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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Robert McBurnie, Plaintiff, vs. City of Prescott, et al., Defendants.	No. CV-09-8139-PCT-FJM **ORDER**

The court has before it defendants' motion for summary judgment on plaintiff's First Amendment retaliation claim (Doc. 202), plaintiff's response (Doc. 207), and defendants' reply (Doc. 210). We also have before us plaintiff's motion for leave to file memorandum opposing defendants' motion to strike (Doc. 212), defendants' response (Doc. 216), and plaintiff's reply (Doc. 219).

I

Plaintiff Robert McBurnie was an employee with the City of Prescott, performing the City's electrical work. He frequently worked overtime hours in his work with the Prescott Parks and Recreation Department until the City determined its budget could no longer support overtime pay. Plaintiff filed a grievance against his then supervisor, defendant Eric Smith, alleging that the City's forced use of compensatory time in lieu of overtime pay

violated the Fair Labor Standards Act (FLSA).

Plaintiff was eventually transferred to the Facilities Maintenance Department where he was supervised by defendants Ted Hanneman and Mic Fenech. Hanneman asked plaintiff to cross train two other employees, Dave Suggs and Mike Robbins, on electrical issues so that other employees could work the City's special events. Plaintiff refused to cross train Suggs and Robbins, claiming that the work required a qualified electrician. Eventually, plaintiff raised his safety concerns regarding cross training with the Arizona Department of Occupational Safety and Health (ADOSH). Plaintiff continued to refuse to cross train his coworkers until February 23, 2009, when he and 11 other full-time City employees were laid off as part of a City-wide reduction in force. Defendants assert that plaintiff's selection for lay off was largely due to his steadfast refusal to follow his supervisor's directive to cross train other employees on the City's electrical systems.

Plaintiff filed this action against the City of Prescott and its employees asserting 13 claims related to his discharge, including a claim that his First Amendment rights were violated when he was retaliated against for complaining to ADOSH about safety concerns related to cross training other employees. We dismissed plaintiff's First Amendment retaliation claim on defendants' motion for summary judgment, concluding that reporting safety concerns was part of plaintiff's regular duties, and therefore his speech was not constitutionally protected. During trial, we granted defendants' motion for judgment as a matter of law on certain claims, including plaintiff's claim for negligent infliction of emotional distress. The matter went to the jury on plaintiff's sole remaining claim of retaliatory discharge in violation of the FLSA. The jury returned its verdict in favor of defendants on the remaining claim.

On appeal, the Ninth Circuit reversed and remanded on plaintiff's claims of First Amendment retaliation, FLSA retaliation, and negligent infliction of emotional distress. The matter is now before us on defendants' post-appeal motion for summary judgment on plaintiff's First Amendment retaliation claim (Doc. 202).

II

The Ninth Circuit concluded that plaintiff had raised a genuine and material dispute over whether his speech, and in particular his communications with ADOSH, were beyond the scope of his regular job duties. The court remanded for further proceedings on this claim "without prejudice as to whether defendants may file a renewed motion for summary judgment on the basis of the evidentiary record presented at trial." (Doc. 182-2 at 3). In accordance with that instruction, we issued a scheduling order stating that any post-appeal motion for summary judgment will be "limited to the trial record on the First Amendment retaliation claim." (Doc. 198). Neither party objected to that limitation.

Defendants properly limited their post-appeal motion for summary judgment to the trial record. However, plaintiff offered new evidence, including a new affidavit by plaintiff, a previously undisclosed interview transcript of Julie McGirk, the ADOSH final investigative report regarding plaintiff's job termination, plaintiff's post-termination ADOSH communications, and an August 14, 2008 ADOSH letter to plaintiff, none of which was produced at trial. To allow plaintiff to introduce evidence outside the record would unfairly prejudice the defendants and is contrary to clear directives of both the Ninth Circuit and this court. We will not consider evidence not contained in the trial record for purposes of defendants' post-appeal motion for summary judgment.

Plaintiff moves for leave to file a memorandum in response to what he calls defendants' motion to strike this extra-record evidence. But defendants did not file a separate motion to strike. Instead, they properly challenged plaintiff's proffered evidence in their objections to plaintiff's statement of facts. See LRCiv 7.2(m)(2). We do not need a memorandum from plaintiff, nor is one permitted under the federal or local Rules of Civil Procedure. Plaintiff's motion for leave to file a memorandum is denied (Doc. 212).

III

Defendants move for summary judgment on plaintiff's First Amendment retaliation claim. In opposition to this motion, plaintiff contends that he was retaliated against for making two complaints to ADOSH—one "in July 2008" and the other "on August 8, 2008."

Response at 3, 4, 8.[1]

In evaluating plaintiff's First Amendment claim, we must find "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Bd. of Educ., 391 U.S. 563, 568, 88 S. Ct. 1731, 1734-35 (1968). This balancing requires a five-step inquiry: (1) whether plaintiff spoke on a matter of public concern; (2) whether plaintiff spoke as a private citizen or public employee; (3) whether plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the City had an adequate justification for treating plaintiff differently from members of the general public; and (5) whether the City would have taken the adverse employment action absent the protected speech. Dahlia v. Rodriguez, 735 F.3d 1060, 1067 (9th Cir. 2013) (citing Eng v. Cooley, 552 F.3d 1062, 1070 (9th Cir. 2009)). The plaintiff bears the burden of proof on the first three factors. The burden shifts to the government to prove the last two. Clairmont v. Sound Mental Health, 632 F.3d 1091, 1103 (9th Cir. 2011). "If the plaintiff fails to carry his burden at any step, qualified immunity should be granted to the defendant." Id.

A. Matter of Public Concern

The Ninth Circuit has "defined the scope of the public concern element broadly and adopted a liberal construction" of what constitutes an issue of public concern under the First Amendment. Id. The issue of whether an employee is speaking on a matter of public concern is a question of law for the court to decide. We review the "content, form, and context of a given statement, as revealed by the whole record." Id. The content of the speech is "the greatest single factor" in the inquiry. Id. Speech that "helps the public evaluate the performance of public agencies" or discusses "threats to public safety" are generally considered matters of public concern. Id. at 1104. Speech relating to internal personnel

[1]Plaintiff does not oppose defendants Eric Smith and Rudy Baranko's motion for summary judgment on the basis of qualified immunity. Therefore, summary judgment is granted in favor of Smith and Baranko.

grievances and disputes, however, ordinarily will not be viewed as addressing matters of public concern.

Here, the speech at issue is limited to plaintiff's communications with ADOSH in July 2008 and on August 8, 2008 regarding his safety concerns in having to cross train coworkers whom he believed were not qualified. Response at 3, 4, 8. Defendants attempt to construe these communications as a self-serving effort by plaintiff to maximize his overtime hours by remaining the only employee trained to perform electrical services at City events. However, even if we assume that plaintiff's motive was to present a personal grievance in reporting to ADOSH, he nevertheless presented plausible employee and public safety concerns to the government agency charged with investigating and regulating the City. See Clairmont, 632 F.3d at 1105 (holding that the motive behind the speech is not relevant "so long as [the speech itself] meets the public concern test"). Therefore, broadly and liberally construing plaintiff's alleged speech, we conclude that plaintiff's alleged complaints to ADOSH presented issues of public concern.

B. Private Citizen or Public Employee

Our second inquiry is whether plaintiff spoke as a private citizen or public employee. "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Garcetti v. Ceballos, 547 U.S. 410, 421, 126 S. Ct. 1951, 1960 (2006). If speech is classified as having been made pursuant to an employee's official duties, then the speech is denied First Amendment protection. "The proper inquiry [to determine the scope of an employee's official duties] is a practical one." Id. at 424, 126 S. Ct. at 1962. Whether an employee spoke as public employee or a private citizen is a mixed question of fact and law. Posey v. Lake Pend Oreille Sch. Dist., 546 F.3d 1121, 1130 (9th Cir. 2008). The "scope and content of a plaintiff's job responsibilities" is a question of fact, but the "ultimate constitutional significance of the facts as found" is a question of law. Id. at 1129-30.

Plaintiff complained about his safety concerns regarding cross training other

employees whom he believed were not qualified to perform electrical work. Defendants argue that plaintiff's "job description, as well as the City's general expectations of its employees, required the identification and reporting of safety concerns as part of McBurnie's official duties." MSJ at 4-5. It is undisputed that the safe operation of the City's electrical systems was a core aspect of plaintiff's job. The City's Safety Manual required employees to promptly report accidents, injuries, and unsafe work conditions. DSSOF ¶7. Plaintiff acknowledged that the reporting of safety concerns to supervisors was a necessary part of his work. DSSOF ¶ 11.

However, plaintiff's speech regarding his safety concerns in cross training consisted not only of complaints made to his supervisors, which plaintiff concedes were part of his job responsibilities, but also to ADOSH, an independent state agency. "When a public employee communicates with individuals or entities outside of his chain of command, it is unlikely that he is speaking pursuant to his duties." Dahlia, 735 F.3d at 1074 (citing Freitag v. Ayers, 468 F.3d 528, 545-46 (9th Cir. 2006)).

An issue of fact exists as to whether plaintiff acted as a private citizen to expose official wrongdoing to an independent state agency, or whether he acted as a disgruntled employee refusing to follow his supervisors' directive in order to maintain his monopoly on performing City electrical work. Reporting to an outside agency, while indicative of speech by a private citizen, does not conclusively establish private speech. Instead, evidence of motive, as well as the content and context of the speech are all relevant in determining whether an employee is speaking as a private citizen.

Although we conclude that a material issue of fact exists with respect to the second step of the First Amendment analysis, we nevertheless proceed to step three because summary judgment in favor of defendants is appropriate if plaintiff fails to meet his burden of proof at any one of the first three steps in the analysis.

C. Substantial or Motivating Factor

The third inquiry in our analysis–whether plaintiff's speech was a substantial or motivating factor in his termination "is purely a question of fact. . . .[W]e must assume the

truth of plaintiff's allegations." Eng, 552 F.3d at 1071.

As previously discussed, plaintiff premises his First Amendment retaliation claim on two communications with ADOSH–one in July 2008, and the other on August 8, 2008. Response at 3, 4. While plaintiff makes some reference to the record demonstrating that a phone call to ADOSH occurred sometime in late July 2008, he offers no evidentiary support regarding a contact with ADOSH on August 8, 2008. A party cannot demonstrate a material dispute of fact if he fails to properly support an assertion of fact as required by Fed. R. Civ. P. 56(c)(1).[2]

More importantly, however, plaintiff does not allege that he informed any City defendant about either of these two contacts with ADOSH. Indeed, plaintiff testified at trial that he did *not* inform City personnel of any ADOSH contacts other than his request for information. Tr. 250, lns 13-20 (Q: "Did you tell anybody at the city that you had spoken to this fellow named Mr. Harnsberger [ADOSH compliance officer] at any time between the time you spoke to him and the time Ms. Mandeville came to the City?" A: "No."). Obviously, plaintiff's speech cannot be a motivating factor in any adverse employment action if the defendants were unaware of the speech. Therefore, even assuming the truth of plaintiffs' allegations that he contacted ADOSH on two occasions voicing legitimate concerns of safety violations by the City, he has failed to present a material issue of fact that this presumed constitutionally protected speech was a motivating factor in the adverse employment actions.

Plaintiff asserts that the ADOSH consultation meeting on August 14, 2008 "occurred as a result of McBurnie's *complaint to ADOSH*," Response at 4 (emphasis added) (citing PSOF ¶¶ 138-42), the inference being that defendants knew of the complaint. However,

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[2]At PSOF ¶ 142, plaintiff relies on his own 2013 affidavit and a his 2009 post-termination ADOSH complaint (neither of which was produced at trial) in which he refers to an August 8, 2008 contact with ADOSH. Although we have already held that we will not consider evidence not contained in the trial record for purposes of this motion, we note that although the documents refer to an August 8, 2008 contact with ADOSH, plaintiff presents no evidence demonstrating that defendants knew about this communication.

plaintiff's citation to the record mischaracterizes the evidence he offers in support of this argument. Instead, the record demonstrates only that the ADOSH meeting "occurred because of McBurnie's *concerns* the City was violating OSHA regulations." PSOF ¶ 138.[3]

Plaintiff also cites to a transcript of an October 21, 2009 ADOSH interview of City risk management employee Julie McGirk, which is not part of the trial record. But even the improper cite to McGirk's ADOSH interview transcript confirms that McGirk knew that plaintiff had frequently expressed concerns about cross training and accordingly on her own initiative, McGirk scheduled the August 14, 2008 consultation meeting with ADOSH. See McGirk Tr. at 47-49. Therefore, the materials cited do not support plaintiff's argument that defendants knew about plaintiff's July 2008 or August 8, 2008 complaints to ADOSH. Plaintiff has failed to establish a genuine question of fact on this issue.

Finally, although plaintiff does not advance the argument that he was retaliated against for his communications at the August 14, 2008 consultation meeting with ADOSH, we note that it is undisputed that the City arranged the meeting and required plaintiff to attend. Therefore, plaintiff's attendance at the meeting was part of his job responsibilities.

D.

Even if plaintiff had shown that his speech to ADOSH was a substantial or motivating factor in the adverse employment actions, we would nevertheless conclude that the City defendants had an adequate justification for treating plaintiff differently from other members of the general public and that it would have reached the adverse employment decisions even in the absence of the plaintiff's protected conduct.

Plaintiff's alleged protected conduct was not "a but-for cause of the adverse employment action." Eng, 552 F.3d at 1072. Defendants have adequately demonstrated, and plaintiff has failed to refute, that plaintiff repeatedly refused his supervisor's directive to cross train his coworkers, and that the City had a legitimate operational need to have multiple

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[3]Plaintiff cannot create a material dispute of fact in opposition to a motion for summary judgment by mischaracterizing the evidence.

individuals trained on the special events electrical system in order to avoid the incurrence of employee overtime. The First Amendment does not insulate an employee from the consequences of refusing to perform legitimate work assignments.

IV

Therefore, based on the foregoing, we conclude that plaintiff has failed to demonstrate that a genuine issue of material fact exists as to whether his speech to ADOSH was a substantial or motivating factor in the adverse employment actions, and alternatively has failed to refute the defendants' evidence that it would have made the same adverse employment decision in the absence of any protected speech.

IT IS ORDERED GRANTING defendants' motion for summary judgment on plaintiff's First Amendment retaliation claim (Doc. 202).

IT IS FURTHER ORDERED DENYING plaintiff's motion for leave to file memorandum (Doc. 212).

DATED this 14th day of February, 2014.

Frederick J. Martone

Frederick J. Martone
Senior United States District Judge