UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-7731
Summary Calendar

CLAY WEST,

Plaintiff-Appellant,

versus

BRAZOS RIVER HARBOR NAVIGATION DISTRICT, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA-G-92-86)

(July 29, 1994)

Before POLITZ, Chief Judge, JOLLY and DUHÉ, Circuit Judges.

POLITZ, Chief Judge:[*]

Clay West appeals the action of the district court dismissing his civil rights and pendent state law claims. The dismissals were in part under Fed.R.Civ.P. 12(b)(6) and in part by summary judgment. For the reasons assigned, 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.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

West was hired as financial director of the Brazos River Harbor Navigation District in August 1991. In this capacity he oversaw investment of the district's funds, a substantaial amount of which were managed by Fred P. Schumm, a stockbroker with extensive business and political connections. In late 1991 Schumm moved from A.G. Edwards to Merrill, Lynch, Pierce & Smith, Inc., hoping to take the district's account with him. West granted Schumm blanket transfer authority in writing, orally reserving the right to review each transfer transaction. Schumm ordered a $185,000 transfer without consulting West who promptly rescinded the blanket authorization. Approximately a week later, on the occasion of his six-month review, West's employment was terminated.

After an unsuccessful appeal to the Board of Commissioners West filed the instant suit, claiming a violation of his first amendment and due process rights and asserting various state law claims. The district court dismissed the due process claims under Rule 12(b)(6) and granted the defendants summary judgment on the remaining claims. This appeal timely followed.

Analysis

1. Procedural due process.

West contends that he was terminated without due process of law. Finding that West received all the process to which he constitutionally was entitled the district court dismissed. We agree.

Prior to termination, a public employee with a property

interest in his job is entitled only to notice of the proposed dismissal and the reasons therefor, and an opportunity to respond, provided that a full post-termination hearing follows.[1] Those pretermination requisites were satisfied when A.J. Reixach, the district director, and F.J. Richers, the board chairman, met with West to discuss his termination. West erroneously protests that he was entitled to notice of specific charges before that meeting. He was not.[2]

West further complains that the commissioners, who comprised the tribunal that decided his appeal, were biased. An abbreviated pretermination hearing must be followed by a post-termination hearing adjudged by an impartial decisionmaker.[3] We are persuaded, however, that West has not raised a triable claim. His assertion of bias is based on Reixach's contact with each commissioner prior to the discharge. From those conversations West infers that the commissioners approved Reixach's decision, thereby prejudging the subsequent appeal. That inference typically might carry a complaint past a Rule 12(b)(6) motion. But the summary judgment record before us addresses this precise issue in defendants' challenge to West's claim under the Texas Open Meetings Act. Reixach's affidavit attests that he did not solicit the approval of the commissioners but merely apprised them of the situation. West

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[1] **Browning v. City of Odessa**, 990 F.2d 842 (5th Cir. 1993).

[2] **Powell v. Mikulecky**, 891 F.2d 1454 (10th Cir. 1989).

[3] **Walker v. City of Berkeley**, 951 F.2d 182 (9th Cir. 1991) (citing **Schaper v. City of Huntsville**, 813 F.2d 709 (5th Cir. 1987)).

presented no contrary evidence. Mere notification does not compromise impartiality; West's due process claim is fatally wanting. Were we to vacate the Rule 12(b)(6) dismissal and remand for assessment of the claim on the summary judgment record, the result would be foreordained. In the interest of sound judicial economy and administration we decline to take this futile step.

2. First amendment.

The trial court granted defendants summary judgment on West's first amendment claim, determining that his conduct did not address a matter of public concern. Again we agree.

The first amendment does not protect a public employee who "speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest."[4] In applying this distinction, we have looked to the capacity in which the employee spoke rather than the importance of the issue, recognizing "the reality that at some level of generality almost all speech of state employees is of public concern."[5]

West alleges that he was fired for rescinding the blanket authority that he had granted Schumm to transfer district funds to Merrill, Lynch[6] and for disseminating a copy of the rescission order to the district's auditors. To be sure, mishandling of

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[4]**Connick v. Myers**, 461 U.S. 138, 147 (1983).

[5]**Gillum v. City of Kerrville**, 3 F.3d 117, 121 (5th Cir. 1993), cert. denied, 114 S.Ct. 881 (1994).

[6]We question whether this allegation states a claim of retaliation for speech. For present purposes, we merely assume *arguendo* that it does.

public funds is a matter of public concern. But that was not the issue confronting West. As he testified at his deposition, he did not believe the $185,000 transfer was illegal; indeed, he had issued the blanket authorization. He wanted pre-transfer notice. His stance on that internal procedure did not entitle him to first amendment protection.

3. State law claims.

West also challenges the grant of adverse summary judgment on his claims of slander and violation of the Texas Whistle Blower Act and Open Meetings Act.

The allegedly defamatory statements concern two matters: drinking and incompetence. Phyllis Saathoff, an auditor from Kennemer, Vandaveer & Master, reported to Reixach that she had smelled alcohol on West's breath while conducting the district's annual audit. She likewise informed her superior, Everett Kennemer, also indicating that West lacked the accounting skills and competency for his position. Kennemer in turn alerted Reixach and Richers; Reixach possibly told Richers as well.[7]

Under Texas law, West must establish malice to prevail on his slander claim. That requirement stems both from his status as a public official[8] and the summary judgment proof of privilege adduced by the defendants.[9] Malice is publication of a statement

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[7]West also contends that Reixach told other commissioners but presents no evidence of such.

[8]**Casso v. Brand**, 776 S.W.2d 551 (Tex. 1989).

[9]**Schauer v. Memorial Care Systems**, 856 S.W.2d 437 (Tex.App. 1993).

with knowledge or reckless disregard of its falsity.[10] West cites Saathoff's failure to put her observations in writing and Reixach's failure to suspend him immediately from his job to support his argument that neither believed the alcohol-related charges to be true. That is speculation, not evidence. So too is his suggestion that Saathoff fabricated the charges in order to obtain his job. West contends that a letter from Kennemer to Reixach warning of inadequate controls over investments establishes that Kennemer supported his decision to stop the $185,000 transfer. West neglects to mention that this letter was the direct result of his earlier issuance of the blanket transfer authority. The slander charge does not survive the summary judgment challenge.[11]

West also contends that Reixach's contacts with individual commissioners about his termination violated the Open Meetings Act.[12] As noted, West presented no evidence to counter Reixach's affidavit that the contacts were for information purposes only. The statute expressly exempts such contacts from its open meeting requirements.[13]

Equally unfounded is West's claim of a violation of the

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[10]**Schauer**.

[11]See **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242 (1986).

[12]Tex. Rev. Civ. Stat. art. 6252-17, now codified at Tex. Gov't. Code § 551.001 *et seq*.

[13]Tex. Rev. Civ. Stat. art. 6252-17, § 2(r), now codified at Tex. Gov't. Code § 551.075(a).

Whistle Blower Act,[14] which prohibits retaliation against a public employee "who in good faith reports a violation of law to an appropriate law enforcement authority."[15] West contends that he made such a report by sending the auditors a copy of his letter rescinding blanket transfer authority from the A.G. Edwards account. We disagree. The letter made no suggestion of illegal conduct and the activity complained of was that which West himself had authorized. The Whistle Blower Act does not apply.

4. Conspiracy.

Finally, West charged that Schumm, Merrill Lynch, and the auditors conspired with the district to violate his constitutional and statutory rights. Our disposition of the substantive claims compels dismissal of the conspiracy charge. Further, we agree with the district court that West offered no evidence whatsoever of an agreement. Summary judgment was proper.

AFFIRMED.

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[14]Tex. Rev. Civ. Stat. art. 6252-16a, now codified at Tex. Gov't. Code § 554.001 *et seq*.

[15]Tex. Rev. Civ. Stat. art. 6252-16a, § 2, now codified at Tex. Gov't. Code § 554.002.