UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-50713

(Summary Calendar)

Roberto Fernandez,

Plaintiff-Appellant,

versus

San Felipe Del Rio Consolidated Independent School District, Et Al.,

Defendant-Appellee.

Appeal from the United States District Court
For the Western District of Texas
(DR 93 CA 17)

August 29, 1995

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

Roberto Fernandez filed suit under 42 U.S.C. § 1983 against the San Felipe Del Rio Consolidated Independent School District (the "District"), the District Superintendent, and seven present and former members of the District's Board of Trustees (the "Board"), alleging that the Board had demoted him in violation of the First and Fourteenth Amendments to the United States

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Constitution. The district court granted the defendants' motion for summary judgment, and Fernandez appeals. We affirm.

I

Walter Williams, the District Superintendent, advised Fernandez that he intended to present an administrative reorganization plan to the Board. The reorganization plan provided that the Board would replace the deputy superintendent position, held by Fernandez, with three assistant superintendent positions. The plan further provided that Williams would assume the former deputy superintendent's responsibility of supervising principals. Five days later, the Board adopted the plan, and Superintendent Williams appointed Fernandez to one of the assistant superintendent positions. As Assistant Superintendent for Administration, Fernandez was responsible for facilities management and maintenance.

Fernandez' salary did not change, but he was no longer responsible for supervising principals, and his office was eventually moved from the District's administration building to an annex. Fernandez considered the change in his position effected by the reorganization a demotion.

Fernandez filed suit in federal court, claiming that the Board had demoted him in violation of the First and Fourteenth Amendments. First, Fernandez claimed that the Board had demoted him in retaliation for comments of his that were published in two articles that appeared in the local newspaper, one on the day before, and the other on the day of the Board's adoption of the

reorganization plan. The first article attributed the following statements to Fernandez:

> Fernandez said he knew his position was not on the chart but had not been notified by Williams on any changes. It is his "assumption" that he would become assistant superintendent for special programs.
>
> "The position has been deleted," Fernandez said."I have not been given notice or reasons for the (possible) demotion."

Record on Appeal, vol. 2, at 539. The second article attributed the following statements to Fernandez:

> Fernandez was quoted in [yesterday's] News-Herald as saying that Williams did not give him any notice or reasons about the deletion of the deputy superintendent position.
>
> This morning, Fernandez confirmed that Williams met with him for five minutes [on November 13th], but stood behind his statement in [yesterday's] paper.
>
> "He told me that I would no longer be deputy superintendent," Fernandez said. "I was not given any reasons for the demotion."
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> ....
>
> Fernandez said he had received nothing "written or orally" from Williams about not performing his duties, leading him to believe "there were other motives involved other than job performance."
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> Fernandez said this is not the first time that there has been an attempt to remove him as deputy superintendent.
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> "One year ago there were efforts to do exactly the same thing," Fernandez said. "They were not successful, but this is a more elaborate scheme."

Record on Appeal, vol. 2, at 540.

Second, Fernandez claimed that the Board had demoted him in retaliation for his having exposed irregular purchasing activities by a member of the Board. Third, Fernandez claimed that the Board had demoted him in retaliation for spreading rumors about Superintendent Williams. Lastly, Fernandez claimed that the Board had demoted him to punish him for the past recalcitrance of his

brother, a former Board member.[1]

The defendants collectively moved for summary judgment. The district court granted summary judgment in favor of some of the defendants on the basis of legislative immunity and in favor of the remaining defendants on the merits. The district court dismissed Fernandez' state constitutional claims without prejudice. Fernandez appeals, contending that the district court erred (1) in holding that the Board did not demote him in retaliation for statements protected by the First Amendment, (2) in holding that the Board's action did not violate his Fourteenth Amendment rights to due process, and (3) in failing to remand his state law claims to state court.

II

We review a grant of summary judgment de novo, applying the same standard as did the district court. *Evans v. City of Marlin, Tex.*, 986 F.2d 104, 107 (5th Cir. 1993). We "review the facts drawing all inferences most favorable to the party opposing the motion," *Reid v. State Farm Mut. Auto. Ins. Co.*, 784 F.2d 577, 578 (5th Cir. 1986), and will uphold the court's summary judgment if the summary judgment record demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *accord Evans*, 986 F.2d at 107.

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[1] Fernandez' complaint included other allegations of unfairness and retaliation, but he makes no argument on appeal regarding his other allegations. In his response to the defendants' motion for summary judgment, Fernandez further claimed that the Board's actions violated Article I, sections 8 and 19, of the Texas Constitution.

A

Fernandez argues that the district court erroneously held that the District had not retaliated against him in violation of the First Amendment. "To assert the protections of the First Amendment, the employee must establish, as a threshold matter, that his speech or activity related to a matter of public concern." *Vojvodich v. Lopez*, 48 F.3d 879, 884-85 (5th Cir. 1995) (citing *Connick v. Meyers*, 461 U.S. 138, 146, 103 S. Ct. 1684, 1690, 75 L. Ed. 2d 708 (1983)), *petition for cert. filed*, 64 U.S.L.W. 3068 (U.S. Mar. 30, 1995) (No. 93-8838). Whether speech addresses a matter of public concern is a question of law, *Connick*, 461 U.S. at 148 n.7, 103 S. Ct. at 1690 n.7, which we review de novo, *Copsey v. Swearingen*, 36 F.3d 1336, 1345 (5th Cir. 1994).

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147-48, 103 S. Ct. at 1690. We also look to whether the employee's primary motive was a personal interest in his employment or a citizen's interest in a public issue, *see Dodds v. Childers*, 933 F.2d 271, 273 (5th Cir. 1994),[2] although a personal motive is

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[2] *See also Terrell v. University of Tex. Sys. Police*, 792 F.2d 1360, 1362 (5th Cir. 1986) ("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 citizen or primarily in his role as employee."), *cert. denied*, 479 U.S. 1064, 107 S. Ct. 948, 93 L. Ed. 2d 997 (1987). As we noted in *Gillum v. City of Kerrville*, 3 F.3d 117 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 881, 127 L. Ed. 2d 76 (1994):

> In *Terrell* . . . , we did not focus on the inherent `importance' of the subject matter of the speech, but on the extent to which the terminated employee spoke as a citizen or employee. . . . This

not dispositive, *see Davis v. Ector County, Tex.*, 40 F.3d 777, 782-83 (5th Cir. 1994); *Wilson v. University of Tex. Health Ctr.*, 973 F.2d 1263, 1269 (5th Cir. 1992), *cert. denied*, ___ U.S. ___< 113 S. Ct. 1644, 123 L. Ed. 2d 266 (1993).

Based on our review of the record, we conclude that in making the comments published in the local newspaper, Fernandez spoke as an employee regarding an issue of private concern, the future of his employment with the school district, rather than as a citizen on a matter of public concern. The content of his speech related purely to the effect of the Board's reorganization plan on his employment, not, as he suggests on appeal, to the effect of the reorganization plan on the school system. *See Knowlton v. Greenwood Indep. School Dist.*, 957 F.2d 1172, 1178 (5th Cir. 1992) (rejecting school cafeteria workers' first amendment claim where although plaintiffs were fired for protesting conditions that amounted to FLSA violations, "[t]he record reflect[ed] that the workers' concern was the effect of the [complained of] program on their employment and personal lives, rather than public interest in FLSA violations"); *Dodds*, 933 F.2d at 274 (rejecting first amendment claim where plaintiff's "comments indicate[d] that her primary concern [w]as the effect of [alleged nepotism] on her own

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> 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. Relatedly, we are chary of an analytical path that takes judges so uncomfortably close to content based inquiries.

Id. at 120-21. In *Gillum* we rejected a plaintiff's first amendment claim because although the content of the employee's speech related to an issue of public concern, corruption in a police department's internal affairs division, the plaintiff's focus on the issue was personal. *Id.* at 121.

employment, not its potential effect on the public interest"); *Ayoub v. Texas A & M Univ.*, 927 F.2d 834, 837 (5th Cir.), *cert. denied*, 502 U.S. 817, 112 S. Ct. 72, 116 L. Ed. 2d 46 (1991) (holding that plaintiff's complaints about allegedly discriminatory compensation did not relate to a matter of public concern because plaintiff "spoke not as a citizen on matters of public concern but rather as an employee upon matters of only personal interest").[3]

The fact that Fernandez' comments were reported in the local newspaper is relevant to the public concern inquiry, *see Scott v. Flowers*, 910 F.2d 201, 211 (5th Cir. 1990) (noting that public interest in comments "as evidenced by the attention given [plaintiff's] letter by the local media," supported holding that comments addressed a matter of public concern), but not dispositive *see Coughlin v. Lee*, 946 F.2d 1152, 1156, 1157-78 (5th Cir. 1991) (holding that although letter was shown on television and printed in local newspaper during political campaign, "its content did not address a matter of public concern"). We also note that Fernandez' brother-in-law is the publisher and general manager of the newspaper that published Fernandez' comments.

In sum, we hold that Fernandez's comments related to the purely personal issue of his future employment with the school district, and in commenting on the effect of the school board's

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[3] Fernandez cites *White v. South Park Indep. Sch. Dist.*, 693 F.2d 1163 (5th Cir. 1982), in support of his claim that his comments regarding his demotion were protected under the First Amendment. In *White*, we stated, "A teacher's speech is not necessarily unprotected simply because it concerns internal operating procedures rather than issues of public importance." *Id.* at 1168 n.7. However, this statement is dicta because in *White* we explicitly declined to decide whether the speech at issue in that case was protected under the First Amendment. *Id.*

reorganization plan on his employment he spoke "not as a citizen upon matters of public concern but instead as an employee upon matters only of personal interest." *Connick*, 461 U.S. at 147, 103 S. Ct. at 1690.

Fernandez also suggests that the Board's action was motivated by objections he made to irregular purchases by a member of the Board. We assume arguendo that Fernandez' speech addressed a matter of public concern. *See Davis*, 40 F.3d at 782 ("There is perhaps no subset of `matters of public concern' more important than bringing official misconduct to light."). Nevertheless, Fernandez' argument fails because he offered no summary judgment evidence to show that his objections motivated the Board's decision to adopt the reorganization plan. *See Frazier v. King*, 873 F.2d 820, 826 (5th Cir. 1989) (holding that plaintiff was required to demonstrate that exercise of her First Amendment rights motivated defendants' retaliatory action), *cert. denied*, 493 U.S. 977, 110 S. Ct. 502, 107 L. Ed. 2d 504 (1989). Indeed, Fernandez admitted in his deposition that he did not learn of, let alone speak about, the irregular purchasing activities until *after* the Board had adopted the reorganization plan.

Lastly, Fernandez contends that Williams "held a personal vendetta" against him because Williams "believed that Fernandez and/or his wife were spreading rumors" about Williams. Even construing this as an argument that Williams' belief about Fernandez' alleged gossiping motivated the Board's action against Fernandez, and further assuming that the suspected rumors involved

a matter of public concern, Fernandez' claim fails because, according to Fernandez, he never spread any such rumors. Because Fernandez never spoke on the issue, he cannot claim that his speech motivated the Board's action against him. *See Mylett v. Mullican*, 992 F.2d 1347, 1349-50 (5th Cir.) (holding that plaintiff was required to "show that he engaged in speech, or at least expressive activity" to prevail on first amendment retaliation claim), *cert. denied*, ___ U.S. ___, 114 S. Ct. 345, 126 L. Ed. 2d 310 (1993).

B

Fernandez argues that the district court erroneously held that the District did not demote him in violation of his Fourteenth Amendment right to due process. According to Fernandez, his demotion by the Board violated his "due process right to be free from punishment absent personal culpability." Specifically, Fernandez claims that the Board demoted him to punish him for his wife's alleged gossiping and for the past recalcitrance of his brother, a former Board member. Fernandez relies on our decision in *St. Ann v. Palisi*, 495 F.2d 423 (5th Cir. 1974), in which we held that the suspension of public school students for the misdeeds of their parents violated the students' substantive due process rights. *Id.* at 426-27. Our opinion in *St. Ann* contains broad language to the effect that "[f]reedom from punishment in the absence of personal guilt is a fundamental concept in the American scheme of justice," *id.* at 425, and is thus protected by the substantive component of the due process clause, *id.* at 425-26. While this language appears to support Fernandez' claim, we have

significantly limited *St. Ann*'s holding. In *Burris v. Willis Independent School District*, 713 F.2d 1087 (1983), we rejected an argument nearly identical to Fernandez' and distinguished *St. Ann* on the grounds that the plaintiff did not have a constitutionally protected property interest in continued employment:

> Burris' remaining liberty claim may be easily disposed of. Relying on *St. Ann v. Palisi*, 495 F.2d 423 (5th Cir. 1974), Burris claims that he had a liberty right to be free from punishment for the wrongs of others, here, members of the "old line" Board. In *Palisi*, we disapproved of the suspension of students for the misconduct of others. Public school students, of course, have a property right to attend school. *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1972). Thus, the punishment in *Palisi* amounted to a deprivation of a constitutionally protected right. As we have already held, however, Burris possessed no property right in his continued employment.

Id. at 1093 n.3. Thus, in *Burris*, we limited the substantive due process right to be free from punishment for the conduct of others to situations in which the alleged punishment deprives the complainant of a constitutionally protected property interest. While this holding arguably confuses substantive and procedural due process,[4] we are bound by our interpretation of *St. Ann* in *Burris*. *See Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 426 (5th Cir. 1987) ("[O]ne panel cannot overturn another panel, regardless of how wrong the earlier panel decision may seem to be.").

Because in *Burris* we rejected a claim nearly identical to Fernandez' on the grounds that the dismissed state school district

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[4] Not only did the panel in *Burris* confuse substantive with procedural due process, but its suggestion that *St. Ann* depended on the holding in *Goss v. Lopez* is illogical. The Supreme Court decided *Goss* in 1975, one year after we decided *St. Ann*. (The *St. Ann* panel's citation to *Goss* erroneously lists the date of that case as 1972.)

employee did not have a property interest in his employment, we must similarly reject Fernandez' claim. The district court held that Fernandez did not have a constitutionally protected property interest in his former position, and Fernandez has waived any objection to that holding by not challenging it on appeal. *See Evans v. City of Marlin, Tex.*, 986 F.2d 104, 106 n.1 (5th Cir. 1993) (holding that issues not raised or briefed on appeal are considered abandoned).

C

Lastly, Fernandez argues that the lower court erred in failing to "remand" his state law claims to state court. The district court declined to exercise supplemental jurisdiction over the claims and dismissed them without prejudice. *See* 28 U.S.C. § 1367(c)(3) (Supp. IV 1992) (providing that "district courts may decline to exercise supplemental jurisdiction" when "the district court has dismissed all claims over which it has original jurisdiction").

The basis for Fernandez's argument is unclear. He filed his claims in federal court, not state court, and Fernandez does not explain how the district court could have "remanded" his state law claims to state court. Furthermore, the district court's dismissal without prejudice of Fernandez' state law claims gives Fernandez exactly what he seeks: the ability to litigate his state law claims in state court.[5]

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[5] Fernandez cites our unpublished decision in *Idoux v. Lamar University System*, No. 93-5163 (Sept. 28, 1994) to support his argument that the district court erred. Fernandez' reliance on *Idoux* is misplaced, however, because in that

III

For the foregoing reasons, we **AFFIRM** the district court's decision.

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case the state law claims had been removed from state to federal court. In addition, we held that in the circumstances of that case, the district court erred by ruling *on the merits* of the state law claims after dismissing the federal claims. In this case, in contrast, the district court neither removed the state law claims nor ruled on their merits.