IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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JOHN E. JOYCE,

OPINION AND ORDER

Plaintiff,

00-C-0221-C

v.

DELBERT BLOCK, ALBERT BROCKELMAN, HENRY FEIGE, DAVID HOLSTROM, DENNIS KROPP, KAREN MARTINSON, CHARLES STOKKE, AND WESLEY SOMMERS,

Defendants.

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In this civil action brought under 42 U.S.C. § 1983, plaintiff John E. Joyce alleges that defendants, in their individual capacities, interfered with his First and Fourteenth Amendment rights to exercise freedom of speech by retaliating against him by not hiring him as the Menomonie, Wisconsin City Attorney. Presently before this court is defendants' motion to dismiss the case pursuant to Fed. R. Civ. P. 12(b)(6) for plaintiff's failure to state a claim upon which relief may be granted. Defendants contend that they enjoy absolute immunity from suit because their actions were legislative, not administrative, and alternatively, that plaintiff does

not state a proper First Amendment claim against them. I conclude that defendants do not enjoy legislative immunity for the acts alleged against them in plaintiff's complaint and that under a liberal interpretation of the facts plaintiff's complaint states a First Amendment claim. Therefore, defendants' motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief will be granted will be denied. From plaintiff's amended complaint, I find the following facts solely for the purpose of deciding defendants' motion to dismiss.

ALLEGATIONS OF FACT

At times relevant to this complaint, defendant Stokke was the Mayor of Menomonie and all other defendants were alderpersons or members of the city council. Plaintiff was a lawyer admitted and licensed to practice law in Wisconsin. On March 31, 1994, plaintiff submitted a $36,000/year bid for the position of Menomonie city attorney. On April 19, 1994, the city council followed the recommendation of defendant Mayor Stokke and accepted the bid of the present city attorney to continue to fill the position for the following year, although his bid was $14,000 more than plaintiff's.

Before being turned down for the city attorney position, plaintiff acted or spoke in opposition to Menomonie on several occasions. In November 1992, plaintiff sued Menomonie on behalf of a client who opposed the Menomonie Business Improvement District as lacking

compliance with state law. In November 1993, plaintiff attended a budget hearing of the Menomonie city council as president of Dunn County Taxpayers Association, Inc. and criticized the yearly salary for the city attorney, arguing that the position merited $36,000. In November of 1993, plaintiff wrote a letter to the editor of the Eau Clair Leader-Telegram opposing the need for new schools in the Menomonie Area School District, a position defendants supported. In December 1993, plaintiff took out a full page advertisement in the Menomonie Reminder Newspaper, listing reasons to vote against the school bond referendum. On December 14, 1993, that referendum was defeated.

In mid-February 1994, Menomonie began advertising for bids for the position of Menomonie city attorney. On March 27, 1994, plaintiff wrote a letter to the editor of the Dunn County News, criticizing the pamphlet distributed by a local group, "Communities and Schools Together for The Present and Future," headed and funded by defendant Mayor Stokke. On March 30, 1994, defendant Stokke attempted to refute the statements in plaintiff's letter. Also on March 30, 1994, plaintiff took out a full page advertisement in the Menomonie Reminder newspaper giving the public reasons to vote "No" on the April 5, 1994 school bond referendum. On March 31, 1994, plaintiff applied for the city attorney position. On April 4, 1994, plaintiff received a handwritten letter from defendant Kropp, criticizing him for becoming negative regarding the community and associating with other negative individuals.

On April 5, 1994, the school bond referendum in the Menomonie Area School District was defeated. On April 16, 1994, plaintiff wrote to members of the Menomonie city council asking it to consider his prior experience as assistant Menomonie city attorney, his training of the current city attorney, and his $14,000 lower bid for the city attorney position. Defendant Mayor Stokke recommended Kenneth Schofield be re-appointed as Menomonie city attorney. At the April 19, 1994 meeting the City Council accepted the bid of Kenneth Schofield to continue as the City Attorney at $50,000 for that year. On May 15, 1995, the city council adopted an ordinance that changed the process for the selection of the city attorney from a bid process to a mayoral appointment process.

OPINION

Immunity

On a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), the court must accept as true all well-pleaded allegations of the complaint and draw all inferences in favor of the non-movant. See Levenstein v. Salafasky, 164 F.3d 345, 347 (7th Cir. 1998). Plaintiff, the non-movant in this case, indicates that the city council made the decision to accept the bid of Kenneth Schofield, resulting in the re-hiring of Schofield as city attorney. At issue is whether that act of hiring was administrative or legislative. Although "local legislators

are absolutely immune for their legislative acts," see Rateree v. Rockett, 852 F.2d 946, 949 (7th Cir. 1988)(quoting Reed v. Village of Shorewood, 704 F.2d 943, 952-53 (7th Cir. 1983)), they are not immune for their administrative acts, see Rateree, 852 F.2d at 950 (citing Tenney v. Brandhove, 341 U.S. 367, 379 (1951)). Although the city council is a legislative body, the act of hiring is generally an administrative act. See Rateree, 852 F.2d at 950; see also Forrester v. White, 484 U.S. 219 (1988) (no judicial immunity for judge's act of firing or demotion); Davis v. Passman, 442 U.S. 228 (1979) (no legislative immunity for congressperson's act of firing staff employee).

Defendants are correct that mayors and city council persons do enjoy absolute immunity from suits under 42 U.S.C. § 1983 for legislative acts. See Bogan v. Scott-Harris, 523 U.S. 44, 49 (1998). In Bogan, the court held that the elimination of a position, as part of the budgetary process, was a legislative act providing officials of local municipalities with absolute immunity. See 523 U.S. at 55. However, there is a functional difference between budgetary decisions which are legislative, necessarily having an effect on employment when positions are eliminated, see id., and the act of hiring or firing, which has been deemed administrative, see Rateree, 852 F.2d at 950.

Defendants argue that their decision to rehire the current city attorney was a budgetary decision, but this argument is suspect. Although the hiring process involved the submission of

bids, the decision was not primarily a budgetary one, as was the vote in Rateree to eliminate positions for financial reasons. Indeed, defendants chose a candidate who bid $14,000 more than plaintiff bid. Defendants were performing an administrative act of hiring for which they do not enjoy absolute legislative immunity. Therefore, defendants' motion to dismiss plaintiff's complaint on the ground that defendants are entitled to legislative immunity will be denied.

First Amendment Claim

To state a cause of action under 42 U.S.C. § 1983, plaintiff must allege facts from which an inference may be drawn that 1) defendants acted under color of state law; and 2) defendants deprived plaintiff of a constitutional right. See Hill v. Shelander, 924 F. 2d 1370, 1372 (7th Cir. 1991); see also Kentucky v. Graham, 473 U.S. 159, 166 (1984) (citing Monroe v. Pape, 365 U.S. 167 (1961)). "Acting under color of state law requires that the defendant[s] in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" West v. Atkins, 487 U.S. 42, 49 (1988) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)). Because defendants were acting in their capacities as mayor, city alderpersons and city council members, they were exercising responsibilities pursuant to state law and acting under color of state law.

Defendants argue that they did not deprive plaintiff of a constitutional right because

there was no connection between plaintiff's alleged speech and the decision not to hire him for the city attorney position. It is not clear what defendants mean by this. Even if plaintiff's activities in 1992 are too distant from the April 1994 hiring decision to suggest the necessary nexus between the protected speech and the alleged wrongdoing, plaintiff alleges a number of anti-city actions he took beginning in November 1993 and continuing to April 1994 that show the necessary chronology of events. Perhaps defendants are attempting to argue that their decision not to hire plaintiff was based on legitimate considerations. However, if this is the case, defendants cannot succeed on this argument at this time. Having chosen to file a motion to dismiss they are precluded from putting in evidence outside the pleadings.

In determining whether a government employee's speech is protected by the First Amendment, courts employ the Connick-Pickering test. (A prospective employee qualifies as an employee. See Bonds v. Milwaukee County, 207 F.3d 969 (7th Cir. 2000)). First, the court determines whether the employee's speech addresses a matter of public concern. See Mt. Healthy City School District Board of Educ. v. Doyle, 429 U.S. 274, 284-87 (1977) (citing Connick v. Myers, 461 U.S. 138, 146 (1983)). Plaintiff spoke out about salaries of city employees, the necessity of new schools, and school bond referendums. These are all matters of public concern.

Because plaintiff's statements addressed matters of public concern, they are protected

by the First Amendment. The next step of the Connick-Pickering test is used to determine whether the employer has the right to refuse to hire a prospective employee despite the protected speech. See Bonds, 207 F.3d at 982. The court must balance the "'interest of the [prospective 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.'" Mt. Healthy City School District Board of Educ., 429 U.S. at 284-87 (quoting Pickering v. Board of Education, 391 U.S. 563, 568 (1968)). At this stage of the proceeding it would be premature to perform any balancing of interests when it is not even known whether defendants based their decision not to hire plaintiff on his frequent opposition to matters the city endorsed. Moreover, if the defendants were to argue that their decision was based on the speech, they have the burden of demonstrating the overriding interest in promoting a harmonious work environment in order to validate their encroachment on a prospective employee's First Amendment rights, see Elrod v. Burns, 427 U.S. 347, 362-63 (1975) (citing Buckley v. Valeo, 424 U.S. 1 (1975)), and that would require submission of extrinsic evidence proper for a motion of summary judgment, see Travel All Over the World v. Saudi Arabia, 73 F.3d 1423, 1430 (7th Cir. 1996).

Because analysis of the second step of the Connick-Pickering test is not appropriate at this time, I must address only whether plaintiff has alleged sufficient facts to suggest that

defendants retaliated against him by not hiring him because of his protected speech. Plaintiff's allegations are sufficient to meet this burden.

ORDER

IT IS ORDERED that the motion of defendants Delbert Block, Albert Brockelman, Henry Feige, David Holstrom, Dennis Kropp, Karen Martinson, Charles Stokke, and Wesley Sommers to dismiss the complaint for plaintiff John E. Joyce's failure to state a claim upon which relief can be granted under Fed. R. Civ. P. 12(b)(6) is DENIED.

Entered this 9th day of August, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge