

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-2512
Summary Calendar

JIM NIX,

Plaintiff-Appellant,

VERSUS

CITY OF GALENA PARK, Et Al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas

(CA H 91 2266)

(January 31, 1994)

Before REYNALDO G. GARZA, DUHÉ and EMILIO M. GARZA, Circuit Judges.
PER CURIAM:*

Jimmy R. Nix ("Nix") appeals the district court's grant of summary judgment in favor of the appellees, the City of Galena Park, Chief of Police B.O. Clements ("Clements"), Mayor Alvin Baggett, and City Commissioners James E. Brooks, James G. Garland and Eugene T. Valcoviak. Finding that no genuine issue of material fact exists as to an essential element of Nix's 42 U.S.C. section

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

1983 claim, we AFFIRM the district court's grant of summary judgment in favor of the appellees.

I. FACTS

Appellant Nix brought this action against the appellees alleging that they deprived him of liberty and property interests in violation of 42 U.S.C. section 1983.

Nix joined the City of Galena Park Police Department in October 1969. In 1973, Nix, who had achieved the rank of captain, was appointed by Mayor Baggett to serve as Assistant Chief of Police, a position created that year by resolution of the Galena Park City Council. Nix served as Assistant Chief of Police until 1974, at which time he returned to his job as a captain with the police force.

In 1977, the City Council officially re-created the position of Assistant Chief of Police. Nix was again appointed to the job, and he served in that capacity until May of 1991. In July 1990, the Mayor appointed Clements as the new Chief of Police. Nix, who had been previously told by the Police Commissioner that he would receive the job, made it publicly known that he would not support the Mayor in any future campaigns.

On May 28, 1991, Nix received a letter from Clements stating that Nix was being placed on "indefinite suspension" for conducting escorts of two private freight carriers while on duty and in a city owned vehicle, in violation of Rule 3.04 of the City of Galena Park Police Department General Manual. At the time he received the letter, Nix "was told in unequivocal language that he should quit

the police department, abandoning any retirement benefits . . . or face criminal prosecution for theft charges." The letter containing Clements' accusations against Nix was released to at least one newspaper, which published the letter along with a news story about Nix's "indefinite suspension."

Nix appealed his suspension to the Civil Service Commission. Following a hearing, the Commission determined on June 27, 1991 that the allegations against Nix were true, but that the punishment of "indefinite suspension" was excessive and should have been limited to a suspension of fifteen days. Because fifteen days had already passed, the Commission ordered that Nix be immediately reinstated "to his former position with all the benefits and emoluments due to him."

The following morning, Nix reported to Chief Clements' office, with the expectation that he would resume work as the Assistant Chief of Police. At that time, Clements stated, "It's been recommended to me that you take vacation time. And that's the recommendation that I'm going with." When Nix asked Clements how much "vacation" he was to take, Clements replied, "[t]ake two months and come back and we'll see where we go from there."

Upon his return to work, Nix was advised that he would serve as a captain in the police force, and not as Assistant Chief of Police. Nix accepted the position and began work, but initiated this action against the appellees.

II. DISCUSSION

Nix alleges that the appellees deprived him of: (1) a

property interest (his position as Assistant Chief of Police); and (2) a liberty interest by "demoting" him to the rank of captain, thus "stigmatizing" him as unfit to serve as Assistant Chief of Police without due process of law and in violation of 42 U.S.C. section 1983.

We find that Nix has failed to raise a genuine issue of material fact as to: (1) whether he possessed a cognizable property interest in continued employment as Assistant Chief of Police; and (2) whether the circumstances of his reassignment denied him a protected liberty interest.

A. Standard of review

We review the district court's grant of summary judgment by "reviewing the record under the same standards which guided the district court." A grant of summary judgment is proper when no genuine issue of material fact exists that would necessitate a trial. In determining whether the grant was proper all fact questions are viewed in the light most favorable to the nonmovant. Questions of law, however, are decided de novo.

Alexandria Associates, LTD., v. Mitchell Co., 2 F.3d 598, 600 (5th Cir. 1993) (quoting Walker v. Sears, Roebuck & Co., 853 F.2d 355, 358 (5th Cir. 1988)). The moving party has the burden of showing that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Williams v. Adams, 836 F.2d 958, 960 (5th Cir.), reh. denied, en banc, 844 F.2d 788 (5th Cir. 1988). Once the movant carries this burden, the burden shifts to the nonmovant to show that summary judgment should not be granted. Celotex Corp. v. Catrett, 477 U.S. 317, 324-25 (1986). A party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of pleading,

but must set forth specific facts showing the existence of a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256-57 (1986).

B. 42 U.S.C. § 1983

"A municipality is liable under § 1983 for a deprivation of rights protected by the Constitution or federal laws that is inflicted pursuant to official policy." Palmer v. City of San Antonio, Tex., 810 F.2d 514, 515 (5th Cir. 1987). Nix bears the burden of showing the existence of a property or liberty interest in continued employment with the city. See Price v. City of Junction, Tex., 711 F.2d 582, 589 (5th Cir. 1983). "A protected property interest in employment exists only if the employee has 'a legitimate claim or entitlement' to continued employment." Irby v. Sullivan, 737 F.2d 1418, 1421 (5th Cir. 1984) (quoting Board of Regents v. Roth, 408 U.S. 564, 577 (1972)). Furthermore, property interests are not created by the Constitution. "Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law" Roth, 408 U.S. at 577.

(1) Property interest

In Moore v. Otero, 557 F.2d 435 (5th Cir. 1977), this court considered a case with facts quite similar to those at bar. Plaintiff Moore was a sixteen-year veteran with the City of Tampa Police Force. In 1970, the Tampa Chief of Police, with the

approval of the Mayor, promoted Moore from "patrolman" to "corporal," a position reserved for individuals demonstrating "above average performance." Id. at 436. Moore served as a corporal until 1974, at which time he was reassigned to duty as a patrolman after other officers reported that Moore had failed to assist an off-duty patrolman in an investigation. Id. Thereafter, Moore brought suit against the City of Tampa and police officials pursuant to 42 U.S.C. section 1983, alleging that his reassignment from corporal to patrolman constituted a deprivation of constitutionally protected property and liberty interests without due process of law. In rejecting Moore's section 1983 claim and affirming the district court's grant of summary judgment in favor of the defendants, we stated:

Moore's claim to due process under the fourteenth amendment merits consideration only if the department's action deprived him of "liberty" or "property." We conclude that Moore had no property interest in his position as corporal, nor did the circumstances of his transfer deny a liberty interest.

Moore plainly had no property interest in his position as corporal. We look to state law to measure Moore's property claim. The Tampa Code could not be clearer that a corporal serves in that special capacity only at the pleasure of the chief of police and the mayor. . . . We view Moore's position as corporal as no different from that held by a probationary employee: no reasonable expectation of continuous employment as a corporal exists that could give rise to a property interest.

Id. at 437.

In this case, as in Moore, the provision of the Texas Local Government Code under which Nix was named Assistant Chief of Police clearly states that, "A person appointed under this section serves

at the pleasure of the department head." Texas Local Government Code § 143.014(G). Based on this provision and Nix's failure to submit summary judgment evidence from some other source that would lead Nix to expect that he would continue in that position indefinitely, we find that no reasonable expectation of continuous employment as Assistant Chief of Police existed that could give rise to a constitutionally cognizable property interest.

Thus, we find that Nix failed to raise a genuine issue of material fact that he was deprived of a property interest within the ambit of the due process clause of the fourteenth amendment.

(2) Liberty interest

Moore also held that Moore's reassignment from corporal to patrolman did not deny him any liberty interest qualifying for due process protection.

To establish a liberty interest sufficient to implicate the fourteenth amendment safeguards, the individual must be not only stigmatized but also stigmatized in connection with a denial of a right or status previously recognized under state law.

* * *

When an employee retains his position even after being defamed by a public official, the only claim of stigma he has derives from the injury to his reputation, an interest that Paul reveals does not rise to the level of a liberty interest. The internal transfer of an employee, unless it constitutes such a change of status as to be regarded as essentially as a loss of employment, does not provide the additional loss of a tangible interest necessary to give rise to a liberty interest meriting protection under the due process clause of the fourteenth amendment.

Moore, at 437-38 (citing Paul v. Davis, 424 U.S. 693, 710 (1976)).

Utilizing the "stigma-plus" test outlined in Paul v. Davis, we

find that Clement's public allegations regarding Nix's on-duty use of a public vehicle to escort freight carriers, together with Nix's reassignment from Assistant Chief of Police to captain, did not deprive Nix of a liberty interest protected by the due process clause of the fourteenth amendment. Nix does not dispute that, following his removal as Assistant Chief of Police, he returned to his former position as a captain with the City of Galena Park Police Force; a position he still held as late as June of 1992. Nix admits that as a captain with the City of Galena Park Police Force, he received the same or substantially similar salary and fringe benefits as he received during his employment as Assistant Chief of Police. Certainly, this internal transfer does not constitute such a change of status as to be regarded as essentially a loss of employment. Just as in Moore, Nix's retention of employment following the alleged "deprivation" negates his claim that he was denied a liberty interest. The only claim of stigma Nix possesses derives from the injury to his reputation, an interest that does not rise to the level of a liberty interest.

Thus, we find that Nix failed to raise a genuine issue of material fact that he was deprived of a liberty interest protected by the due process clause of the fourteenth amendment.¹

III. CONCLUSION

Finding that Nix failed to raise a genuine issue of material

¹. Having found that Nix failed to raise a genuine issue of material fact with regard to the first essential element of his section 1983 claim, it is unnecessary to decide whether the actions by the appellees were undertaken pursuant to official policy.

fact as to an essential element of his section 1983 claim, we AFFIRM the district court's grant of summary judgment in favor of the appellees.