UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 93-5434
Summary Calendar

VERMILION PARISH BUS DRIVERS AND OPERATORS ASSOCIATION AND JEFFREY J. FAULK, SR.,

Plaintiffs-Appellants,

VERSUS

VERMILION PARISH SCHOOL BOARD, DANIEL R. DARTEZ, ANTHONY J. FONTANA, JR., KIBBIE P. PILLETTE, HAMPTON J. PRIMEAUX, CECIL J. HERBERT, CARROLL E. LeBLANC, HERMAN J. SUIRE, and DUFFY G. MARCEAUX, JR.,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Louisiana
(92 CV 922)

(April 28, 1993)

Before REYNALDO G. GARZA, DUHÉ, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM*:

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

This is a 42 U.S.C. § 1983 claim arising out of plaintiff Faulk's employment as a bus driver by the Vermilion Parish School Board. Plaintiffs-appellants, the Vermilion Parish Bus Drivers & Operators Association and its President, Jeffrey J. Faulk, Sr. ("plaintiffs"), brought this action against the appellees, Vermilion Parish School Board, its superintendent, Daniel R. Dartez and its respective individual members, (Anthony J. Fontana, Jr., Kibbie P. Pillette, Hampton J. Primeaux, Cecil J. Herbert, Carroll E. LeBlanc, Herman J. Suire, Duffy G. Marceaux, Jr.). Also joined in this suit is the Vermilion Parish Assistant District Attorney and General Counsel for the School Board, Calvin Woodruff. Plaintiffs claim that Dartez, the School Board Members and Woodruff have violated their Constitutional rights by virtue of certain actions allegedly taken by the School Board concerning the employment and discipline of Faulk and the compensation of certain "substitute" bus drivers. Appellants appeal the summary judgment granted in favor of the defendants-appellees dismissing all of their claims. We AFFIRM.

I.

In this 1983 action, plaintiffs contend that the defendants violated their Constitutional rights by virtue of certain actions taken by the School Board concerning the employment and compensation of school bus drivers. Of concern to us on appeal are appellant Faulk's claims that he was denied due process prior to his two suspensions without pay, and that he was retaliated against for exercising his right to free speech. As detailed

below, plaintiff Faulk was involved in two incidents, one involving a bus accident and the other concerned the alleged slapping of a student that resulted in the School Board disciplining Faulk with suspensions.

Faulk claims that prior to this time he had not experienced any problems with the School Board or any of its members, and his problems began when he threatened to speak out regarding the School Board's alleged violation of the law, concerning employment of "substitute" bus drivers beyond a 90-day period.[1]

Faulk argues that the basic violations of his procedural Due Process rights occurred subsequent to the two occurrences detailed below. These principal actions resulted in two suspensions of Faulk by the Board members, which he claims were instituted without complying with the requirements of Louisiana's tenure laws, La. Rev Stat. 17:492-93.

Incident Number 1 involved an accident between Faulk's bus

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[1] State law empowers the Board to appoint "substitute" drivers with a mandatory condition provided by LSA-R.S. 17:500(C)(c):

> At any time a substitute bus driver has been driving a route for more than 90 consecutive days, the school board shall review the circumstances of the regular operator to be certain that the continued use of a substitute operator is warranted and appropriate.

Appellants allege that the School Board have knowingly violated that state law by unlawfully continuing "substitute" drivers long after 90 days to the detriment of the Associations' membership. Moreover, it was the threat of disclosing this allegation that forms the basis of Faulk's claim that he was retaliated for exercising his free speech.

The substitute drivers are not party to this action.

and a farm truck on May 1, 1991. The Plaintiff was involved in an accident while operating his bus. According to the School Board, Faulk violated board policy and state law by failing to promptly report that accident to either the police or the School Board. Instead, Faulk left the scene of the accident and completed his route. After a hearing before the Board on July 30, 1991, Faulk was found guilty of willful neglect of duty and suspended without pay for five (5) days.

Incident Number 3 involved a complaint by a parent that Faulk had slapped a student on his school bus. Faulk was suspended by the School Board for ten (10) days effective April 27, 1992.

Plaintiff has alleged other instances where the board, Dartez, and Woodruff have sought to punish him for threatening to speak out about the substitute bus driver policy. Faulk does not claim that these incidents standing alone rise to a Constitutional violation of his civil rights, however, he claims that they represent a pattern of the School Board Members' retaliation for his speech.

Incident Number 2 involved a modification of plaintiff's bus route. Faulk alleges that the School board violated state school policy when they required Faulk to alter his route by dropping off children on the way out of a dead end street, instead of on the way into the dead end street.

Incident Number 4 involves the School Board policy concerning the interplay between extra compensation earned by

drivers for extracurricular activities and drivers' "personal leave" as granted in the bus drivers' contract, Article 10.2(a). Plaintiff claims bus drivers should not take "sick days," if in fact they are not sick, as the practice harms the drivers and the bus drivers' association.

Further, plaintiff alleges that Dartez, the School Board Members, and Woodruff decided to retaliate against him for his statements to the public that the practice of the School Board of keeping certain drivers in the position of "substitute" was against the law. Plaintiff also alleges that his right to freedom of speech, as protected by the First Amendment, was abridged by Dartez, the School Board Members and Woodruff pursuant to the board's adverse actions toward him.

II.

Dismissal of Due Process Complaint

Faulk argues that he has a Constitutionally protected property interest in his right to unfettered continuance of his employment and receipt of his salary. He states that his Constitutionally protected property interest arises from La. Rev. Stat. 17:492, which grants tenure to certain bus drivers. Faulk has driven a school bus in Vermilion Parish since 1967 and therefore, has been tenured for approximately 23 years. La. Rev. Stat. 17:492 states in pertinent part:

> Each school bus operator shall serve a probationary term of three (3) years reckoned from the dated of his first employment in the parish in which the operator is serving his probation. During the probationary term the parish school board may dismiss or discharge any operator upon the written recommendation of the parish

> superintendent of schools accompanied by valid reasons therefor.
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> Any school bus driver found unsatisfactory by the parish school board at the expiration of the probationary term shall be notified in writing by the school board that he has been discharged or dismissed; in the absence of such notification such probationary school bus operator shall automatically become a regular and permanent operator in the employ of the school board of the parish in which he has successfully served his probationary term.
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> . . .
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> In order to acquire tenure under the provisions hereof, each school bus operator shall personally operate and drive the school bus he is employed to operate; no one shall acquire tenure in the operation of more than one school bus.

Appellant further states that his Constitutionally protected property interest includes being allowed to perform his duties without interruption or suspension, absent being found guilty by substantial evidence, after a hearing by the board and after receiving proper notice from the superintendent all in accordance with the state law governing removal of tenured bus drivers, La. Rev. Stat. 17:493. La. Rev. Stat. 17:493 states in part:

> a. A permanent school bus operator shall not be removed from his position except upon written and signed charges of willful neglect of duty, or incompetence, or immorality, or drunkenness while on duty, or physical disability to perform his duties, or failure to keep his transfer equipment in a safe, comfortable, and practical operating condition or of being a member or contributing to any group, organization, movement, or corporation that is prohibited by law or injunction from operating in the State, and then only if found guilty after a hearing by the school board of the parish or city in which the school bus operator is employee. . . .

b. All hearings hereunder shall be private or public, at the option of the operator affected thereby. . . . The operator affected shall have the right to appear before the board with witnesses in his behalf and with counsel of his selection, all of whom shall be heard by the board at said hearing. For the purpose of conducting hearings hereunder, the board shall have the power to issue subpoenas to compel the attendance of all witnesses on behalf of the operator. Nothing herein shall impair the right of appeal to a court of competent jurisdiction.

c. If a permanent school bus driver is found guilty by a school board, after due and legal hearing has provided herein, of charges of willful neglect of duty, . . . and ordered removed from office, or <u>disciplined by the board</u>, the superintendent with approval of the board shall furnish to the school bus operator a written statement of recommendation of removal or discipline, which shall include but not be limited to the exact reason, offense or instance upon which the recommendation is based. **Such operator may, not more than one (1) year from the date of said finding, petition a court of competent jurisdiction for a full hearing to review the action of the school board, and the court shall have jurisdiction to affirm or reverse the action of the school board in the matter.** If the finding of the school board is reversed by the court and the operator is ordered reinstated and restored to duty, the operator shall be entitled to full pay for any loss of time or salary he may have sustained by reason of the action of said school board. (emphasis added).

Appellant alleges that his Due Process right arising from his interest in continued employment was violated. Appellant's first complaint is that the district court committed egregious error in incorrectly dismissing his Due Process claims because he was denied a pre-deprivation due process hearing. Appellant's position is that the state statute affords him a more elaborate

pre-deprivation hearing that the minimum "notice and opportunity to be heard" standards dictated by the United States Constitution. He looks to this court to enforce the Louisiana statutory pre-deprivation procedures. For the following reasons, we affirm the district court on this point.

The Fourteenth Amendment requires only that a party "be given notice and an opportunity to be heard." Franceski v. Plaquemines Parish School Board, 772 F.2d 197, 199 (5th Cir. 1985). The United States Supreme Court has described the standard in determining what constitutes "due process" for the more serious action of actually firing an employee as follows:

> [The] pre-termination [hearing] though necessary, need not be elaborate. We have pointed out that "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. [citations omitted.] In general, "something less" than a full evidentiary hearing is sufficient prior to adverse administrative action. [citations omitted.]
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> . . .
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> [The] pre-termination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions - essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action. [citations omitted.]
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> The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why a proposed action should not be taken is a fundamental due process requirement. [citations omitted.] The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. [citations omitted.] To require more than this prior to termination would intrude to an unwanted extent on the government's

> interest in quickly removing an unsatisfactory employee.

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 545-46 (1985). This circuit has specifically held that due process requires only that the public employee be provided notice and an opportunity to be heard prior to his discharge. Wilson v. UT Healthcare, 973 F.2d 1263, 1270 (5th Cir. 1992), cert. denied, 113 S. Ct. 1644 (1993). In Browning v City of Odessa, Texas, 990 F.2d 842, 844 (5th Cir 1993), this court found that a short meeting lasting less than thirty minutes wherein the employee simply explained his side of the story was sufficient for due process purposes. "The due process clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions." Bishop v. Wood, 426 U.S. 341, 350 (1976).

In the instant case, Faulk was afforded more than adequate Constitutional Due Process prior to his five day suspension. By letter dated May 27, 1991, Faulk was advised that the School Board intended to conduct an investigation into his failure to promptly report his bus accident. Faulk was also fully advised of the charges and provided with the date and time of a hearing to be conducted on the charges against him. Faulk was represented by counsel through this process, and this counsel met with the school superintendent to more fully discuss the charges to be addressed in the upcoming hearing. That evidentiary hearing was ultimately held on July 30, 1991.

Faulk was not suspended until after a full evidentiary hearing had been held. He was represented by counsel and had

ample notice of the hearing and full opportunity to cross-examine his accusers. Faulk was allowed to and in fact did call witnesses on his own behalf. This evidentiary hearing more than satisfied the Constitutional Due Process requirements.

Faulk was made plainly aware of the complaint against him. He was afforded full opportunity to present his side of the issue. Only after a full evidentiary hearing that went above and beyond constitutional requirements was he suspended for five days. The protections afforded Faulk were more than adequate for such minor sanctions.

Similarly, Faulk was afforded far more protection than required prior to his ten day suspension in 1992. That suspension arose from a parent's complaint that Faulk had slapped a student on his school bus. The School Board investigated that charge and ultimately decided to suspend Faulk for a period of ten days. On January 27, 1992, Faulk was given written notice of the complaint made against him. Once again, Faulk was represented by legal counsel throughout this process. Faulk's attorney made a written response to the charges on January 29, 1992. Faulk was therefore given notice and an opportunity to respond. Additionally, the School Board conducted a full investigative hearing into the incident. At that hearing, Faulk was again represented by counsel. He had full opportunity to cross-examine his accusers and to present evidence on his own behalf. The committee ultimately recommended to the School Board that Faulk be suspended for ten days without pay, and the Board

followed that recommendation.

Since it is clear that the appellant received both notice and an opportunity to respond to the charges against him before any deprivation or interruption in his right to continued employment occurred, we affirm the district court's judgment on this alleged point of error. It appears that Faulk is complaining about the result reached in those hearings, and for that La. Rev. Stat. 17:493(c) provides an adequate remedy of review through the state court system. Because we find that the pre-deprivation due process was sufficient, we need not address the value of any post-deprivation remedies in light of the Parratt/Hudson doctrine.[2]

Dismissal of First Amendment Claim:
Public Concern or Private Matter?

Appellants next contend that their First Amendment right to free speech was abridged because the defendants conduct discussed above was in retaliation of Faulk's speaking out against some questionable practices. More specifically, appellants contest the district court's finding that the speech in question did not involve matters of public concern.

The threshold legal question for a determination of a

[2] The Parratt/Hudson Doctrine provides that post-deprivation remedies are all the process that are due in certain instances "simply because they are the only remedies the state could be expected to provide." Zinermon v. Burch, 494 U.S. 113, 128 (1990). The underlying principle is that any proposed pre-deprivation safeguards would be of limited value in preventing the kind of deprivation at issue in the specific case. Id. at 129. Because the value of any pre-deprivation safeguard would be "negligible in preventing the kind of deprivation at issue," post-deprivation remedies are sufficient as a matter of law. Id.

violation of a plaintiff's right to freedom of speech is whether the employee's speech dealt with matters of truly public concern opposed to matters of purely personal interests or inter-office disputes. Connick v. Myers, 461 U.S. 138, 146 (1983). Faulk claims that the public at large would have had an interest in knowing that the Vermilion Parish School Board was allegedly keeping certain bus drivers in the position of "substitutes" in contravention of the law. In Connick, the Supreme Court rejected this argument and the Fifth Circuit as well has stated:

> Because almost anything that occurs within a public agency could be of concern to the public, we do not focus on the inherent interest or importance of the matters discussed by the employee. Rather, our task is to decide whether the speech at issue in a particular case was made primarily in the plaintiff's role as a citizen or primarily in the role as an employee.

Caine v. Hardy, 943 F.2d 1406, 1416 (5th Cir. 1991) (en banc), cert. denied, 112 S.Ct. 1474 (1992).

Appellant clearly states that his remarks were made in the context of an employee of the Vermilion Parish School Board and as a representative of the Vermilion Parish Bus Drivers Association. As previously stated, the substitute drivers are not members of the Association.

A determination of "public concern" is a question of law to be resolved by the court. Connick, 461 U.S. at 148. This Court finds that Faulk's statements concerning the substitute drivers do not rise to the level of "public concern," as the speech in question was primarily concerned with Faulk's representation of the Vermilion Parish Bus Drivers' Association. Although, it may

be inferred that the alleged retaliation by the School Board was directed at Faulk, as the Association's president, the statement about the substitutes was not sufficient to be deemed a matter of public concern. "Such a constitutionalization of primarily intra-office disputes would invite undesirable judicial interference into mundane government operations, however, with hardly even a marginal effect on the vigorous debate of public issues secured by the First Amendment." Caine, 943 F.2d at 1416.

Therefore, we find that appellants' First Amendment freedom of speech rights were not violated by Dartez, the School Board Members, or Calvin Woodruff, as his statements were not of sufficient public concern to warrant constitutional protection.

Dismissal of Calvin Woodruff

Appellants finally assert that the district court committed error in dismissing Calvin Woodruff as a defendant. Appellants were allowed to amend their complaint to name Calvin Woodruff, attorney for the Vermilion Parish School Board and also an assistant district attorney for Vermilion Parish, as defendant. Plaintiffs' claim was based on a series of allegations, loosely based on the theory that private parties may be held liable under section 1983 if "they willfully participate in joint action with state agents."

The district judge found that although the appellants made a number of allegations, they provided no documentation, affidavits, or deposition testimony to support the claims that

defendant Woodruff willfully conspired with the School Board to violate plaintiffs' rights. We agree.

In opposing a motion for summary judgment, "an adverse party may not rest upon the mere allegations or denials of his pleading, but by his response by affidavits or as otherwise provided in [Fed. R. Civ. P. 56], must set forth specific facts showing there is a genuine issue for trial." Fed. R. Civ. P. 56(e). "On a motion for summary judgment, the opponent bears the burden of establishing that there are genuine issues of material fact, and may not wait until trial or appeal to develop claims or defenses to the summary judgment motion." C. F. Dahlberg & Co., Inc. v. Chevron, USA, Inc., 836 F.2d 915, 920 (5th Cir. 1988). The appellants have failed to meet the burden of coming forward with "opposing affidavits or other competent evidence setting forth specific facts to show that there is a genuine issue of material fact for trial. Mere allegations are insufficient." United States v. An Article of Drug Consisting of 4,680 Pales, 725 F.2d 976, 985 (5th Cir. 1984).

Moreover, since we find no deprivation of any constitutional right to have occurred, Woodruff could not be guilty of willfully conspiring to violate plaintiffs' rights.

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

AFFIRMED.