

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60802

EDUARDO HERNANDEZ,

Plaintiff-Appellee,

versus

BROWNSVILLE INDEPENDENT SCHOOL DISTRICT,
ET AL.,

Defendants,

REYNALDO GARCIA, PAUL HEMPHILL,
JOHN WEBER and GAY JOKL,

Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Texas
(CA-B-92-55)

November 20, 1995

Before REAVLEY, JOLLY, and WIENER, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:*

Eduardo Hernandez filed this suit against his former employer, Brownsville Independent School District (the "District"), and four members of the District's board of trustees, Reynaldo Garcia, John

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Weber, Paul Hemphill and Gay Jokl Greenspan, individually (together, the "Four Trustees"). Hernandez asserts that the Four Trustees declined to renew his contract in retaliation for his political associations and in violation of his right of privacy. The Four Trustees moved for summary judgment on the basis of qualified immunity. The district court denied the motion in an order entered November 2, 1994. The Four Trustees now appeal. We dismiss the appeal of defendant Hemphill, who has no right to an interlocutory appeal as a former trustee. We reverse the district court's denial of qualified immunity on Hernandez's right of privacy claim as to defendants Greenspan, Weber and Garcia (together, the "Three Trustees") and we remand for dismissal of that claim. We dismiss the remainder of the appeal for lack of appellate jurisdiction.

I

Hernandez's career with the school district has been bumpy. He was employed by the District from 1977 until June 30, 1990. Through the school year 1987-88, he actually served as deputy superintendent in charge of administration. His fall from the pinnacle was swift, however. During that school year, the District suspended Hernandez. He filed a lawsuit against the District arising out that employment dispute; the parties, however, resolved their differences and settled prior to trial. Under the settlement agreement, Hernandez accepted reassignment to the position of registrar, at the same salary and benefits through the remainder of

his contract (ending June 30, 1990). The settlement also provided that, when Hernandez's contract came up for renewal, only his performance as registrar would be considered. In the written evaluations he received as Registrar, Hernandez ranked as either "exceeds expectations" or "clearly outstanding"--the two highest ratings--in every category. Furthermore, he had never received a written reprimand.

Yet, this record did not insulate him from further attack. Sometime before Hernandez's contract expired, Hemphill threatened Hernandez, stating that "his [Hemphill's] group had 'gotten' [Hernandez's] brother and they would get [Hernandez] next." Hernandez's brother is a political figure--the ex-mayor of Brownsville, Texas. At least, in part, the "group" referred to by Hemphill is composed of the Three Trustees. Further, Raul Beistro, former superintendent of the District, personally informed Hernandez that: (1) Garcia had said that Hernandez was "unwanted" and soon "would be out"; (2) Weber had asked Beistro to "write-up" Hernandez, or create unfavorable documentation for Hernandez's file, so that there would be a basis to fire Hernandez.

In March 1990, Hernandez learned that his contract had not been renewed and that his employment with the District would terminate on June 30, 1990. In April 1990, Hernandez requested and received a review hearing before the board of trustees. In May 1990, Hernandez appeared before the current board, which included the Three Trustees, and presented his case. Hemphill, the fourth

board member named in the suit, was no longer serving on the board at the time of the review hearing. After deliberating in a closed executive session, the board returned and announced that they had decided not to renew Hernandez's contract.

In response, Hernandez filed suit against the District and the Four Trustees, individually, asserting under § 1983 that his contract was not renewed in retaliation for his political associations and in violation of his right to privacy. In addition, Hernandez alleged conspiracy under 42 U.S.C. § 1985 and the common law torts of fraud and intentional infliction of emotional distress. The Four Trustees responded by filing a motion for summary judgment on the basis of qualified immunity, contending that Hernandez did not satisfy the heightened pleading requirement, that he had not stated a claim for a constitutional tort and, in any event, that the constitutional torts that he asserted were not clearly established at the time.

The district court issued an austere order denying summary judgment to the Four Trustees.¹ The Four Trustees timely appealed.

II

As an initial matter, we must determine the basis of our jurisdiction over the defendants' appeal. Mosley v. Cozby, 813 F.2d 659, 660 (5th Cir. 1987). Individual defendants who are public officials may interlocutorily appeal the denial of qualified immunity. Mitchell v. Forsyth, 472 U.S. 511, 530 (1985). We lack appellate jurisdiction, however, to review a denial of summary judgment when disputed issues of material fact were the basis of the denial. Johnson v. Jones, 115 S.Ct. 2151, 2156 (1995); see also Boulos v. Wilson, 834 F.2d 504, 509 (5th Cir. 1987). Instead, an appellate court may review only whether the district court "mistakenly identified clearly established law . . . given [] the facts that the district court assumed when it denied summary judgment for that (purely legal) reason." Id. at 2159. Thus, in a section 1983 case, whether summary judgment is denied for a "purely legal" reason or because of disputed facts is an issue of jurisdictional importance. Id.

¹ In toto, the district court's order reads as follows:

The Court has considered the Motion for Partial Summary Judgment of individual defendants REYNALDO GARCIA, PAUL HEMPHILL, JOHN WEBER and GAY JOKL GREENSPAN ("the individual Defendants"). The Court finds that Defendants have not met their burden to show they are entitled to qualified immunity in this action. Accordingly, the Defendants' Motion for Partial Summary Judgment is **DENIED.**

We previously have instructed "district courts [to] state for the record, and for the benefit of the circuit court on appeal, their reason for denying immunity." Schaper v. City of Huntsville, 813 F.2d 709, 713 (5th Cir. 1987)(citing Fed. R. Civ. P. 41(b) & 52(a)). Where a "district judge simply den[ies] summary judgment motions without indicating [his] reasons for doing so, . . . a court of appeals may undertake . . . a review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed." Johnson, 115 S.Ct. at 2159.

Although the district court's spartan opinion here does not identify either the facts or reasoning upon which it relied, we may review the record to determine what facts the court likely assumed. If after analyzing the "purely legal" issues we determine that a disputed fact precludes summary judgment, we must dismiss the claim or appeal for lack of jurisdiction.

III

A

We apply a de novo review to the denial of a public official's qualified immunity. Johnston v. City of Houston, 14 F.3d 1056, 1059 (5th Cir. 1994). Qualified immunity is a defense for public officials and only for public officials. See Anderson v. Creighton, 483 U.S. 635, 639 (1987). As noted earlier, defendant Hemphill was no longer a Trustee at the time of the non-renewal decision. Although Hemphill's lack of participation in the non-

renewal decision may be important for the question of causation and section 1983 liability, it is fatal to his claim for qualified immunity. Since Hemphill cannot claim qualified immunity, he has no basis on which to seek interlocutory review of the district court's denial of his summary judgment motion. Accordingly, we dismiss Hemphill's appeal.

In contrast to Hemphill, qualified immunity may be available to the Three Trustees. Qualified immunity protects public officials from liability if their conduct does not violate clearly established law in effect at the time of the alleged constitutional tort. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). The first step in the qualified immunity analysis is to determine whether the plaintiff has alleged a violation of a constitutional right. Siegert v. Gilley, 500 U.S. 226, 232 (1991). The second step in this analysis is determining whether the constitutional right allegedly violated was clearly established at the time the events occurred. Id.

B

Hernandez has alleged two constitutional torts. First, he contends that the non-renewal of his contract constitutes a violation of his right to privacy. Second, he asserts that the non-renewal decision was an unconstitutional retaliation for exercising his right of association. The Three Trustees are entitled to qualified immunity on a given claim, as discussed

above, only if Hernandez fails to meet both prongs of the two-step analysis outlined above.

We find that Hernandez has failed to state a constitutional claim alleging a violation of his privacy. The Supreme Court has recognized two different types of constitutionally protected privacy interests: (1) the "confidentiality" branch, involving a person's interest in avoiding disclosure of personal matters; and (2) the "autonomy" branch, involving a person's independence in making certain kinds of decisions (e.g., marriage, procreation, contraception). American Civil Liberties Union of Mississippi, Inc. v. King, 911 F.2d 1066, 1069 (5th Cir. 1990).

Hernandez fails to identify which one of these two privacy interests were violated by the non-renewal decision. We safely may conclude, we believe, that the "autonomy" branch is not implicated. With respect to the "confidentiality" branch, Hernandez alleges no facts that would support a claim that the Three Trustees either obtained or disclosed confidential information. To the contrary, he contends that the non-renewal decision was made in a closed executive session.

Hernandez's privacy claim fails to identify a constitutionally protected right in general, much less explain how that right has been violated in his particular case. As a matter of law, he has failed to state a constitutional tort for invasion of privacy. Accordingly, we reverse the district court and hold that qualified

immunity shelters the Three Trustees from Hernandez's right of privacy claim.

C

We do find, however, that Hernandez sufficiently has alleged a violation of a clearly established constitutional right to freedom of association. "Freedom to associate with others for the common advancement of political beliefs and ideals is . . . protected by the First and Fourteenth Amendments." Kinsey v. Salado Independent School District, 950 F.2d 988, 993 (5th Cir.) (quotations omitted), cert. denied, 504 U.S. 941 (1992). When evaluating a failure-to-renew-a-contract claim based on political activity, we balance the First Amendment values implicated by those activities against the possible disruptive effect on governmental services within the specific context of each case. Id. In order to prevail, the employer must establish that its interest in promoting the efficiency of the services provided by its employees outweighs the employee's interest in engaging in the protected activity. United States Dep't of Justice v. Federal Labor Relations Auth., 955 F.2d 998, 1005 (5th Cir. 1992).

In the present case, the Three Trustees have failed to allege that Hernandez's political activities had any disruptive effect on the services provided by the District. Because the Three Trustees have not alleged that Hernandez's activities affected the services provided by the District, there is no countervailing state interest to weigh against Hernandez's First Amendment rights. Assuming

Hernandez's allegations to be true, a reasonable factfinder could find that political animus motivated the Three Trustees's non-renewal decision. Thus, Hernandez sufficiently has alleged the violation of a constitutional right.

Moreover, it was well established at the time of the non-renewal decision, that public officials could not decline to rehire an employee because that employee has exercised his constitutionally protected First Amendment freedoms. Mt. Healthy City Sch. Dist. v. Doyle, 429 U.S. 274, 283-84 (1977). As far back as 1984, the established law in this circuit has been that a public official cannot retaliate against an employee for political association and affiliation. Professional Association of College Educators, TSTA/NEA v. El Paso County Community College District, 730 F.2d 258, 262 (5th Cir.), cert. denied, 469 U.S. 881 (1984). Therefore, it should have been readily apparent to a reasonable Trustee in 1990 that retaliation against an employee for exercising his First Amendment rights was prohibited.

Nevertheless, we find it necessary to dismiss this appeal for lack of appellate jurisdiction. The Three Trustees present their testimony that the non-renewal decision was not in retaliation for Hernandez's association with his brother. On the other hand, Hernandez presents evidence that his political association is just the reason his contract was not renewed. Because this claim raises a genuine issue of fact--motivation--we are required under Johnson to dismiss the Three Trustees's appeal on the freedom of

association claim for lack of appellate jurisdiction. Johnson,
115 S.Ct. at 2156.

IV

Accordingly, we DISMISS outright Hemphill's appeal, we REVERSE the district court's denial of qualified immunity as to the Three Trustees on Hernandez's right of privacy claim and we REMAND for dismissal of that claim, and we DISMISS the remainder of the appeal for lack of appellate jurisdiction.

DISMISSED in part, REVERSED in part,
and REMANDED.