M-12/21/94

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

G. W. ECKLES,

Plaintiff,

v.

OREGON STATE BOARD OF PSYCHOLOGIST EXAMINERS, et al.,

Defendants.

Civil No. 92-945-ST

JUDGMENT

IT IS HEREBY ADJUDGED AND DECREED that:

(1) ORS 675.010(4), 675.020(1), and 675.020(2) restrict plaintiff's commercial speech that is truthful and not actually or inherently misleading, and to that extent place unconstitutional burdens on his commercial speech.

(2) Plaintiff's description of himself and his services in the following terms is truthful and not misleading: psychologist; counseling psychologist; psychotherapist; psychotherapy; psychological counseling; educated, trained and

experienced in psychology; recipient of a Masters Degree in Psychology.

(3) The members of the Oregon State Board of Psychologist Examiners, the Board Administrator, and the State Attorney General in their official capacities are enjoined from further enforcing ORS 675.010(4), 675.020(1), and 675.020(2) against plaintiff for speech that is truthful and not misleading. This injunction does not prohibit defendants from enforcing those statutes against plaintiff's commercial speech that is false or misleading.

(4) Plaintiff's claims against the State of Oregon, the Oregon State Board of Psychologist Examiners, former members of the Board, and former Attorney General Charles S. Crookham are dismissed without prejudice.

(5) Plaintiff's claim under the Oregon Constitution is dismissed, without prejudice to plaintiff's right to subsequently refile it in state court.

DATED this 19 day of December, 1994.

Robert E. Jones
UNITED STATES DISTRICT JUDGE

Presented by:

Jeffrey S. Love, OSB #87398
of Attorneys for Plaintiff

Mr. Love ✓

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

G. W. ECKLES, Plaintiff,	)	Civil No. 92-945-JO
v.	)	OPINION AND ORDER
OREGON STATE BOARD OF PSYCHOLOGIST EXAMINERS, et al., Defendants.	)	

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JONES, Judge:

This disposition resolves defendants' objections (#107) to Magistrate Judge Stewart's Findings and Recommendations (#106). After consideration of defendants' objections, the findings of the Magistrate are adopted. This opinion supplements those findings, particularly in light of the recent Supreme Court opinion in Ibanez v. Fla. Dept. of Business Regulation Bd. of Accountancy, _____ U.S. _____, 114 S.Ct. 2084 (1994), which was decided subsequent to filing of the Findings and Recommendations. The Magistrate's recommendations are modified to the extent that plaintiff is granted prospective declaratory relief that ORS 675.010(4), 675.020(1), and 675.020(2) place unconstitutional burdens on commercial speech as applied to plaintiff, and prospective injunctive relief prohibiting defendants from further enforcing those provisions against plaintiff.

BACKGROUND

The facts and procedural posture are set forth in detail in the Findings and Recommendations (F&R). By way of summary, plaintiff claims that ORS 675.020(1) and two other provisions which it incorporates (ORS 675.010(4) and 675.020(2)) constitute unconstitutional burdens on his speech protected by the First Amendment. Revised Pretrial Order ("RPTO") ¶ 4(A)(2)(a)-(e). Plaintiff also contends that these provisions are unconstitutionally vague and overbroad. RPTO ¶ 4(A)(3)(c) and (d).

The statute at issue prohibits a person from "purporting to be a psychologist" unless that person is licensed by the State Board of Psychologist Examiners ("Board"). ORS 675.020(1). "Purporting to be a psychologist" is defined as using "any title or any description of services which incorporates one or more of the following terms: 'psychology,' 'psychological,' 'psychologist,' or any term of like import . . . or variant thereof or when the person purports to be trained, experienced or an expert in the field of psychology." ORS 675.020(2).

Plaintiff possesses a Master or Arts degree with a major in Psychology, and is part owner, operator, and a counselor at Eckles & Mauk Counseling, Inc. in Salem, Oregon. Plaintiff is not licensed to practice psychology by the Board. Plaintiff wishes to use a title and describe his services with one or more of the terms which ORS 675.020 prohibits an unlicensed person from using. Defendants have taken the position that plaintiff may not (1) call himself a psychologist; (2) advertise his credentials without disclaimers which make it clear that he is not licensed by the Board; or (3) use any title or description of services which incorporates those terms listed in ORS 675.020(2).

In response to plaintiff's motion for summary judgment, the Magistrate recommends that plaintiff be granted prospective declaratory relief that ORS 675.010(4), 675.020(1) and 675.020(2) place unconstitutional burdens on commercial speech and prospective injunctive relief prohibiting defendants from further enforcing those provisions. Findings & Recommendations ("F&R")

at 30. The Magistrate found that First Amendment protections for non-commercial speech did not apply (F&R at 15-19) and did not reach the issues of whether the statute is vague and overbroad. F&R at 29-30.

LEGAL STANDARD AND STANDARD OF REVIEW

The Constitution accords a lesser protection to commercial speech than to other constitutionally guaranteed expressions. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456-57 (1978). Commercial speech consists of expression related solely to the economic interests of the speaker and its audience. Central Hudson Gas v. Public Service Comm'n of N.Y., 447 U.S. 559, 561 (1980). Holding oneself out as a psychologist is commercial speech, because the sole purpose for doing so is to gain commercial advantages. Abramson v. Gonzalez, 949 F.2d 1567, 1574 (11th Cir. 1992).

"Commercial speech that is not false, deceptive or misleading can be restricted, but only if the State shows that the restriction directly or materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." Ibanez, 114 S.Ct. at 2088 (citing Central Hudson, 447 U.S. 557, 566). The regulation must directly advance the interest asserted, and "may not be sustained if it provides only ineffective or remote support for the government's purpose." Edenfield v. Fane, 113 S.Ct. 1792, 1800 (1993).

A restriction on commercial speech must be in reasonable proportion to the interests served. Id. at 1798. Only false,

deceptive or misleading commercial speech may be completely banned. Ibanez v. Florida Dept. of Business Regulation Bd. of Accountancy, 114 S.Ct. 2084, 2088 (1994)(citing Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 638 (1985)). Commercial speech that is "potentially misleading" may be regulated by "measures other than a total ban to prevent deception or confusion." Peel v. Attorney Registration and Disciplinary Comm'n of Ill., 110 S.Ct. 2281, 2295-96 (1990). The Supreme Court has stated, "we cannot allow rote invocation of the words 'potentially misleading' to supplant the Board's burden to 'demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree.'" Ibanez, 114 S.Ct. at 2090 (quoting Edenfield v. Fane, 113 S.Ct. at 1800).

"It is well established that 'the party seeking to uphold a restriction on commercial speech carries the burden of justifying it.'" Id. at 1800 (quoting Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 71 n.20 (1983)).

Summary judgment may be granted when there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). A party opposing summary judgment bears the burden of producing facts that create a genuine issue for trial, and if that party is unable to do so, then summary judgment is proper. Lindahl v. Air France, 930 F.2d 1434, 1436-37 (9th Cir. 1991). If the non-moving party will bear the burden of proof at trial as to an

element essential to its case, and the party fails to make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element, then summary judgment is appropriate. California Architectural Bldg. Prod. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (1987). It may not be argued that the mere existence of any disagreement about a material fact is sufficient to preclude summary judgment. Id.

Summary judgment is appropriate in the present case, because the non-moving party, defendant, would bear the burden of proof at trial that the restrictions on commercial speech imposed by ORS 675.020(1), 675.010(4) and 675.020(2) are justified, and, as discussed below, defendants have failed to make a showing sufficient to establish a genuine dispute that the restrictions on plaintiff's commercial speech are justified.

DISCUSSION

Defendants' objections to the Findings and Recommendations address three issues. First, defendants argue there is no First Amendment protection for communications between plaintiff and actual customers. Defs' Objections at 2-3, 11-12. Second, defendants argue that the analysis of the regulation's validity is flawed because the particular speech plaintiff wishes to communicate has not been described sufficiently to apply the appropriate legal standards. Id. at 3-4. Third, defendants argue that the relief recommended by the Magistrate is excessive. Id. at 13-14. Each of these objections is addressed below.

1. The statute at issue regulates speech, not conduct.

Defendants argue that the Magistrate erred in failing to classify communications between plaintiff and his clients as conduct. Def. Objections at 2-3, 11-12. Defendants maintain that there is an important distinction between plaintiff's advertising to potential customers, which is commercial speech, and plaintiff's communication with actual customers, which defendants contend is conduct. Defs' Objections at 2. Defendants argue that communication with actual customers is conduct because in that context plaintiff is engaging solely in the rendering of professional services which should not be characterized as speech.

In support of the assertion that communicating with actual clients is conduct, defendants urge the court to adopt a statement expressed by Justice White, concurring in Lowe v. Securities and Exchange Comm'n, 472 U.S. 181, 232 (1985). Def. Objections at 11-12. Justice White stated:

> One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession. Just as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional's speech is incidental to the conduct of the profession.

Lowe, 472 U.S. at 232. However, the language quoted by defendants from Lowe is inapplicable here because it refers to states' authority to regulate professional practice, whereas the present case involves regulation of the use of specific words in

a title or description of services[1]. See F&R at 20-25 (statute at issue regulates title not practice). The authority cited by defendants does not support the assertion that communication between plaintiff and actual clients is conduct rather than speech.

2. The speech plaintiff wishes to communicate has been identified with sufficient particularity to determine that the restrictions on plaintiff's speech are not justified.

Defendants also maintain that the analysis of whether plaintiff's commercial speech is unconstitutionally burdened is flawed because the speech that plaintiff wishes to communicate has not been identified sufficiently to apply the appropriate legal standards. Defs' Objections at 3. Specifically, defendants argue that the speech has not been described to the extent necessary to determine if it would be truthful, misleading or potentially misleading. Id. However, the record reflects that there are at least two examples of commercial speech plaintiff has been restricted from communicating by the regulation at issue. First, it is apparent that plaintiff wishes to advertise that he has a Master's Degree in Psychology without a disclaimer that he is not licensed to practice psychology in Oregon. See Complaint, Exhibit 6; F&R at 3, 12; Defs' Objections at 4-5. It is also apparent that plaintiff wishes to describe

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[1] Justice White's concurring opinion continues, "[i]f the government enacts generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on freedom of speech or the press subject to First Amendment scrutiny." 472 U.S. at 232 (emphasis added).

himself as a psychologist. See Defs' Objections at 5. The regulation at issue however, completely bans the use of "'psychology,' 'psychological,' 'psychologist,' or any term of like import . . . or variant thereof" in "any title or any description of services" by an unlicensed individual such as plaintiff. See ORS 675.020.

a. The regulation that plaintiff may not advertise his Master's Degree without a disclaimer is an unconstitutional burden on plaintiff's commercial speech.

Defendants maintain that under the regulation at issue:

> any reference to "psychology" in [plaintiff's] advertising should be accompanied by sufficient disclaimers to inform readers that he is not licensed to practice psychology. For example: "Masters [sic] of Arts degree with a major in psychology, but not licensed to practice psychology."

Complaint, Exhibit 6, p. 7 (emphasis in original). Defendants maintain that "[f]or plaintiff to advertise that he has college degrees in psychology is potentially misleading because plaintiff's prospective customers could well interpret it to mean that plaintiff has a license to practice psychology. . . . ." Defs' Objections at 4-5.

In order to assess the regulation's validity, it must first be determined whether it is potentially misleading for plaintiff to advertise his degree without the disclaimer. Commercial speech that is "potentially misleading" may be regulated by "measures other than a total ban to prevent deception or confusion." Peel, 110 S.Ct. at 2295-96. However, "rote invocation of the words 'potentially misleading' [will not be

allowed] to supplant the Board's burden to 'demonstrate that the harms it recites are real and that its restrictions will in fact alleviate them to a material degree.'" Ibanez, 114 S.Ct. at 2090 (quoting Edenfield v. Fane, 113 S.Ct. at 1800).

In Ibanez, the Supreme Court invalidated a sanction imposed against an attorney for advertising that she was a CPA (certified public accountant) and CFP (certified financial planner) without a disclaimer that she was not licensed by the state accountancy board. 114 S.Ct. 2084. The Court held that the regulation unduly burdened the plaintiff's commercial speech primarily because the State failed to meet its burden of proof that the restriction was justified. Id. at 2090-92. Similar to the present case, the defendant in Ibanez asserted that the regulation was justified because plaintiff's CFP credential (CFP) was "potentially misleading." Id. at 2090. In holding that the restriction was not justified, the Court relied on "the state of this record -- the failure of the Board to point to any harm that is potentially real, not hypothetical." Id.

In the present case, defendants have likewise failed to meet the burden of proof that there is any danger that advertising plaintiff's degree without a disclaimer is potentially misleading. The record contains no more than bare assertions that such advertising would be potentially misleading and defendants have failed to present any evidence of "any harm that is potentially real, not hypothetical." See Id. Defendants therefore, have failed to provide sufficient evidence to

withstand plaintiff's motion for summary judgment that the restriction on the advertisement of plaintiff's degree is an unconstitutional burden on his commercial speech.

Even if defendants had put forth sufficient evidence that advertising plaintiff's degree without a disclaimer is potentially misleading, defendants have not come forward with any evidence that the regulation is "in reasonable proportion to the interests served." See Edenfield v. Fane, 113 S.Ct. at 1798 (citing Central Hudson, 447 U.S. at 566). In response to the disclaimer requirement, plaintiff has "limited to the extent possible any reference to [his] education, training and experience in psychology." Memorandum in Support of Pl's Motion for Summary Judgment, Affidavit of G.W. Eckles at 4. Defendants have not come forward with any evidence that the requirement that plaintiff concurrently disclose that he is unlicensed each time he communicates the fact that he has a degree is in reasonable proportion to the alleged harm of misleading potential customers. Generally, the "disclosure of truthful, relevant information is more likely to make a positive contribution to decision-making . . . ." Peel, 496 U.S. at 108.

Due to the lack of evidence that advertising plaintiff's degree without a disclaimer is potentially misleading, or that use of a disclaimer in every context is in reasonable proportion to any alleged harm, the regulation that plaintiff may not advertise his Master's Degree without a disclaimer constitutes an

unconstitutional burden on plaintiff's commercial speech in violation of the First Amendment.

b. The complete ban on the use of the title "psychologist" by plaintiff to describe himself or his services is an unconstitutional burden on plaintiff's commercial speech.

Defendants maintain that under ORS 625.020, plaintiff may not advertise himself as a psychologist under any circumstances. See Complaint, Exhibit 2. Plaintiff has been instructed by the Board to "cease and desist from in any way holding yourself out to provide psychological service, represent yourself as a psychologist or use any other designation which incorporates the term 'psychology' or any other title or description of services referred to in ORS 675.020." Id. By way of comparison, the regulation at issue would be similar to one that banned the use of "law," "legal" or any variant thereof in any title or description of services of any individual not licensed to practice law by the state.

As stated above, only false, deceptive, or misleading commercial speech may be completely banned. Ibanez, 114 S.Ct. at 2088 (citing Zauderer, 471 U.S. at 638). Therefore, a threshold issue is whether use of the word "psychologist" by plaintiff to describe himself or his services is false, deceptive or misleading. Plaintiff has come forward with substantial evidence to support the assertion that his use of the title "psychologist" is not deceptive or misleading because it does not imply that he is licensed by the state. For example, plaintiff has submitted evidence that "psychologist" is commonly used to refer to a

person with a Master's Degree in Psychology, as well as other individuals who may or may not be licensed. See Memorandum in Support of Pl's Motion for Summary Judgment, Robinson Affidavit, Ex. 2; Eckles Affidavit, Ex. 5 (advertisement for "psychologist," Master's Degree sufficient). In addition, plaintiff has submitted evidence that "psychologist" is frequently used interchangeably with other terms such as "mental health counselor." Pl's Motion, Jt. Affidavit of Gray et al, Ex. 7.

Defendants have come forward with only minimal evidence to rebut plaintiff's assertion that his use of "psychologist" would not be deceptive or misleading. Defendants maintain that no direct evidence exists regarding the understanding of potential mental health services customers of the word "psychologist" or other words containing the root "psych." Defs' Objections at 7. In attempting to justify that plaintiff's use of the title would be misleading, defendants rely on the charge that plaintiff has refused to supply defendants with client lists and has therefore obstructed defendants' efforts to question these clients as to what various representations might mean to them. Defs' Objections at 7; Defs' Response to Pl's Motion for Summary Judgement, Affidavit of Kendall Barnes, Exhibit 1. Of more relevance, defendants have asked the court to defer to the legislature, characterizing it as a ninety-member sample of Oregon citizens that have, by enacting the regulation at issue, expressed their belief that use of the title psychologist by an

unlicensed person is misleading or deceptive. Defs' Objections at 7.

The Supreme Court has stated that "broad prophylactic rules may not be . . . lightly justified if the protections afforded commercial speech are to retain their force." Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 649 (1985). The Court has required more proof than that offered by defendants for a restriction of commercial speech to withstand a challenge under the First Amendment. For example, a Florida ban on CPA solicitations was struck down where the Board presented "no studies to suggest personal solicitation . . . creates the dangers . . . the Board claims to fear" or "anecdotal evidence . . . that validates the Board's suppositions." Edenfield v. Fane, 113 S.Ct. at 1800. In a similar vein, restrictions on attorney advertising were struck down where the "State's arguments amount to little more than unsupported assertions" without "evidence or authority of any kind." Zauderer, 471 U.S. at 648-49. Insufficiency of the State's proof was also the reason the restriction on commercial speech was found unconstitutionally burdensome in the recent decision of Ibanez. 114 S.Ct. at 2090-92.

In this case, the "evidence" put forth by defendants, which is appropriately characterized as merely an appeal for legislative deference, is insufficient to meet defendants' burden of proof that the use of the title "psychologist" by plaintiff is false, deceptive or misleading. As stated above, only false,

deceptive or misleading advertising may be completely banned. Ibanez, 114 S.Ct. at 2088. Because ORS 675.020 completely prohibit's the use of "psychologist," "psychology," "psychological" or any variant thereof by plaintiff to describe himself or his services, the regulation is an unconstitutional burden on plaintiff's commercial speech.

3. The regulation at issue is unconstitutional as applied to plaintiff.

The Magistrate recommends that plaintiff be granted prospective declaratory relief that ORS 675.010(4), 675.020(1) and 675.020(2) place unconstitutional burdens on commercial speech, and prospective injunctive relief prohibiting defendants from further enforcing these provisions. F&R at 30. Defendants maintain that if relief is to be granted, it should be limited to a prospective declaration and prospective injunctive relief that the regulation is invalid as applied to plaintiff. In support of this argument, defendants cite Parker v. Levy:

> This Court has . . . repeatedly expressed its reluctance to strike down a statute on its face where there are a substantial number of situations to which it might validly be applied. Thus even if there are marginal applications in which a statute would infringe on First Amendment values, facial invalidation is inappropriate if the "remainder of the statute . . . covers a whole range of easily identifiable and constitutionally proscribable . . . conduct."

417 U.S. 733, 760 (1974) (quoting United States Service Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 580-81 (1973)).

There is a substantial state interest "[t]o safeguard the people of the State of Oregon from the dangers of unqualified and improper practice of psychology." See ORS 675.020(1). In many

situations, commercial speech regulated by ORS 675.010(4), 675.020(1) and 675.020(2) would clearly be false, deceptive, or potentially misleading, such as when a person with no training or experience in psychology purports to be a "psychologist." In that instance, imposition of a complete ban or other appropriate restriction would be justified. Because there are a substantial number of situations to which the statute might validly be applied, it would be inappropriate to declare ORS 675.010(4), 674.020(1) and 675.020(2) facially invalid.

CONCLUSION

In light of these findings and those of the Magistrate, the recommendations (#106) of the Magistrate are adopted with the modification that plaintiff is granted prospective declaratory relief that ORS 675.010(4), 675.020(1), and 675.020(2) place unconstitutional burdens on commercial speech as applied to plaintiff. In addition, plaintiff is granted prospective injunctive relief prohibiting defendants from further enforcing these provisions against plaintiff.

DATED this 16 day of August, 1994.

ROBERT E. JONES
United States District Judge

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