

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-60711  
Summary Calendar

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LEON LUXEMBURG,

Plaintiff-Appellant,

versus

TEXAS A & M UNIVERSITY SYSTEM, ET AL.,

Defendants,

DR. LARRY S. SLOTTA, DR. WILLIAM J.  
MERRELL and DR. JAMES M. MCCLOY,

Defendants-Appellees.

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Appeal from the United States District Court for  
the Southern District of Texas  
(CA-G-93-39)

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(June 12, 1995)

Before REAVLEY, HIGGINBOTHAM and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:\*

Dr. Luxemburg was an Assistant Professor at Texas A & M University in Galveston, Maritime College (TAMUG). Luxemburg filed a section 1983 and Title VII suit against TAMUG and several administration members, Larry Slotta, William Merrell, and James

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

McCloy, alleging that the school lowered his salary in retaliation for the exercise of his right to free speech and discriminated against him due to his religion and ethnic origin.<sup>1</sup> The district court granted the defendants' motion for summary judgment and dismissed Luxemburg's claims. Luxemburg appeals. We affirm.

#### BACKGROUND

On May 10, 1990, Dr. Slotta sent a memorandum to Luxemburg outlining a pre-employment conversation concerning salary structure. The memo explained that Luxemburg's salary would be at least \$41,000 for two semesters, with TAMUG covering two-thirds of this salary and Luxemburg providing the other one-third of his salary from grant funds. The same terms of compensation were repeated in an August 8, 1990 letter sent by Slotta to Luxemburg. The employment contract, given to Luxemburg on August 13, 1990, listed his salary as \$4,555.56 per month, but stated that "notification of salary will be forthcoming at a later date." On September 1, 1990, a "500R" form broke down the \$4,555.56 payment into components reflecting the two-thirds/one-third compensation plan.

Luxemburg did not obtain the anticipated grant money and the defendants reduced his salary according to their obligation under the contract terms. Luxemburg alleges that his salary was reduced in retaliation for exercise of his free speech right. Luxemburg contends that he exercised his right to free speech when he refused

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<sup>1</sup> Luxemburg alleged several other claims, but the district court dismissed all claims but the Title VII and section 1983 claims. Luxemburg did not appeal the dismissal of his other claims.

to submit a grant proposal in which Slotta included fraudulent and incorrect statements. After Luxemburg discovered that the proposal was submitted without his approval, he wrote to the authority to which it was submitted requesting its withdrawal from consideration.

The district court gave the parties a strict docket-control order requiring all dispositive motions to be filed by July 15, 1994, and all responses to be filed by July 29, 1994. The defendants filed a timely motion for summary judgment. Luxemburg filed his response and motion to file out of time on August 30, 1994. The district court denied Luxemburg's motion to file out of time for failure to show cause. The court granted summary judgment for the defendants and dismissed the suit. Luxemburg appeals the summary judgment with respect to his section 1983 claim only, contending that the district court improperly failed to consider the evidence presented by him with his response to defendants' summary judgment motion and improperly considered evidence presented by the defendants with their summary judgment motion. He contends that he has raised a material issue of fact with respect to the defendants' motivation in lowering his salary.

#### DISCUSSION

The district court concluded that Luxemburg did not present a prima facie case under section 1983 because he did not show that his employer's disciplinary action (lowering his salary) was in retaliation for his speech. Luxemburg was required to show that his employer would not have taken the same action if not for the constitutionally protected incident. See Bradley v. University of

Tex. M.D. Anderson Cancer Ctr, 3 F.3d 922, 925 (5th Cir. 1993).

The district court concluded that Luxemburg presented no evidence beyond his pleading to support his claim that the decrease in salary was motivated by retaliation for his protected speech. The court correctly concluded that Luxemburg, as the nonmoving party, could not rest upon mere allegations or denials in his pleadings. See Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505, 2510 (1986).

Luxemburg contends that he did present evidence beyond his pleadings in the form of an affidavit submitted with his response to the defendants' motion for summary judgment.<sup>2</sup> The district court did not consider this affidavit because it was not timely filed. Luxemburg contends that this constituted reversible error by the district court. Luxemburg's response was not filed in a timely manner in violation of the district court's Local Rule 6-E. The court did not abuse its discretion in considering the defendants' motion unopposed due to Luxemburg's failure to submit this response and supporting evidence in a timely manner. See Victor F. v. Pasadena Indep. School Dist., 793 F.2d 633, 635 (5th Cir. 1986)(a district court's application of local rules is subject to an abuse of discretion review standard).

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<sup>2</sup> In this affidavit Luxemburg asserts that his contract did not provide for the salary reduction and he was unaware of any agreement to reduce his salary if he did not acquire grant money. Even this affidavit acknowledges that Slotta discussed the proportional salary structure with Luxemburg before hiring him. Even if this discussion does not make the salary structure binding on the parties as a matter of contract, it does indicate a motivation, other than retaliation for speech activities, for the subsequent salary reduction.

The district court went on to state that the defendants had produced evidence indicating that the decision to lower Luxemburg's salary would have taken place in any case because his employment agreement indicated that if no grant money was acquired, his salary would reflect the two-thirds of the total for which the school was responsible. The court then concluded that the defendants, as the movants, had met their summary judgment burden. In reaching this conclusion, the court relied on several documents submitted by defendants indicating that the reduction in salary was taken in accordance with the 500R form.

Luxemburg contends that under Texas contract principles the court could look only to the contract itself in construing the terms of the contract. Luxemburg has not brought a breach of contract claim. The district court was not charged with determining whether, in reducing Luxemburg's contract, the defendants breached their contract. The district court was charged with determining whether there was a material issue of fact with respect to the defendants' motive in reducing Luxemburg's salary. The documents in question were admissible evidence of the school's motive for reducing Luxemburg's salary, even if they were not admissible for purposes of interpreting what was contractually binding on the parties.

Luxemburg presented no contradictory evidence indicating that this alleged motive for the salary reduction was merely a pretext or that it was fabricated. Luxemburg presented no evidence linking the salary reduction to the exercise of his right to free speech.

AFFIRMED.