IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit

FILED
December 17, 2019

Lyle W. Cayce
Clerk

No. 18-30932

PATRICK A. BENFIELD; BRIAN SCOTT WARREN,

Plaintiffs - Appellees

v.

JOE D. MAGEE,

Defendant - Appellant

Appeal from the United States District Court
for the Western District of Louisiana

Before STEWART, CLEMENT, and HO, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge:

Plaintiffs Brian Warren and Patrick Benfield sued their boss, Joe Magee, claiming that he fired them for exercising their First Amendment free-speech and free-association rights. Magee moved to dismiss their claims based on qualified immunity. The district court held that Magee was entitled to qualified immunity for Benfield's free-association claim but not for Warren's or Benfield's free-speech claims. Magee, on interlocutory appeal, challenges this denial of qualified immunity. We affirm in part, reverse in part, and remand for further proceedings.

I.

Warren and Benfield worked in Louisiana as paramedics for the Desoto Parish Emergency Medical Services. Louisiana paramedics must complete annual recertification training and submit reports of this training to a certification organization. The Desoto Parish EMS Medical Director had to sign these annual reports before submission. Joe Magee, the Desoto Parish EMS Administrator, would allegedly sign these reports on behalf of the Medical Director. When the reports were computerized in 2007, Magee allegedly instructed Warren to "check[] off the box for [the Medical Director's] approval of the training hours," which he did. This box was apparently used in lieu of a physical signature.

In June 2015, Warren sent a letter to a member of the Desoto Parish Police Jury[1] suggesting changes to Desoto Parish EMS personnel, procedures, and policy. After submitting this letter, Warren claims that "Magee and some of his underlings" harassed him. This harassment included criticizing Warren's religious beliefs, harassing him about going back to school, telling him to go to counseling or be fired, denying him a promotion, accusing him of acts of terrorism for hiring an attorney to sue the Desoto Parish EMS, accusing him of having women at the station for sexual purposes, and encouraging him to quit.

In December 2016, the new co-Medical Director asked Warren how he and Benfield had been recertified. Warren told him about the practice of checking the box for the Medical Director's approval. Shortly thereafter, "[Magee] told [Warren] that he needed to quit 'before something bad happened.'" Warren does not explain what "something bad" might mean.

[1] Parish police juries are akin to county commissions or county councils.

Later that month, Magee allegedly asked Benfield to provide a statement that Warren was not authorized to check the box for the Medical Director and that Magee had not authorized Warren to do so. Benfield refused because, according to him, the statement would have been false. Magee then suspended Warren and Benfield in early January 2017 for falsifying documents and training records. On January 26, 2017, Magee fired them.

Warren and Benfield sued Magee under 42 U.S.C. § 1983, alleging (1) that Magee "retaliated against [Warren] for expressing, in his capacity as a private citizen, matters of public concern" in his June 2015 letter to the Desoto Parish Police Jury; and (2) that Magee "retaliated against [Benfield] due to [Magee's] perception that [Benfield] was allied with [Warren] and because [Benfield] would not provide false statements to the authorities or to [Magee] concerning [Warren]." Benfield also alleged a state-law whistleblower claim, but has since abandoned it.

Magee moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that he was entitled to qualified immunity because neither Warren nor Benfield adequately pleaded a constitutional violation and any alleged constitutional right was not clearly established. The district court granted the motion in part and denied it in part. The court held that Warren stated a free-speech claim and that clearly established law prohibited Magee from firing Warren for sending his June 2015 letter. But the court declined to consider whether to dismiss Benfield's free-speech claim because Magee had challenged only Benfield's free-association claim.

Magee appealed. He seeks interlocutory review of the district court's denial of qualified immunity for both free-speech claims.[2]

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[2] Benfield does not cross-appeal, so the dismissal of his free-association claim is not before this Court.

II.

On interlocutory appeal, we review a district court's denial of a qualified-immunity-based motion to dismiss de novo. *Club Retro, L.L.C. v. Hilton*, 568 F.3d 181, 194 (5th Cir. 2009). We accept all well-pleaded facts as true, drawing all reasonable inferences in the nonmoving party's favor. *Id.* We do not, however, accept as true legal conclusions, conclusory statements, or "'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead factual allegations that, if true, "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. That is, the well-pleaded facts must make relief plausible, not merely possible. *See Iqbal*, 556 U.S. at 678.

III.

A.

Magee argues that he is entitled to qualified immunity for Warren's free-speech claim. Once a defendant raises a qualified-immunity defense, the burden shifts to the plaintiff to show that (1) the official violated a statutory or constitutional right, and (2) the right was "clearly established" at the time. *Morgan v. Swanson*, 659 F.3d 359, 371 (5th Cir. 2011) (en banc) (citing *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)). A court can analyze either element first. *Id.*

Warren claims that Magee violated his constitutional rights by firing him in retaliation for exercising his First Amendment right to free speech. To establish such a First Amendment retaliatory-discharge claim, Warren must prove that (i) he suffered an adverse employment action; (ii) his speech involved a matter of public concern; (iii) his interest in speaking on the issue outweighed Magee's interest in promoting workplace efficiency; and (iv) his

speech was a substantial or motivating factor for Magee's actions. *Harris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216, 220 (5th Cir. 1999).

Magee argues that Warren failed to allege a causal connection between the June 2015 letter and his firing—i.e., that his letter was a substantial or motivating factor for his firing—that this letter was not protected speech, and that, even if it was, the law did not clearly establish that at the time. The parties do not dispute that Warren suffered an adverse employment action, and the district court correctly noted that Magee never addressed whether Warren's interest in speaking on the issue outweighed Magee's interest in promoting workplace efficiency. The issues, therefore, are (1) whether Warren's speech was on a matter of public concern and (2) whether his June 2015 letter was a substantial or motivating factor for his firing. We agree with Magee that Warren failed to allege a sufficient causal connection between his letter and his firing. Thus, whether Warren's letter was speech on a matter of public concern or not, Warren has not stated a First Amendment retaliatory-discharge claim.

Warren sent his letter in June 2015 and was fired in January 2017—a 19-month gap. "Close timing between an employee's protected activity and an adverse action against him may provide the 'causal connection' required" to make out a prima facie retaliation case. *Swanson v. Gen. Servs. Admin.*, 110 F.3d 1180, 1188 (5th Cir. 1997) (citing *Armstrong v. City of Dallas*, 997 F.2d 62, 67 (5th Cir. 1993). But a 19-month gap is too long to show causation by itself. *See, e.g.*, *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 274 (2001) (holding that 20-month gap "suggests, by itself, no causality at all"); *Raggs v. Miss. Power & Light Co.*, 278 F.3d 463, 472 (5th Cir. 2002) (finding five-month gap alone insufficient); *Evans v. City of Houston*, 246 F.3d 344, 354 (5th Cir. 2001) (noting that a district court in this circuit has found that "a time lapse

of *up to four months* has been found sufficient" (emphasis added)). Thus, the timing, by itself, between Warren's speech and his firing is not close enough to permit a plausible inference that Warren's firing was causally connected to his speech.

This circuit has, however, allowed plaintiffs to show causation by relying on "a chronology of events from which retaliation may plausibly be inferred." *Brady v. Hous. Indep. Sch. Dist.*, 113 F.3d 1419, 1424 (5th Cir. 1997) (quoting *Woods v. Smith*, 60 F.3d 1161, 1166 (5th Cir. 1995)). Warren's chronology-of-events allegation is that Magee "and some of his underlings" harassed him after he submitted the June 2015 letter. But Warren's allegations do virtually nothing to establish a chronology. He states that this harassment occurred sometime after the June 2015 letter, yet provides no further specificity. These are his harassment allegations in full:

> Following the submission of the letter, [Warren] started being subject to harassment by [Magee] and some of his underlings. The harassment included, but was not limited to:
>
> (A) Harassing [Warren] about going back to school;
> (B) Criticizing or commenting upon [Warren's] religious beliefs;
> (C) Telling [Warren] to go to counseling or be terminated;
> (D) Denying him a supervisor's position;
> (E) Accusing [Warren] of acts of terrorism for hiring an attorney to sue Desoto Parish EMS;
> (F) Falsely accusing [Warren] of having woman [sic] at the station for sexual purposes; and
> (G) Regularly encouraging him to quit his employment at Desoto Parish EMS.

These allegations are insufficient. Because we cannot infer a retaliatory motive based on the 19-month gap between Warren's speech and his firing, Warren's burden is to bridge this gap with a chronology of events that permits such an inference. He cannot do that without stating with specificity when he was harassed. If the harassment did not begin soon enough after he sent the

June 2015 letter, the chronology of this harassment would fail to permit the necessary inference for the same reason that his firing 19 months later fails to permit the inference: it is too remote from the protected activity to imply a causal connection. And if the harassment did not continue periodically throughout the 19-month gap, we would be unable to plausibly infer that the harassment and Warren's firing are part of a causally connected string of events stemming from Warren's June 2015 letter. Warren's allegations, as is, are little more than "naked assertions devoid of further factual enhancement." *Iqbal*, 556 U.S. at 678 (cleaned up). Because Warren's harassment allegations lack specificity, he has not alleged a plausible causal connection. Thus, his right to relief is only speculative.

Warren responds by admitting that he does not specify when this harassment occurred, but argues that he provided dates in the ensuing three paragraphs. He provides dates, but not for the alleged harassment. The dates are for the appointment of the new co-Medical Director and the dispute over whether Magee instructed Warren to check the box for the Medical Director. Warren never argues that these events, which occurred at least eight months after he sent his letter, are evidence of retaliation. Thus, this argument fails.

Because Warren failed to allege the requisite causal connection between his June 2015 letter and his firing, he has not alleged an element of his First Amendment retaliatory-discharge claim. That means that Warren has not shown that Magee violated one of his constitutional rights, and therefore, he has not met his burden to overcome Magee's qualified-immunity defense.[3]

[3] Magee also argues that Warren failed to allege that Magee knew about the letter. Because we hold that Warren failed to allege a causal connection between his June 2015 letter and his January 2017 firing, we do not address this alternative argument.

B.

Magee next challenges the district court's denial of qualified immunity for Benfield's free-speech claim. The district court held that "[b]ecause Magee treats Benfield's claim as a free[-]association claim only, Magee does not address Benfield's allegation that he was retaliated against for refusing to provide a false statement." The court, therefore, "decline[d] to consider this issue sua sponte." Magee argues that this was error. He claims that he (a) sought dismissal of all claims, (b) mentioned Benfield's failure to identify "expressive activity," and (c) stated that "Benfield had not adequately alleged that he 'spoke as a private citizen on a matter of public concern.'" Not quite.

Magee's motion to dismiss stated that "Plaintiffs purport to assert First Amendment retaliation claims, but fail to plausibly allege facts supportive of such a contention." Even if we charitably read this to be seeking a dismissal of Benfield's potential free-speech claim, Magee's motion never substantively addressed that claim. Magee spent just over one page on Benfield's First Amendment arguments in a section titled "Benfield fails to adequately plead a Freedom of Association Claim." In that section, Magee mentioned "expressive activities," but only once and only when citing a free-association rule statement. He never argued that Benfield's claim should be dismissed for not identifying an expressive activity.

Although Magee did state in his motion that "[Benfield] does not assert that he spoke as a private citizen on a matter of public concern," Magee did not state this as a positive argument for dismissal. Indeed, the next sentence reads: "Instead, [Benfield] contends that he was terminated because he was 'viewed as being an ally to [Warren].'" That is, Magee was contrasting the claim that he thought Benfield was making—a free-association claim—with a claim that he thought Benfield was not making—a free-speech claim. Thus, this

statement, in the conspicuously labeled free-association section, was not a positive argument that Benfield failed to allege an element of a free-speech claim. Given Magee's belief that Benfield had not even raised a free-speech claim, Magee's failure to argue that such a claim should be dismissed is unsurprising. Because Magee made no substantive argument for dismissing Benfield's free-speech claim, the district court did not err in refusing to address the issue sua sponte.

C.

At the end of Warren's briefing, he adds that, if we find his complaint deficient, he would like a chance to replead. He made the same request in the district court. The district court did not rule on this issue, and Magee does not address it. We nevertheless deny this contingent request.

Warren could have amended his complaint as a matter of course in response to Magee's motion, which pointed out the deficiencies in Warren's pleading. *See* FED. R. CIV. P. 15(a)(1)(B). Instead, Warren stood on his pleading, arguing that he had, in fact, stated a claim. And he has never stated what he would amend. Because Warren did not amend as a matter of course, never identified what amendments he might make, and argued in the district court and here that his pleading states a claim, we deny his request. *See, e.g.*, *McKinney v. Irving Indep. Sch. Dist.*, 309 F.3d 308, 315 (5th Cir. 2002) (upholding denial of plaintiffs' request to amend when "they failed to amend their complaint as a matter of right, failed to furnish the district court with a proposed amended complaint, and failed to alert both the court and defendants to the substance of their proposed amendment"); *Spiller v. City of Tex. City, Police Dep't*, 130 F.3d 162, 167 (5th Cir. 1997); *see also Confederate Mem'l Ass'n, Inc. v. Hines*, 995 F.2d 295, 299 (D.C. Cir. 1993); *Glenn v. First Nat'l Bank in Grand Junction*, 868 F.2d 368, 370 (10th Cir. 1989) ("If Appellants

had *any* grounds for amending, they could have amended as a matter of *right* at the time they issued their request. Obviously, either they had no additional facts or they felt they had stated a claim."). This denial affects only Warren's request to replead his now-dismissed claims. We take no stance on whether the district court, on remand, may grant leave to replead or amend other claims.

IV.

For the foregoing reasons, we REVERSE the district court's denial of qualified immunity for Warren's free-speech claim; RENDER judgment for Magee on that claim; AFFIRM the court's judgment to not dismiss Benfield's free-speech claim; and REMAND this case for further proceedings.