UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3027

LARRY SPEARS,

Plaintiff-Appellant,

versus

RALPH SMITH, ET AL.,

Defendants,

SALVATORE SAM CARUSO and
ROBERT CALLAHAN, SR.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
CA 90 3013 H

June 14, 1993

Before POLITZ, Chief Judge, GARWOOD and DAVIS, Circuit Judges.

POLITZ, Chief Judge:[*]

In this civil rights action, Larry Spears appeals an adverse summary judgment, based on qualified immunity grounds, with respect to defendants Salvatore Sam Caruso and Robert Callahan, Sr. We affirm.

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[*]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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

Spears worked for the City of Slidell, Louisiana as an unpaid traffic and safety consultant. In connection with his duties, the city provided Spears with an office containing a desk and two filing cabinets in its police department annex building. Spears typically locked the office upon leaving.

In June 1989 Spears came under suspicion of improperly using his position with the city to influence disposition of traffic citations. One evening, Slidell police officer Jay Strahan and detective Ralph Smith, allegedly with the assistance of officer Mike Freeman, entered Spears' office to investigate these allegations. Strahan and Smith found a number of documents which they believed to be "fixed" traffic citations, as well as others which they believed related to unlawful activity by Spears. These documents were copied and the originals were replaced where found.

Strahan and Smith forwarded copies of the documents to the Louisiana State Inspector General's (SIG) office. They also contacted Slidell city council member Callahan, informing him of the evidence they had found and raising the possibility of returning to Spears' office to obtain more information. Callahan relayed this information to mayor Caruso. On July 2, after consulting city attorney Elaine Guillot, Caruso, Callahan and Strahan made a second nocturnal visit to Spears' office, gaining access with a master key.

Callahan and Caruso found nothing suspicious in unlocked desk and filing cabinet drawers. Following telephonically received

advice from Guillot during the search, Caruso did not open a locked desk drawer. Callahan and Strahan attest that the search yielded additional documentary evidence of ticket-fixing in plain view on Spears' desk and in a wall-mounted cubbyhole, copies of which Smith transmitted to the SIG.[1] Affidavits by Callahan and Caruso attest that they searched Spears' office to assist in a criminal investigation by the SIG's office, and also that they did so as part of an investigation into alleged work-related misconduct.

Following a city civil service commission hearing focusing on the ticket-fixing charges, Spears was removed as a safety consultant. As a result of their testimony at that hearing, Smith and Freeman were indicted for perjury. Investigations by the SIG and St. Tammany Parish District Attorney's offices exonerated Spears of any criminal wrongdoing.

After learning of the two searches, Spears filed the instant action under 42 U.S.C. § 1983, alleging violations of his fourth and fourteenth amendment rights by Smith, Strahan, Freeman, and the City of Slidell. He later amended his pleadings to include identical claims against Caruso and Callahan. Smith, Strahan, and Freeman asserted their fifth amendment privilege against self-incrimination in response to deposition notices by Spears. Caruso and Callahan moved for summary judgment, claiming that their actions did not violate Spears' fourth amendment rights or, in the

[1] Spears insists that searchers removed papers from his desk drawers, rather than simply papers in plain view on the desk top.

alternative, that qualified immunity shielded them from suit. After a hearing, the court permitted Spears additional time in which to find and file evidence relating to the qualified immunity defense. None was forthcoming and the court granted summary judgment to Caruso and Callahan. At Spears' request, the trial court entered judgment for Caruso and Callahan pursuant to Fed.R.Civ.P. 54(b),[2] and he timely appealed.

Analysis

We review rulings on summary judgment motions *de novo*, guided by the same standards applied by the district courts.[3] Summary judgment is appropriate where the evidence "show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[4] In conducting our analysis, we view the evidence in the light most favorable to the nonmovant[5] and determine materiality by reference to governing substantive law.[6] No "genuine issue as to any material fact"

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[2] The district court administratively closed the action with respect to the remaining defendants, pending the resolution of the criminal prosecutions against Smith and Freeman.

[3] E.g., **King v. Chide**, 974 F.2d 653 (5th Cir. 1992).

[4] Fed.R.Civ.P. 56(c).

[5] E.g., **Lavespere v. Niagara Mach. & Tool Works, Inc.**, 910 F.2d 167 (5th Cir. 1990); **King**.

[6] **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242 (1986); **King**; **Fields v. City of South Houston, Tex.**, 922 F.2d 1183 (5th

exists and we perforce must affirm a grant of summary judgment if the evidence, so viewed, would not permit a rational fact finder to resolve material issues against the movant.[7]

Qualified immunity shields officials from liability for acts which do not "violate clearly established rights of which a reasonable person would have known,"[8] under the law extant at the relevant time.[9] In considering assertions of qualified immunity, however, we conduct this "objective legal reasonableness" analysis, only if the plaintiff has alleged violation of a "clearly established constitutional right."[10] Spears' claim that the search of his office by Callahan and Caruso violated the fourth amendment proscription on "unreasonable searches and seizures" fails to surmount this initial hurdle.

The fourth amendment affords protection against unreasonable

Cir. 1991).

[7] **Lavespere**; see **Anderson**, 477 U.S. at 251-52.

[8] **Harlow v. Fitzgerald**, 457 U.S. 800, 818 (1982); see also **Anderson v. Creighton**, 483 U.S. 635 (1987); **Mitchell v. Forsyth**, 472 U.S. 511 (1985); **King**.

[9] E.g., **Anderson**, 483 U.S. at 639; **Mitchell**, 472 U.S. at 530; **Harlow**, 457 U.S. at 818; **King** (citing **Pfannstiel v. City of Marion**, 918 F.2d 1178 (5th Cir. 1990)).

[10] **Siegert v. Gilley**, 111 S.Ct. 1789, 1793 (1991); **Quives v. Campbell**, 934 F.2d 668, 670 (5th Cir. 1991).

official intrusion into protected privacy interests.[11] In **O'Connor v. Ortega**,[12] the Supreme Court considered the application of that provision to workplace searches of government employees. That case involved a fourth amendment claim arising out of the search of a government employee's office by supervisors investigating alleged misfeasance.[13] Although no opinion in **O'Connor** commanded majority support, the justices unanimously recognized the employee's protected privacy interest in his desk and filing cabinet, because he had exclusive use of and stored personal items there.[14] Five justices further agreed that an intrusion by a public employer on such a protected privacy interest of a government employee for noninvestigatory, work-related purposes and for investigation of work-related misconduct does not violate the fourth amendment if reasonable in its inception and scope.[15] The plurality, however,

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[11] See, e.g., **United States v. Jacobsen**, 466 U.S. 109 (1984).

[12] 480 U.S. 709 (1987).

[13] Supervisors suspected the employee-physician of sexual harassment and misconduct related to his supervision of a residency training program.

[14] **Id.** at 718-19 (plurality opinion); **id.** at 730-31 (Scalia, J., concurring); **id.** at 732 (Blackmun, J., dissenting).

[15] **O'Connor**, 480 U.S. at 725-26 (plurality opinion); **id.** at 732 ("I would hold that government searches to retrieve work-related materials or to investigate violations of workplace rules -- searches of the sort that are regarded as reasonable and normal in the private-employer context -- do not violate the Fourth Amendment") (Scalia, J., concurring); see also **Shields v. Burge**, 874 F.2d 1201, 1203-04 (7th Cir. 1989) (plurality position in

carefully limited its holding to those two types of searches.[16]

The parties in the case at bar do not dispute that Spears had a protected privacy interest in the areas searched by Caruso and Callahan. Undisputed summary judgment evidence, however, reflects that Strahan and Smith approached Callahan with proof that Spears was using his position with the city to "fix" traffic tickets, and that Caruso and Callahan entered Spears' office to investigate those allegations. The summary judgment evidence further establishes that Callahan and Caruso restricted their search to Spears' desk top, filing cabinet, unlocked desk drawers, and wall-mounted cubbyholes. The record presents no issue of fact about whether Callahan and Caruso had, in the words of the **O'Connor** plurality, a reasonable suspicion that their search of Spears' office would uncover new evidence of ticket-fixing, or about the reasonableness of the scope of the search in view of those suspicions.

Spears argues that the record creates an issue of fact about the purpose of the July 2 search, precluding summary judgment. We

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O'Connor had support of five justices); **Schowengerdt v. General Dynamics Corp.**, 823 F.2d 1328, 1335 (9th Cir. 1987) (same). The plurality indicated that this reasonableness turns upon the existence of "reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose" and upon whether "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct]." **O'Connor**, 480 U.S. at 726 (quoting **New Jersey v. T.L.O.**, 469 U.S. 325, 342 (1985)) (plurality opinion).

[16] **O'Connor**, 480 U.S. at 723 (plurality opinion).

cannot agree. He points to an affidavit by Caruso as evidence that Caruso conducted the search solely as part of a criminal investigation.[17] Affidavit testimony reflects that Caruso searched Spears' office "to attempt to locate evidence of malfeasance being conducted by a city employee." Regardless of the parties' characterizations of the search, improper use of public office for ticket-fixing -- investigation of which undisputedly motivated the search -- constitutes both criminal wrongdoing and "work-related misconduct." The **O'Connor** Court did not purport to address investigative searches of this sort.[18] Further, the sparse pre-**O'Connor** authority on the subject[19] suggests that such searches do not violate the fourth amendment.[20] Against this backdrop, we are

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[17] In relevant part, that affidavit reads:

> On or about June 28, 1989, I received a phone call from Councilman Bob Callahan. He advised that Slidell Police Officers Jay Strahan and Ralph Smith told him of thier belief that public documents in Larry Spear's [sic] office . . . would aide [sic] the criminal investigation being conducted by the Inspector General's Office.

[18] Indeed, we note that the **O'Connor** Court reserved judgment on the standards governing investigatory searches directed at uncovering purely criminal misconduct.

[19] **O'Connor**, 480 U.S. at 720-21 (noting paucity of authority).

[20] E.g., **United States v. Collins**, 349 F.2d 863 (2d Cir. 1965) (because "[t]he agents were not investigating a crime unconnected with the performance of defendant's duties as a Customs employee," search of surface and interior of employee's desk to locate evidence of mail theft did not violate fourth amendment) (citing **United States v. Blok**, 188 F.2d 1019 (D.C. Cir. 1951)).

impelled to the conclusion that Spears has not alleged violation of a "clearly established" constitutional right.[21]

For the foregoing reasons, the judgment of the district court is AFFIRMED.

[21] Spears also claims that the district court improperly entered summary judgment against him before he could obtain discovery from Smith, Strahan, and Freeman. The record, however, does not indicate that Spears raised this contention in the district court and we therefore decline to consider it. E.g., **Campbell v. Sonat Offshore Drilling, Inc.**, 979 F.2d 1115 (5th Cir. 1992).