UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

RICK DEVINE PLAINTIFF

v. CIVIL ACTION NO. 3:99CV-695-S

JEFFERSON COUNTY, KENTUCKY, et al. DEFENDANTS

MEMORANDUM OPINION

This matter is before the Court on the Defendants' motion for summary judgment. For the reasons described below, the motion will be granted by a separate order entered this date.

The Plaintiff, Rick Devine ("Devine") has filed suit against Jefferson County, Kentucky and two of its employees alleging that they violated 42 U.S.C. section 1983 by retaliating against him for exercising his First Amendment rights to free speech and free association. Devine has also claimed violations of Kentucky Revised Statutes sections 336.130, 446.070, and 65.200 because the Defendants allegedly disciplined and discharged him for exercising his statutory rights to speak out against his collective bargaining agent.

The Defendants have moved for summary judgment because they claim (1) that there is no evidence that the Defendants were motivated by Devine's opposition to his collective bargaining representative, and (2) that the First Amendment does not prohibit the action taken by the Defendants in this case.

BACKGROUND FACTS

The following facts are undisputed.

Devine was an EMT for Jefferson County Emergency Medical Service ("JCEMS") for several years before the events in question. On June 6, 1999, Devine was involved in an on-the-job

argument. Devine admits that during this argument he placed his index finger in the chest of a co-worker, the union steward for the employees of JCEMS, and said something which included a reference to a "union steward hanging from a pole . . .." (Def.'s Motion Summ. J., Exh. E.) Based upon this confrontation, the management of JCEMS, including the Defendants, issued a statement which indicated that they believed several other employees' accounts of the event rather than Devine's. The management then suspended Devine for fifteen days.

Based upon this action, Devine filed suit on or about September 28, 1999 in Jefferson County, Kentucky Circuit Court. The Defendants removed the case to this Court on October 21, 1999.

On January 27, 2000, while the suit was pending in this Court, Devine was dispatched to assist a man with Crohn's Disease. The man eventually declined transportation to the hospital and signed an incomplete refusal form. Devine then used another refusal form to doctor the original one by adding medical information so as to make it appear that the man signed the form with that information present. This falsification did not lead to any legal problems for JCEMS.

The "falsification of records or reports" is classified a "major" violation under the JCEMS's collective bargaining agreement and subjected Devine to "termination for the first offense." (Def.'s Motion Summ. J., Exh. O, Art. 18, §3(c).) JCEMS subsequently discharged Devine and cited this violation as its reason. Devine then amended his Complaint to include the discharge.

DISCUSSION

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P 56(c); *see.*

Canderm Pharmacal, Ltd. v. Elder Pharmaceuticals, Inc., 862 F.2d 597, 601 (6th Cir. 1988). The party moving for summary judgment bears the burden of demonstrating the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986).

However, the moving party's burden may be discharged by demonstrating that there is an absence of evidence to support an essential element of the nonmoving party's case for which he or she bears the burden of proof. *Id.*, at 323. Once the moving party demonstrates this lack of evidence, the burden passes to the nonmoving party to establish, after an adequate opportunity for discovery, the existence of a disputed factual element essential to his or her case with respect to which he or she bears the burden of proof. *Id.* If the record taken as a whole could not lead the trier of fact to find for the nonmoving party, the motion for summary judgment should be granted. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

In order to recover under 42 U.S.C. section 1983, Devine must be able to establish that the Defendants deprived him of a right "secured by the Constitution." The Constitutional rights allegedly involved in this case are the rights of free speech and freedom of association contained in the First Amendment. In *Connick v. Myers*, 461 U.S. 138, 147, 103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983), the Supreme Court held that "when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest," the employee did not have a First Amendment claim against the employer. The Court ruled that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.*, 461 U.S. at 147-48, 103 S.Ct. at 1690. This inquiry is a question of law. *Id.* fn.7.

In *Boals v. Gray*, 775 F.2d 686 (6th Cir. 1985), the Sixth Circuit Court of Appeals decided

a case with similar issues to the one before us. They held, first, that the *Connick* analysis extended to the right of free association. *Id.* at 692. Next, they decided that "an employee's speech, activity or association, merely because it is union-related, does not touch on a matter of public concern as a matter of law." *Id*. at 693. They added, in dicta, that "We have no doubt that an employee who is disciplined solely in retaliation for his membership in and support of a union states a valid first amendment claim under *Connick* and *Pickering*[*v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1967)]." *Id.* Devine contends that the converse of this statement should also be true: that when one is discharged solely on the basis of vocal opposition to a union, he also states a valid first amendment claim. But, as *Connick* indicated, the question of whether an employee's speech addresses a matter of public concern must be determined from the "content, form, and context of given statement, as revealed by the whole record." *Connick,* 461 U.S. at 147-48, 103 S.Ct. at 1690. Thus, the question of whether Devine's statements and actions addressed a matter of public concern should be answered by the record of this particular case.

Nowhere in his response to the Defendants' motion for summary judgment does Devine offer any evidence that he attempted to associate himself with other anti-union employees. Thus, we find that Devin's freedom of association claim does not address a matter of public concern and is not actionable.

In respect to Devin's free speech claim, Defendants' have included in the record Devine's statement regarding the June 6 incident. In it, he states, "In an effort to educate the chief union steward how real unions are designed to work I told him, 'if this were a real company with a real union like Ford for example they would find their union steward hanging from a pole some-where in the parking lot." (Def.'s Motion Summ. J., Exh. E.) Although this certainly establishes that

Devine was critical of the union, it is just as obvious that it is not the kind of speech which addresses a matter of public concern. An employer should not be required to countenance such a thinly-veiled threat. Instead, it is the type of speech upon which an employer may take action. Clearly, JCEMS's decision to suspend Devine for fifteen days was not pretextual.

Likewise, Devine admits that he did falsify the release form which was the basis for his termination. The collective bargaining agreement permits termination for such action. Another employee, Patrick Parks, was terminated for violating this rule in June of 1998. Thus, JCEMS has articulated and established valid non-discriminatory reasons for its actions. Devine, in turn, fails to provide evidence that would create a genuine issue of material fact as to this justification for his termination was pretextual. Obviously, falsifying records in the health care area is serious. The collective bargaining agreement recognized it as such by providing that record falsification was a major violation for which termination was authorized. We would be hard pressed to find pretext in such a situation.

The only evidence offered by Devine relating to his right of free speech comes from his own affidavit which states, "I was a long-time and well-known critic of Local #783 as a company union." (Pla.'s Resp. Motion Summ. J., Devine Aff., ¶2.) This is nothing more than a restatement of the allegations in the Amended Complaint. It is well established that affidavits containing "nothing more than . . . conclusory allegations and subjective beliefs . . . are wholly insufficient evidence" to establish a claim "as a matter of law." *Mitchell v. Toledo Hospital*, 964 F.2d 577, 585 (6th Cir.1992). Thus, Devine's affidavit does not provide sufficient evidence to satisfy us (1) that he actually made public statements critical of the union, (2) that if he made such statements, they addressed a matter of public concern, or (3) that a reasonable jury could find that these statements

were the underlying reason for his suspension and termination.

In the final analysis, the record before us, at best, resembles that before the Supreme Court in *Connick*. There, the Court said that the plaintiff's speech, if shown to the public, "would convey no information at all other than the fact that a single employee is upset with the status quo." *Connick*, 461 U.S. at 148, 103 S.Ct. at 1691. Similarly, Devine has not presented any evidence which would connect his actions or speech to issues of public import. This is true despite the fact that Devine has alleged that his problems were related to what is commonly a matter of public import, collective bargaining. Thus, we find that there is no genuine issue of material fact that Devine made any statements addressing a matter of public concern.

Also, the Defendants have articulated and established that there were valid non-discriminatory reasons for the discipline they meted out. Devine has not denied taking the actions on which his discipline was based, although he has attempted to place a different spin on the meaning or severity of those actions. He has failed to provide evidence that could show that the Defendants had ulterior motives for the discipline or that he spoke out against the union in a permissible way. Thus, there is no genuine issue as to whether the Defendants' reasons are pretextual. The Defendants are entitled to a judgment as a matter of law.

Devine's remaining claim is based upon Kentucky law and deals directly with his ability to "associate collectively for self-organization . . . ." K.R.S. § 336.130(1). Assuming *arguendo* that this statute protects Devine's right to speak out against the union, he must still be able to establish that the action take by the Defendants was based upon his exercise of this right. The Defendants have argued that there is no genuine issue of material fact as to this point. Again, Devine has failed to produce anything other than his own conclusory statement to back up this point. At this stage in

the discovery process, his inability to produce a deposition or affidavit from any other employee detailing his statements or actions is inexcusable – especially in light of the fact that he claims to have been a "long time" and "well-known" critic. Thus, we again find that there is no genuine issue of material fact as to whether Devine spoke out in exercise of his alleged right to criticize the union.

CONCLUSION

The Defendants have demonstrated that there is an absence of evidence to support the notion that Devine exercised his First Amendment rights and that his exercise of those rights was the cause of his termination. Devine has failed to produce evidence to the contrary. Therefore, the Defendants are entitled to summary judgment in this case. Their motion will be granted by separate order entered this date.

This _____ day of _____, 2000.

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CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record

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ORDER

For the reasons set forth in the memorandum opinion entered this date and the Court being otherwise sufficiently advised, **IT IS HEREBY ORDERED AND ADJUDGED** that the Defendants' motion for summary judgment is **GRANTED**. The Plaintiff's claim is **DISMISSED** with prejudice.

This is a final and appealable order.

IT IS SO ORDERED this _____ day of _____, 2000.

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CHARLES R. SIMPSON III, CHIEF JUDGE
UNITED STATES DISTRICT COURT

cc: Counsel of Record