UNITED STATES COURT OF APPEAL
FIFTH CIRCUIT

No. 93-5163

JOHN IDOUX,

Plaintiff-Appellant,

versus

LAMAR UNIVERSITY SYSTEM, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Eastern District of Texas
(1:92CV440 & 1:93CV00441)

(September 28, 1994)

Before WIENER, EMILIO M. GARZA, and BENAVIDES, Circuit Judges.

PER CURIAM:*

John Idoux appeals the district court's entry of summary judgment on his § 1983 claims and all but one of his state constitutional claims against Lamar University and a number of its officials. We affirm in part and reverse and remand in part.

I

John Idoux was appointed to serve as Interim President of

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* Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Lamar University-Beaumont Campus ("Lamar") while Lamar searched for a new president. Idoux was a tenured chemistry professor who had been elevated the year before to the position of Executive Vice President for Academic and Student Affairs. While serving as Interim President, Idoux found himself embroiled in a series of disputes with Lamar's chancellor, George McLaughlin.[1] The most significant of these controversies involved payments to Lamar's former women's basketball coach, Al Barbre. Barbre was under investigation by the NCAA, and Idoux opposed McLaughlin's attempts to make certain settlement payments to Barbre. Ultimately, McLaughlin bypassed Idoux and instructed a vice president to make the payments.

Approximately three months after the Barbre payments were made, Idoux was called to a meeting with McLaughlin, Amelie Cobb, C.W. Conn and Ted Moor. Cobb, Conn and Moor are members of the Lamar University System Board of Regents ("Board"). McLaughlin demanded Idoux's resignation and, when Idoux asked him for his reasons, refused to state any.[2] The next day, Idoux submitted a letter of resignation, which the Board accepted. Although Idoux later asked that his letter be returned, McLaughlin refused the request. At the time of this appeal, Idoux has returned to his

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[1] As this case comes to us on summary judgment, we review the facts in the record (and present them here) in the light most favorable to Idoux, the nonmovant below. *See Duckett v. City of Cedar Park*, 950 F.2d 272, 276 (5th Cir. 1992).

[2] Idoux now believes that his "dismissal" was in retaliation for his outspoken opposition to certain of McLaughlin's actions as Chancellor.

teaching position in the Chemistry Department.

After Idoux's resignation became effective, he filed suit in state court under 42. U.S.C. § 1983 and the Texas Constitution against Lamar, McLaughlin, the Board, the members of the Board in their official capacities, and Cobb, Conn and Moor in their individual capacities. In his complaint, he alleged that the actions of McLaughlin and the Board constituted a denial of his federal and state constitutional rights. The suit was subsequently removed to district court where the court dismissed on absolute immunity grounds all the defendants except for Cobb, Conn and Moor in their individual capacities. *See Idoux v. Lamar Univ. Sys.*, 828 F. Supp. 1252, 1256 (E.D. Tex. 1993).

As the only remaining defendants in the case, Cobb, Conn and Moor moved for summary judgment on the basis of (1) their purported qualified immunity from suit on the federal constitutional claims, and (2) Idoux's failure to allege a proper cause of action for damages under the Texas Constitution. The court granted their motion with respect to Idoux's federal constitutional claims, and it granted summary judgment on all but one of Idoux's state constitutional claims, concluding that only the free speech claim stated an independent cause of action under the Texas Constitution.[3] Idoux now appeals the court's entry of summary judgment. We affirm in part, reverse in part and remand.

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[3] The court remanded Idoux's free speech claim under article I, section 8 of the Texas Constitution to state court.

II

Idoux argues that the district court erroneously granted Cobb, Conn and Moor's motion for summary judgment. In an appeal from summary judgment, "we review the record *de novo*, examining the evidence in the light most favorable to the nonmovant . . . ." *Duckett v. City of Cedar Park*, 950 F.2d 272, 276 (5th Cir. 1992) (citations omitted). "Summary judgement is proper if the movant demonstrates that there is an absence of genuine issues of material fact." *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986)). "The movant accomplishes this by informing the court of the basis for its motion, and by identifying portions of the record which reveal there are no genuine material fact issues." *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986)). The burden then shifts to the nonmovant to "direct the court's attention to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial))that is, the nonmovant must come forward with evidence establishing each of the challenged elements of its case upon which it will bear the burden of proof at trial." *Id.* "`[O]nly evidence))not argument, not facts in the complaint))will satisfy' the burden," and "[u]nsworn pleadings, memoranda or the like are not, of course, competent summary judgment evidence." *Johnston v. City of Houston*, 14 F.3d 1056, 1060 (5th Cir. 1994) (quoting *Solo Serv. Corp. v. Westowne Ass'n*, 929 F.2d 160, 164 (5th Cir. 1991),

and *Larry v. White*, 929 F.2d 206, 211 n.12 (5th Cir. 1991), *cert. denied*, 113 S. Ct. 1946, 123 L. Ed. 2d 651 (1993)).

A

Idoux argues that the district erroneously granted summary judgment on his federal constitutional claims because the summary judgment evidence reveals genuine issues of material fact as to the merits of his constitutional claims, that is whether Cobb, Conn and Moor violated his constitutional rights. This argument entirely ignores, however, the crucial issue of qualified immunity. Even if an official's conduct "actually violates a plaintiff's constitutional rights," he is entitled to qualified immunity unless it is further demonstrated that his conduct was unreasonable under the applicable standard. *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1183 (5th Cir. 1990); *see Davis v. Scherer*, 468 U.S. 183, 190, 104 S. Ct. 3012, 3017, 82 L. Ed. 2d 139 (1984).[4]

As state officials performing discretionary functions, Cobb, Conn and Moor are immune from liability under § 1983 "unless is its shown by specific allegations that [they] violated clearly established constitutional law." *Salas v. Carpenter*, 980 F.2d 299, 305 (5th Cir. 1992). Since the Supreme Court's decision in *Siegert v. Gilley*, 500 U.S. 226, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991), we have followed a two-step approach to appeals from grants of

[4] Idoux's factual allegations are relevant, but only as they relate to the qualified immunity issue. *Cf. Brawner v. City of Richardson*, 855 F.2d 187, 191 (5th Cir. 1988) ("Although the question whether a public official is entitled to immunity is different from whether the underlying claim has merit, it will often be necessary for a reviewing court to consider the plaintiff's factual allegations in order to resolve the immunity issue.").

summary judgment based on qualified immunity.[5] We first determine "whether the plaintiff has asserted a violation of a constitutional right at all." *Johnston*, 14 F.3d at 1060 (quoting *Siegert*, 500 U.S. at 232, 111 S. Ct. at 1793).[6]

If the plaintiff meets this threshold requirement, we then decide whether the defendants are entitled to qualified immunity, an inquiry that "generally turns on the 'objective reasonableness of the action' assessed in light of the legal rules that were 'clearly established' at the time it was taken." *Texas Faculty Ass'n v. University of Texas*, 946 F.2d 379, 389 (5th Cir. 1991) (quoting *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S. Ct. 3034, 3038, 97 L. Ed. 2d 523 (1987)). "The law is deemed to be clearly established if the contours of a right asserted are sufficiently clear that a reasonable official would understand that what he is doing violates that right." *White v. Taylor*, 959 F.2d 539, 544 (5th Cir. 1992). Accordingly, "[i]f reasonable public officials

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[5] *Siegert* involved an appeal from a *denial* of summary judgment on qualified immunity grounds, *see Siegert*, 500 U.S. at 229, 111 S. Ct. at 1792, but we have since held that the same framework applies to appeals from *grants* of summary judgment based on qualified immunity. *See Quives v. Campbell*, 934 F.2d 668, 670 (5th Cir. 1991).

[6] Under our "heightened pleading requirement," Idoux's complaint must "state factual detail and particularity including why the defendant-official cannot maintain the immunity defense." *Colle v. Brazos County*, 981 F.2d 237, 246 (5th Cir. 1993) (citing *Elliott v. Perez*, 751 F.2d 1472, 1473 (5th Cir. 1985)). The district court applied this standard over Idoux's objection that the Supreme Court overruled the "heightened pleading standard" in *Leatherman v. Tarrant County Narcotics Unit*, ___ U.S. ___, 113 S. Ct. 1160, 122 L. Ed. 2d 517 (1993). We do not reach the question here, however, because Idoux's three claims either meet or fail the first prong of our qualified immunity analysis regardless of whether we apply the heightened pleading requirement.

could differ on the lawfulness of the defendant's actions, the defendant is entitled to qualified immunity." *Id.*

1

Idoux's first amendment claim satisfies the threshold requirement of *Siegert*. Idoux alleges in his complaint that the defendants demanded his resignation "in retaliation for" his constitutionally protected speech. "It is well established that a public employee may not be discharged for exercising his right to free speech under the first amendment." *Thompson v. City of Starkville*, 901 F.2d 456, 460 (5th Cir. 1990).

As Idoux's first amendment claim meets the first step of the *Siegert* analysis, we "must determine whether qualified immunity is appropriate given the evidence submitted and the contours of the rights allegedly violated." *Johnston*, 14 F.3d at 1061. For a public employee to establish a violation of her First Amendment right to free speech, she 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).

Frazier v. King, 873 F.2d 820, 825 (5th Cir.), *cert. denied*, 493 U.S. 977, 110 S. Ct. 502, 107 L. Ed. 2d 504 (1989).

Even assuming Idoux's speech implicated a matter of public concern and his interest outweighed Lamar's, the summary judgment record contains no evidence that Idoux's speech motivated Cobb, Conn and Moor's conduct. In fact, there is no evidence that Cobb, Conn and Moor even knew why McLaughlin demanded that Idoux resign, let alone that they shared McLaughlin's motives.[7] They were present in the room when Idoux was effectively fired, but no reasons were discussed at that meeting. Even the facts alleged in Idoux's complaint describe a dialogue wholly between Idoux and McLaughlin. On appeal, Idoux argues that his summary judgment evidence "alleges" that Cobb, Conn and Moor's conduct was motivated by Idoux's exercise of his first amendment rights.[8] However, to satisfy his burden, Idoux must point to evidence))not argument))that establishes a genuine issue of material fact. *See Solo Serve Corp. v. Westowne Ass'n*, 929 F.2d 160, 164 (5th Cir. 1991). Idoux further argues that the timing of his forced resignation, coming "directly on the coat tails of Idoux's last and most confrontational discussion [with Dr. McLaughlin]," raises an inference that he lost his job in retaliation for his speech. The

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[7] In support of their motion for summary judgment, all three defendants submitted affidavits attesting to the fact that they understood Idoux's forced resignation to have stemmed from his poor performance as Interim President.

[8] Specifically, Idoux points to the following language in an affidavit he submitted opposing summary judgment: "Approximately two weeks later, . . . after I had had a chance to collect my thought and make a more reflecting decision while not under the heat of the moment, I realized that what McLaughlin, Moor, Cobb and Conn had done to me was wrong, malicious, and in retaliation for not being a 'team player' in their eyes." Record on Appeal, vol. 4, at 637-38. Idoux's subjective belief, formed two weeks after the relevant events, does not create a genuine issue of fact material to the issue of qualified immunity.

timing of his resignation may indeed raise a reasonable inference regarding McLaughlin's motivation, but it does not link Cobb, Conn and Moor to these events in such a way as to raise a reasonable inference that Idoux's speech motivated their conduct.[9]

"In the absence of a genuine issue as to a material fact, we review the summary judgment record to ascertain the objective reasonableness of the defendant's actions." *Johnston*, 14 F.3d at 1060. The summary judgment evidence, viewed in the light most favorable to Idoux, shows only that Cobb, Conn and Moor were present when McLaughlin demanded Idoux's resignation without an explanation of his reasons. Evidence of their presence at the meeting, without more, does not raise a genuine issue of material fact as to the qualified immunity claims of Cobb, Conn and Moor.

2

Idoux's due process claim alleging a deprivation of property without due process of law fails the threshold requirement of *Siegert*. Idoux alleges in his complaint that his forced resignation "constituted the denial of [his] property . . . interest as protected by the Fourteenth Amendment . . . ." To succeed on his due process claim, Idoux must demonstrate that he

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[9] Idoux also argues that Cobb, Conn and Moor's motivation is necessarily a fact question for the jury. While motivation is a question of fact, *see Wheeler v. Mental Health & Mental Retardation Auth.*, 752 F.2d 1063, 1069 (5th Cir. 1985), it does not preclude summary judgment unless there is a genuine issue of material fact. *See Duckett v. City of Cedar Park*, 950 F.2d 272, 276 (5th Cir. 1992). In *Click v. Copeland*, 970 F.2d 106, 113 (5th Cir. 1992), we held that "[w]hether an employee's protected conduct was a substantial or motivating factor in an employer's decision to take action against the employee is a question of fact, *ordinarily* rendering summary disposition inappropriate." (emphasis added). *Click* does not hold that the question of motivation *necessarily* renders summary judgment inappropriate.

had a clearly-established property interest in his employment. *See Moulton v. City of Beaumont*, 991 F.2d 227, 230 (5th Cir. 1993). Idoux does not allege, however, whether or how he acquired a constitutionally protected property interest in his position as Interim President. *Cf. Brown v. Texas A&M Univ.*, 804 F.2d 327, 334 (5th Cir. 1986) ("[Plaintiff's] bare recitation that he could only be fired for cause is insufficient to establish a property interest.").

In his summary judgment pleadings and on appeal, Idoux offers two bases for his property interest in his position as Interim President, neither of which have merit. First, Idoux argues that the "Lamar University Systems policy manual" created an objective expectation of future employment. Idoux does not say what provisions of that manual accomplish this, however, and he did not submit the manual into evidence. Second, Idoux argues that McLaughlin's representation to him that he would serve as Interim President until the appointment of a new President also created an objective expectation of future employment. Such a promise falls far short of the implied contract necessary to rebut the presumption in Texas that employment "for an indefinite term may be terminated at will and without cause." *Sabine Pilot Serv., Inc. v. Hauck*, 687 S.W.2d 733, 734 (Tex. 1985). To overcome Cobb, Conn and Moor's qualified immunity defense, Idoux "must show that the illegality of the challenged conduct was clearly established in factual circumstances closely analogous to those of this case."

Richardson v. Oldham, 12 F.3d 1373, 1381 (5th Cir. 1994). Idoux has cited no authority supporting a constitutionally protected property interest based on a representation that an interim position would last as long as necessary.[10]

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Finally, Idoux's liberty interest claim also fails the threshold requirement of *Siegert* because it does not state a constitutional violation. To establish the deprivation of a liberty interest, "an employee must demonstrate that his governmental employer has brought false charges against him that `might seriously damage his standing and associations in his community,' or that impose a `stigma or other disability' that forecloses `freedom to take advantage of other employment opportunities.'" *Wells v. Hico Indep. Sch. Dist.*, 736 F.2d 243, 256 (5th Cir. 1984) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 573, 92 S. Ct. 2701, 2707, 33 L. Ed. 2d 548 (1972)). The employee must also show that the charges were made public. *Ortwein v. Mackey*, 511 F.2d 696, 699 (5th Cir. 1975).

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[10] Idoux filed two letters with this Court pursuant to Fed. R. App. P. 28 that cite cases he argues modify the at-will employment doctrine in Texas. All but one of the cases were issued in 1994, two years after the events in question, and are therefore irrelevant to the qualified immunity question. *See Spann v. Rainey*, 987 F.2d 1110, 1114 (5th Cir. 1993) (whether defendant's actions are objectively reasonable depends on law clearly established at the time of the alleged violation) (emphasis added). The one case decided before the events in this case, *Morgan v. Jack Brown Cleaners, Inc.*, 764 S.W.2d 825 (Tex. App.--Austin, 1989, writ denied), is inapposite because it involved an oral contract not to fire an employee for a reason that ultimately precipitated her termination. *Id*. at 826.

In his complaint, Idoux alleges that his discharge "constituted the denial of [his] property and liberty interest as protected by the Fourteenth Amendment."[11] Simply demanding Idoux's resignation, without the levying of false and damaging charges, does not amount to a deprivation of a liberty interest protected by the Fourteenth Amendment. *See Roth*, 408 U.S. at 573, 92 S. Ct. at 2707 (holding that refusal to renew a teacher's contract, without a charge that would damage the teacher's standing and associations in the community, did not implicate his liberty interests). Consequently, Idoux's complaint fails to state a constitutional violation.

The basis for Idoux's claim on appeal that Cobb, Conn and Moor deprived him of his liberty is unclear. In the district court, Idoux argued that Cobb, Conn and Moor's publication of his resignation letter, which stated that he was resigning for personal reasons, deprived him of his liberty. If simply firing Idoux would not have deprived him of liberty without due process, *see Roth*, 408 U.S. at 573, 92 S. Ct. at 2707, then we fail to see how a resignation letter could be more damaging to Idoux's reputation. In his brief on appeal, Idoux refers to Cobb, Conn and Moor's "intentionally constructed false statements" that formed "one basis" for Idoux's termination. Assuming these statements to be Cobb, Conn and Moor's explanations for Idoux's forced resignation,

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[11] Idoux also alleged that because of the actions of the Board, he suffered public humiliation and loss of stature in both the professional and social communities.

contained in their affidavits in support of summary judgment, we merely note that these statements were made in connection with their defense of Idoux's lawsuit. In *Ortwein*, we explained that an employee must show that the charges were made public "in any official or intentional manner, *other than in connection with the defense of (related legal) action*." 511 F.2d at 699 (emphasis added) (quoting *Kaprelian v. Texas Woman's Univ.*, 509 F.2d 133, 139 (5th Cir. 1975).

B

Finally, Idoux appeals the district court's dismissal of all but one of his state constitutional claims. The district court held that "[n]either the Texas Constitution, state statute, nor case law provide plaintiffs with a vehicle to pursue the rights guaranteed by [article I, sections 3, 19, and 29 of the Texas Constitution]." *Idoux*, 828 F. Supp. at 1261 (citing *Bagg v. University of Texas Medical Branch*, 726 S.W.2d 582, 584 n.1 (Tex. App.--Houston [14th Dist.] 1987, writ ref'd n.r.e.). The court nevertheless concluded that Idoux's article I, section 8 free speech claim stated a valid cause of action under the authority of *Davenport v. Garcia*, 834 S.W.2d 4 (Tex. 1992) and *Jones v. Memorial Hosp. Sys.*, 746 S.W.2d 891 (Tex. App.--Houston [1st Dist.] 1988, no writ). *See Idoux*, 828, F. Supp. at 1261.

Texas courts of appeals have split over the question whether the Texas Bill of Rights provides a private cause of action for

damages.[12] Numerous commentators and various other jurisdictions have endorsed the concept of a compensatory cause of action for infringement of state constitutional rights, *see Albertson's, Inc. v. Ortiz*, 856 S.W.2d 836, 839 n.6 (Tex. App.--Austin 1993, writ denied) (citing authorities), but the Texas Supreme Court has yet to resolve the question.[13]

In light of the unsettled nature of this question of state constitutional law, we deem it appropriate to remand all of Idoux's state constitutional claims to the 60th Judicial District Court of Jefferson County, Texas (where Idoux originally filed them). In *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 351, 108 S. Ct. 614, 619-20, 98 L. Ed. 2d 720 (1988), the Supreme Court held that district courts may, within their discretion, remand pendent claims

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[12] *Contrast Bagg v. University of Texas Medical Branch*, 726 S.W.2d 582, 584 n.1 (Tex. App.--Houston [14th Dist.] 1987, writ ref'd n.r.e.) ("We . . . can find no Texas statute or case that provides a citizen the kind of redress afforded by 42 U.S.C. § 1983 or by *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). There is no state 'constitutional tort.'"); *Mitchell v. Amarillo Hosp. Dist.*, 855 S.W.2d 857, 873 (Tex. App.--Amarillo 1993, writ denied) (following *Bagg*); *Tutt v. City of Abilene*, 877 S.W.2d 86, 88 (Tex. App.--Eastland 1994, writ requested) (same); *Albertson's, Inc. v. Ortiz*, 856 S.W.2d 836, 841 (Tex. App.--Austin 1993, writ denied) ("[W]e decline appellees' invitation to infer from the Texas Constitution an action for damages to redress a private person's violation of another's freedom of speech."), with *City of Beaumont v. Bouillon*, 873 S.W.2d 425, 441 (Tex. App.--Beaumont 1993, writ granted) ("[T]he constitution does provide for an independent grounding to assert a constitutional cause of action where a governmental entity interferes with an individual's constitutionally protected right, especially those rights enumerated in the Bill of Rights."); *Jones v. Memorial Hospital System*, 746 S.W.2d 891, 893-94 (Tex. App.--Houston [1st Dist.] 1988, no writ) (Article I, section 8 provides a cause of action against public entities."). We note, however, that *Jones* involved a constitutional tort claim for reinstatement and not damages. *See Albertson's, Inc.*, 856 S.W.2d at 839.

[13] The one appellate case squarely to hold that the Texas Constitution implies a compensatory cause of action for damages, *City of Beaumont v. Bouillon*, 873 S.W.2d 425 (Tex. App.--Beaumont 1993, writ granted), is currently pending before the Texas Supreme Court.

to state court when the federal courts have dropped out of the lawsuit. The Court instructed district courts to handle state law claims "in the way that will best accommodate the values of economy, convenience, fairness, and comity." *Id.* We conclude that the state claims should be remanded to state court in the interest of comity. Whether the Texas Constitution implies a compensatory cause of action is a question of enormous importance for the citizens and government of Texas. Consequently, we deem it inappropriate for resolution by a federal court at this time, especially when the state constitutional claims are the only ones remaining in the case.

III

For the foregoing reasons, we **AFFIRM** the district court's summary judgment on Idoux's § 1983 claims, **REVERSE** its summary judgment on Idoux's state constitutional claims and **REMAND** to the district court with instructions to remand those claims to state court.