UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 91-7341

DORIS EVANS, ELISE NANCE, DOROTHY ROBINSON,
JAMES H. LEE, ROOSEVELT HARRIS, JR., and FLORA LONGMIRE,

Plaintiffs-Appellants,

VERSUS

THE CITY OF INDIANOLA, MISSISSIPPI,

Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Mississippi at Greenville

(CA GC 89 192 B 0)

(December 16, 1992)

Before BROWN, GARWOOD, and DeMOSS, Circuit Judges.

DEMOSS, Circuit Judge:*

Plaintiffs Evans, Nance, Longmire, and Robinson, former radio dispatchers of the Indianola Police Department (IPD), and Plaintiffs Lee and Harris, former police officers of IPD, brought this action pursuant to 42 U.S.C. § 1983 against the City of Indianola (the City) for wrongful discharge. All plaintiffs,

---

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

except Harris, were terminated from their employment with the City in March 1989, which they contend was done in retaliation for their speech activities concerning the removal of the chief of police, Chief Scrivner, from office. Plaintiff Harris was demoted from assistant police chief and subsequently resigned in April 1989 after being notified that the City intended to terminate him. Harris contends that the City demoted and constructively discharged him as a result of his speech activities regarding the removal of the police chief from office. All the Plaintiffs claim that their termination was in violation of their first amendment rights to free speech. Plaintiffs are seeking reinstatement, back pay, protection from further retaliation, and damages for mental anguish and emotional distress, attorneys' fees, and costs.

The City contended that any speech activity played no role in plaintiffs' termination. Rather, the City contended that the plaintiffs were terminated for "rank insubordination." Following extensive discovery, the City filed two motions for summary judgment, one against the dispatchers and one against the officers, Lee and Harris. The City argued that neither group had actually engaged in any speech which led to their termination, and even if they had, their speech did not involve matters of public concern. In response, both groups of plaintiffs argued that summary judgment was not appropriate because they had engaged in speech which, as a matter of law, involved matters of public concern, and that their refusal to stop such protected speech activities upon demand by the City, led to their ultimate termination.

On November 18, 1991, the district court granted the City summary judgment holding that as a matter of law, plaintiffs' speech activities did not involve matters of public concern. The court found that each of the plaintiffs spoke predominately in their capacities as employees, rather than as citizens, and that their speech was motivated by their personal employment situations. On that basis, the court found that even though the plaintiffs or their legal representative may have spoken in a public forum, their speech concerned personal employment grievances. Plaintiffs appeal that judgment. After careful review, we affirm the district court's judgment.

I. FACTS

During the two years prior to the Plaintiffs' termination, the IPD experienced internal problems, which were well-publicized. As a result, all the Plaintiffs, except Harris, along with 17 other police officers, hired an attorney, Carver Randle, to represent them in seeking removal of Police Chief Scrivner. On March 6, 1989, Randle appeared before the Mayor and Board of Aldermen (the Board) arguing for Scrivner's removal due to problems with communication, mistrust, disciplinary matters and job security. Subsequently, a member of the Board made a motion to remove Scrivner, but no one seconded the motion.

On March 15, 1989, Mayor Tommy McWilliams called a meeting of all the members of the IPD. Plaintiffs Evans, Nance, Longmire, and Lee attended. The Mayor asked Lee two questions:

> 1. Will you support and work with the Chief of Police as designated by the Mayor and Board of Alderman?

> 2. Will you comply with the orders, regulations, and policies established by the Mayor and Board of Aldermen governing the Indianola Police Department?

Lee declined to answer either question. Evans, Nance, and Longmire left the meeting prior to being questioned by the Mayor. Later, the Mayor held a meeting with Plaintiff Robinson who refused to answer the first question. Then the Mayor met with Plaintiff Harris who refused to answer the two questions because he had previously made his statements in the local newspaper that he and Scrivner got along "just fine." Harris had stated in a newspaper, however, that in regards to sympathizing with the police officers' grievances, "[i]f I could, I would."

On March 16, 1989, a community meeting was held at which Plaintiffs' attorney Randle spoke, criticizing the Board for refusing to accept the Chief's resignation, which he had tendered in February, 1989, and also criticizing the way the police department handled its problems.

On March 20, 1989, a second community meeting was held at which Plaintiff Lee spoke and complained about the Board's refusal to accept Chief Scrivner's resignation, lack of job security and impaired job performance due to police officers "watching each other." The local newspaper quoted Lee as stating that he was demoted by Scrivner in 1988 for some "unreputable [sic] reason" and that "no promotion of officers" had occurred since Scrivner became Chief of Police. The newspaper, however, later reported this last statement as being erroneous.

Finally, on March 27, 1989, the Mayor and Board of Aldermen met in executive session. During the session, Plaintiff Harris

overheard them discussing him. He burst in and asked, "Are ya'll trying to get rid of me?" He subsequently left the room. As a result the Board then voted to remove Harris as Assistant Chief of Police and demoted him to corporal for "rank insubordination and violation of the Indianola Police Department Code of Conduct" due to eavesdropping on and interrupting a meeting of the Board and speaking in a "harsh manner" to the Board, all of which constituted conduct unbecoming a police officer. The Board also voted to terminate the other plaintiffs for "rank insubordination."

After his demotion, Harris failed to report for duty and on April 25, 1989, the Board voted to suspend Harris and to require him to show cause why he should not be terminated. On April 28, Harris submitted his resignation alleging that he had been constructively terminated.

II. DISCUSSION

It is well established that a public employee may not be discharged for exercising his or her right to free speech under the first amendment. See e.g., Thompson v. City of Starkville, Miss., 901 F.2d 456, 460 (5th Cir. 1990); Page v. Delaune, 837 F.2d 233, 237 (5th Cir. 1988); Price v. Brittain, 874 F.2d 252, 256 (5th Cir. 1989). The court in Thompson described this Circuit's three-part analysis when considering whether particular speech by a public employee is protected:

> In order to establish a constitutional violation [the plaintiff] must first prove that her speech involved a matter of public concern. Connick v. Myers, 461 U.S. 138, 147 [103 S.Ct. 1684, 1690, 75 L.Ed.2d 708] . . . (1983). Second, she must demonstrate that her interest in "commenting upon matters of public concern" is greater than the defendants' interest in "promoting the

> efficiency of the public services [they] perform." Pickering v. Board of Education, 391 U.S. 563, 568 [88 S.Ct. 1731, 1734-35, 20 L.Ed.2d 811] . . . (1968). Third, she must show that her speech motivated the defendants' decision to fire her. Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 287 [97 S.Ct. 568, 576, 50 L.Ed.2d 471] . . . (1977).

Id. at 460 citing, Frazier v. King, 873 F.2d 820, 825 (5th Cir.), cert. denied sub nom. Davoli v. Frazier, ___ U.S. ___, 110 S.Ct. 502, 107 L.Ed.2d 504 (1989).

In this case, we need only reach the first step of the above analysis, whether the plaintiffs' speech constitutes a matter of public concern. To decide this issue, we follow the dictates of the Supreme Court in Connick. 461 U.S. at 138, 103 S.Ct. 1684. Connick instructs us to determine whether the speech at issue in a case can "be fairly characterized as constituting speech on a matter of public concern" before further analyzing allegations of unconstitutional restrictions on speech. 461 U.S. at 146, 103 S.Ct. at 1689. For "speech on public issues" occupies the "'highest rung of the hierarchy [sic] of First Amendment values'" and is entitled to special protection." Id. t 145, 103 S.Ct. at 1689. However, if the "employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices without intrusive oversight by the judiciary in the name of the First Amendment." Id. t 146, 103 S.Ct. at 1690. The rationale behind the public concern requirement is to prevent public employees from relying on the Constitution for redress of personal grievances. Id. at 149, 103 S.Ct. at 1691. As guidance in determining whether speech addresses an issue of public

concern, Connick further instructs us to consider "the content, form, and context of a given statement, as revealed by the whole record." Id. at 147-148, 103 S.Ct. at 1690 (footnote omitted).

Whether speech addresses a matter of public concern is to be reviewed *de novo* by the appellate court. Dodds v. Childers, 933 F.2d 271, 273 (5th Cir. 1991). What constitutes "public concern" is imprecise and requires a case-by-case analysis. Thompson , 901 F.2d 456, 461. However, it is clear that "[t]he courts will not interfere with personnel decisions 'when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest.'" Page, 837 F.2d at 237.[1]

---

[1] This court in Page outlined several examples of speech that involved matters of public concern:

> . . . the Supreme Court has found legitimate public interest in the President's welfare policies and an attempt on the President's life (Rankin [v. McPherson,], 107 S.Ct. at 2897-98) and in the need of a school system for a tax increase (Pickering [v. Board of Education,] 391 U.S. at 571, 88 S.Ct. at 1736). This Court has held that public employees spoke as citizens on special police treatment for a wealthy subdivision (Thomas v. Harris County, 784 F.2d 648, 653 (5th Cir. 1986)); on a controversial, federally funded reading program (Wells v. Hico Independent School District, 736 F.2d 243, 249 (5th Cir. 1984(, cert. denied, 473 U.S. 901, 106 S.Ct. 11, 87 L.Ed.2d 672 (1985)); and on the power of County Commissioners to oversee a community action program (Gonzalez v. Benavides, 712 F.2d 142 (5th Cir. 1983). On the other hand, public employees were held to speak as employees, not citizens, concerning: the transfer policies and morale problems of a district attorney's office (Connick, 461 U.S. at 148-49, 103 S.Ct. at 1690-91); the personnel policies of university police (Terrell, 792 F.2d at 1362-63); an unfavorable employee evaluation (Day, 768 F.2d at 700-01); and isolated disputes among doctors and other professionals at a public hospital (Davis, 755 F.2d at 460-61).

A. Randle's, Lee's and Harris's Speeches

1. Content

The Attorney Randle's speech on March 6 called for the ouster of the Chief of Police and complained about "job security, dissention [sic] among employees, lack of support from the Chief, mistrust, and uneasiness among employees, lack of communication between supervisors and the Chief, and the fear of retaliation." Record Vol. 1. at p. 4. At the March 16 community meeting, he criticized the Board for not accepting Scrivner's resignation and that the police department mishandled its internal problems. All of these complaints concern the internal affairs of the police department. These matters are similar to the questions pertaining to "confidence," "trust," and "the level of office morale," which "do not fall under the rubric of matters of 'public concern.'" Connick, 103 S. Ct. at 1690.

Lee spoke at the second community meeting on March 20, 1989. Lee complained about the City's failure to accept Chief Scrivner's resignation, lack of job security, and impaired job performance because employees were "watching each other." Record Vol. 2 p. 486; Vol. 3 p. 580. In addition, Lee was quoted in a local newspaper article as saying that Chief Scrivner demoted him for some "unreputable reason" in 1988. Record Vol. 2, p. 510; Vol. 3, p.580. The newspaper reported that Lee's complaint that had no promotions of officers since Chief Scrivener took office, was

---

Page v. Delaune, 837 F.2d 233, 237-38 (5th Cir. 1988).

incorrect. Lee also refused to answer Mayor McWilliam's question on March 15, 1989.

Harris was not represented by Randle, so the relevant speech attributable to him is the remark he made when he interrupted the executive session. Harris was also quoted in a local newspaper saying he had to stay neutral because of his position as assistant police chief, but he was sympathetic with the grievances of his fellow employees.

2. Context and Form

Attorney Randle's and Lee's remarks at the Board meetings were made in public. Harris's speech to the newspaper was also public. But, "the publication of the speech at issue, appropriately viewed, is simply another factor to be weighed in analyzing whether [the] alleged speech addressed matters of public concern." Thompson, 901 F.2d at 466.

The district court properly focused on the motives behind and not on the inherent public interest of a speech "because almost anything that occurs within a public agency could be of concern to the public." Terrell v. University of Texas System Police, 792 F.2d 1360, 1362 (5th Cir. 1986). The critical issue is whether speeches were made "primarily as a citizens rather than as . . . employees." Dodds, 933 F.2d at 273. Therefore,"[a]ll speech arising from 'mixed motives'... is not automatically protected." Id.

The district court found that Randle represented the plaintiffs as employees, not as citizens. Randle presented a laundry list detailing various employee complaints concerning

department affairs. In such a case, "no particular statement touching upon a matter of potential public concern must be treated separately out of context and thereby given first amendment protection." Davis v. West Community Hospital, 755 F.2d 455, 462 (5th Cir. 1985). The allegations of police department misconduct certainly are of public concern. Coughlin v. Lee, 946 F.2d 1152, 1157 (5th Cir. 1991). However, the motive for Randle's voicing the various complaints was in his capacity as a representative of the plaintiffs and seventeen other police officers, not "as a citizen upon matters of public concern." Connick, 103 S. Ct. at 1690. These complaints were made on behalf of the Plaintiffs as employees. They did not hire Randle as part of their civic duty but in order to insure job security.

Lee's speech centered around personal concerns over job security, dissatisfaction with Chief Scrivner and a refusal to answer the Mayor's loyalty questions. The essence of Lee's remarks was that he did not like Chief Scrivner and wanted him fired. Lee's vague charges that police officers were "watching each other" did not rise to the level of accusing the Chief of illegal actions, wrong doing, or a breach of the public trust. Further, Lee stated in his deposition that his primary motivation was job security.

Harris's speech also reveals that he was motivated by his personal concerns about internal problems within the police department which affected his job security. Harris's statements are similar to the survey issued by the disgruntled employee in Connick, which "convey[ed] no information at all other than the fact that a single employee is upset with the status quo." 103 S.

Ct. at 1691. The plaintiffs themselves characterized their grievances as concerning "issues of job security, dissention [sic] among employees, lack of support from the Chief, distrust and uneasiness among employees, lack of communication between supervisors and the Chief, and fear of retaliation." Record Vol. 1, p. 4. The plaintiffs' statements do not have the same import as the fire fighter's in Moore v. City of Kilgore, Texas, 877 F.2d 364, 367 (5th Cir. 1989), who warned of inadequate manpower in combatting fires. Nor are they akin to the supervisor's statements in Gonzalez v. Benavides, 774 F.2d 1295, 1301 (5th Cir. 1985) that the County Commissioner's Court was violating federal regulations which could result in a loss of federal funds.

B. Mayor's Prohibition

Plaintiffs contend that the questions asked by Mayor Tommy McWilliams on March 15, 1989, constituted a prohibition which violated their First Amendment rights and any specific statements they might have made were matters of public concern. The City argues that even though this issue is probably not properly before the court, the prohibition was of future statements that were similar to the police officers' past statements. But, the Plaintiffs argue that even though the past statements related to internal matters, the future statements would have been related to misconduct and racial discrimination.

This issue is not properly before this court. The Plaintiffs' complaint cannot be construed to encompass this issue. The complaint alleges that the Plaintiffs' were fired in retaliation

for exercising their first amendment rights, not for their threatened exercise of those rights in the future.

Even if this issue is properly before the court, the Mayor's questions did not amount to a prohibition on future speech of public concern. Asking Plaintiffs to support the Chief of Police and to follow department regulations is not the emphatic prohibition that is found in other cases. In Moore, the Plaintiff received a written memorandum which stated: "There will be no more public announcements by you regarding your opinion of any policies or directives issued by this City." Id. at 368. In Gonzalez, the Plaintiff was ordered to publicly acknowledge the commissioners' power to evaluate him, which he claimed violated federal law. Id. at 1298. However, the Mayor's questions concerning support the Chief of Police and respect for department regulations would not seem to preclude the Plaintiffs from asserting misconduct or racial discrimination in the future.

AFFIRMED.