In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00179-CV

JAMES C. WETHERBE, PH.D., APPELLANT

V.

PAUL GOEBEL, PH.D., JOHN OPPERMAN, PH.D.,
AND LAWRENCE SCHOVANEC, PH.D., APPELLEES

On Appeal from the 72nd District Court
Lubbock County, Texas
Trial Court No. 2015-515,617, Honorable Ruben Gonzales Reyes, Presiding

March 6, 2018

MEMORANDUM OPINION

Before CAMPBELL and PIRTLE and PARKER, JJ.

Appellant James C. Wetherbe, Ph.D. sued Duane Nellis, Ph.D., in his official capacity as president of Texas Tech University; Lawrence Schovanec, Ph.D., in his official capacity as provost of Texas Tech; and Lance Nail, Ph.D., in his official capacity as dean of the Rawls College of Business at Texas Tech, alleging they engaged in retaliation against Wetherbe for his speech on the subject of academic tenure. When John Opperman, Ph.D. and Paul Goebel, Ph.D. assumed their respective positions of

interim president of the university and interim dean of the Rawls College of Business they were substituted in their official capacities as parties defendant for Nellis and Nail.[1]

Appellees, as defendants in the trial court, filed a plea to the jurisdiction which the trial court sustained; it dismissed the case. Wetherbe challenges that order on appeal. Finding the trial court erred by dismissing Wetherbe's suit for want of subject matter jurisdiction, we will reverse its dismissal order and remand the case to the trial court for further proceedings.

Background

The issue presented here is the subject of ongoing as well as prior litigation.[2] Because the facts are well known to the parties, we will mention only so much background information as is necessary for our disposition.

Wetherbe was hired by Texas Tech in 2000 as the Robert G. Stevenson Chaired Professor in Information Technology. He has been an outspoken critic of academic tenure, even before his affiliation with Texas Tech. Materials in the record indicate many of his peers in the academe disagree with his negative views on tenure. Claiming retaliation for his speech on tenure, Wetherbe filed suit in federal court in 2012 against

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[1] We judicially notice that Schovanec is now president of the university, Michael Galyean, Ph.D., is provost, and Margaret L. Williams, Ph.D., is dean of the Rawls College of Business. Schovanec, Galyean, and Williams are substituted as appellees in their respective official capacities. TEX. R. APP. P. 7.2(a).

[2] *Wetherbe v. Smith,* No. 5:12-CV-218-C, 2013 U.S. Dist. LEXIS 191270 (N.D. Tex. Sept. 26, 2013), *rev'd,* 593 Fed. App'x 323 (5th Cir. 2014), *cert. denied,* 135 S. Ct. 2386, 192 L. Ed. 2d 166 (June 1, 2015); *Wetherbe v. Texas Tech Univ.,* No. 5:15-CV-119-Y, 2016 U.S. Dist. LEXIS 44301 (N.D. Tex. Mar. 31, 2016)*, aff'd in part and rev'd in part, Wetherbe v. Tex. Tech Univ. Sys.,* 699 F. App'x 297 (5th Cir. 2017) (per curiam, op. on reh'g).

Texas Tech's then provost, Bob Smith, and Schovanec. He generally complained of lost professional opportunities in the university. The suit was dismissed.[3]

In the current state-court litigation, Wetherbe claims appellees retaliated against him for speech published on the issue of tenure after his original lawsuit was filed. Particularly, Wetherbe's petition included a chart identifying articles he authored on tenure or concerning his position on tenure. Corresponding to the publication dates of these articles were events which Wetherbe alleged constituted adverse retaliatory conduct. Among the retaliatory acts Wetherbe alleged were: denial of access to data pertaining to a specific scholarship fund, removal as associate dean for outreach and from participation in the chief executive roundtable and the leadership council, removal as professor for an MBA communications skills course, replacement as advisor for the MBA student association, notification by Nail of "an unfounded sexual harassment allegation," and demotion to "professor of practice."

Appellees as defendants in the trial court filed a plea to the jurisdiction asserting sovereign immunity from suit. Specifically, they argued Wetherbe failed to allege his speech was a matter of public concern, an element of his free-speech retaliation case. Therefore, they argued, his speech was not entitled to constitutional protection and his

[3] The district court denied the defendants' motion to dismiss Wetherbe's First Amendment retaliation claim except as to Schovanec, individually. *Wetherbe v. Smith,* 2013 U.S. Dist. LEXIS 191270, at *21-22. The Fifth Circuit court of appeals reversed and rendered an order dismissing Wetherbe's First Amendment retaliation claim but made no ruling on his free-speech claim under the Texas Constitution. *Wetherbe v. Smith,* 593 Fed. App'x 323, 329. An order in the record indicates on remand the district court chose not to exercise its supplemental jurisdiction over the state-law claims and dismissed them without prejudice. According to Wetherbe, he then filed the present litigation in state court.

claims were barred by sovereign immunity.[4] The trial court sustained the jurisdictional challenge and dismissed Wetherbe's claims.

Analysis

Through a single issue on appeal, Wetherbe contends the trial court erred in determining his speech on tenure was not a matter of public concern.

"Sovereign immunity from suit defeats a trial court's subject matter jurisdiction and thus is properly asserted in a plea to the jurisdiction." *Tex. Dep't of Parks & Wildlife v. Miranda,* 133 S.W.3d 217, 225–26 (Tex. 2004). "Whether a court has subject matter jurisdiction is a question of law." *Id.* at 226. Therefore, an appellate court reviews de novo a trial court's order sustaining a plea to the jurisdiction. *Id.* We accept as true the factual allegations of the plaintiff's petition. *Heckman v. Williamson Cty.,* 369 S.W.3d 137, 150 (Tex. 2012).

"The State's sovereign immunity extends to various divisions of state government, including agencies, boards, hospitals, and universities." *Ben Bolt-Palito Blanco Consol. Indep. Sch. Dist. v. Texas Political Subdivisions Prop./Cas. Joint Self-Ins. Fund,* 212 S.W.3d 320, 324 (Tex. 2006). With the ultra vires exception to sovereign immunity, an individual sued in his official capacity enjoys the protections of sovereign immunity to the

[4] Appellees concluded the argument in their plea to the jurisdiction with the summation, "Therefore, this court lacks subject matter jurisdiction over Wetherbe's claims. Indeed, he is unable to establish a waiver of sovereign immunity because he cannot establish a prima facie case of free speech retaliation. That is because he cannot, as a matter of law, establish the second element showing his speech was a matter of public concern." Appellees reurged the ground in their reply to Wetherbe's response to their plea.

same extent as those available to his employer. *City of El Paso v. Heinrich,* 284 S.W.3d 366, 380 (Tex. 2009).

A plaintiff may overcome the bar of sovereign immunity by alleging a facially valid constitutional claim. *Tex. A&M Univ. v. Starks,* 500 S.W.3d 570-71 (Tex. App.—Waco 2016, no pet.) (citing *City of Houston v. Johnson,* 353 S.W.3d 499, 504 (Tex. App.—Houston [14th Dist.] 2011, pet. denied)). *See Heinrich,* 284 S.W.3d at 373 n.6 (Tex. 2009) (when sued in their official capacities, state officials are generally not shielded from suits seeking equitable relief for a violation of constitutional rights); *Bell v. City of Grand Prairie,* 221 S.W.3d 317, 325 (Tex. App.—Dallas 2007, no pet.) (stating that request for injunction requiring "City's officers to follow the law in the future . . . is not barred by the City's immunity to suit"); *Price v. Tex. Alcoholic Bev. Comm'n,* No. 01-12-01164-CV, 2014 Tex. App. LEXIS 7495, at *8 (Tex. App.—Houston [1st Dist.] 2014, pet. denied) (mem. op.). "While it is true that sovereign immunity does not bar a suit to vindicate constitutional rights, *Heinrich,* 284 S.W.3d at 372, immunity from suit is not waived if the constitutional claims are facially invalid, *see Andrade v. NAACP of Austin,* 345 S.W.3d 1, 11 (Tex. 2011)." *Klumb v. Houston Mun. Emples. Pension Sys.,* 458 S.W.3d 1, 13 (Tex. 2015).

Whether a public employee's speech is constitutionally protected involves three considerations. *Turner v. Perry,* 278 S.W.3d 806, 816 (Tex. App.—Houston [14th Dist.] 2009, pet. denied). First, the court determines whether the employee's speech was made pursuant to his official duties. *Id.* (citing *Davis v. McKinney,* 518 F.3d 304, 312 n.12 (5th Cir. 2008)). Job-required activities or activities undertaken while performing a person's job are activities pursuant to official duties. *Williams v. Dallas Indep. Sch. Dist.,* 480 F.3d 689, 693 (5th Cir. 2007) (per curiam). If the employee's speech was made pursuant to

official duties, then it is not protected by the First Amendment, because "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." *Garcetti v. Ceballos,* 547 U.S. 410, 421-22, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006).

Second, if the speaker did not engage in the speech pursuant to official duties, then the question becomes whether the speech involved a matter of public concern. *Turner,* 278 S.W.3d at 816 (citing *Davis,* 518 F.3d at 312).

Third, if the speech does pertain to a matter of public concern, the employee's interest in expressing his concerns is balanced with the employer's interest in performing its services efficiently. *Turner,* 278 S.W.3d at 816 (citing *Davis,* 518 F.3d at 312); *see Pickering v. Board of Education,* 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968) ("The problem in any case is to arrive at 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 an employer, in promoting the efficiency of the public services it performs through its employees").

Because appellees based their jurisdictional challenge in the trial court on the public-concern element of Wetherbe's retaliation case, we turn to that question.[5] Its

[5] For reasons not made clear in the record before us, Wetherbe is currently pursuing another case in federal court in which, according to Wetherbe, "[t]he legal and factual issues between the instant case and the federal case are similar." In the federal case, in ruling on a motion to dismiss filed by Texas Tech, Nail, and Goebel, the district court concluded Wetherbe's speech on tenure did not involve a matter of public concern and he therefore failed to state a First Amendment retaliation claim. The Fifth Circuit reversed the portion of the district court's order that found Wetherbe's speech did not touch on a matter of public concern and remanded the case. *See Wetherbe v. Tex. Tech Univ. Sys.,* 2016 U.S. Dist. LEXIS 44301 (N.D. Tex. Mar. 31, 2016), *aff'd in part and rev'd in part, Wetherbe v. Tex. Tech Univ. Sys.,* 699 F. App'x 297 (5th Cir. 2017) (per curiam,

determination depends on the content, form, and context of a given statement, as revealed by the entire record. *Connick v. Myers,* 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983); *Kennedy v. Tangipahoa Par. Library Bd. of Control,* 224 F.3d 359, 366 (5th Cir. 2000). "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Connick*, 461 U.S. at 146.

The speech that Wetherbe's pleadings allege to be constitutionally protected appears in the form of articles, which he listed in his petition's chart and attached to the petition, published in widely-disseminated publications including HARVARD BUSINESS REVIEW and THE WALL STREET JOURNAL. Some of the articles were written by Wetherbe; others were authored by reporters but quote Wetherbe.

As for the content of his speech, all the articles described views opposed to academic tenure. Some articles described Wetherbe's personal experiences with tenure, others focused more generally on the topic, expressing Wetherbe's views that the institution of academic tenure is detrimental to higher education and particularly detrimental to business schools. We will address three.[6] In Wetherbe's HARVARD BUSINESS REVIEW piece entitled "It's Time for Tenure to Lose Tenure," he argued that American higher education needs radical change, and it should start with the abolition of

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op. on reh'g). The Fifth Circuit handed down its opinion after briefing in the present case was completed. Wetherbe brought the circuit court's decision to our attention via a supplemental brief. Appellees did not respond.

[6] *See Wetherbe,* 699 F. App'x at 300 (apparently discussing two of the same articles as are appended to Wetherbe's petition in the record before us).

tenure. The article asserted tenure hinders colleges' performance by restricting their ability to shift research and teaching resources to meet changing needs. The article proposed replacing tenure with a system of multiyear contracts. It proposed other changes such as requiring research professors to seek funding from sources outside their universities, and greater use of innovative teaching methods. It concluded the end of tenure would make such changes possible. In a BIZED article entitled "The End of Tenure," Wetherbe described his own experiences that led to his resignation from tenure at the University of Minnesota. He cited the opinion of Columbia University professor Mark C. Taylor that tenure has outlived its usefulness and a 1989 lecture of "management guru" Peter Drucker suggesting changes in the institution. The article further discussed the concept of multiyear contracts for faculty, suggesting rolling contracts of three years for new associate professors and five years for full professors. Under the "rolling contract" concept, the article explained, at the end of each year another year would be added to its term unless the employer determined otherwise. In that way, the article said, a professor holding a five-year rolling contract would receive a minimum of five years' notice of termination of the contract. In a 2013 FINANCIAL TIMES editorial, "Tenure system stifles business schools," Wetherbe described ways he said tenure is harmful for business schools, asserting it protects incompetent faculty from termination, locks in unproductive expenditures, enables faculty to resist new teaching methods, and restricts the ability to shift research and faculty investments as needed. According to the editorial, "In today's global market with fleeting product cycles, continuous innovation and agile business models, tenure is the ultimate business irony."

In their plea to the jurisdiction, and on appeal, appellees emphasize Wetherbe's prior litigation against Texas Tech and university officials, in which he complained also of retaliatory acts. In an analysis to determine whether speech touches on a matter of public concern, a court should consider whether the speech "was merely an extension of an employment dispute." *Turner,* 278 S.W.3d at 815 (citing *Connick,* 461 U.S. at 148). In some of the articles appended to Wetherbe's petition in the current litigation, including some written by Wetherbe, there is extensive discussion of the claims he made in his earlier litigation[7] and of the allegedly retaliatory acts he contended resulted from his expressions of his views on tenure. But not all the speech Wetherbe's current pleadings allege as protected speech contains such discussions. The HARVARD BUSINESS REVIEW, BIZED and FINANCIAL TIMES pieces contain no reference to Wetherbe's litigation or of disputes with Texas Tech. Those articles addressed tenure in general and not Wetherbe's personal working conditions.

Moreover, Wetherbe's personal involvement in and experience with tenure do not necessarily devalue his speech on the topic in the public square. *See Wetherbe,* 699 F. App'x at 300 (commenting, after discussing articles, "Wetherbe's position as a professor who has rejected tenure could make his thoughts on tenure of greater interest to the public given his unique experience and vantage point"); *see also San Diego v. Roe,* 543 U. S. 77, 80, 125 S. Ct. 521, 160 L. Ed. 2d 410 (2004) (per curiam) (observing that public employees "are uniquely qualified to comment" on "matters concerning government policies that are of interest to the public at large").

[7] All of the articles Wetherbe listed in the chart contained in his petition are dated in December 2012 or later, after Wetherbe initiated his original federal-court suit on December 4, 2012.

For our present purpose of determining the trial court's jurisdiction over the claims Wetherbe has plead, we find the pleadings allege statements with content speaking to a public concern.

We turn to a consideration of the context in which Wetherbe's statements were made. The record contains evidence that the pieces stating Wetherbe's views on tenure were made in the context of an existing public discussion over the continued value of academic tenure. *See Wetherbe,* 699 F. App'x at 301 (citing *Tangipahoa Par. Library Bd.,* 224 F.3d 359 at 373 ("[S]peech made against the backdrop of ongoing commentary and debate in the press involves the public concern")). Wetherbe's HARVARD BUSINESS REVIEW, BIZED and FINANCIAL TIMES pieces attached to his petition cited other academic and business figures who had published views similar to his.

Wetherbe attached additional articles to his response to appellees' plea to the jurisdiction. An article from the WALL STREET JOURNAL, "Should Tenure for College Professors be Abolished," was included among its discussions of "Big Issues in Education."[8] The article presented the contrasting positions of a writer and author who argued tenure is bad for students and an English professor and president of the American Association of University Professors who argued for the preservation of tenure, urging "it offers critical protection." The record also contains online comments following the article, expressing the diverse opinions of readers on the subject.

A July 2010 piece from NYTimes.com, written by the same English professor and president of the American Association of University Professors, was titled, "Tenure

[8] The copy in the record is of an online version of the article, and states it was "updated" in June 2012.

Protects Freedom and Students' Learning." The author urged the necessity of tenure, pointing to its protection of academic freedom and the resulting benefit to students and higher education. A notation following the online article indicated it had drawn 173 comments. Also from NYTimes.com, a September 2010 piece, written by Taylor, the Columbia University professor, was titled, "Why Tenure is Unsustainable and Indefensible." The author argued against tenure because of its monetary and intellectual costs. A notation following the article indicated it had drawn 149 comments.

These Wall Street Journal and NYTimes.com pieces, and the comments from readers, indicate Wetherbe's speech was made in the context of an ongoing public debate that did not begin with Wetherbe. Further support for that conclusion comes from the report, appended to Wetherbe's pleadings, of a survey of some 1081 individuals occupying the position of provost or its equivalent. The survey, conducted in late 2012 by the Gallup organization, contained a section on tenure, and reported that 70% of provosts agreed that tenure "remains important and viable at my institution." Sixty-four percent responded positively, however, to a question asking if they favored a system of long-term contracts for faculty over the existing system of tenure in higher education.

Further, Wetherbe's petition alleged that some of his written comments about tenure were by invitation. The Fifth Circuit found this fact weighs in favor of finding Wetherbe's speech constituted a matter of public concern. *See Wetherbe,* 699 F. App'x at 300 (citing *Salge v. Edna Indep. Sch. Dist.,* 411 F.3d 178, 189 (5th Cir. 2005) ("an invitation to speak that has issued from the public, particularly from the press, demonstrates the public's interest in the matter and therefore weighs in favor of holding an employee's speech protected"); *Moore v. Kilgore,* 877 F.2d 364, 371 (5th Cir. 1989)).

Accepting as true the factual allegations of Wetherbe's petition, *Heckman,* 369 S.W.3d at 150, and considering the form, content and context of the speech he alleges to be constitutionally protected, as reflected by the entire record, we, like the Fifth Circuit, find the speech involved a matter of public concern. *Wetherbe,* 699 F. App'x at 301; *see Turner,* 278 S.W.3d at 816.

Appellees' Response

Appellees' response brief on appeal contains argument that we would characterize as asserting two additional general reasons we should sustain the trial court's order. They contend that Wetherbe did not plead facts sufficient to establish each element of a free-speech retaliation claim and that Wetherbe's claims were barred by res judicata.

As for the sufficiency of Wetherbe's allegations, in the trial court appellees, through their plea to the jurisdiction and reply to Wetherbe's response, challenged only the public-concern element of his retaliation case. Their argument attacking the pleadings will therefore not be considered in this appeal. *See Tex. Southern Univ. v. Rodriguez,* No. 14-10-01079-CV, 2011 Tex. App. LEXIS 4196, at *17 n.7 (Tex. App.—Houston [14th Dist.] June 2, 2011, no pet.) (mem. op.) (refusing to consider on appeal ground for dismissal not raised before the trial court in plea to the jurisdiction).

As their second major reply ground, appellees urge that the doctrine of res judicata bars Wetherbe's free-speech retaliation claim because it was brought or could have been brought in one of his prior federal lawsuits. Res judicata is an affirmative defense that must be specifically alleged by pleading. TEX. R. CIV. P. 94. Appellees did not raise res judicata in their answer. More importantly, however, an affirmative defense, which by its

very nature does not affect a court's subject matter jurisdiction, may not be urged through a plea to the jurisdiction. *See State v. Lueck,* 290 S.W.3d 876, 880 (Tex. 2009); *Tex. Dep't of Transp. v. Jones,* 8 S.W.3d 636, 638 (Tex. 1999) (per curiam). We overrule appellees' res judicata contention.

Appellees based their jurisdictional challenge on the absence of the public-concern element of Wetherbe's free-speech retaliation case. Because we find Wetherbe alleged his challenged speech on tenure touched on a matter of public concern and because we ascribe no merit to appellees' responsive arguments, we sustain Wetherbe's issue.

Conclusion

We reverse the order of the trial court sustaining appellees' plea to the jurisdiction and remand the case to the trial court for further proceedings consistent with this opinion.

James T. Campbell
Justice