

**GEORGE EBERHARDT AND
THERESA EBERHARDT**

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NO. 2000-CA-1533

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COURT OF APPEAL

VERSUS

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FOURTH CIRCUIT

**ALAN J. LEVASSEUR,
INDIVIDUALLY, AND IN HIS
CAPACITY AS EXECUTIVE
DIRECTOR OF THE
CRESCENT CITY
CONNECTION DIVISION OF
THE DEPARTMENT OF
TRANSPORTATION OF THE
STATE OF LOUISIANA;
FRANK SHAW, ET AL.**

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STATE OF LOUISIANA

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**APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 91-13107, DIVISION "I-7"
HONORABLE TERRI F. LOVE, JUDGE**

**JAMES F. MC KAY, III
JUDGE**

(Court composed of Chief Judge William H. Byrnes, III, Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr.)

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-and-

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AFFIRMED

The plaintiffs, George Eberhardt and Theresa Eberhardt, appeal the trial court's grant of the defendants' motion for summary judgment.

FACTS AND PROCEDURE

Corporal George Eberhardt was dismissed from his employment with the Louisiana Department of Transportation, Crescent City Connection (CCC) Division, as a police officer in June of 1990. He had been a Bridge Police Officer for fourteen years and worked directly under Chief of Police Frank Shaw at the time of his dismissal. The CCC's executive director was Alan Lavasseur. The deputy chief was Michael Helmstetter. Sergeant James Murphy, who is also a defendant in this case, held the position of Commander of the Internal Affairs Division.

In early June of 1990, it came to the attention of Chief Shaw that Corporal Eberhardt had been moonlighting as a private investigator. Corporal Eberhardt had allegedly obtained free copies of police reports from

both the New Orleans Police Department (NOPD) and the Jefferson Parish Sheriff's Office (JPSO). Chief Shaw reported the matter to Sergeant Murphy, who as the Commander of Internal Affairs conducted an investigation. It is alleged that between February of 1989 and June of 1990, Corporal Eberhardt had requested thirty-one police reports from the NOPD, only one of which pertained to bridge police business. Between January of 1989 and April of 1990, Corporal Eberhardt had requested twenty-three reports from the JPSO, of which only one report was related to CCC business.

As a result of the ongoing investigation, Chief Shaw and Sergeant Murphy met with Corporal Eberhardt to inquire about his requests for police reports. Corporal Eberhardt admitted that he had requested the police reports for his private investigation business. As a result of this inquiry, Sergeant Murphy prepared a written report, which concluded that Corporal Eberhardt had obtained police reports illegally and under false pretenses. On July 13, 1990, Corporal Eberhardt was suspended from his position effective July 26, 1990. On July 17, 1990, Chief Shaw wrote a memorandum to Executive Director Levasseur, advising him of the findings

and recommending that Corporal Eberhardt be removed from his position. On or about July 26, 1990, Corporal Eberhardt was verbally notified that he was being suspended and received a hand-delivered notice written by Mr. Levasseur confirming the reasons for this action. On September 26, 1990, Mr. Levasseur advised Corporal Eberhardt that termination was being considered because of the misuse of his authority in obtaining free police reports for his personal gain. Corporal Eberhardt, with assistance of counsel, responded to these charges on October 1, 1990. On October 2, 1990, Mr. Levasseur gave Corporal Eberhardt written notice of employment termination.

Corporal Eberhardt appealed his suspension and termination to the Louisiana Civil Service Commission. A formal administrative hearing was held regarding his challenge of the suspension. After hearing Corporal Eberhardt's testimony, wherein he admitted that he had obtained free police reports for his private business, the Appeals Referee found that "the appointing authority has, by appellant's testimony, established sufficient cause for having issued the suspension" and denied the appeal. Corporal Eberhardt also appealed his termination to the Louisiana Civil Service

Commission, but this challenge was dismissed as untimely. The appellant failed to appeal the Civil Service Commission's decisions to the First Circuit. Instead, he filed suit in the instant matter.

On October 30, 1992, the defendants brought an exception for lack of subject matter jurisdiction, asserting that the Civil Service Commission procedures set forth in Article 10 § 12 of the Louisiana Constitution provide the plaintiff's sole and exclusive remedy to challenge his termination. The district court agreed and dismissed the case with prejudice. This Court held that Article 10 §12 of the Louisiana Constitution did not preclude Corporal Eberhardt's claims under 42 U.S.C. § 1983 for violation of his federal constitutional rights, but the Constitution was silent with respect to the viability of the remaining state law claims. This Court remanded the matter for further proceedings.

The defendants filed a motion for summary judgment on October 27, 1998. On October 5, 1999, the trial court granted the motion and dismissed the plaintiffs' claims with prejudice. It is from this judgment that the plaintiffs appeal.

DISCUSSION

The appellants contend that the trial court erred on three grounds, two procedural and one substantive, when it granted defendants' motion for summary judgment. They assert that the trial court erred in evaluating the witnesses' testimony, in failing to give reasons for the dismissal and in granting the summary judgment when issues of material fact are still at issue.

Summary judgments are reviewed on appeal de novo. *Smith v. Our Lady of the Lake Hospital*, 93-2512 (La.7/5/94), 639 So.2d 730. A motion for summary judgment is properly granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits submitted, if any, show there is no genuine issue of material fact such that the mover is entitled to judgment as a matter of law. La.C.C.P. art. 966. Louisiana Code of Civil Procedure Article 966, as amended, provides that:

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of actions such as this. The procedure is favored and shall be construed to accomplish these ends. La. C.C.Pro. art. 966 A(2). A summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to a material fact, and that the mover is entitled to judgment as a matter of law. La. C.C.Pro. art. 966 B.

However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden does not [98-2379 La.App. 4 Cir. 8] require him to negate all essential elements of the adverse party's claim, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim. La. C.C.Pro. art. 966 C (2).

At least one court of appeal has stated that "[t]he rules should be liberally construed." *Oakley v. Thebault*, 96-0937, (La.App. 4 Cir. 11/18/96), 684 So.2d 488, 490; *Daniel v. Blaine Kern Artist, Inc.*, 96-1348 (La. App. 4 Cir. 9/11/96), 681 So.2d 19.

In determining whether an issue is genuine, courts cannot consider the merits, make credibility determinations, evaluate testimony or weigh evidence. *Id.* A summary judgment is rarely appropriate for a determination based on subjective facts such as intent, motive, malice, knowledge or good faith. *Coto v. McDermott*, 99-1866 (La. App. 4 Cir. 10/31/00), 777 So.2d 828,830; *Penalber v. Blount*, 550 So.2d 577, 583 (La.1989).

The plaintiffs advance arguments contending that the employment termination was based on retaliation. They assert that the depositions presented to the trial court support this supposition and that there was a conflict in the deposition testimony of various witnesses and defendants, in

particular Alan Levasseur and Frank Shaw. Particularly, they allege that there was conflicting testimony concerning the practice of police officers obtaining police reports free of charge. The appellants also assert that there were many underlying factors concerning Corporal Eberhardt's suspension and termination. These included his involvement in an ongoing investigation into the theft of bridge tolls, and they lacked any policy in place concerning the acquisition of police reports for whatever reason, personal or official.

Appellants advance claims against the defendants pursuant to 42 U.S.C.A § 1983 and seek recovery from the defendants in their official capacity. Title 42 § 1983 of United States Code provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

While these are all critical factors crucial to the appellants' claims of constitutional violations and retaliatory termination, the appellants failed to provide evidence that advanced their claims past mere speculation and

innuendo. Concerning appellants' claims of retaliation based on the toll bridge investigations, the individual (Alan Levasseur) who was responsible for Mr. Eberhardt's termination was not employed by the CCC at the time of the investigation in 1989. Furthermore, the investigations of the toll thefts occurred in April and May of 1989, well over a year before the plaintiff was initially suspended in July of 1990.

The trial court stated: "After a careful consideration of the law, facts and memoranda filed herein, the court finds that plaintiff's claim that the termination of his employment constitutes retaliation in violation of his constitutional rights (under the First and Fourteenth Amendment [sic.]) is based upon an alleged 'conspiracy' is not supported by the fact [sic.]" Although the trial court does not elaborate upon which facts it references in reaching its conclusion a district court is not required to provide detailed, written reasons for its judgment, but need only provide such written reasons upon the request of a party. La. C.C.P. art. 1917

The trial court went on to state:

"IT IS HEREBY ORDERED, ADJUGED AND DECREED that there is no factual evidence presented to support a cause of action under 42 USC sec. 1983 and there are no genuine issues of material fact which preclude summary judgment as a matter of law."

We agree. After a careful inspection of the entire record, it is evident that the appellant failed to make a *prima facie* case that Corporal Eberhardt's termination could have been based on retaliation and discrimination in

violation of his constitutional rights.

CONCLUSION

Accordingly, we affirm the trial court's judgment granting the defendants' motion for summary judgment.

AFFIRMED