

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

C. KAUI JOCHANAN)	CV. NO. 10-00253 DAE-KSC
AMSTERDAM,)	
)	
Plaintiff,)	
)	
vs.)	
)	
KITV 4 TELEVISION STATION;)	
MIKE ROSENBERG, General)	
Manager,)	
)	
Defendants.)	
_____)	

ORDER DENYING PLAINTIFF'S MOTION FOR INJUNCTIVE RELIEF

Pursuant to Local Rule 7.2(d), the Court finds this matter suitable for disposition without a hearing. On April 30, 2010, Plaintiff filed his complaint. (Doc. # 1) On the same day, Plaintiff filed the instant Motion for Injunctive Relief. (Doc. # 4.) Plaintiff's motion was not titled as a request for a temporary restraining order. On May 6, 2010, Plaintiff, who is pro se, informed the Court telephonically that he had intended the Motion to be one for a temporary restraining order and requested that the Court review such Motion before the action Plaintiff sought to enjoin occurred on May 7, 2010. On May 7, 2010, this Court directed Defendants to respond to Plaintiff's Motion by noon the same day. On

May 7, 2010, Defendant KITV 4 filed its opposition (Doc. # 6) and supporting declaration (“KITV Decl.,” Doc. # 7.)

After reviewing Plaintiff’s motion and the supporting and opposing memoranda, the Court DENIES Plaintiff’s Motion for Injunctive Relief. (Doc. # 4.) Under the Communications Act of 1934, as amended 47 U.S.C. §§ 1 - et seq., and the rules established to implement the Act, 47 C.F.R. §§ 73.1 et seq., the Federal Communications Commission (“F.C.C.”) has established procedures for the production and broadcast of televised debates. Other circuits have found that there is no private cause of action under section 315 of the Communications Act by a candidate who is excluded from a debate broadcast by a privately owned television station. See, e.g., McCarthy v. National Broadcasting Co., No. 96-7822, 162 F.3d 1148, * 3 (2d Cir. 1998) (collecting cases); Lechtner v. Brownyard, 679 F.2d 322, 326-27 (3rd Cir. 1982) (collecting cases).

Further, in the instant case, KITV 4 is operated by Hearst Stations Inc., a private corporation owned by Hearst Corporation. (KITV Decl. ¶ 2.) KITV 4 is not owned by a state or political subdivision and, as such, there is no state action for which Plaintiff has shown a cause of action under the First Amendment against KITV 4. Moreover, even where a debate is broadcast by a public television

station owned by a state or political subdivision, the Supreme Court has held that no private right of action lies under the First Amendment.

This case is similar to Arkansas Educ. Television Com'n v. Forbes, 523 U.S. 666 (1998). In Forbes, petitioner Arkansas Educational Television Commission (AETC), a state-owned public television broadcaster, sponsored a debate between the major party candidates for the 1992 election in Arkansas' Third Congressional District. Id. at 669-70. When AETC denied the request of respondent Forbes, an independent candidate with little popular support, for permission to participate in the debate, Forbes filed suit, claiming, inter alia, that he was entitled to participate under the First Amendment. Id. at 671.

Where property is not a traditional public forum and the government has not chosen to create a designated public forum, the property is either a nonpublic forum or not a forum at all, for purposes of First Amendment analysis. Id. at 677-78. Access to a nonpublic forum can be restricted if the restrictions are reasonable and are not an effort to suppress expression merely because public officials oppose the speaker's views. See id. at 680 (citing Cornelius v. NAACP Legal Defense & Ed. Fund, Inc., 473 U.S. 788, 800 (1985)).

The Supreme Court held that the debate was a nonpublic forum from which the broadcaster could exclude the candidate in the reasonable,

viewpoint-neutral exercise of its journalistic discretion that was consistent with the First Amendment. Id. at 683. The Supreme Court explained that a televised debate among candidates for political office, sponsored by a public broadcaster, was a “nonpublic forum,” rather than a “designated public forum.” Id. at 678-79. In such a forum, a broadcaster cannot grant or deny access to a debate among candidates for political office on the basis of whether it agrees with a candidate’s views, however, a broadcaster could, under the First Amendment, exclude an independent candidate with little popular support in the reasonable, viewpoint-neutral exercise of its journalistic discretion. Id. at 682-83.

In Forbes, the debate did not have an open-microphone format, but rather, the broadcaster reserved eligibility for participation to candidates for a particular congressional district seat, then made candidate-by-candidate determinations as to which of the eligible candidates would participate, and the independent candidate was not excluded because of his viewpoint, but for his objective lack of support. Id. at 680. In the instant case, as Defendants attest, and Plaintiff never asserts to the contrary, KITV 4 made candidate-by-candidate determinations as to which of the eligible candidates for the Hawai`i’s First Congressional District Seat would participate in the station’s televised forum based in part upon their degree of public support and never took into account any

candidate's individual political viewpoints. (KITV Decl. ¶ 3.) There are fourteen candidates for the First Congressional District. KITV 4 along with its debate partner, the League of Women Voters, selected three candidates deemed the most newsworthy. (Id.) The criteria included public support as reflected in public opinion polls. (Id.) KITV 4 is a news intensive television station and broadcasts more than 20 hours of news each week. (Id. ¶ 6.) KITV 4 relied upon its journalistic judgment in determining whom to include.

As the Forbes' Court stated, "such 'selective access,' unsupported by evidence of a purposeful designation for public use, does not create a public forum, but indicates that the debate was a nonpublic forum." Id. at 680. Further, such a process evidences that KITV 4's decision to exclude Plaintiff was likely a reasonable, viewpoint-neutral exercise of journalistic discretion consistent with the First Amendment. The current record supports the finding that Plaintiff was excluded not because of his viewpoint, but because he had not generated appreciable public interest. For all the reasons above, Plaintiff has failed to show a reasonably likelihood of success on the merits necessary for this Court to issue a temporary restraining order against KITV 4.

The Court further notes that although Plaintiff is pro se, Plaintiff failed to ever properly inform the Court of his request for immediate injunctive

relief in the form of a temporary restraining order. Additionally, Plaintiff's allegations are conclusory rather than factual and fail to meet Plaintiff's burden under Federal Rule of Civil Procedure 65.

Accordingly, the Court DENIES Plaintiff's Motion. (Doc. # 4.)

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, May 7, 2010.





David Alan Ezra
United States District Judge

Amsterdam v. KITV 4 Television Station, et al., Cv. No. 10-00253 DAE-KSC;
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