UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8839
Summary Calendar

LOUIS DAVID WILKINSON
and NICHOLAS L. FORTNER,

Plaintiffs-Appellees,

VERSUS

CITY OF PAMPA, TX, ET AL.,

Defendants,

GLEN HACKLER,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(A-93-CV-243)

(May 18, 1994)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Defendant Glen Hackler appeals the district court's denial of summary judgment grounded on qualified immunity. We **DISMISS** the interlocutory appeal for lack of jurisdiction.

I.

Plaintiffs David Wilkinson and Nicholas Fortner were police officers in Pampa, Texas, until terminated following an internal

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 Pursuant to that rule, the court has determined that this opinion should not be published.

investigation in May 1992. Wilkinson and Fortner filed suit against the City; the then-city manager, appellant Glen Hackler; chief of police James D. Laramore; Lieutenant Steven L. Chance; and police department dispatcher Lisa Burden. Plaintiffs' claims arose under the Texas Whistleblower Act, Tex. Rev. Civ. Stat. Ann. art. 6252-16a; the Texas Constitution; and 42 U.S.C. § 1983. Plaintiffs alleged, *inter alia*, that their civil rights were violated because they were terminated without due process of law and in violation of their rights to free speech, and in retaliation for their reporting violations of City policy, municipal ordinances, and state law. Hackler was a party to the original decision to terminate plaintiffs, and, in his position as city manager, upheld the recommendation of the personnel review board that plaintiffs be terminated.

Hackler and the City moved for summary judgment; in his summary judgment motion, Hackler asserted, among other grounds, that he was entitled to qualified immunity. The district court denied the City's and Hackler's motions for summary judgment, without prejudice to their moving for judgment at the conclusion of the plaintiffs' case in chief. In denying the motions, the court stated:

> IT IS ORDERED that the motions for summary judgment are OVERRULED as the evidentiary record before the Court establishes factual disputes with regard to the Plaintiffs' allegations of denial of procedural due process under their causes of action pursuant to 42 U.S.C. § 1983, and the evidence presented in the pleadings is so intertwined that the Court declines to grant any partial summary judgment at this time....

II.

This court must examine the basis for its jurisdiction on its own motion, if necessary. *E.g.*, ***Mosley v. Cozby***, 813 F.2d 659, 660 (5th Cir. 1987), *cited in* ***Burt v. Ware***, 14 F.3d 256, 257 (1994).

> As a general rule, only a final judgment of the district court is appealable. *See* 28 U.S.C. § 1291. Because the order presently under review, the denial of a motion for summary judgment, is interlocutory rather than final in character, to be appealable it must fall within an exception to section 1291.

Feagley v. Waddill, 868 F.2d 1437, 1439 (5th Cir. 1989). Specifically, an order denying qualified immunity is appealable only "`to the extent that it turns on an issue of law.'" ***Id.*** (quoting ***Mitchell v. Forsyth***, 472 U.S. 511 (1985)); *see also* 28 U.S.C. § 1292 (jurisdiction over interlocutory appeals generally). "[I]f disputed *factual issues material to [qualified] immunity* are present, the district court's denial of summary judgment sought on the basis of immunity is not appealable." ***Feagley***, 868 F.2d at 1439 (cited and quoted in ***Johnston v. City of Houston***, 14 F.3d 1056, 1060) (emphasis added); *accord*, ***Lampkin v. City of Nacogdoches***, 7 F.3d 430, 431, 436 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 1400 (1994).

The record before us shows disputed issues of material fact. For example, plaintiffs contend that they were terminated in retaliation for exercising their rights to free speech on matters of public concern. Hackler disputes not only whether the speech was protected speech for First Amendment purposes, but also whether plaintiffs' protected speech, if any, was a "motivating factor" in

their termination. This issue is material to the determination whether Hackler is entitled to qualified immunity; if plaintiffs' version of the facts is true, they have, at least, stated a claim for violation of a clearly-established constitutional right -- freedom of speech -- of which defendants surely should have been aware. *See, e.g.*, ***Johnston***, 14 F.3d at 1059, 1061 (citing and quoting ***Harlow v. Fitzgerald***, 457 U.S. 800, 818 (1982)) (test for qualified immunity is whether defendants' conduct "violate[d] clearly established rights of which a reasonable person would have known"; freedom of speech claims are "neither novel nor obscure"). Accordingly, we lack jurisdiction to entertain Hackler's appeal from the denial of that portion of his motion for summary judgment based on qualified immunity. ***Lampkin***, 7 F.3d at 436.

III.

For the foregoing reasons, the appeal is

DISMISSED.