IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-9528

GEORGIANN L. GRACE and
JAMES B. POTTS, JR.,

Plaintiffs-Appellants,

VERSUS

BOARD OF TRUSTEES FOR STATE COLLEGES AND UNIVERSITIES, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Louisiana
(CA 84 414)

(October 29, 1993)

Before HIGGINBOTHAM, DAVIS, and SMITH, Circuit Judges.

JERRY E. SMITH, Circuit Judge:[*]

Plaintiffs allege that they were dismissed and demoted from their jobs as university professors in violation of their First Amendment rights. Following the grant of a new trial, the district court granted defendants' motion for summary judgment. Finding no error, we affirm.

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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Plaintiff James B. Potts was and is a tenured English professor at Northeast Louisiana University (the "university") in Monroe, Louisiana. Plaintiff Georgiann Grace was hired as an untenured English instructor by Potts during a period when he served as the head of the English department; she worked at the university from Spring 1978 through Fall 1984. During this time, friction developed among plaintiffs and defendants. Defendants claim that the battle arose from plaintiffs' demands that they be granted leave from their classes in order to pursue their private consulting activities together and that they be assigned to teach certain courses of their choosing.

Grace and Potts exhausted university grievance procedures, realizing only slight success. In July 1982, they filed suit in state court, challenging the university's grievance procedures as violative of the Louisiana Administrative Procedure Act and federal and state constitutional due process guarantees. The state trial and appeal courts denied their claims, and the Louisiana Supreme Court denied certiorari. A few months after the state court suit concluded, Grace was terminated by the university, and Potts was de facto demoted by a pay reduction and by increased and inferior teaching assignments.

On April 18, 1984, plaintiffs filed this suit under 42 U.S.C. § 1983, claiming that their First Amendment rights were violated by the retaliatory acts of defendants in response to their allegedly protected activity, the filing of the state court suit. Defendants

were a number of administrators at the university, including other English Department members and members of the initial grievance panel.

In the first trial in the district court, the jury answered a series of special interrogatories by finding in favor of the plaintiffs, awarding Potts $10,000 in compensatory damages and $25,000 in punitive damages. Grace was awarded $85,000 in compensatory damages.

Defendants moved for a judgment notwithstanding the verdict ("j.n.o.v."), or alternatively for a new trial. They argued for a j.n.o.v. on the ground that the district court erred as a matter of law in treating the plaintiffs' state court suit as a matter of public concern protected by the First Amendment. The district court rejected this argument, holding that the suit touched on matters of public concern.

Defendants also moved for a new trial on the ground that the court erred in failing to give to the jury a requested special interrogatory on the so-called Mt. Healthy defense. See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977). The court held that the defendants were prejudiced by its failure to give the requested interrogatory; thus, it granted a new trial.

At the outset of the second trial, defendants moved for summary judgment on the ground that as a matter of law plaintiffs' claims did not touch upon matters of public concern. Applying the multi-factor test established in Connick v. Myers, 461 U.S. 138 (1983), the district court granted defendants' motion.

Plaintiffs now appeal the district court's grant of a new trial as well as its grant of defendants' summary judgment motion. Of the initial defendants, only Vines, Morgan, and Jeffrey remain as defendants in this suit.[1]

II.

A.

Whether speech is protected by the First Amendment is a question of law to be determined by the court. Rankin v. McPherson, 483 U.S. 378, 386 n.9 (1987); Dodds v. Childers, 933 F.2d 271, 273 (5th Cir. 1991). The First Amendment protects a public employee from being discharged for speaking only if his speech addresses a matter of "public concern." Dodds, 933 F.2d at 273. If the speech does not address a matter of public concern, "a court will not scrutinize the reasons motivating a discharge that was allegedly in retaliation for that speech." Id. If the speech is deemed to have been on a matter of public concern, the plaintiff may recover if he can show: (1) that his interest in "commenting upon matters of public concern" outweighs the defendant's interest in "promoting the efficiency of the public services he performs," Pickering v. Board of Educ., 391 U.S. 563, 568 (1968), and (2) that the protected speech was a "motivating factor" in the employer's decision to fire him, Mt. Healthy, 429 U.S. at 287.

We review de novo the question of whether the speech at issue addresses a matter of public concern. Dodds, 933 F.2d at 273.

[1] They were the only defendants held liable in the initial jury trial.

Matters of public concern often are intertwined with private employee disputes. In such cases, the plaintiff must demonstrate that his primary purpose for speaking, Dorsett v. Board of Trustees, 940 F.2d 121, 124 (5th Cir. 1991); Dodds v. Childers, 933 F.2d 271, 274 (5th Cir. 1991), was "as a citizen upon matters of public concern" and not merely "as an employee upon matters of personal interest." Connick, 461 U.S. 138, 147 (1983). "Absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." Id.

Under Connick, whether an employee's speech is a matter of "public concern" is "determined by the content, form, and context of a given statement, as revealed by the whole record." See also Ayoub v. Texas A & M Univ., 927 F.2d 834 (5th Cir.), cert. denied, 112 S. Ct. 72 (1991). Whether speech addresses a matter of public concern should be determined on a case-by-case basis. Moore v. City of Kilgore, Tex., 877 F.2d 364 (5th Cir.), cert. denied, 493 U.S. 1003 (1989).

The plaintiffs claim that the district court erred in granting defendants' summary judgment motion. They argue that the district court held that the speech touched upon a matter of public concern and thus should not have considered the motives animating their speech. In the alternative, plaintiffs argue that the court erred in deciding as a matter of law that the speech was primarily personal and thus unprotected by the First Amendment. Neither

position has merit.

B.

Plaintiffs argue that the district court actually held that the speech at issue was a matter of public concern, and thus it should not have gone on to consider the motives animating the speech. In discussing the "content" prong of the Connick test, the district court wrote,

> The court further finds that the subject matter of the suit touches on matters of public concern, i.e., whether faculty grievances are conducted in a fair manner in accordance with state and federal statutory and constitutional requirements. The public naturally has an interest in ensuring that professors at state universities are well qualified and productive teachers. Whether or not faculty grievance procedures are conducted in accordance with law and in a fair manner may indirectly affect the quality and efficiency of the teaching staff and be of interest to the public at large.

Plaintiffs rely upon this statement as a holding that the speech was a matter of public concern and thus protected by the First Amendment.

Usually, when courts state that the speech of a government employee addressed a matter of "public concern," they mean that the content, form, and context of the speech indicate that the employee spoke as a citizen on a public issue rather than as an individual pursuing a private matter. The First Amendment protects from discharge public employees who speak as citizens. The district court, however, used the term "public concern" to describe the content of the plaintiffs' speech. The court thus employed the term in its analysis, rather than to signal its conclusion.

Nevertheless, the court went on to consider the form and context of the speech, as required by Connick. Thus, while the court's use of language was unconventional, its reasoning was consistent with Supreme Court precedent.

The court's reasoning was also consistent with Fifth Circuit practice. In Terrell v. University of Tex. Sys. Police, 792 F.2d 1360, 1362 (5th Cir. 1986), cert. denied, 479 U.S. 1064 (1987), for example, this court discounted the significance of the content of the speech standing alone:

> 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. In making this determination, the mere fact that the topic of the employee's speech was one in which the public might or would have had a great interest is of little moment.

Id.

Almost any issue can be reconstructed to be of interest to the public in some way; thus, this criterion provides little guidance in distinguishing public from private speech. The attenuated connection between plaintiffs' speech and the public's need for the information provided by Grace and Potts's suit illustrates the dubious value of relying upon content as the sole guide to identify what constitutes protected speech.

We focus on the "hat worn by the employee when speaking," i.e., whether he speaks as a citizen or a private employee, rather than upon the "importance" of the issue he addresses. Gillum v. City of Kerrville, Tex., No. 93-8006, slip op. at 12 (5th Cir.

Sept. 16, 1993). Thus, it was proper for the district court to consider Grace and Potts's motives for filing the state court suit. See Ayoub v. Texas A & M Univ., 927 F.2d 834 (5th Cir. 1991).

C.

The district court applied Connnick and held that plaintiffs' speech did not address a matter of public concern. We review motions for summary judgment de novo, and we review the evidence and any inferences drawn from it in the light most favorable to the non-moving party. Gillum, No. 93-8006, slip op. at 12. Reviewing plaintiffs' evidence in this light, we conclude that the district court did not err in holding that there were no genuine issues of material fact and that defendants were entitled to summary judgment as a matter of law.

Grace and Potts's claim is identical to that rejected by this court in Dorsett. 940 F.2d at 123. Dorsett was a university professor who claimed that he suffered retaliation for challenging university policies. The court affirmed the grant of summary judgment on the ground that his speech was not a matter of public concern. The court there noted,

> The continuing retaliatory actions alleged by Dorsett appear to be nothing more than decisions concerning teaching assignments, pay increases, administrative matters, and departmental procedures. . . . [S[uch decisions might seem extremely significant to Dorsett, who has devoted his life to teaching. . . . [N]evertheless, . . . the alleged harms suffered . . . do not rise to the level of a constitutional deprivation.

Id.

Similarly, Grace and Potts have demanded leave to engage in

consulting activities and the right to teach only classes of their choosing. They complain that as a result of their state court action Grace, a non-tenured instructor, was terminated, and Potts suffered a pay reduction and increased and inferior teaching assignments. As in Dorsett, "[t]hese concerns are matters of private, not public, interest." Id. at 124.

Dorsett instructs us to be especially wary of attempting to "micromanage the administration of thousands of state educational institutions." Id. "Of all fields that the federal courts `should hesitate to invade and take over, education and faculty appointments at [the university] level are probably the least suited for federal court supervision.'" Id. (quoting Smith v. University of N. Car., 632 F.2d 316, 345 (4th Cir. 1980)). Dorsett concluded,

> In public schools and universities across this nation, interfaculty disputes arise daily over teaching assignments, room assignments, administrative duties, classroom equipment, teacher recognition, and a host of other relatively trivial matters. A federal court is simply not the appropriate forum in which to seek redress for such harms.

Id. at 123. We heed this warning in affirming the summary judgment.

Plaintiffs are unable to demonstrate that any issue of material fact remains as to whether they can show that their primary motivation in bringing their state court suit was to benefit the public, rather than to further their private dispute with the university. Thus, defendants are entitled to summary judgment as a matter of law. To reach this conclusion, we examine the content, form, and context of the speech. Connick, 461 U.S. at

148.

The district court found that the content of the state court suit was loosely tied to a matter of public concern: university grievance procedures and the ability of the university to hire and retain professors. While logically relevant, the practical relationship between Grace and Potts's lawsuit and the quality of Louisiana's state university system is slight. In discussing the context of plaintiffs' speech, the district court found that they "presented no evidence that their primary motivation was to aid other faculty members or draw attention to matters beyond those involving their own personal interests."

There is some evidence that plaintiffs were not acting solely from self-interest in challenging the university grievance procedures. In her deposition, Grace testified that she filed the lawsuit because she "was speaking out on a matter that should have concerned everyone, and that was the corruption within the university and the breakdown of the faculty procedure itself." Potts also stated during the first trial that his motives were not wholly selfish.

The district court dismissed these statements as "retroactive embellishment" of plaintiffs' private claims. At best, these statements suggest that the public good was one motive animating Grace and Potts's suit. But these statements fall short of proof that would allow a reasonable jury to conclude that this was their primary motivation.

Finally, under Connick, we look at the form of the speech.

Bringing suit in state court is unquestionably the availment of a public setting. Stating private demands in a public setting, however, does not automatically convert the private grievance into a matter of public concern. See Caine v. Hardy, 943 F.2d 1406, 1416 (5th Cir. 1991) (en banc), cert. denied, 112 S. Ct. 1474 (1992) ("context alone cannot transform an inherently self-interested opinion into one that implicates public issues. Had [plaintiff] proclaimed his opposition to [defendant] . . . from the steps of the Mississippi capitol, the characterization of this speech would not differ.").

The district court held that the "activity sought to be protected [was] the pursuit of the lawsuit as opposed to any specific testimony elicited therein." There is no evidence that the availment of a public setting was anything but incidental to the pursuit of private demands.

The content, form, and context of plaintiffs' speech indicate that theirs was nothing more than a private dispute with their employer, which coincidentally happened to be a state university. Under the facts of their case, no constitutional concerns are implicated: "Our responsibility is to ensure that citizens are not deprived of fundamental rights by virtue of working for the government; this does not require a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State." Connick, 461 U.S. at 147.

III.

Plaintiffs argue that even if their state court suit is not protected by the freedom of speech provisions of the First Amendment, they have a claim under that amendment's petition clause.[2] They contend that the clauses protect distinct behavior and that the public concern requirement limiting invocation of the free speech clause should not apply to the petition clause. This argument is meritless.

The First Amendment guarantees three distinct rights: Congress shall make no law [i] respecting an establishment of religion, or prohibiting the free exercise thereof; [ii] or abridging the freedom of speech or of the press; [iii] or the right of the people peaceably to assemble and to petition the Government for a redress of grievances. U.S. CONST. AMEND. I. Plaintiffs argue that each clause should be construed independently from the others. More specifically, they argue that the public concern showing required to invoke free speech protection should not apply to the petition clause. The defendants respond that the petition clause has been interpreted identically to the speech clause, and thus a showing of public concern should be required.

There is no support in authority or in logic for construing the petition clause more broadly than the speech clause. The Supreme Court stated this unequivocally in McDonald v. Smith:

> To accept petitioner's claim . . . would elevate the Petition Clause to special First Amendment status. The Petition Clause, however, was inspired by the same ideals

[2] It is uncertain whether plaintiffs even properly raised this claim in the district court, as the district court did not discuss the petition clause in granting summary judgment.

> of liberty and democracy that gave us the freedoms to speak, publish, and assemble. These First Amendment rights are inseparable, and there is no sound basis for granting greater constitutional protection to statements made in a petition . . . than other First Amendment expressions.

472 U.S. 479, 485 (1985). Similarly, in Day v. South Park Indep. Sch. Dist., 768 F.2d 696, 701 (5th Cir.), cert. denied, 474 U.S. 1101 (1985), this court explicitly rejected the claim that matters of private concern, whether raised as speech or petition claims, are protected by the First Amendment's shield.

In this case, the speech and petition acts are the same: the filing of the state court suit. For the reasons identified in rejecting plaintiffs' free speech claim, we conclude that their claim under the petition clause does not address a matter of public concern; thus, summary judgment on this ground was proper.

IV.

Following a verdict for plaintiffs, the district court granted the defendants' motion for a new trial on the ground that the failure to give a requested special interrogatory confused the jury and prejudiced defendants. Plaintiffs contend that granting this motion was an abuse of discretion.

At trial, defendants requested a jury interrogatory "asking in effect: In the event that you find that the prosecution of the lawsuit was a motivating factor [in the adverse employment decision], then do you find that defendants would have taken the same action anyway?" This instruction is known as the Mt. Healthy defense. Mt. Healthy, 429 F.2d at 287.

Under FED. R. CIV. P. 59, the court may grant a new trial based upon its appraisal of the fairness of the trial and the reliability of the jury's verdict. A new trial may be granted if the court finds that the trial was unfair or marred by prejudicial error. Smith v. Transworld Drilling Co., 773 F.2d 610, 613 (5th Cir. 1985). A motion for new trial may also be granted for substantial errors of law in the admission or rejection of evidence or the giving or refusal of instructions. Challenges made to special jury interrogatories are considered in context with the surrounding circumstances, including the court's instructions to the jury. Winter v. Brenner Tank, Inc., 926 F.2d 468, 472 (5th Cir. 1991).

The court charged the jury that "[t]he plaintiff[s] must prove that the exercise of the First Amendment right was a substantial motivating cause in the employment decision, and that the employment decision would not otherwise have been made."[3] Despite instructing the jury correctly, the district court granted defendants' motion for a new trial on the ground that the special interrogatories failed fully to consider the Mt. Healthy defense.

The judge gave the jury the following interrogatories. For Potts, the interrogatory read, "Do you find that prosecution of a lawsuit by plaintiff Potts in state court against Northeast Louisiana University was a substantial or motivating factor in the decision of any defendant to levy a de facto demotion upon plaintiff James Potts?" Similarly, for Grace the interrogatory

[3] This instruction actually misstates the Mt. Healthy rule. Under Mt. Healthy, defendants bear the burden to show that they would have taken the adverse employment action independently of the protected speech.

read, "Do you find that a substantial or motivating factor in the decision not to rehire plaintiff Georgiann Grace was Grace's prosecution of a lawsuit against Northeast Louisiana university in state court?"

The interrogatories failed to ask the jury whether the adverse employment decision would have been made notwithstanding the protected speech. Asking whether the speech was a factor in the adverse employment decision does not force the jury to consider whether other factors would have led the university to the same conclusion. For example, the protected speech may be redundant to other reasons behind the adverse employment decision. The court was within its discretion to decide that the special interrogatories did not "match" the jury instructions, prejudicing the defendants.

Plaintiffs rely upon two cases to support their claim that the district court exceeded its discretion in granting defendants' motion for a new trial: Winter v. Brenner Tank and Kemp v. Ervin, 651 F. Supp. 495 (N.D. Ga. 1986). In Winter, the court held that proper jury instructions could correct errors in an interrogatory. Winter, 926 F.2d at 472. In Winter, however, the court gave additional instructions on the specific interrogatory in issue, and the jury manifested its understanding of the issues. Id. Thus, there was no reason to believe that the jury was confused by the erroneous interrogatory. In the current case, however, the court did not supplement its original instructions in order to alleviate confusion, nor did the jury manifest any understanding of the

relationship between the interrogatories and the court's instructions.

Second, plaintiffs argue that this case is analogous to Kemp, 651 F. Supp. at 502. This analogy is flawed. The defendants in Kemp argued that the Mt. Healthy test was withdrawn from the jury by a failure to provide interrogatories consistent with the jury instructions.

Grace contends that Kemp rejected defendant's claim "because the jury was fully charged in a manner which comported with the requirements of Mt. Healthy." But the court in Kemp also denied the motion because it concluded that the language of the interrogatories, standing alone, was sufficient to require the jury to consider the Mt. Healthy defense. Id. Accordingly, the district court did not abuse its discretion in granting a new trial on the ground that the special interrogatories did not fully instruct the jury on the Mt. Healthy defense, thereby confusing the jury and prejudicing the defendants.

V.

In summary, the plaintiffs challenge to the university grievance procedure does not address a matter of public concern. The Constitution does not require this court to intervene in private employee disputes. The summary judgment is AFFIRMED.