

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FREDDIE M. DAVIS,

Plaintiff,

v.

PRISON HEALTH SERVICES, *et al*,

Defendants.

No. C 09-2629 SI

**ORDER DIRECTING BRIEFING ON
WHETHER PLAINTIFF ENGAGED IN
SPEECH OR PETITIONING ACTIVITY
ON A MATTER OF PUBLIC CONCERN**

(Briefs due by December 9, 2011)

Immediately before trial, plaintiff dismissed all of her race- and gender-related claims, and has proceeded to trial only on her First Amendment retaliation claims. The Court has reviewed the parties' proposed jury instructions relating to this claim. The parties do not agree on the content of the First Amendment retaliation instruction, but both parties' competing jury instructions on the issue require the Court to determine in the first instance whether plaintiff has engaged in conduct protected by the First Amendment, prior to submission of the case to the jury. It is on this question that the Court directs further briefing.

Plaintiff's proposed instruction is based on Ninth Circuit Model Civil Jury Instruction No. 9.10, which relates to First Amendment claims brought by citizen plaintiffs, while defendants' proposed instruction is based on Model Instruction No. 9.9, which relates to First Amendment claims brought by public employee plaintiffs. Under defendant's proposed instruction, the Court must find that plaintiff's speech was on a matter of public concern; under plaintiff's proposed instruction, the Court must find only that plaintiff's signing of the petition and/or protesting the conduct of her supervisor was "protected speech."

1 Defendants contend that their instruction should be used because plaintiff, as an employee of
2 a government contractor, is considered a public employee for First Amendment purposes. Based upon
3 the Court’s preliminary research, this contention appears to be correct. In *Board of County Com’rs,*
4 *Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668, 673 (1996), the Supreme Court held that
5 independent contractors are protected under the First Amendment from retaliatory governmental action
6 under the same framework applicable to public employees, and that the extent of the protection is to be
7 determined by weighing the government’s interest as contractor against the free speech interests at
8 stake:

9 To prevail, Umbehr must show that the termination of his contract was motivated by his
10 speech on a matter of public concern, an initial showing that requires him to prove more
11 than the mere fact that he criticized the Board members before they terminated him. If
12 he can make that showing, the Board will have a valid defense if it can show, by a
preponderance of the evidence, that, in light of their knowledge, perceptions, and
policies at the time of the termination, the Board members would have terminated the
contract regardless of his speech.

13 *Id.* at 686.

14 “When a public employee sues a government employer under the First Amendment’s Speech
15 Clause, the employee must show that he or she spoke as a citizen on a matter of public concern.”
16 *Borough of Duryea, Pennsylvania v. Guarnieri*, 131 S. Ct. 2488, 2493 (2011) (citing *Connick v. Myers*,
17 461 U.S. 138, 147 (1983)). In *Connick*, the Supreme Court held that “when a public employee speaks
18 not as a citizen upon matters of public concern, but instead as an employee upon matters only of
19 personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum
20 in which
21 to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the
22 employee’s behavior.” *Connick*, 461 U.S. at 147 (employee’s questionnaire asking co-workers about
23 their confidence in supervisors, level of office morale, and need for a grievance committee, did not
24 address a matter of public concern and instead questions were “mere extensions of Myers’ dispute over
25 her transfer to another section of the criminal court”).

26 In *Guarnieri*, the Supreme Court held that the “public concern” test applies to First Amendment
27 retaliation claims brought by public employees against their employers under the Petition Clause of the
28 First Amendment. In that case, a police chief filed a union grievance challenging his termination. The

1 police chief was reinstated, and the borough council issued a number of directives instructing the chief
2 in the performance of his duties. The chief filed a lawsuit against the council under 42 U.S.C. § 1983
3 alleging that his union grievance was a petition protected by the Petition Clause of the First Amendment,
4 and that the directives issued upon his reinstatements were retaliation for that protected activity. After
5 the suit was filed, the council denied the chief overtime pay; the police chief then amended his lawsuit
6 to allege that his § 1983 lawsuit was a petition and that the denial of overtime constituted retaliation for
7 having filed the lawsuit. The Supreme Court held that the public interest test governed Guarnieri's
8 claims, and that "[t]he framework used to govern Speech Clause claims by public employees, when
9 applied to the Petition Clause, will protect both the interests of the government and the First Amendment
10 right. If a public employee petitions as an employee on a matter of purely private concern, the
11 employee's First Amendment interest must give way, as it does in speech cases." *Id.* at 2500; *see also*
12 *Rendish v. City of Tacoma*, 123 F.3d 1216, 1221 (9th Cir. 1997) ("[I]t follows that the threshold
13 requirement demanded of a public employee's speech in order to receive constitutional protection from
14 adverse employment actions – that it involve a matter of public concern – applies with equal force to
15 a public employee's petition for redress of grievances.").

16 The Court is concerned about whether plaintiff's speech and petitioning activity involves a
17 matter of public concern. The parties are directed to brief this issue. *See generally Guarnieri*, 131 S.
18 Ct. at 2501 (discussing factors relevant to analysis of whether petition relates to a matter of public
19 concern); *Connick*, 461 U.S. at 147-48 & n.7 (same regarding speech). If plaintiff contends that *Board*
20 *of County Com'rs, Wabaunsee County, Kan. v. Umbehr* does not apply to this case, plaintiff shall also
21 brief that question.

22 **The parties' briefs shall be filed by 5 p.m. on Friday, December 9, 2011.**

23
24 **IT IS SO ORDERED.**

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26 Dated: December 6, 2011

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SUSAN ILLSTON
United States District Judge