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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIAN HAGEN,

O R D E R
Civ. No. 10-6100-AA

Plaintiff,

vs.

CITY OF EUGENE, PETE KERNS,
JENNIFER BILLS, and TOM EICHHORN,

Defendants.

AIKEN, Chief Judge:

Defendants moved for a court trial of two issues prior to the jury trial scheduled in this case. On March 7, 2012, the court heard oral argument on those issues, as well as considered exhibits and heard witness testimony.

I. Grievance Arbitration Issue

Plaintiff grieved his May 20, 2009 transfer from the K-9 team through the grievance process set out in the collective

1 bargaining agreement between the City and the Eugene Police
2 Employees' Association. An arbitration hearing was held on
3 October 23, 2009 to resolve plaintiff's grievance. One of
4 plaintiff's contentions in his grievance was that his transfer
5 from K-9 was the result of a "pattern of harassment and
6 discrimination against Officer Hagen by the Department of his
7 protected whistleblowing actions regarding safety of the K9
8 program and the leadership of the same program." Plaintiff's
9 grievance of his transfer went to arbitration in which an
10 arbitrator issued a decision on plaintiff's claim.

11 As part of his grievance, plaintiff alleged that defendant
12 Bills' decision to transfer him from the K-9 team was motivated
13 by retaliation against plaintiff for speaking out about SWAT
14 safety issues.

15 Defendants argue that plaintiff's grievance arbitration
16 decision is preclusive on the issue of defendant Bills' motive
17 in transferring plaintiff from the K-9 unit.

18 Under Oregon law, issue preclusion applies when:

- 19 1. The issue in the two proceedings is identical.
- 20 2. The issue was actually litigated and was
21 essential to a final decision on the merits in
22 the prior proceeding. 3. The party sought to be
23 precluded has had a full and fair opportunity to
24 be heard on that issue. 4. The party sought to be
25 precluded was a party or was in privity with the
26 party to the prior proceeding. 5. The prior
27 proceeding was the type of proceeding to which
28 this court will give preclusive effect.

Boise Cascade v. Bd. of Forestry, 186 Or. App. 291, 298, 63 P.2d
598 (internal quotation omitted), rev. denied, 335 Or. 578, 74
P.3d 112 (2003).

The party asserting issue preclusion (defendants) bear the

1 burden of proof on the first, second and fourth requirements.
2 Thomas v. US Bank Nat'l Assoc., 224 Or. App. 457, 469, 260 P.3d
3 711, rev. denied, 351 Or. 401, 268 P.3d 152 (2011).

4 Based on the witness testimony before this court, I find
5 the issue of defendant Bills' motivation in transferring
6 plaintiff out of the K-9 unit was not "actually litigated" in the
7 grievance proceeding; nor was it "essential to a final decision
8 on the merits" in the grievance proceeding. Specifically, I rely
9 on unrebutted witness testimony indicating that "the issue at
10 arbitration" was whether the transfer itself constituted
11 discipline. Plaintiff's alleged refusal to work with the
12 sergeant qualified as a legitimate management right to transfer
13 plaintiff.

14 The record also supports the contention that "retaliation"
15 was not raised in the underlying proceeding except as to whether
16 there was an objective review of the facts, as part of the "just
17 cause" provision of the collective bargaining agreement. There
18 is no evidence that retaliation as defined pursuant to First
19 Amendment case law was raised in the arbitration. In fact, the
20 evidence was that the grievance procedure at issue was
21 specifically limited to a violation of an article or subsection
22 contained within the collective bargaining agreement. Further,
23 there does not exist a section in the collective bargaining
24 agreement that prohibits the employer from retaliating.

25 The court also relies on evidence in the record of
26 plaintiff's "full and fair opportunity to be heard" during the
27 underlying proceeding. Again, it is undisputed that plaintiff
28 did not receive relevant information from defendant despite

1 repeated requests until after the grievance arbitration hearing.

2 II. Qualified Immunity on "Public Concern"

3 Defendants next moved for judgment on plaintiff's First
4 Amendment retaliation claim based on qualified immunity.
5 Defendants argue that plaintiff's complaints could have
6 reasonably been considered speech concerning his personal safety
7 and not protected speech because it was in the nature of an
8 employee grievance. Specifically, defendants assert that, at
9 least, the law at the time of defendants' actions, was not
10 clearly established that plaintiff's speech activity fell within
11 the ambit of "public concern."

12 In order to prevail on a First Amendment retaliation claim,
13 a public employee must establish, among other elements, that his
14 speech activity was a matter of "public concern." Eng v. Cooley,
15 552 F.3d 1062, 1070 (9th Cir. 2009), cert. denied, 130 S. Ct. 1047
16 (2010). To overcome a defense of qualified immunity, a public
17 employee plaintiff must show that, at the time of defendants'
18 actions, it was clearly established that his speech involved a
19 matter of public concern. Rivero v. City and County of San
20 Francisco, 316 F.3d 857, 865 (9th Cir. 2002).

21 Here, plaintiff, a police officer employee, complained to
22 fellow police officers as well as his supervisors, the police
23 union president, union representatives, SWAT sergeants, and
24 management, about accidental firearm discharges that occurred
25 when plaintiff's unit was dispatched to emergency calls along
26 with the SWAT team unit (another Eugene police response unit).
27 In fact, one instance complained of by plaintiff was an
28 accidental shooting in a residential neighborhood where the spent

1 bullet was never recovered. Plaintiff testified that his concern
2 around the accidental firings when he lodged his complaints was
3 for his own safety, coworker safety, as well as the safety of the
4 residential neighborhoods where at least one of the accidental
5 firings occurred.

6 After considering the witness testimony along with the
7 exhibits, and considering the content, form, and context of
8 plaintiff's speech, I find that plaintiff's speech was a matter
9 of public concern and therefore defendants are not entitled to
10 the affirmative defense of qualified immunity. The topic of
11 plaintiff's speech is undisputedly a matter of public concern,
12 that is, accidental firearm discharges when police officers are
13 responding to emergency calls. Moreover, the fact that speech is
14 directed internally rather than to the public at large is not
15 dispositive as to whether speech is considered a public concern.
16 Desrochers v. City of San Bernardino, 572 F.3d 703, 714 (9th Cir.
17 2009). In fact, Desrochers held that the essential question as
18 to whether a public employee's speech involves matters of public
19 concern for purposes of a First Amendment retaliation claim, is
20 whether the speech addresses a matter of public as opposed to
21 personal interest. Id. at 708. This determination is made by
22 review of the "whole record." Id. at 709. Moreover, it is
23 significant that the court holds that the content of the speech
24 is the "greatest single factor" when determining whether the
25 speech is of public concern, and the court defines the "scope of
26 public concern" "broadly." Id. at 710. Finally, the court looks
27 at whether a public employee's speech is "more likely to serve
28 the public values of the First Amendment." Id.

1 Here, when reviewing the record as a whole, the safety
2 issues raised by plaintiff are clearly a matter of public
3 concern, and based on the content of plaintiff's speech, it
4 addressed a matter of public versus personal interest. Moreover,
5 the cases relied upon by defendants can be distinguished. In
6 Ramirez v. County of Marin, plaintiff alleged retaliation for
7 complaining about the "supposed need for protective vests,
8 weapons, and other equipment." 2011 WL 5080145, *9 (N.D. Cal.
9 Oct. 25, 2011). The court concluded plaintiff's speech on those
10 issues were not matters of public concern because it concerned
11 only his supervisors and his work place safety. Similarly, in
12 Nederhiser v. Foxworth, the court held that a police officer's
13 letter criticizing an internal investigation into his conduct
14 addressed to superior officers in the police force did not
15 constitute a matter of public concern. 2007 WL 869710 (D. Or.
16 March 21, 2007). Finally, in Robinson v. York, the court held
17 that complaints about the job performance of co-workers and
18 management's response to the situation are not matters of public
19 concern. 566 F.3d 817, 823 (9th Cir. 2009).

20 Plaintiff's speech in the case at bar can be distinguished.
21 Plaintiff's speech, as a police officer responding to emergency
22 calls as a public safety officer, complaining about fellow police
23 officers who repeatedly "accidentally discharge" their firearms
24 during emergency response calls, is clearly speech that concerns
25 the public. The same cannot be said for the cases cited above,
26 including a complaint about the job performance of a co-worker,
27 a letter criticizing an internal investigation into the police
28 officer's conduct, complaints by police officers about their

1 supervisor's management styles including creating a hostile work
2 environment by violating internal policies, and a complaint about
3 the need for "protective vests, weapons, and other equipment."

4 Finally, defendants rely on the recent case, Hunt v. County
5 of Orange, 2012 WL 432297 (9th Cir. Feb. 13, 2012), where the
6 trial court concluded that plaintiff's campaign speech in a
7 contested race for sheriff was not protected by the First
8 Amendment, but the Ninth Circuit reversed and found that
9 defendant was entitled to qualified immunity because a government
10 official in defendant's position "reasonably but mistakenly"
11 could have believed that plaintiff fell within the exception for
12 policy-makers such that he could demote plaintiff without
13 violating his constitutional rights. 2012 WL 432297, *7-8.
14 Again, this case is distinguishable from the facts at bar. Here,
15 we have by definition, an issue of public safety when there is a
16 police officer employee responding to emergency 911 calls from
17 the public and who complains about fellow officers accidentally
18 discharging their weapons when responding to those public
19 assistance calls.

20 CONCLUSION

21 Defendants' motions for the court are denied as stated
22 above.

23 IT IS SO ORDERED.

24 Dated this 13th day of March 2012.

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27 Ann Aiken
28 United States District Judge