IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-2499
Summary Calendar

KEVIN RAY JOHNSON, LYNDON EARL PARKS, and RONNIE LYNN GLOVER,

Plaintiffs-Appellants,

versus

CITY OF SPRING VALLEY,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Texas
(CA-H-91-1347)

(July 1, 1994)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

This is the appeal of the district court's order granting the motion of the City of Spring Valley, Texas, for judgment as a matter of law pursuant to Rule 50 of the Federal Rules of Civil Procedure. We affirm.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

I

This suit was initiated by Kevin Ray Johnson, Lyndon Earl Parks and Ronnie Lynn Glover (the "appellants") challenging the termination of their employment with the Police Department of the City of Spring Valley, Texas ("Spring Valley"). According to the appellants, they were fired by the City Administrator, George Parker, because they exercised their First Amendment rights in criticizing certain action taken by Parker.

After presentation of all proof to the jury, the district court held that Parker was not a final policymaker whose actions could impose liability on Spring Valley under 42 U.S.C. § 1983. The district court further found that Parker asked permission from the city council to terminate the appellants and the city council granted that permission, making Parker its "messenger" and not the final policymaker. Following this oral ruling, the appellants' counsel stated that their theory of the case was based on Parker's being the policymaker and, in the light of the court's ruling, they would not insist on submitting the case to the jury. Spring Valley thereafter moved for judgment pursuant to Rule 50 and that motion was granted. The appellants timely appealed.

II

Before the events giving rise to this suit, Spring Valley enacted Ordinance No. 169, creating the position of city administrator who would serve at the will of the city council. That ordinance gave specific powers to the city administrator,

including the power to "select or remove all department heads and subordinate employees," under the supervision of the city council. By separate ordinance, the city council created the Spring Valley Police Department and gave specific authority to the city administrator to take any personnel actions with regard to the police department, in accordance with Ordinance No. 169.

In 1988, the appellants, all of whom were employed by the Spring Valley Police Department, joined the Spring Branch Memorial Police Officer's Union and, as members of that organization, attended meetings where actions taken by Spring Valley officials were questioned or criticized. They also attended a meeting and engaged in conversations about encouraging Spring Valley residents to run for election to the city council. The Spring Valley city administrator, George Parker, asked one of the appellants if he was a member of the Union.

On January 23, 1990, Parker advised the city council that he intended to terminate the employment of the appellants because he believed that they were responsible for low morale in the police department and because he believed that they had engaged in a work slowdown.[1] The city council members questioned Parker regarding the basis of his recommendation and authorized him to terminate the

[1]The city administrator's recommendation was based on a recommendation made to him by the police chief.

appellants' employment.[2] The appellants were fired and they thereafter initiated this suit.

III

A motion for judgment as a matter of law under Rule 50 of the Federal Rules of Civil Procedure may be granted "[i]f during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue." Fed. R. Civ. P. 50(a)(1). We review an order granting a Rule 50 motion de novo, applying the same standard that guides the district court. Deus v. Allstate Insurance Co., 15 F.3d 506 (5th Cir. 1994). "If the evidence at trial points so strongly and overwhelmingly in the movant's favor that reasonable jurors could not reach contrary conclusion, this court will conclude that the motion should have been granted. Omnitech International, Inc. v. Clorox Co., 11 F.3d 1316 (5th Cir. 1994).

The district court granted the Rule 50 motion after determining that the city council and not the city administrator was Spring Valley's policymaker with respect to the appellants'

[2]After the January 23 meeting, Parker advised a Spring Valley resident that he was going to fire three employees and that the decision was "political." The police chief also told the appellants after they were terminated that he would tell prospective employers that they had not committed any misconduct but were fired for political reasons. For these and other reasons, the appellants contended that their firings were unconstitutional. Because we conclude that the district court properly held that Spring Valley was not liable on other grounds, we do not address this issue.

terminations. The appellants conceded that, because their theory of the case was dependent on a ruling that the city administrator was the policymaker, the case should not be sent to the jury in the light of this adverse ruling.[3] Therefore, the issue before this court is essentially whether the district court properly determined the policymaker for purposes of the appellants' termination. If the district court's determination of that issue is correct, the Rule 50 motion was properly granted.

A municipality may only be held liable under 42 U.S.C. § 1983 "where it can be shown that the officials acted in accordance with an official government policy or firmly entrenched custom." Worsham v. City of Pasadena, 881 F.2d 1336, 1339 (5th Cir. 1989). The Supreme Court has held that the district judge, relying on "state and local positive law" as well as "custom or usage,"

> must identify those officials or governmental bodies who speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue.

[3]It is significant to our holding that the plaintiffs' case was not based on a theory that the city council adopted a policy or otherwise took action independent of the city administrator to retaliate for the plaintiffs' exercise of their First Amendment rights. The point is that although the City authorized the plaintiffs' firings, there is no unconstitutional policy implicated in this decision. To hold otherwise would be to impose liability on the city council under the doctrine of respondeat superior.

Jett v. Dallas Independent School District, 491 U.S. 701, 737 (1989). See also Gonzalez v. Ysleta Independent School District, 996 F.2d 745, 752 (5th Cir. 1993).

A "policymaker" whose actions can render a municipality liable must

> possess[] final authority to establish municipal policy with respect to the action ordered. The fact that a particular official--even a policymaking official--has discretion in the exercise of particular functions does not, without more, give rise to municipal liability based on an exercise of that discretion. The official must also be responsible for establishing final government policy respecting such activity before the municipality can be liable.

Pembaur v. City of Cincinnati, 475 U.S. 478, 483 (1986).

Even if a municipal official has authority to make policy in some areas, "policy making authority in areas other than the one implicated is not sufficient to impose liability on the City." Worsham v. City of Pasadena, 881 F.2d 1336, 1340 (5th Cir. 1989). As tried and argued by the plaintiffs, the dispositive question in this case is whether Parker was a policymaker for Spring Valley with respect to the termination of the appellants' employment.

Looking to state law, specifically Spring Valley's ordinances, we find that the city administrator's duties are expressly delineated by the city council. It is important that the City Administrator has only the powers given to him by ordinance, and his exercise of those powers is "under supervision of the City Council." One of the city administrator's responsibilities--specifically delegated by the city council--is to "promote, demote,

and take any and all other necessary personnel actions" with regard to the city police department. According to the appellants, these ordinances had the effect of rendering the city administrator a "policymaker" of Spring Valley.

Significantly, however, no ordinance presented to the district court gave the city administrator the authority to make the policies that determined the circumstances under which employees could be demoted or terminated. At most, the city council gave the city administrator the discretion to hire and fire employees; even if this discretion were exercised in an unconstitutional manner, Spring Valley could not be held liable for his actions so long as the city council was not implicated in such conduct. See Pembaur, 475 U.S. at 483, n.12. Even if Parker had final authority to make the decision to terminate the appellants' employment, he was not a city policymaker in that area. See Jett, 7 F.3d at 1248.

Therefore, the district court properly held that Parker was not a policymaker for Spring Valley with respect to the appellants' termination.

III

For the foregoing reasons, the judgment is

A F F I R M E D.