

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-20173

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GARY C. DAWSON,

Plaintiff-Appellee,

versus

FRANCES SMART, ET AL.,

Defendants,

FRANCES SMART,

Defendant-Appellant.

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Appeal from the United States District Court for the  
Southern District of Texas  
(CA-H-92-4067)

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(February 15, 1995)

Before VAN GRAAFEILAND,\* JOLLY, and WIENER, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:\*\*

In this § 1983 case, Mayor Frances Smart of Fulshear, Texas, appeals the district court's determination that she is not entitled

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\*United States Court of Appeals, Second Circuit Judge sitting by designation.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

to qualified immunity in connection with the dismissal of Gary Dawson from his job as Fulshear's chief of police. In this interlocutory appeal, we hold that Dawson failed to allege that Mayor Smart violated a clearly established constitutional right and further failed to adduce evidence that would permit a reasonable jury to find that she caused his dismissal and, consequently, to return a verdict in his favor against her. Accordingly, we reverse the district court's denial of qualified immunity as to Mayor Smart and remand the case for entry of judgment in her favor and for such further proceedings as may be appropriate.

I

A

Although Dawson alleges an intricate intrigue on the part of Mayor Smart and the city, the relevant facts of this case are fairly simple. Citing "insubordination" as its reason, the city council dismissed Dawson from his job as police chief of Fulshear on December 21, 1994. The vote was three to one, and Mayor Smart did not vote. The vote came following a public meeting concerning certain alleged improprieties in his conduct as police chief. Mayor Smart presided over the meeting and questioned Dawson about his conduct as police chief. Dawson refused to answer any questions on the advice of his counsel, based on their interpretation of a restraining order issued earlier that day by a Texas court. The Texas court stopped the city council from proceeding in a matter before it concerning allegations by Dawson

that Mayor Smart had illegally fixed tickets for friends and political supporters (a similar matter was also pending before a grand jury), but expressly did not restrain the city council from otherwise "considering the continued employment of" Dawson.

B

This suit originated with the complaint Dawson filed to obtain the restraining order. Ten days after Dawson was dismissed, the defendants removed Dawson's complaint to federal court. As amended, his complaint alleged that Mayor Smart "implemented a design to violate" his civil rights. Specifically, it alleged that she "empaneled" the city council as an "illegal tribunal" in an "attemp[] to interfere with an ongoing Grand Jury investigation," and that she "summarily discharged [him] for upholding his oath before the Grand Jury not to disclose the subject matter of [its] investigation." As a result of these actions, the complaint continued, Dawson was deprived of his due process and his First Amendment rights, as applied to Texas through the Fourteenth Amendment. He also alleged certain state law claims.

The defendants filed a motion for judgment on the pleadings or, alternatively, for summary judgment. In their motion, they alleged, in relevant part, that Mayor Smart did not dismiss Dawson, but instead the city council dismissed him following a majority vote, and that she was entitled to qualified immunity from Dawson's suit.

The district court determined that although Mayor Smart lacked the authority to vote on Dawson's dismissal, she nonetheless might be liable because she attended and presided over the city council meetings and questioned Dawson at the public hearings. In addition, the district court stated, she had "repeatedly asked for [Dawson's] resignation and vigorously pursued evidence in order to get [him] fired." The district court held that Mayor Smart had failed to show as a matter of law that there was no causal connection between her actions and the alleged illegalities. Moreover, the district court stated that the issue "[w]hether firing [Dawson] for failure to reveal the [grand jury] information would violate [his] first amendment rights has not been briefed adequately." As a consequence, the district court declined to find that Mayor Smart was entitled to qualified immunity.<sup>1</sup>

## II

### A

As an initial matter, it is clear that we have jurisdiction to review the district court's denial of summary judgment. Although it is true as a general rule that a denial of summary judgment is

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<sup>1</sup>The court also declared that it was "not persuaded that [Dawson's] speech regarding Smart's alleged illegal activities . . . was entitled to first amendment protection." This statement by the district court is puzzling, because it is evident that Dawson did not allege in his complaint that he was dismissed as retaliation for exposing Smart's ticket-fixing scheme. At one point, the district court states that Dawson "claims that he was wrongfully terminated solely for refusing to perform an illegal act [referring to the attempt to force him to reveal his grand jury testimony]."

not appealable, we may review a district court's denial of summary judgment on the ground of qualified immunity to the extent that the denial turns on issues of law. Salas v. Carpenter, 980 F.2d 299, 304 (5th Cir. 1992). Our jurisdiction encompasses the question whether the evidence is legally sufficient to establish an issue of fact. E.g., Pfannsteil v. City of Marion, 918 F.2d 1178 (5th Cir. 1990). If factual issues exist that preclude summary judgment, of course, our jurisdiction evaporates. Salas, 980 F.2d at 304. Our review is plenary, and we view the evidence in the light most favorable to the nonmoving party--here, Dawson. Id. Upon a properly supported motion for summary judgment, the nonmoving party who bears the burden of proof at trial must adduce evidence that would support a jury verdict in his favor. Little v. Liquid Air Corp., 37 F.3d 1069, 1075-76 (5th Cir. 1994) (en banc).

B

Under federal law, a government official is immune from suit for her discretionary acts unless the plaintiff alleges that the defendant violated a clearly established constitutional right and the court determines that the plaintiff's conduct was objectively reasonable in the light of clearly established law. Salas, 980 F.2d at 305-06. Our inquiry begins by determining whether Dawson has alleged that Mayor Smart violated a clearly established constitutional right. Id. at 305. If he has done that, then she must show that she was acting within the scope of her discretionary authority. Id. at 306. Dawson may defeat Mayor Smart's bid for

qualified immunity if he shows that her conduct violated law that was clearly established at the time of the alleged violation. Id.

In this case, our inquiry begins and ends with the first step. For the reasons that follow, we hold that Dawson has failed to show that Mayor Smart violated his constitutional rights.

First, Dawson's due process claim fails because he has not adduced evidence that he has a property interest in his job that would implicate the procedural protections of the Fourteenth Amendment. Dawson admits that he was an at-will employee initially, but contends that his affidavit, which states that unnamed city officials told him that he would remain as police chief as long as he faithfully enforced Texas law, creates a disputed factual issue concerning whether he had a property interest in his job. We disagree. Even assuming that some city official had the authority to modify his at-will employment, and that the oral agreement was enforceable, Dawson's evidence does not reveal the identity of the "officials." As a consequence, no reasonable jury could conclude that the unnamed "officials" had the ability effectively to modify the contract and bind the city.<sup>2</sup>

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<sup>2</sup>At oral argument, counsel for Dawson stated that he could obtain an affidavit that would identify the officials. Summary judgment procedure requires the nonmoving party to adduce evidence to support his claim, and to seek a continuance before the judge rules on the motion if he is unable to adduce evidence. See Fed. R. Civ. P. 56(f). Our cases make clear that before obtaining a continuance, the non-moving party first must request additional discovery before the district court rules on the motion, second, must notify the court that further discovery is being sought, and third, must explain specifically how the

Because he does not have evidence of a protected property interest in his job, we hold that Dawson has not stated a colorable due process claim.

Second, with respect to the First Amendment, Dawson alleged in his complaint only that he was dismissed for failing to reveal his grand jury testimony. It was not clearly established at the time of Dawson's dismissal that the First Amendment protects such conduct. Dawson admits that he is unable to supply us with such authority. It follows that Dawson has not alleged a violation of a clearly established constitutional right.

C

In any event, Dawson has failed to adduce sufficient evidence of a causal link between his dismissal and Mayor Smart's actions. To the contrary, the evidence shows that Mayor Smart did not vote, and that the three members who voted for Dawson's dismissal cited numerous complaints of inappropriate conduct toward citizens of Fulshear, his disobedience of purchasing directives from the city council, and other allegations of abuse of his position. The record before the district court on summary judgment failed to show any connection between the conduct by Mayor Smart that Dawson

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requested discovery will enable them to justify their opposition to summary judgment. See, e.g., Witchita Falls Office Assocs. v. Banc One Corp., 978 F.2d 915, 919 (5th Cir. 1992), cert. denied, \_\_\_ U.S. \_\_\_, 113 S.Ct. 2340 (1993). Dawson did not seek a continuance. Accordingly, he cannot be permitted to forestall summary judgment with a promise that he will bring forward additional evidence at some time in the future.

alleged in his complaint and Dawson's dismissal. Once Mayor Smart came forward with evidence establishing the reasons for Dawson's dismissal and her lack of participation in the city council's vote to dismiss him, the burden fell on Dawson to produce evidence that would create disputes of material fact as to these issues. Cf. Little, 37 F.3d at 1075. Dawson, however, failed to adduce sufficient evidence on these issues. It is true that Dawson offered competent evidence that the mayor had both motive to seek his dismissal and an opportunity to influence the city council's decision on the matter. He failed, however, to meet his burden to offer any evidence that she said or did anything that affected the council's decision to dismiss him. Each reason asserted by each of the council members for dismissing Dawson was wholly independent of Mayor Smart and Dawson has not shown--or even suggested--that any of the reasons were pretextual. In short, Dawson has not adduced evidence that creates a disputed issue of material fact--or if believed would support a jury verdict--that Mayor Smart subjected him or caused him to be subjected to a deprivation of his constitutional rights.<sup>3</sup> As a consequence, the district court erred in denying Mayor Smart summary judgment.

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<sup>3</sup>Assuming that Dawson raised a claim that he was dismissed because of his allegations of illegal conduct by Mayor Smart, see footnote 1 above, Dawson's failure to produce evidence of a causal link between his exposing Mayor Smart's alleged ticket-fixing scheme and his dismissal persuades us that this claim is meritless.



III

Because Dawson failed to allege and adduce evidence that Mayor Smart's conduct violated a clearly established constitutional right, we hold that the district court erred in denying summary judgment to Mayor Smart on the grounds of qualified immunity. To that extent, we therefore REVERSE the judgment of the district court and REMAND the case for entry of judgment in favor of Mayor Smart and for such further proceedings as may be consistent with this opinion.

R E V E R S E D and R E M A N D E D.