8th Cir.1997) (en banc) (explaining that an appeal from the denial of qualified immunity implicated only liability for money damages and that qualified immunity would not protect the defendant from claims for injunctive or other equitable relief); Grantham v. Trickey, 21 F.3d 289, 295 (8th Cir.1994) (stating that "qualified immunity does not apply to claims for equitable relief").

Defendants contend Iowa State University's trademarks will suffer irreparable harm absent a stay of the injunction. However, in support of this assertion Defendants have offered no more than speculation and conclusory statements that university trademarks will be harmed by NORML ISU's use of the marks alongside images of cannabis leaves similar to those previously included in designs approved by Defendants. Conversely, Plaintiffs would be irreparably

harmed by a stay, because "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Johnson v. Minneapolis Park & Recreation Bd., 729 F.3d 1094, 1101-02 (8th Cir. 2013) (quoting Elrod v. Burns, 427 U.S. 347, 373 (1976) (plurality opinion)).

Because of the nature of the rights at issue in this case, the Court must conclude that the public interest would not be promoted by a stay of the injunction. For all the foregoing reasons, the Court must deny Defendants' Motion.

III. CONCLUSION

For the reasons stated, Defendants' Motion to Stay, ECF No. 72, must be **dismissed as moot** as to proceedings for money damages, fees, costs, and expenses, and **denied** in all other respects.

IT IS SO ORDERED.

Dated this 26th day of February, 2016.