IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-20901
Summary Calendar

DR. TOM JENKINS,

Plaintiff-Appellant,

versus

CHARLES A. GREEN, Chancellor, and,
HOUSTON COMMUNITY COLLEGE SYSTEM,

Defendants-Appellees.

Appeal from the United States District Court for
the Southern District of Texas
(CA-H-92-3436)

(October 17, 1995)

Before REAVLEY, DUHÉ and WIENER, Circuit Judges.

REAVLEY, Circuit Judge:[*]

Appellant Tom Jenkins filed this suit against the Houston Community College System (HCCS), and its chancellor, Charles Green, claiming that the defendants reassigned, demoted, and failed to promote him in violation of state and federal law. He asserted causes of action under 42 U.S.C. § 1983 for violation of

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

his due process and First Amendment rights, under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-34, and under state common law for intentional infliction of emotional distress. The district court, on the recommendation of a magistrate, granted two summary judgment motions dismissing all of Jenkins' claims, and entered a final judgment. Jenkins appeals, arguing that he raised evidence in support of all of his causes of action sufficient to defeat the summary judgment motions. We affirm in part and reverse in part.

FACTUAL BACKGROUND

Jenkins began working for HCCS in 1977 at the age of 51, after serving as president of two other community colleges. He was hired by J.B. Whitely, then president of HCCS, as a "campus director," an administrator responsible for the northwest quadrant of Harris County. During the period that he worked under Whitely, Jenkins received generally excellent performance evaluations, although defendants presented evidence that his performance was not entirely free of criticism. In 1990 HCCS was reorganized, Whitely resigned as president and defendant Green assumed the newly designated top post of chancellor.

Jenkins claims that his career at HCCS was derailed as a result of Green's hostility toward him. The genesis of this hostility, according to Jenkins, was a meeting Jenkins attended with the West Houston Association (WHA). The WHA is a group of business and community leaders in northwest Houston. The Association concerned itself with developing community college

services in the area. Jenkins was a member of the WHA, and HCCS paid his membership dues. Jenkins regularly reported to Whitely regarding his WHA activities. In late 1989 or early 1990, Jenkins attended a committee meeting of the Association. According to Jenkins, his attendance at this meeting was entirely appropriate. His own job evaluations repeatedly stated that he was expected to "represent and give visibility to the Houston Community College System in the northwest quadrant of Harris County," and to "continue to represent HCCS in the northwest area with high visibility in civic affairs." One of his written job descriptions prepared by HCCS charged him with the duty to "speak, as needed, before Civic, Professional, and Educator groups as requested." Both Whitely and Jenkins confirmed by affidavit that Jenkins was not only permitted but was encouraged to participate in WHA activities and similar activities of civic groups.

According to Jenkins, at the WHA meeting in question, the Association expressed concern that HCCS could not provide the level of community college services the area needed, Jenkins made no damaging or negative statements about HCCS, and he honestly answered all questions put to him, including questions regarding the legal steps required to create a new community college district. He admitted in deposition, however, that some people may have perceived that his real goal in advising WHA was to create a new community college of which he could be president.

On September 20, 1990 the WHA wrote to the College Coordinating Board in Austin, which oversees community colleges statewide. Although the letter was not openly critical of HCCS, it made clear that WHA preferred the creation of a new community college district, rather that an expansion of HCCS in the area. It stated: "After a number of meetings to evaluate our present community college services, the committee has concluded that the educational needs of west Houston are not presently being met, nor can they be adequately served in the future, by the already large and extremely diverse HCC district. Our committee has, therefore, authorized the preparation of a feasibility study in accordance with the Coordinating Board's procedures for creating a community college district."

Green was displeased by the letter when he obtained a copy. He expressed anger toward Jenkins during a face-to-face encounter on November 14, 1990, and informed Jenkins that he was not to further represent HCCS in the northwest quadrant or with the WHA. The next day he wrote Jenkins a letter reassigning him to work under the vice chancellor of academics, Dr. Harding, "for disposition and work as he may see fit to direct as a result of your representation of our College on the West Houston Committee and the ultimate conclusion of that committee . . . ." The letter further expressed Green's impression that Jenkins had not appropriately represented HCCS in his dealings with the WHA. Jenkins' theory is that Green was upset that he was not able to expand his "fiefdom" in northwest Harris County. According to

Jenkins, he tried to explain to Green what had happened at the WHA meeting but Green refused to listen.

After his assignment to Dr. Harding, Jenkins became head of the Fire Academy. While this assignment involved no loss in pay, Jenkins claims that he was demoted, since he went from overseeing four campuses with over 5000 students and staff to a single facility that was in poor financial condition and had less than 300 students. The Fire Academy was shut down a short time thereafter.

As part of the reorganization of HCCS under Green, the system was divided into four geographical quadrants -- the Northwest, Northeast, Southwest and Southeast colleges -- plus a "College Without Walls" and a "Central College." A position of president was created for each of the colleges. Jenkins himself had advocated the creation of separate geographical quadrants for the system with a president over each area.

Believing that his education and extensive experience qualified him for the president positions, Jenkins applied for each of the four quadrant president positions. He swore by affidavit that he had "acted in the *de facto* capacity of a president [of the northwest quadrant] for years within the System." He claims that he was never even interviewed for the new positions, and that all the positions were filled by younger and less experienced candidates. Separate committees, consisting of students, faculty and members of the administration, were set up to screen applications and recommend candidates for the new

presidents to the chancellor. The parties presented conflicting summary judgment evidence as to whether Jenkins' applications were forwarded to all of the hiring committees. Several affiants for the defense stated that Green was not involved in the selection of finalists by the committees.

After the Fire Academy was closed, Jenkins was assigned to the night coordinator position at the Sharpstown campus. Jenkins contends that this position was clearly a demotion from his prior campus director position. Jenkins' pay was reduced, and the job location was 42 miles from his house. In addition, Jenkins had to give up certain outside activities important to him because of the night schedule. Thereafter, Jenkins applied for several other positions within HCCS, but was never given a new job. He filed suit in November of 1992 and resigned from HCCS in September of 1993.

Throughout the period in question, Jenkins signed one-year employment contracts with HCCS. His pay was not reduced until the last of these contracts, when his position as Sharpstown night coordinator was renewed for one year with a slight reduction in pay.

The court granted two summary judgment motions. In the first, it dismissed all claims against HCCS and all claims against Green except the First Amendment claim. The second summary judgment dismissed the remaining First Amendment claim against Green, and the court entered a final judgment.

DISCUSSION

In determining whether a summary judgment was appropriate, we review the record and the pleadings independently, viewing all fact questions in a light most favorable to the nonmovant. *Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir. 1988). Summary judgment is appropriate if the record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). We address each of Jenkins' causes of action below.

A. *Intentional Infliction of Emotional Distress*

The district court correctly ruled that defendants were entitled to judgment as a matter of law on this state common law claim. To recover under Texas law for intentional infliction of emotional distress, the plaintiff must establish, *inter alia*, that the defendant's conduct was extreme and outrageous. *Ugalde v. W.A. McKenzie Asphalt Co.*, 990 F.2d 239, 243 (5th Cir. 1993). Conduct is considered outrageous only "if it surpasses `all bounds of decency' such that it is `utterly intolerable in a civilized community.'" *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 46 cmt. d.) Adverse employment decisions, in and of themselves, as a matter of law are not outrageous conduct in the context of this tort. For example, in *Tarleton State University v. Rosiere*, 867 S.W.2d 948 (Tex. App. -- Eastland 1994, writ dism'd by agr.), the court held that denying a professor tenure was not outrageous, even where the professor claimed that he was denied

tenure because he exercised his First Amendment rights. *Id*. at 950, 952. Further, "in the employment context, this court has repeatedly stated that a claim for intentional infliction of emotional distress will not lie for mere `employment disputes.'" *Johnson v. Merrell Dow Pharmaceuticals, Inc.*, 965 F.2d 31, 33 (5th Cir. 1992). "Only in the most unusual cases does the conduct move out the `realm of an ordinary employment dispute,' into the classification of `extreme and outrageous,' as required for the tort of intentional infliction of emotional distress." *Prunty v. Arkansas Freightways, Inc.*, 16 F.3d 649, 654 (5th Cir. 1994) (citation omitted). Jenkins presented no summary judgment evidence that would take this case out of the realm of an ordinary employment dispute. The fact that Green may have shouted and cursed at Jenkins on one occasion after Green received a copy of the letter from the WHA does not rise to the level of conduct so outrageous as to distinguish this case from other employment disputes which are not actionable. *See Ugalde*, 990 F.2d at 239 ("Liability does not extend to mere insults, indignities, threats, annoyances, or petty oppressions.").

B. *ADEA*

As one ground for granting summary judgment on the ADEA claim, the magistrate concluded, and that district court agreed, that this claim was barred by limitations. We also agree. The ADEA claim needed to be filed with the EEOC within 300 days of the alleged discriminatory act. 29 U.S.C. § 626(d)(2). Jenkins filed his EEOC claim on November 4, 1992. Jenkins' last transfer

-- to the Sharpstown campus -- occurred in October of 1991. He complains in his summary judgment papers, however, that he applied for other positions and was rejected in each case. He argues on appeal that defendants' conduct amounted to a continuing violation of ADEA up until his retirement in 1993.

In the analogous context of Title VII employment discrimination suits, the Supreme Court has recognized that "[m]ere continuity of employment, without more, is insufficient to prolong the life of a cause of action for employment discrimination." *Delaware State College v. Ricks*, 101 S. Ct. 498, 504 (1980). A plaintiff complaining of a continuing violation must identify "the alleged discriminatory acts that continued until, or occurred at the time of, the actual termination of his employment," and "`[t]he proper focus is upon the time of the *discriminatory acts*, not upon the time at which the *consequences* of the acts became most painful.'" *Id*. (quoting *Abrahamson v. University of Hawaii*, 594 F.2d 202, 209 (9th Cir. 1979)). Some courts have recognized the notion of a continuing violation under ADEA, but after *Ricks*, they require that at least one of the alleged discrete acts of discrimination occur within the applicable limitations period. *E.g. Hamilton v. Komatsu Dresser Indus., Inc.*, 964 F.2d 600, 604 (7th Cir.), *cert. denied*, 113 S. Ct. 324 (1992).

Assuming that Jenkins established a continuing violation of ADEA, he failed to offer evidence of a discrete act of discrimination by defendants within the applicable 300-day

limitations period. The last rejection of a request for promotion we can locate in the record occurred on December 9, 1991.

D. *Due Process*

Jenkins claims that Green's treatment of him was arbitrary and capricious, amounting to a denial of Jenkins' substantive due process rights. We agree with the district court that summary judgment was properly granted on this cause of action. Jenkins had to show that he had a constitutionally protected property interest in his employment to prevail on his due process claim. *Board of Regents v. Roth*, 92 S. Ct. 2701, 2708-09 (1972). Jenkins was not fired, but voluntarily resigned. He was reassigned to positions less prestigious than his original campus director position. His pay remained unchanged until his last one-year contract as Sharpstown night coordinator was renewed with a slight reduction in pay. His due process claim, therefore, hinges on whether he had not only a property interest in continued employment, but continued employment with the same pay, rank and status.

Property interests are not created by the Constitution, but must stem from an independent source such as state laws. *Id*. at 2709. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Id*. A mere subjective expectancy is insufficient to create a property

interest, although such an interest may arise from a written contract or "such rules or mutually explicit understandings that support [plaintiff's] claim of entitlement to the benefit . . . ." *Perry v. Sindermann*, 92 S. Ct. 2694, 2699-2700 (1972). Jenkins did state by affidavit that "[i]n my experience in community college administration, and in particular with Houston Community College, when an employee performs his or her job to satisfaction, when the evaluations and documentation support that satisfactory job performance and when that employee has not otherwise been involved in some misconduct regarding his or her employment, that employee has a continued expectation of employment at the same rate of pay and with the same title and rank as then employed." This statement is at most a conclusory assertion of a unilateral expectation on Jenkins' part that he could not be reassigned or demoted absent unsatisfactory performance. He failed to offer evidence of a mutually explicit understanding between himself and HCCS to the same effect. His written contracts with HCCS do not support such an understanding. He signed a series of one-year contracts which made no promise of renewal or renewal at the same pay, and expressly provided that, during the one-year term, HCCS could reassign him to other locations or duties.

D. *First Amendment*

The first summary judgment entered by the district court dismissed the First Amendment claim against HCCS, after the magistrate concluded that HCCS could not be held liable for

Green's actions under a respondeat superior or any other theory. On appeal Jenkins offers no briefing on this point, other than conceding that HCCS should not be held liable on this claim. Accordingly we affirm the district court's judgment insofar as it dismissed the First Amendment claim against HCCS. *See Zeno v. Great Atlantic and Pacific Tea Co.*, 803 F.2d 178, 180-81 (5th Cir. 1986); *Matter of Texas Mortgage Servs. Corp.*, 761 F.2d 1068, 1073 (5th Cir. 1985).

As to Green, the magistrate reasoned that he was entitled to summary judgment because (1) the speech in issue was not constitutionally protected, (2) Green reasonably believed that the speech was not constitutionally protected under *Waters v. Churchill*, 114 S. Ct. 1878 (1994), and (3) Green was entitled to qualified immunity. We cannot accept any of these grounds for the summary judgment in favor of Green on the First Amendment claim.

Jenkins claims that he was demoted and reassigned for exercising his right to free speech at the meeting with the WHA. The First Amendment prohibits public employers from retaliating against employees who speak out on matters of public concern. *Tomkins v. Vickers*, 26 F.3d 603, 606 (5th Cir. 1994). This First Amendment right extends to retaliation in the forms of reassignments, demotions, and denials of promotion. *Click v. Copeland*, 970 F.2d 106, 110 (5th Cir. 1992); *Fyfe v. Curlee*, 902 F.2d 401, 404-05 (5th Cir.), *cert. denied*, 111 S. Ct. 346 (1990). Whether speech involves a matter of public concern "must be

determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 103 S. Ct. 1684, 1690 (1983). We have stated that, in deciding whether the speech is a matter of public concern, the court should decide whether the speech was made primarily in the plaintiffs's role as a citizen or primarily in his role as an employee. *Thompson v. City of Starkville*, 901 F.2d 456, 464-65 (5th Cir. 1990). The facts of the case may display a mixture of personal and employee roles and concerns, and an issue of private concern to the employee may also be an issue of public concern. But where the public employee speaks only as an employee upon a matter of personal interest, the court should allow the public agency to make its own personnel decision. *Id*. at 463-64.

The magistrate concluded that Green had established as a matter of law that Jenkins spoke to the WHA primarily in his role as an employee of HCCS. The record does contain evidence that (1) Jenkins, as part of his position as campus director, was required to represent HCCS in civic affairs and attend civic events on behalf of HCCS, (2) HCCS financed his membership with the WHA by paying his dues, (3) HCCS approved of Jenkins' becoming a member of the WHA, and Jenkins kept HCCS advised of every meeting he attended, (4) Jenkins was originally asked to get involved with the WHA because of his position with HCCS (5) Jenkins admitted in deposition that it was "absolutely" part of his duty to HCCS to represent his employer at WHA meetings, and (6) Green at least believed Jenkins was HCCS' "official

representative" with the WHA. However, the record also contains evidence that (1) Jenkins has ties with educators and others generally concerned about community colleges, often spoke to them on a personal basis, and considers himself part of a nationwide community college movement (2) he was originally approached by a member of the WHA, and not HCCS, to serve on the committee which held the meeting in question, (3) HCCS never assigned Jenkins any formal duties or responsibilities in connection with his membership with the WHA, and he was never officially designated as HCCS's representative to the WHA, (4) Jenkins swore by affidavit that "my advice to the [WHA] was in no way related to my own employment status with HCCS", (5) the speech in question took place in a public forum and not on HCCS premises, (6) the WHA viewed Jenkins as a "resource person" with general knowledge about the workings of a community college system, and (7) at the meeting with the WHA Jenkins answered truthfully all questions put to him, including questions regarding the steps to take to form a community college district. Given this conflicting evidence, Green did not establish as a matter of law that Jenkins' comments to the WHA were not a matter of public concern and therefore not subject to First Amendment protection.

If the speech does involve a matter of public concern, the court must then, under the so-called "*Pickering/Connick* test," balance the interest of the employee as a citizen in commenting upon matters of public concern against the interest of the public employer in promoting the efficiency of the public services it

performs through its employees. *Coughlin v. Lee*, 946 F.2d 1152, 1157 (5th Cir. 1991). Courts "must balance the first amendment interest in protecting an employee's freedom of expression against the government's interest in maintaining discipline and efficiency in the work place." *Noyola v. Texas Dep't of Human Resources*, 846 F.2d 1021, 1025 (5th Cir. 1988). If the balance is found to weigh in the employee's favor, the fact-finder then moves on to the question of causation, and determines whether the plaintiff has established that his protected conduct was a substantial motivating factor in the employer's adverse personnel action taken against him. *Coughlin*, 946 F.2d at 1157.

Looking to the balancing test described above, Jenkins offered evidence that the expansion of community college services is a matter of ongoing personal interest to him, and argues that it is obviously a matter of general public concern. He also argues that there was no evidence presented that his comments to the WHA had an adverse effect on the efficiency of services provided by HCCS, pointing out in his brief, for example, that the comments were not made on HCCS premises and were entirely truthful. Green argues however that there was no causal connection between Jenkins' alleged protected speech and his adverse treatment as an employee. While this was not a ground the district court relied on in granting summary judgment, it was asserted in the second motion for summary judgment. Again, we conclude that on this record disputed material issues of fact have been presented on this issue. Jenkins did present evidence

that (1) he had generally excellent performance evaluations prior to the confrontation with Green, (2) he was removed from his campus director position the next day and later reassigned to less prestigious positions, (3) all the other campus directors became presidents of the newly established colleges,[1] (4) at least some of his applications were not even forwarded to the hiring committees for the new positions, and (5) Green had implied that he did not want to see Jenkins' name brought to him for consideration as a new college president.

Green also argues that he was entitled to summary judgment because his conduct was subject to the defense of qualified immunity. To overcome the defense of qualified immunity, the plaintiff must show that the defendant's conduct was not objectively reasonable and that the defendant violated clearly established law. *Burns-Toole v. Byrne*, 11 F.3d 1270, 1274 (5th Cir.), *cert. denied*, 114 S. Ct. 2680 (1994).

The right of public employees to speak out on matters of public concern, without risking retaliation from their employer, is as a general proposition clearly established. *Tomkins*, 26 F.3d at 606. Further, we have held that at least since 1988, an employer "should have known that if he retaliated against an employee for exercising his First Amendment rights, he could not escape liability by demoting and transferring the employee rather

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[1] He asserts at paragraph 50 of his main affidavit that "through the reorganization all the [other] campus directors became Presidents. I was campus director of the northwest until demoted to the Fire Academy."

than discharging him." *Click*, 970 F.2d at 111. While we note that the issue of immunity should be resolved at the earliest possible state of litigation, *Gibson v. Rich*, 44 F.3d 274, 277 (5th Cir. 1995), we believe that fact issues preclude a finding as a matter of law that a reasonable official in Green's position would not have known that the actions taken against Jenkins were constitutionally impermissible. For example, we think fact issues exist as to whether a reasonable official in Green's position would understand that Jenkins was primarily speaking as a citizen and not an employee, or that his interest in speaking at a public forum on matters of public concern outweighed any interest of HCCS in maintaining employee discipline and efficiency. We do not mean to suggest that Green cannot prevail on his qualified immunity defense. We hold only that, on this record, the district court erred in granting summary judgment based on this defense.

The magistrate also reasoned that Green was entitled to summary judgment in light of *Waters v. Churchill*, 114 S. Ct. 1878 (1994). *Waters* holds that when an employer retaliates against an employee for his speech, the employer's liability should turn in part on what the employer reasonably thought was said, rather than on what the finder of fact ultimately decides was said. *Id*. at 1882, 1889. Under this analysis, we do not believe that Green established as a matter of law that he reasonably believed Jenkins was acting in his capacity as an employee in his dealings with the WHA or that Jenkins' speech had had so adverse an effect

on HCCS as to render it unprotected by the First Amendment. The extent and reasonableness of Green's investigation of this matter is disputed in the record. While Green presented evidence of steps he took to investigate the matter, Jenkins presented evidence that (1) Green never talked to the WHA or to Whitely, his predecessor and the man who had originally approved Jenkins' membership with the WHA, (2) while both Whitely and Jenkins swore that Jenkins prepared written reports of his activities with the WHA, those reports were never produced by HCCS, (3) Jenkins never made any negative comments about HCCS to the WHA, and (4) when Green confronted Jenkins about the September 20, 1990 WHA letter, he was belligerent, did not bother getting Jenkins' side of the story, and ordered him reassigned the next day.

CONCLUSION

The summary judgment in favor of Green on Jenkins' claim for violation of his First Amendment rights is reversed, and we remand the case against Green for further proceedings. As to all other claims against Green, and all claims against HCCS, the judgment below is affirmed.

Affirmed in part, reversed in part, and remanded.