**UNITED STATES COURT OF APPEALS**
**FIFTH CIRCUIT**

---

No. 94-60794

(Summary Calendar)

---

H.B. MAXEY, Jr.,

Plaintiff-Appellee,

versus

ROBERT A. SMITH, Individually and as Alderman of Starkville, Miss., ET AL.,

Defendants-Appellants.

---

Appeal from the United States District Court
For the Northern District of Mississippi
(1:93 CV 122 D D )

---

June 21, 1995

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

PER CURIAM:*

Pursuant to 42 U.S.C. § 1983 (1988), Police Chief H.B. Maxey, Jr., sued certain Starkville, Mississippi (the "City"), aldermen))Robert Smith, Emmitt Smitherman, Ed Buckner, Harold Williams, and Melvin Rhodes))and Ben Hilburn, the City Attorney of Starkville (collectively, the "Starkville officials"), each in his individual and official capacities. Maxey alleged that the

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Starkville officials had violated his civil rights by reprimanding him and placing him on administrative leave from his position as Police Chief. The Starkville officials appeal the district court's denial of their motion for summary judgment. We dismiss in part, reverse in part, and remand.

**I**

Maxey alleged that the Starkville Board of Aldermen (the "Board") had reprimanded him for averring that a private citizen was a city employee,[1] and had placed the reprimand in his personnel file without affording him notice of the charge or an opportunity to be heard on it. He filed a grievance and requested a hearing before an independent hearing officer, but he refused to appear at the hearing, stating that he believed that the hearing officer had a conflict of interest due to the officer's prior representation of the City. The Board held the hearing in Maxey's absence and placed the reprimand in his permanent file.

A few months later, Maxey made several comments to a local newspaper criticizing the independent investigation of a double murder-rape that the Starkville Police had been unable to solve. Shortly after his comments appeared in the newspaper, the Board, on the recommendation of City Attorney Hilburn, placed Maxey on administrative leave.

Maxey filed suit against the Starkville officials, alleging that (1) the reprimand violated his due process rights, (2) placing

[1] This alleged infraction occurred when Maxey arranged for Russell Gaines, a non-employee who trained the City's police dog, to wear a police uniform and attend training at the police academy.

him on administrative leave violated his due process rights because he did not receive notice and an opportunity to be heard, and (3) his assignment to administrative leave status violated his First Amendment right to free speech because the Board had acted in retaliation for his comments to the newspaper.[2]

The Starkville officials moved for summary judgment. They contended that the doctrine of absolute legislative immunity barred Maxey's claims and that Maxey had waived all claims against them in their official capacities by stating that he did not intend to seek damages against the City. In response, Maxey contested the Starkville officials' defenses and also argued that they did not enjoy qualified immunity for their actions against him.

The district court denied the Starkville officials' motion for summary judgment. The court held that (1) the officials were not entitled to legislative immunity,[3] (2) Maxey had not waived his claims against them in their official capacities, (3) Maxey had stated a First Amendment claim from which they were not entitled to qualified immunity, and (4) the officials were not entitled to qualified immunity from Maxey's due process claims. The Starkville officials then filed a motion under Rule 59 of the Federal Rules of Civil Procedure to alter or amend the judgment, which the district court denied. The Starkville officials now appeal the district

---

[2] Maxey also moved for a preliminary injunction, asking the district court to enjoin the Starkville officials from implementing their adverse employment decision. The district court granted Maxey's motion and ordered the Board to reinstate him.

[3] The Starkville officials have abandoned this claim on appeal.

court's denial of their motion for summary judgment.

**II**

**A**

The Starkville officials first contend that Maxey waived any claims against them in their official capacities. Before deciding whether the district court properly denied summary judgment on this issue, we first determine the basis for our jurisdiction. *Mosley v. Cozby*, 813 F.2d 659, 660 (5th Cir. 1987) ("This Court must examine the basis of its jurisdiction, on its own motion, if necessary."). The denial of summary judgment ordinarily is not an appealable final order. *Landry v. G.B.A.*, 762 F.2d 462, 464 (5th Cir. 1985). Accordingly, there exists no basis for the exercise of jurisdiction over this claim, and we dismiss the appeal to the extent it relates to this claim.

**B**

The Starkville officials next argue that the district court should not have denied their motion for summary judgment based on qualified immunity from Maxey's First Amendment claim.[4] "The denial of summary judgment on the basis of qualified immunity is within the small class of cases subject to interlocutory appeal." *Hale v. Townley*, 45 F.3d 914, 918 (5th Cir. 1995). We review a district court's resolution of a motion for summary judgment de

[4] The Starkville officials contend that they did not seek summary judgment on the basis of qualified immunity. However, in their response to Maxey's argument below that they were not entitled to qualified immunity, the Starkville officials addressed the question of qualified immunity. Moreover, they argue in the alternative on appeal that they are entitled to qualified immunity.

novo and examine the evidence in the light most favorable to the nonmovant. *Id.* at 917. A court may properly grant summary judgment only if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-49, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986); *Hale*, 45 F.3d at 917; *see also* Fed. R. Civ. P. 56(c).

With respect to qualified immunity, the first question we must ask is whether the plaintiff has alleged the violation of a constitutional right at all. *Hale*, 45 F.3d at 917 ("The qualified immunity analysis is a familiar one. The first step is to determine whether the plaintiff has alleged the violation of a constitutional right." (citing *Siegert v. Gilley*, 500 U.S. 226, 231-33, 111 S. Ct. 1789, 1793, 114 L. Ed. 2d 277 (1991))); *accord Blackburn v. Marshall, City of*, 42 F.3d 925, 931 (5th Cir. 1995); *Garcia v. Reeves County*, 32 F.3d 200, 202 (5th Cir. 1994). If the plaintiff satisfies the first step, we must then decide whether the right was clearly established at the time of the alleged violation and whether the official's conduct was objectively reasonable. *Hale*, 45 F.3d at 917.

The Starkville officials contend that the First Amendment does not protect Maxey's comments to the newspaper. Generally, "a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers*, 461 U.S. 138, 142, 103 S. Ct. 1684,

1687, 75 L. Ed. 2d 708 (1983).[5] However,

> Because of the special nature of the relationship between an employer and its employees, the Supreme Court has recognized that "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general."

*Blackburn*, 42 F.3d at 931-32 (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734, ___ L. Ed. 2d ___ (1968)); *see also Waters v. Churchill*, ___ U.S. ___, ___, 114 S. Ct. 1878, 1886, 128 L. Ed. 2d 686 (1994) ("[T]he government as employer indeed has far broader powers than does the government as sovereign."). "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Myers*, 461 U.S. at 150, 103 S. Ct. at 1690; *see also id.* at 149, 103 S. Ct. at 1691 ("To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark))and certainly every criticism directed at a public official))would plant the seed of a constitutional case."); *id.* ("While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a

---

[5] *See also Gillum v. City of Kerrville*, 3 F.3d 117, 120 (5th Cir. 1993) ("[T]he state cannot fire an employee for exercising the right to speak on matters of public concern."), *cert. denied*, ___ U.S. ___, 114 S. Ct. 881, 127 L. Ed. 2d 76 (1994); *Thompson v. City of Starkville*, 901 F.2d 456, 460 (5th Cir. 1990) ("[A] public employee may not be discharged for exercising his or her right to free speech under the first amendment.").

roundtable for employee complaints over internal office affairs."). "The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568, 88 S. Ct. at 1734-35.

To determine whether the government can discipline a public employee for her speech, we look to the two-prong test developed in *Pickering* and *Connick*. *Blackburn*, 42 F.3d at 932. "Under this test, a public employee alleging a First Amendment violation on the ground that he has been discharged for his speech must first establish that his speech may be `fairly characterized as constituting speech on a matter of public concern.'" *Id.* (quoting *Connick*, 461 U.S. at 147, 103 S. Ct. at 1690). "The second prong teaches that there is a First Amendment violation only if the employee's interest in speaking outweighs `the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Id.* (quoting *Pickering*, 391 U.S. at 568, 88 S. Ct. at 1734-35); *accord Waters*, ___ U.S. at ___, 114 S. Ct. at 1884.

The Starkville officials argue that Maxey's comments were not on a matter of public concern because they arose out of his dispute with the Board over the Board's appointment of an independent investigator. The determination of whether an issue is of public concern is a question of law, which we review de novo. *Waters*, ___

U.S. at ___, 114 S. Ct. at 1884 (stating that *Connick* analysis raises an issue of law and "it is the [appellate] court's task to apply the *Connick* test to the facts"); *Copsey v. Swearingen*, 36 F.3d 1336, 1345 (5th Cir. 1994) (reviewing that question of whether issue was public concern de novo); *Davis v. Ector County*, 40 F.3d 777, 782 (5th Cir. 1994) (reviewing determination of issue of public concern de novo). "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." *Myers*, 461 U.S. at 147-48, 103 S. Ct. at 1690; *accord Davis*, 40 F.3d at 782; *Thompson*, 901 F.2d at 461.

Maxey's comments to the newspaper concerned the report generated after an independent investigation of a double murder-rape that the Starkville police had not solved. Maxey stated that the report did not contain any information that was not already known, and that he could not comment on the independent investigation because he had not been involved in it. Maxey also stated that, "I have been denied being part of the investigation and denied access to the investigative report. I think I was denied access to the report because it is totally inaccurate and they know I can point out inconsistencies." He further commented that, "I think it's a crying shame to put out a release in this manner and get the families' hopes up. It's a slap in the face to the families involved."

The Starkville officials characterize the issue as a dispute over the proper way to investigate the murders, and claim that

Maxey's comments thus related to his concerns as an employee who disagreed with the Board's administration of the Police Department. Although the Starkville officials' contention has some merit, it does not necessarily preclude a finding that Maxey's speech commented on a matter of public concern. *Thompson*, 901 F.2d at 463 ("The existence of an element of personal interest on the part of an employee in his or her speech does not . . . dictate a finding that the employee's speech does not communicate on a matter of public concern."); *see also Davis*, 40 F.3d at 783 (noting that "although [the complainant] may have had mixed motives, his [action] unquestionably addressed a matter of public concern"). Although Maxey criticized the Board's decision not to involve him in the investigation, he also claimed to be doing so out of concern over the impact of the investigation and report on the victims' families. To that extent, Maxey commented on an issue of public concern. Accordingly, he has satisfied the first prong of the *Pickering/Connick* test.

The Starkville officials nonetheless contend that, even if Maxey's comments involved a matter of public concern, his comments do not warrant First Amendment protection for three reasons. First, they argue that Maxey failed to show that his interest as a citizen in commenting on the murder investigation outweighed the Board's interest as an employer in efficiently administering City functions. "In performing the balancing, the statement will not be considered [by the court] in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in

which the dispute arose." *Rankin v. McPherson*, 483 U.S. 378, 388, 107 S. Ct. 2891, 2899, 97 L. Ed. 2d 315 (1987). We therefore focus on several factors relevant to the balancing, including "(1) whether the speech was likely to generate controversy and disruption; (2) whether the speech impeded the general operation of the department; and (3) whether the speech affected the working relationships necessary to the proper functioning of [the governmental] administration." *Davis*, 40 F.3d at 783.

Second, the Starkville officials contend that Maxey's speech does not warrant protection because it was false. *See Arrington v. County of Dallas*, 970 F.2d 1441, 1448 (5th Cir. 1992) (holding that speech is unprotected if false or made in reckless disregard of the truth). The Starkville officials contend that Maxey had not been excluded from the investigation and that he had been given a copy of the report.

Third, the Starkville officials contend that they decided to place Maxey on administrative leave for reasons other than his speech. If this contention proves true, Maxey's claim fails because no causal connection would exist between his comments and the officials' adverse employment decision. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 576, 50 L. Ed. 2d 471 (1977) ("[T]he District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct."); *see also Pierce v. Texas Dep't of Crim. Justice*, 37

F.3d 1146, 1149 (5th Cir. 1994) ("To establish a First Amendment violation, a public employee must demonstrate that she has suffered an adverse employment action for exercising her right to free speech."), *cert. denied*, 63 U.S.L.W. 3629 (U.S. May 15, 1995) (No. 94-1357); *Garcia*, 32 F.3d at 204 (placing burden on complainants to "show[] that constitutionally protected activity . . . was a substantial or motivating factor in [employer's] decision to terminate their employment").

Robert Smith testified at the preliminary injunction hearing about several incidents involving Maxey. He also testified that, in his opinion, Maxey had lied about being denied a copy of the investigation report, and the newspaper comments were "the final blow." Emmett Smitherman testified at the same hearing that several incidents convinced him that Maxey should be placed on administrative leave, and that he had decided this prior to reading Maxey's newspaper comments. Harold Williams stated in a deposition that he did not subscribe to the newspaper that printed Maxey's comments, and that he had voted to place Maxey on administrative leave because of Maxey's deteriorating relationship with the Board. Melvin Rhodes stated in his deposition that he had read the newspaper comments and believed them to be in poor taste, but that he voted to place Maxey on administrative leave because of other incidents, in particular the City's allegedly illegal purchase of four cars at Maxey's insistence. Ed Buckner stated in his deposition that he believed Maxey to be a liar and insubordinate, and that these problems, combined with the other incidents,

including the newspaper comments, had led him to vote for placing Maxey on administrative leave.

The testimony and affidavits of the various Board members demonstrate that genuine factual disputes remain on all three material issues))the balancing of Maxey's and the Board's interests, the veracity of Maxey's comments, and the basis for the Board's decision. "If disputed factual issues material to qualified immunity are present, the district court's denial of summary judgment sought on the basis of qualified immunity is not appealable." *Hale*, 45 F.3d at 918; *see also Topalian v. Ehrman*, 954 F.2d 1125, 1132 (5th Cir.) (stating that disputed factual issues cannot be resolved on appeal from summary judgment decision), *cert. denied*, ___ U.S. ___, 113 S. Ct. 82, 121 L. Ed. 2d 46 (1992). Accordingly, this Court lacks jurisdiction to consider the propriety of the district court's denial of summary judgment on the grounds of qualified immunity concerning this First Amendment claim, and we dismiss this portion of the Starkville officials' appeal.[6]

---

[6] The Starkville officials also argue that the district court not only decided that they were not entitled to summary judgment on the grounds of qualified immunity, but also that they were not entitled to qualified immunity at all. They contend that, because Maxey did not move for summary judgment, the district court's sua sponte action was unwarranted. "District courts may grant summary judgment sua sponte, `so long as the losing party was on notice that she had to come forward with all of her evidence.'" *Nowlin v. Resolution Trust Corp.*, 33 F.3d 498, 504 n.9 (5th Cir. 1994) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 326, 106 S. Ct. 2548, 2554, 91 L. Ed. 2d 265 (1986))). The district court's ruling is not entirely clear. Although the court's decision only explicitly denied the Starkville officials' motion for summary judgment, the court's memorandum opinion also stated that "this court is of the opinion that qualified immunity is inapplicable to the defendants in the case at hand," and that "the defendants are not entitled to immunity in this case, be it legislative or qualified." As we have already stated, genuine issues of material fact remain on the issue of qualified immunity. Therefore, we construe the district court's decision to hold only that the Starkville officials were not entitled to summary

**C**

The Starkville officials lastly contend that the district court should have granted their motion for summary judgment on Maxey's due process claims on the grounds that they were entitled to qualified immunity. "In a section 1983 cause of action asserting a due process violation, a plaintiff must first identify a life, liberty, or property interest protected by the Fourteenth Amendment and then identify a state action that resulted in a deprivation of that interest." *Blackburn*, 42 F.3d at 935.

Maxey testified at the preliminary injunction hearing[7] that no alderman had promised him that he would retain his position for any length of time, and that he knew that city policy provided that city employees worked at will. He also testified, however, that he had been told that a statute protected the city clerk and police chief from dismissal during an administration, absent cause for the dismissal.

Alderman Mary Lee Beal testified at the preliminary injunction hearing that she had told Maxey that he served at the pleasure of the Board, and that she had never heard another alderman tell Maxey

---

judgment on the issue of qualified immunity, based on the record as submitted. *See Landry*, 762 F.2d at 464 ("[T]he denial of a motion for summary judgment is not the equivalent of the entry of judgment against the movant."). Neither the district court's ruling nor this one precludes the Starkville defendants from submitting another motion for summary judgment based on additional facts or from trying the issue of qualified immunity on the merits before a jury.

[7] The summary judgment record included the record developed at the preliminary injunction hearing. Neither party contests this inclusion, except to the extent that the district court used it as the basis for prohibiting the parties from further developing the record in the future and using those additional facts either as support for subsequent motions for summary judgment or at trial. As we have already stated, *see supra* note 12, nothing in the district court's judgment should be construed as such a prohibition.

otherwise. Smith testified at the hearing that Beal had told Maxey that he served at the pleasure of the Board, and that Maxey might not be rehired when a new Board took office. Moreover, the relevant Mississippi statute states that police chiefs appointed by a board of aldermen "shall hold office at the pleasure or the governing authorities and may be discharged by such governing authorities at any time, either with or without cause." Miss. Stat. Ann. art. 21-3-3. The personnel policy of the City provides that all municipal employment is at will. The personnel manual provides a grievance procedure, but explicitly disclaims that the procedure creates a property interest in continued employment.

Because the grievance procedure does not limit the Board's discretion, Maxey had no property interest in continued employment as Police Chief. *Griffith v. Johnston*, 899 F.2d 1426, 1440 (5th Cir. 1990) ("Where the enabling statute confers discretion on the state agency without providing objective criteria for any limitations on that discretion, the statute does not create an entitlement for Due Process purposes."), *cert. denied*, 498 U.S. 1040, 111 S. Ct. 712, 112 L. Ed. 2d 701 (1991). Also, because Maxey was reprimanded and then placed on administrative leave rather than completely discharged, he was not deprived of any liberty interest. *Moore v. Otero*, 557 F.2d 435, 437-38 (5th Cir. 1977) (holding that "retention of employment negates [plaintiff's] claim that he was denied a `liberty'"). Consequently, Maxey failed to demonstrate any constitutionally protected property or liberty interest. The district court should have granted the Starkville

officials' motion for summary judgment on Maxey's due process claims.

**III**

For the foregoing reasons, we DISMISS the Starkville officials' appeal of the district court's denial of summary judgment on the waiver defense and First Amendment claims, and we REVERSE the district court's denial of summary judgment on Maxey's due process claims and REMAND to the district court for entry of judgment for the Starkville officials on those due process claims.