

UNITED STATES COURT OF APPEALS  
For the Fifth Circuit

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No. 93-5377  
Summary Calendar

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RICHARD L. SIMMONS,

Plaintiff-Appellee,

VERSUS

MARSHAL D. HERKLOTZ, ET AL.,

Defendants-Appellants.

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

(91-CV-565)

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(July 25, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

PER CURIAM:\*

BACKGROUND

On September 30, 1991, Richard L. Simmons, an employee of the Texas Department of Criminal Justice, Institutional Division, (TDCJ-ID), commenced this action against Marshall D. Herklotz, then the Northern Regional Director of the TDCJ-ID, and James A.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Collins, then Director of the TDCJ-ID. In his amended complaint, Simmons alleged that he had been employed with the TDCJ-ID since 1975; that he had been assigned to the position of staff assistant for security operations for the Northern Regional Office since November 1985; and that he had worked under the direct supervision of Herklotz since October 1986. Simmons asserted that he retained this position until October 1, 1990, when he was transferred to the Beto II Unit as a disciplinary captain pursuant to an "alleged" training program for captains initiated by Herklotz.

Simmons further alleged that Herklotz ordered him transferred after Simmons filed a grievance concerning his failure to obtain a promotion to an assistant warden position. According to Simmons, Collins did not give him the promotion even though he was the number one candidate for the position after completing a screening process which included an oral interview before a committee. Simmons alleged that Assistant Regional Director Darwin Sanders warned him in March of 1989 not to use the grievance process or his career with the TDCJ-ID would be over. Sanders allegedly repeated this warning in July 1990, just before Simmons filed his grievance concerning the denial of the promotion. Simmons asserted that he understood Sanders's warnings to mean that an employee would be "blackballed" for filing grievances over the operations of the regional office. Simmons alleged that Herklotz knew the "blackballing" procedure was used as a means of retaliating against employees who filed grievances and that Herklotz encouraged the use of this system.

Simmons claimed that Herklotz ordered him transferred in retaliation for filing the grievances. He alleged the retaliatory transfer, ordered by Herklotz, violated his First Amendment right to freedom of speech and his state law right to file grievances as a public employee. He also asserted that Collins reviewed his grievance and Sanders's statements concerning the blackballing procedure, but refused to take any action. Simmons requested \$500,000 in compensatory damages, \$500,000 in punitive damages, and attorney's fees.

Defendants moved for summary judgment on the ground of qualified immunity. They argued that Simmons failed to establish a violation of his First Amendment rights because his grievances did not amount to speech on matters of public concern. Rather, defendants asserted, Simmons' grievances concerned only the promotion to the assistant warden position that he believed he should have been awarded. In response, Simmons submitted excerpts of his own deposition and Herklotz's deposition. He argued, among other things, that the evidence established a genuine issue of material fact as to whether his speech was protected by the First Amendment. The district court, *sua sponte*, ordered Simmons to submit all evidence concerning the substance of the speech in which he engaged and which, he alleged, prompted defendants to retaliate against him, so the court could determine whether the speech was protected by the First Amendment. In response, Simmons submitted

copies of the grievances, his own affidavit, and excerpts from the depositions of Herklotz, Sanders, and Hasel Ray Terry, another TDCJ-ID employee.

On October 1, 1993, defendants filed a notice of appeal from the court's failure to rule on their motion, citing Helton v. Clements, 787 F.2d 1016 (5th Cir. 1986). The district court subsequently denied the motion on October 7, 1993. The court determined that the content of Simmons' speech--the two grievances--involved only the denial of his promotion, which could not be construed as a matter of public concern. Likewise, both the context and form of the speech, the court concluded, indicated that Simmons was speaking in his capacity as an employee expressing dissatisfaction with a personnel decision involving only him.

The court noted, however, that some statements in Simmons' pleadings, letter brief, and affidavit submitted in opposition to defendants' motion characterized his grievances as concerning the "promotional system" and the "grievance procedure." The court observed that similar references to the "promotion system" and "grievance procedure" appeared in the deposition excerpts of Terry, Sanders, and Herklotz. The court stated that the procedure by which civil servants are promoted would constitute a matter of public concern and that if Simmons' grievances were aimed at the system as a whole, then his speech would pertain to a matter of public concern. The court concluded that because there was some evidence, albeit slight, that Simmons' speech concerned promotion procedure, a matter protected under the First Amendment, summary

judgment was inappropriate. Defendants filed a timely notice of appeal from this order.

#### OPINION

As a preliminary matter, Simmons argues that defendants did not properly invoke the Court's jurisdiction by filing a notice of appeal from the district court's refusal to rule on the motion for summary judgment. Simmons does not maintain that defendants' subsequent appeal from the denial of the motion should be dismissed, however. Defendants contend that the notice of appeal was proper under Helton. Moreover, defendants argue, the Court need not resolve the issue because the district court subsequently ruled on the motion, rendering moot their appeal from the court's refusal to rule. Defendants correctly point out that their appeal from the denial of the motion is authorized by Mitchell v. Forsyth, 472 U.S. 511, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). Thus, this Court need not determine whether defendants' initial appeal was proper under Helton because the district court denied the motion and Mitchell permits an interlocutory appeal of an order denying a claim of qualified immunity to the extent it turns on an issue of law. 472 U.S. at 530.

This Court reviews the denial of summary judgment on the basis of qualified immunity de novo, examining the evidence in the light most favorable to the non-moving party. Salas v. Carpenter, 980 F.2d 299, 304 (5th Cir. 1992). Summary judgment is proper if the moving party establishes that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of

law. Campbell v. Sonat Offshore Drilling, Inc., 979 F.2d 1115, 1118-19 (5th Cir. 1992).

In examining a claim of qualified immunity, the first step is to ascertain whether the plaintiff has alleged the violation of a clearly established constitutional right. Siegert v. Gilley, 500 U.S. 226, 111 S. Ct. 1789, 114 L. Ed. 2d 277 (1991). This Court uses "currently applicable constitutional standards to make this assessment." Rankin v. Klevenhagen, 5 F.3d 103, 106 (5th Cir. 1993). The second step is to "decide whether the defendant's conduct was objectively reasonable." Spann v. Rainey, 987 F.2d 1110, 1114 (5th Cir. 1993). Reasonableness is assessed in light of the legal rules clearly established at the time of the incident. Id.

Defendants argue that the district court erred by denying their motion for summary judgment because the speech which allegedly caused the retaliatory transfer did not address a matter of public concern. Defendants maintain that the district court erred in relying on Simmons' post-hoc characterizations of his grievances as relating to the promotional system and grievance system rather than the actual grievances. Finally, defendants contend that even if Simmons' grievances could be construed as touching on matters of public concern, his claim must fail because he was speaking as an employee rather than as a citizen.

Whether speech is protected by the First Amendment is a question of law to be determined by the Court. Rankin v. McPherson, 483 U.S. 378, 386 n.9, 107 S. Ct. 2891, 97 L. Ed. 2d.

315 (1987); Dodds v. Childers, 933 F.2d 271, 273 (5th Cir. 1991). The First Amendment protects a public employee's speech only if it addresses a matter of "public concern." Connick v. Myers, 461 U.S. 138, 147, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). Whether speech involves a matter of "public concern" is "determined by the content, form, and context of a given statement, as revealed by the whole record." Connick, 461 U.S. at 147-48. "If the speech does not address a matter of public concern, a court will not scrutinize the reasons motivating a discharge that was allegedly in retaliation for that speech." Dodds, 933 F.2d at 273. This Court reviews de novo the question whether the speech at issue involves a matter of public concern. Id.

#### A. Content

This Court will first examine the content of Simmons' speech to determine whether it involved a matter of public concern. In doing so, the Court must assess Simmons' "primary motivation" for filing his grievances. Dorsett v. Board of Trustees, 940 F.2d 121, 124 (5th Cir. 1991). "This focus on the hat worn by the employee when speaking rather than upon the `importance' of the issue reflects the reality that at some level of generality almost all speech of state employees is of public concern." Gillum v. City of Kerrville, 3 F.3d 117, 121 (5th Cir. 1993), cert. denied, 114 S. Ct. 881 (1994). If Simmons' primary purpose was to speak out as a citizen on a matter of public importance, then he is entitled to protection from adverse employment actions based on that speech. Id. If, on the other hand, he was simply expressing his

dissatisfaction as an employee on a matter of personal interest, "a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." See Connick, 461 U.S. at 147.

The content of Simmons' grievances, as the district court correctly observed, relates only to his failure to receive a promotion for which he had applied. The informal grievance, a letter to Collins dated June 6, 1990, begins: "I would like to address concerns I have encountered in regards to the promotional process. These concerns have evolved from the following series of events which relate to my specific situation." (emphasis added). Simmons then stated that he had applied for a promotion to assistant warden. Following his screening board interview on February 6, 1990, he was advised that his performance was "excellent" and that he was the number one candidate. Then, on February 21, 1990, he met with a selection board for another promotion. Later that day, Herklotz informed him that someone else had gotten that promotion because Simmons was the number one candidate for assistant warden from the Northern Region and would soon be promoted. Simmons wrote that on May 17, 1990, he was eliminated from the promotion board process, even though he was ranked number one in the Northern Region. Simmons concluded his letter by stating: "These concerns have created an obvious pattern which appears to have unofficially eliminated all promotional possibilities for my future in this agency. I respectfully request

an explanation which may clarify these issues." Id. (emphasis added).

Simmons' formal grievance to Herklotz, dated July 12, 1990, also listed the chronology leading up to the denial of the promotion and requested the following relief:

1. A full explanation as to why, after qualifying through the screening process, I was not allowed to compete for the position of assistant warden by meeting the selection board.
2. That pursuant to the terms of the Employees [sic] Grievance Procedure and Vernon's Texas Civil Statutes, Article 6252-17A, I be provided with copies of all written documentation subject to the above statute, pertaining to the screening board for assistant warden for the Northern Region which was held on February 6, 1990.
3. That I be offered, with the option to refuse, a position comparable in pay group and responsibility to that of the assistant warden position which I was denied the opportunity to compete for.
4. That I be awarded back pay at assistant wardens [sic] compensation from June 1, 1990, which is the date I would have been entitled to such compensation had I successfully competed for the position in question.

Simmons' affidavit describes his grievances as complaints about the "promotional system" and the "promotional policy" of the TDCJ-ID. In his deposition, however, Simmons testified that he filed the informal grievance to get some information as to why he was "cut from these boards." Likewise, with respect to the formal grievance, Simmons testified that he wanted to know why he was cut off the promotion list. Simmons testified that he received a response from Herklotz indicating that he had been cut off because his time had run out. Simmons testified that he filed another grievance after that "over the promotional process and the

grievance process." In that grievance, Simmons stated, he outlined his complaints with the promotion process and the grievance process. He received the same response from Herklotz to that grievance. Simmons further testified that on September 21, 1990, Ray Terry, Assistant Regional Director, informed him that he was being transferred "because they would like to start a career development training program for captains, and it was felt that there's a bad atmosphere in this office now, and I wouldn't--we wouldn't all work together as team players." The transfer involved a move of three miles and no pay cut.

The foregoing evidence demonstrates that Simmons' grievances related to his concerns about his employment status and his prospects for promotion only. The record indicates that his primary motivation in filing the grievances was to complain about being denied the promotion to assistant warden. Accordingly, the speech does not address a matter of public concern and cannot support a cause of action for retaliatory transfer under the First Amendment. See Ayoub v. Texas A & M Univ., 927 F.2d 834, 837 (5th Cir.), cert. denied, 112 S. Ct. 72 (1991).

As the district court noted, though, Simmons does make references to grievances about the "promotional policy" and the "promotion system" in his affidavit. Similarly, Terry and Sanders, respond to questions in their depositions which refer to the promotional system and which ask whether an applicant's use of the grievance procedure would have any impact on the applicant's chances for promotion. Likewise, Heklotz's deposition refers to

complaints about the "promotional system" in the following exchange:

Q. Can you recall, in your capacity as a Regional Director, anyone grieving the promotional system or process within TDC other than Richard Simmons?

A. I can't recall any specific grievance regarding the promotional procedure. I think that there has been some grievances regarding--and I'm trying to think--I think there has been some specific grievances about people not being promoted, not actually the procedure.

Based on this evidence, the district court concluded that Simmons' expression addressed the promotion procedure or policy, a matter protected by the First Amendment, and denied the motion for summary judgment. We hold this conclusion is erroneous for the following reasons.

First, as this Court has observed, "[r]etrospective embellishment cannot transform personal grievances into matters of public concern." Dodds, 933 F.2d at 274; see Ayoub, 927 F.2d at 837-38. Here, the district court relied on Simmons' subsequent characterizations of the grievances rather than the actual grievances to conclude that they touched on a matter of public concern. The plain wording of the grievances indicates that they addressed an issue of concern only to Simmons. Second, insofar as Simmons' complaints could be construed to concern the overall promotion policy, they did so only as that policy had been applied to him. Thus, it is apparent that his primary motivation in complaining about the system was his concern about his own advancement. See Dorsett, 940 F.2d at 124; Ayoub, 927 F.2d at 837-38. Simmons was not speaking as a citizen on a matter of concern

to the public as a whole, but rather as an employee about a personnel decision. See Connick, 461 U.S. at 147-48.

Finally, the district court's reliance on Thompson v. City of Starkville, 901 F.2d 456 (5th Cir. 1990), is misplaced. The content of the grievance in Thompson involved the allegedly uneven application of a police department's promotion policy and requested that promotions granted to others in violation of the policy be rescinded. Thus, the grievance involved more than just the application of the promotion policy to the plaintiff. Nevertheless, the court indicated that the written grievance focused "largely on matters of personal interest" to Thompson. Id. at 462. Thompson also alleged, however, that he made oral complaints about improper promotions, and aided others in filing grievances pertaining to numerous instances of police misconduct. Id. These complaints, the court concluded, "address far more than one employee's dissatisfaction with the status quo or his own lot." Id. at 462-63. Simmons' grievances, in contrast, expressed only his dissatisfaction with being denied a promotion and his subsequent transfer to a different position.

#### B. Context and Form

Both the context and form of Simmons' expressions indicate that the speech does not address a matter of public concern. See Dorsett, 940 F.2d at 125. The speech took the form of two internal written grievances concerning the denial of a promotion. Simmons did not complain about being denied the promotions to anyone outside the TDCJ-ID. Moreover, the context in which the grievances

arose reveals that the grievances were related only to the decision to deny Simmons the promotion to the assistant warden position and his dissatisfaction with that decision, not an overall concern with how the promotion or grievance procedures operated. Therefore, these factors support the conclusion that Simmons' speech did not involve a matter of public concern. Because Simmons has failed to establish a constitutional violation, this Court need not address the second step of the Siegert inquiry: whether defendants' actions were reasonable in light of clearly established law.

The order of the trial court denying defendants' motion for summary judgment is reversed; and judgment is hereby rendered in favor of defendants.