

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 96-30991

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EUGENE VICTOR,

Plaintiff-Appellant,

VERSUS

WAYNE McELVEEN, Individually and as Sheriff of the Parish of  
Calcasieu,

Defendant-Appellee.

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

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August 6, 1998

Before DeMOSS and DENNIS, Circuit Judges, and ROSENTHAL\*, District  
Judge.

DENNIS, Circuit Judge:

1           In this case we review the district court's summary judgment  
2           dismissing an action by a former sheriff's deputy under 42 U.S.C.  
3           § 1983 for damages resulting from the sheriff's wrongful  
4           termination of his employment in violation of his First Amendment  
5           right to free speech. The deputy, Eugene Victor, an African-

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\* District Judge of the Southern District of Texas, sitting by  
designation.

6 American, was discharged by the sheriff for statements Victor made  
7 at a workplace meeting to which the sheriff had summoned a group of  
8 black deputies to explain and discuss the implementation of a  
9 Community Oriented Police Servicing ("COPS") program for a  
10 community predominantly of black citizens. The sheriff planned to  
11 employ an all-black, 12-deputy workforce in the program; another  
12 purpose of the meeting was to solicit applicants for those  
13 positions. In response to the sheriff's request for input from the  
14 deputies about the program, while a newspaper reporter was present,  
15 Victor complained that only black deputies had been required to  
16 attend the meeting, stated that deputies of all races should have  
17 been involved, and asserted that an equal number of black and white  
18 deputies should be employed in the program to avoid a situation  
19 similar to that which prevailed in 1980; at that time, according  
20 to Victor, black deputies were permitted to patrol only in black  
21 neighborhoods. A local newspaper ran a story on the meeting  
22 highlighting some of Victor's remarks. Four days after the meeting  
23 the sheriff fired Victor for "making false statements regarding  
24 this department during an informational meeting with other  
25 deputies, and causing dissension within the department."

26 The district court held that: (1) Victor's speech did not  
27 address a matter of public concern; and (2) Victor's expressions --  
28 particularly his statement that there were enough black people at  
29 the meeting for a "Tarzan movie" -- caused dissension, contained  
30 irrelevant statements, and interfered with effective operations;

31 therefore, Victor's interest in making his statements was  
32 outweighed by the interest of the state in the effective  
33 functioning of the sheriff's office. We reverse and remand for  
34 further proceedings. Victor's protest against racial  
35 discrimination was both inherently, and in content, form and  
36 context, a matter of public concern. There are genuine disputes as  
37 to issues of material facts determinative of whether any of  
38 Victor's statements were knowingly or recklessly false and whether  
39 his speech as a whole so interfered with the efficient functioning  
40 of the sheriff's office that the state's interest therein outweighs  
41 Victor's First Amendment rights.

42 I

43 The district court's conclusion that summary judgment was  
44 appropriate is a question which we review *de novo*. See, e.g.,  
45 *Dawkins v. Sears Roebuck and Co.*, 109 F.3d 241, 242 (5th Cir.  
46 1997). Summary judgment is proper only when it appears that there  
47 is no genuine issue of material fact and that the moving party is  
48 entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). On  
49 summary judgment the inferences to be drawn from the underlying  
50 facts contained in the affidavits, depositions, and exhibits of  
51 record must be viewed in the light most favorable to the party  
52 opposing the motion. *United States v. Diebold, Inc.*, 369 U.S. 654,  
53 655 (1962).

54 II

55           Construing the record in the light most favorable to the  
56 nonmovant, Victor, we draw inferences from the underlying facts as  
57 follows. Eugene Victor served as a deputy marshal under then-city  
58 marshal Wayne McElveen from 1973 until 1980. In 1980 after  
59 McElveen was elected Sheriff of Calcasieu Parish, he employed  
60 Victor as a deputy. Victor was assigned to a succession of jobs  
61 over the years: graveyard shift patrol, traffic department,  
62 internal affairs, and the transportation division. Victor finally  
63 served as a courtroom bailiff for the two years before his  
64 dismissal on December 6, 1994.

65           In 1994, the Calcasieu Parish Sheriff's Department received a  
66 federal grant under the Community Oriented Police Servicing  
67 ("COPS") program, a program that provides federal funds to  
68 establish community-based policing in high crime areas. The  
69 department received the grant for North Lake Charles, an area  
70 inhabited predominantly by black citizens. Sheriff McElveen called  
71 an informational meeting to discuss implementation of the COPS  
72 program. The sheriff's department sent letters to a group of  
73 black deputies informing them that the meeting was "mandatory" and  
74 that their attendance was "required." The department also posted  
75 notice of the meeting in the squad room. The notice invited, but  
76 did not require, all department personnel to attend the meeting.  
77 Victor testified in his deposition that the general notice was not  
78 posted until after the meeting began.

79           The meeting was held on December 1, 1994. Of the 75 to 80  
80 persons at the meeting only four or five were white, including the  
81 sheriff and one or two supervisory deputies. A newspaper reporter  
82 covered the event although she had not been invited by the  
83 sheriff's office. The sheriff, after briefly explaining his plans  
84 for the COPS program, asked for questions and comments from the  
85 deputies about the program. Deputy Victor was the first to be  
86 recognized. Before voicing his concerns, Victor asked for and  
87 received the sheriff's assurance that he could speak freely without  
88 "any fear of any retribution of any kind." Victor complained that  
89 the sheriff's department had required the presence of the group of  
90 black deputies but not the attendance of any white deputy. He  
91 began with a remark that there were "enough black people here to do  
92 a Tarzan movie," or words to that effect. He perceived the  
93 sheriff's plan as calling for the employment of only black deputies  
94 in the program. He protested that deputies of other ethnic groups  
95 should be included in the meeting and the program. According to  
96 one deputy present, Victor recommended that six white and six black  
97 deputies be assigned to the program. Victor asserted that in 1980  
98 the sheriff's department had a policy, since abolished, of  
99 restricting black deputies' patrol duties to North Lake Charles, an  
100 area populated mainly by black people. His remarks may be fairly  
101 characterized as a warning that a COPS program with only black  
102 deputies on front line duty would be a step backward, detrimental  
103 to the community and the department. After Victor's remarks, the

104 sheriff and other deputies stated that it was not true that the  
105 department in 1980 had restricted the patrols of black deputies to  
106 North Lake Charles. Further, the sheriff explained that, even if  
107 the twelve COPS deputies closely involved with the community were  
108 to be black, the regular deputy patrols within the area would  
109 continue to include white officers. The sheriff acknowledged in  
110 his deposition, that subsequent to the meeting he had employed  
111 eleven black and one white deputies for the COPS program. The  
112 sheriff testified, however, that this racial makeup was required  
113 for an effective COPS program, and was not a sign of bigotry as he  
114 thought Victor had stated or suggested at the meeting. Other black  
115 deputies disagreed with Victor and contended that providing twelve  
116 black deputies for community oriented police services would be  
117 beneficial to the deputies and the community. After Victor's  
118 remarks and the reactions thereto, which consumed about ten  
119 minutes, the meeting resumed with a more detailed explanation of  
120 the proposed COPS program by Richard F. Tanous, the sheriff's  
121 department systems administrator, and concluded without any  
122 untoward incident. The next day the newspaper published an article  
123 about the meeting, featuring some of Victor's statements. The  
124 sheriff fired Victor four days after the meeting for "making false  
125 statements regarding this department during an informational  
126 meeting with other deputies, and causing dissension within the  
127 department."

128 Victor brought the present action under 48 U.S.C. § 1983

129 against Sheriff Wayne McElveen, individually and as sheriff of  
130 Calcasieu Parish, alleging that the sheriff's termination of his  
131 employment violated his right to free speech secured by the First  
132 and Fourteenth Amendments. The suit also alleged that Sheriff  
133 McElveen's actions violated his rights under the Fifth and  
134 Fourteenth Amendments. The sheriff moved for summary judgment  
135 denying Victor's claims and sustaining his defense of qualified  
136 immunity. The district court granted summary judgment dismissing  
137 Victor's claims with prejudice. The court concluded that Victor's  
138 speech did not address a matter of public concern, as he spoke  
139 primarily in his role as a public employee and not in his role as  
140 a citizen. The district court further held that, assuming the  
141 speech involved a matter of public concern, the government's  
142 interest, as an employer, outweighed Victor's First Amendment  
143 interest in commenting on the matter. The district court also  
144 granted summary judgment for Sheriff McElveen on Victor's Fifth and  
145 Fourteenth Amendment claim. The district court did not rule on  
146 Sheriff McElveen's defense of qualified immunity.

147 Victor appeals from the district court's decision that his  
148 First Amendment rights were not violated. He does not challenge  
149 dismissal of the Fifth and Fourteenth Amendment claim.

150 III

151 It has long been established that the government may not  
152 constitutionally compel persons to relinquish their First Amendment

153 rights as a condition of public employment. *E.g.*, *Keyishian v.*  
154 *Board of Regents*, 385 U.S. 589 (1967); *Connick v. Myers*, 461 U.S.  
155 138 (1983); *Pickering v. Board of Education*, 391 U.S. 563 (1968);  
156 *Perry v. Sindermann*, 408 U.S. 593 (1972). The *Pickering* Court  
157 held that the First Amendment protects the rights of public  
158 employees "as citizens to comment on matters of public interest" in  
159 connection with the operation of the government agencies for which  
160 they work. *Pickering*, 391 U.S. at 568. The government has  
161 legitimate interests in regulating the speech of its employees,  
162 however, that differ significantly from its interests in regulating  
163 the speech of people generally. *Id.* The scope of public  
164 employees' First Amendment rights must be determined by balancing  
165 "the interests of the [employee], as a citizen, in commenting upon  
166 matters of public concern and the interest of the State, as an  
167 employer, in promoting the efficiency of the public services it  
168 performs through its employees." *Id.*

169 The threshold question in applying the *Pickering* balancing  
170 test is whether Victor's speech may be "fairly characterized as  
171 constituting speech on a matter of public concern." *Connick*, 461  
172 U.S. at 146. "Whether an employee's speech addresses a matter of  
173 public concern must be determined by the content, form, and context  
174 of a given statement, as revealed by the whole record." *Id.* at  
175 147-148. "[W]e are compelled to examine for ourselves the  
176 statements in issue and the circumstances under which they [were]



177 made to see whether or not they . . . are of a character which the  
178 principles of the First Amendment, as adopted by the Due Process  
179 Clause of the Fourteenth Amendment, protect.'" *Id.* at 150 n.10  
180 (quoting *Pennekamp v. Florida*, 328 U.S. 331, 335 (1946)(footnote  
181 omitted)). The employee's "right to protest racial discrimination,  
182 [however, is] a matter inherently of public concern [and] is not  
183 forfeited by her choice of a private[, rather than a public]  
184 forum." *Id.* at 148 n.8 (citing *Givhan v. Western Line Consol. Sch.*  
185 *Dist.*, 439 US 410, 415-416 (1979)); see also *Wilson v. UT Health*  
186 *Ctr.*, 973 F.2d 1263, 1269 (5th Cir. 1992)("The content of [the]  
187 speech -- reports of sexual harassment perpetrated on [plaintiff]  
188 and other women -- is of great public concern.").

189 The content of Victor's speech was inherently of public  
190 concern because it was a protest against racial discrimination.  
191 Victor's protest may be fairly characterized as criticizing the  
192 sheriff for holding a meeting that only African-American deputies  
193 were required to attend for the purpose of explaining and  
194 discussing the implementation of a federally funded program that  
195 would serve a community of predominantly black residents. His  
196 remarks may be reasonably viewed as expressing concerns that  
197 deputies of other races or ethnic groups would not be involved in  
198 planning or carrying out the program in the black community.  
199 Victor's comments indicated his apprehension that the sheriff  
200 planned to employ only black deputies in the COPS program, which he

201 thought would be a regressive step for the community and the  
202 department. He stated that the department had a policy in 1980 of  
203 assigning black deputies to serve exclusively in predominantly  
204 black neighborhoods. Consequently, Victor's expression can be  
205 "fairly considered as relating to [a] matter of political, social,  
206 or other concern to the community[.]" *Connick*, 461 U.S. at 146.

207         Considering Victor's statement with respect to its context and  
208 form confirms that the speech dealt with a matter of public  
209 concern. The statement was made in the course of a meeting  
210 arranged by the sheriff to inform a group of black deputies about  
211 a new federally funded program to be administered by the sheriff's  
212 office to provide community oriented police service in a high crime  
213 area inhabited predominantly by black citizens. The meeting was  
214 attended by a representative of the press. The sheriff, after his  
215 initial remarks describing the program, invited the deputies to ask  
216 questions and make comments about the program. The sheriff  
217 recognized Victor for this purpose. Before making his remarks,  
218 Victor asked the sheriff for and was given assurance that he could  
219 speak freely without "any fear of any retribution of any kind."

220         Victor spoke as a citizen on a matter of public concern, not  
221 as an employee upon matters only of personal interest. See  
222 *Connick*, 461 U.S. at 147. At the time of his remarks, Victor was  
223 well pleased with his position as a courtroom bailiff; there was  
224 no evidence that he was a disgruntled employee or had any personal

225 reason to protest what he perceived to be the potential racially  
226 discriminatory effects of the sheriff's approach to the new  
227 program. Because Victor knew of the presence of the newspaper  
228 reporter, it may be reasonably inferred that he intended to inform  
229 the public of his criticism of the racial orientation of the  
230 deputies' meeting and the sheriff's plan to employ only black  
231 deputies in the COPS program. Thus, Victor's speech had the  
232 earmarks of a citizen speaking out publicly on a matter of general  
233 concern, not that of an employee engaged in a personal employment  
234 dispute. See *id.* at 148 & n.8. Consequently, the context of  
235 Victor's remarks, as well as their inherent characteristic as a  
236 protest against racial discrimination, demonstrate that he spoke on  
237 a matter of public interest and concern.

238 The sheriff disputes the accuracy of Victor's reference to the  
239 department's past policy of ethnical patrol assignments and  
240 deplores Victor's "Tarzan movie" simile as upsetting to him and his  
241 employees. However, "[t]he inappropriate or controversial character  
242 of a statement is irrelevant to the question whether it deals with  
243 a matter of public concern." *Rankin v. McPherson*, 483 U.S. 378,  
244 387 (1987); see also *id.* ("[D]ebate on public issues should be  
245 uninhibited, robust, and wide-open, and . . . may well include  
246 vehement, caustic, and sometimes unpleasantly sharp attacks on  
247 government and public officials.") (quoting *New York Times Co. v.*  
248 *Sullivan*, 376 U.S. 254, 270 (1964)); *Bond v. Floyd*, 385 U.S. 116,

249 136 (1966) ("Just as erroneous statements must be protected to give  
250 freedom of expression the breathing space it needs to survive, so  
251 statements criticizing public policy and the implementation of it  
252 must be similarly protected.") Also, of course, genuine disputes  
253 as to issues of material facts must be resolved at trial, not by  
254 summary judgment.

255 Because Victor's statement addressed a matter of public  
256 concern, *Pickering* next requires that we balance Victor's interest  
257 in making his statement against "the interest of the State, as an  
258 employer, in promoting the efficiency of the public services it  
259 performs through its employees." *Pickering*, 391 U.S. at 568. The  
260 employee's statement is not considered in a vacuum, however.  
261 *Rankin*, 483 U.S. at 388. "In performing the balancing, . . . the  
262 manner, time, and place of the employee's expression are relevant,  
263 as is the context in which the dispute arose." *Id.* (citing  
264 *Connick*, 461 U.S. at 152-153, and *Givhan*, 439 U.S. at 415 n.4).  
265 The Supreme Court has recognized as pertinent considerations  
266 "whether the statement impairs discipline by superiors or harmony  
267 among co-workers, has a detrimental impact on close working  
268 relationships for which personal loyalty and confidence are  
269 necessary, or impedes the performance of the speaker's duties or  
270 interferes with the regular operation of the enterprise." *Id.*

271 The state interest considerations focus on the effective  
272 functioning of the public employer's enterprise. "Interference

273 with work, personnel relationships, or the speaker's job  
274 performance can detract from the public employer's function;  
275 avoiding such interference can be a strong state interest." *Id.*  
276 In this respect, however, the sheriff fails to demonstrate, without  
277 dispute as to material facts, a state interest that outweighs  
278 Victor's First Amendment rights. Although Victor's statement was  
279 made at the workplace, there is a genuine dispute as to whether it  
280 interfered with the efficient functioning of the sheriff's office.

281 The summary judgment evidence contains the testimony of  
282 several of the deputies who attended the meeting. Deputy Steward  
283 testified in his deposition that he "had a heated conversation"  
284 with Victor following the meeting. But Steward said that he was  
285 "not upset to the intent that I was ready to fight him or hate  
286 him," and that, in fact, he liked Victor before and after the  
287 meeting. One deputy testified that the comments were only slightly  
288 disruptive, while another was reported to have been "upset" by  
289 them. One deputy testified that Victor "disrupted the meeting  
290 bad." Richard Tanous, the department systems administrator who  
291 made the main presentation at the meeting, testified, however, that  
292 he was able to fully and effectively perform his duties following  
293 Victor's remarks. He testified that any disruption was over before  
294 he made his presentation. Tanous described the effect of the  
295 comments on the meeting as "more frustration on the part of the  
296 administration and of the other employees who were there that were

297 having to listen to it, that they wanted to hear what [the COPS  
298 program] was going to be about and [Victor] was taking up valuable  
299 time with these questions and comments without knowing what was  
300 going to be said." Tanous also stated that Victor's remarks  
301 "absolutely [did] not" cause racial tension in the department after  
302 the meeting. When asked how long the "dissension" caused by  
303 Victor's statements lasted, the sheriff testified that "it lasted  
304 a couple of days at least." Viewing the summary judgment record in  
305 the light most favorable to Victor, we conclude that the evidence  
306 of record shows that Victor's remarks in response to the sheriff's  
307 invitation of comments caused no unanticipated delays or disruption  
308 or interference with the meeting or the functioning of the  
309 sheriff's office.

310 Moreover, concerns about maintaining harmony and eliminating  
311 disruption cannot be the sole measure of government interest when  
312 the employee's speech furthers other important state interests.  
313 For example, in *Wilson v. UT Health Center*, 973 F.2d 1263 (5th Cir.  
314 1992), the defendant argued that a police officer's interest in  
315 reporting sexual harassment within the department was outweighed by  
316 the police force's interest in eliminating dissension and providing  
317 efficient police protection. This court concluded, however, that if  
318 a jury determines that the police officer "reported sexual  
319 harassment in good faith," then the state's "interest in  
320 maintaining a police force that is free of sexual intimidation,

321 which [her] good faith reports would serve, outweighs any interest  
322 in departmental efficiency and harmony." *Id.* at 1270.

323 Similarly, a reasonable trier of fact could find that Victor's  
324 good faith comments would serve a very important state interest --  
325 the prevention or elimination of racial discrimination and its  
326 vestiges within state agencies, entities and departments. The  
327 defendant attempts to justify his actions by noting that "[a]  
328 charge of racism can most definitely affect morale, efficiency, and  
329 functions of any interracial work environment." The mere fact that  
330 racial issues can be divisive, however, does not excuse retaliation  
331 against an employee who in good faith raises perceived racially  
332 discriminatory practices in an attempt to promote the welfare of  
333 the governmental department. *Cf. id.* The record contains no  
334 concrete evidence, as opposed to surmise or suspicion, that Victor  
335 made any statement with knowing or reckless falsity or acted in bad  
336 faith with an intent to disrupt the meeting or the sheriff's  
337 operations for an improper reason.

338 The fact that Victor's remarks were made in response to the  
339 sheriff's express invitation to comment freely, frankly and without  
340 fear of repercussion, on the COPS program as explained by the  
341 sheriff, weighs heavily in favor of an inference that sincere,  
342 critical responses should not have been surprising or considered as  
343 an interference. As this court recognized in *Bickel v. Burkhart*,  
344 632 F.2d 1251, 1257 (5th Cir. 1980), when an employee speaks in

345 response to an invitation and on a matter pertinent to that  
346 request, the context factor weighs in his favor. *Cf. Warnock v.*  
347 *Pecos County*, 116 F.3d 776, 781 (5th Cir. 1997) ("When a public  
348 employer grants an employee the task of serving as ombudsman within  
349 a particular field, it may not fire that employee for accurate and  
350 thorough criticisms of the relevant governmental practices.").  
351 *Bickel* concerned the First Amendment claim of a firefighter who was  
352 discharged when he voiced concerns about the fire department and  
353 the state of its equipment at a departmental meeting. The *Bickel*  
354 court made the following observation:

355       The context in which the plaintiff spoke out is  
356       important. The record clearly indicates that after  
357       Paschal made his presentation on salaries, he opened the  
358       meeting to discussion. According to one fireman in  
359       attendance, "[i]t was just an open, frank discussion, 'If  
360       you have anything on your mind, let's get it out in the  
361       open and talk about it, anything.'" Similarly, Bickel  
362       testified that he thought Paschal was effectively asking  
363       for "input on what we thought about anything that had to  
364       do with the fire service."

365 *Bickel*, 632 F.2d at 1257. Here, the summary judgment record  
366 establishes that Sheriff McElveen invited officers to comment on  
367 the planning and implementation of the COPS program. Victor made  
368 his remarks in response to this invitation and did so only after



369 receiving assurances from the sheriff that he would not be  
370 retaliated against for his speech. In addition, the comments were  
371 germane to the sheriff's request for input on the planning and  
372 implementing of the COPS program. As in *Bickel*, the context of  
373 speech within a response to an invitation weighs in favor of  
374 protecting the invited speaker's right of expression.

375 IV

376 Because this matter is before us following a grant of summary  
377 judgment, we make no intimations regarding the correctness *vel non*  
378 of either party's factual assertions or the final outcome after a  
379 trial on the merits. See *Rankin v. Klevenhagen*, 5 F.3d 103, 108  
380 (5th Cir. 1993). For the reasons assigned, the summary judgment of  
381 the district court is REVERSED and the case is REMANDED for further  
382 proceedings.