IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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GREG LaFOND,

Plaintiff,

v.

LARRY STURZ, DAVID ELVIG,
TOM STEUDING and
CITY OF ALTOONA,

Defendants.

OPINION AND
ORDER

03-C-435-C

- -

This is a civil for monetary relief in which plaintiff Greg LaFond contends that defendants Larry Sturz, David Elvig, Tom Steuding and the City of Altoona, Wisconsin (1) violated his rights under the First Amendment by exercising a not-for-cause buy-out provision in his employment contract in retaliation for his protected speech; (2) subjected him to a hostile work environment; (3) breached his employment contract; (4) defamed him; and (5) wrongfully terminated his employment in violation of state public policy. In an opinion and order dated July 19, 2003, I granted defendants' motion for summary judgment on plaintiff's First Amendment claim and dismissed the remainder of his claims without prejudice to his refiling them in state court. Now before the court is plaintiff's motion to

reconsider, brought pursuant to Fed. R. Civ. P. 59(e).

In support of his motion, plaintiff raises three principal arguments: (1) the court erred in analyzing the temporal proximity between plaintiff's participation in an investigation of a possible election law violation that implicated defendants Sturz and Steuding and defendant Sturz's initial actions that eventually led to a vote to buy-out plaintiff's employment contract; (2) plaintiff's testimony about what Jeff Manhardt, a council member of defendant City, had told him about certain comments made by defendant Sturz was not hearsay but was instead an admission by a party opponent under Fed. R. Evid. 801(d)(2)(D); (3) the court should consider deposition testimony of Manhardt even though it was submitted after the deadline for filing summary judgment materials had passed and was not referred to in the parties' proposed findings of fact.

Plaintiff's first argument is premised not on reasonable inferences but on speculation. Plaintiff's second argument fails because plaintiff's testimony about Manhardt's description of what defendant Sturz said to Manhardt does not qualify as an admission by a party opponent. Manhardt's statement is not relevant to defendant City's potential liability and plaintiff has offered no evidence to show that Manhardt was an agent of defendant City. The statement is relevant to the potential liability of defendant Sturz, but Manhardt is not defendant Sturz's agent. Finally, considering the new evidence plaintiff proffers would be futile. Manhardt's deposition testimony shows retaliatory animus on the part of defendant

Sturz, but the record evidence is insufficient to allow a jury to find that defendant Sturz was involved in the buy-out so as to be liable to plaintiff under 42 U.S.C. § 1983. This conclusion also puts another nail in the coffin with respect to plaintiff's first two arguments; whatever the merits of those arguments, plaintiff cannot establish suspect motive as to any defendant other than Sturz. Accordingly, I will deny plaintiff's motion for reconsideration. Because plaintiff has not shown that a different outcome is warranted, defendants' motion for additional briefing will be denied as moot.

A. Temporal Proximity

In analyzing plaintiff's claim that his participation in the campaign truck investigation was a substantial or motivating factor for defendants' actions, I noted the following:

> The evidence reveals a relatively short span of time between plaintiff's actions and the buy-out; plaintiff forwarded his office's review of Ely's complaint regarding the use of the truck to the Eau Claire district attorney on January 22, 2003, and placed copies of this letter in the business mailboxes of defendants Sturz and Steuding just 17 days before Thiel gave defendant Sturz a notice for the closed session meeting and less than a month before the vote was taken.

Plaintiff argues that the time frame was even shorter. He asserts that when defendant Sturz initiated the meeting at which the buy-out was approved, only two days had passed after a

state investigator had questioned Bob Brown, the owner of the van that was the subject of the alleged campaign truck violation. In his brief, plaintiff asserts that the investigation took place on February 5 and that defendant Sturz initiated a meeting on February 7. This argument is curious; in his proposed findings of fact, plaintiff had asserted that the investigation had taken place a week earlier. Plt.'s PFOF 81A, dkt. #33, at 24 ("[O]n January 30, 2003 a Wisconsin Department of Transportation (DOT) investigator visited Hillcrest Truck & Auto [and] interviewed Bob Brown . . . .").

Plaintiff concedes that he has no evidence showing that any defendant knew of the February 5 investigation but argues that "[a] reasonable inference could be made that, just as he did on July 29, 2002, Brown contacted defendant Sturz on or soon after February 5, 2003, the day that the state investigator interrogated him." Plt.'s Br., dkt. #46, at 5. A jury could not assume that a person would act in a certain way simply because he had done so on one occasion nearly half a year earlier. Such an assumption would be speculation, not a reasonable inference. Conjecture does not create a triable issue of fact. McCoy v. Harrison, 341 F. 3d 600, 604 (7th Cir. 2003). (Under Fed. R. Evid. 406, a person's conduct on a particular occasion may be inferred from past conduct when that conduct is of such invariable regularity that it can be classified as routine or habit. Thompson v. Boggs, 33 F.3d 847, 854 (7th Cir. 1994). Plaintiff does not suggest that application of this rule would be appropriate.) Again, plaintiff premises his argument on facts different from those he

alleged in his proposed findings. Plaintiff did not propose that Brown had contacted defendant Sturz but instead proposed that Brown notified defendant Steuding, who then told defendant Sturz. Plt.'s PFOF 81D, dkt. #33, at 24.

In any event, neither plaintiff's proposed finding nor the evidence cited therein indicates when either of these communications took place. Brown Dep., dkt. #18, at 81, lns. 2-10 ("possibl[y]" told defendant Steuding "sometime after February 5th"); Sturz Dep., dkt. #20, at 40 (didn't recall having ever received a call from Brown in early 2003); Steuding Dep., dkt. #15, at 93 (Brown told him about the investigation "in a reasonable amount of time after it took place"). Plaintiff cites a portion of defendant Sturz's deposition that plaintiff contends shows that by February 13, defendant Sturz knew that Brown had been questioned on February 5. It is not clear why plaintiff thinks this testimony is relevant to his argument that the relevant time gap should be shortened to the two days between February 5 to February 7. This evidence shows defendant Sturz's knowledge as of February 13. Moreover, the court already assumed that as early as January 22, defendant Sturz knew that Ely had filed a second complaint and that Brown had been investigated the previous July. Because plaintiff's first argument is based on factual propositions different from those he proposed for purposes of summary judgment and is not adequately supported by the evidence to which he now cites, it is not a ground for altering the opinion.

B. Admission by Party Opponent

In opposing defendants' motion for summary judgment, plaintiff relied on his own testimony that city council member Jeff Manhardt had told him that defendant Sturz had said that he scheduled the closed session meeting for voting on the buy-out of plaintiff's contract because plaintiff had been harassing Brown. Plaintiff argues that this testimony should not have been excluded as hearsay because it qualifies as an admission by a party opponent. His theory is that Manhardt is an agent of defendant City and therefore, any statement that he makes qualifies as an admission by a party opponent under Fed. R. Evid. 801(d)(2)(D), which provides that a statement is not hearsay if it is "offered against a party and is . . . a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship." The statement plaintiff wants to use is the following:

> Mr. Manhardt came to my office after he had met with Mr. Sturz [in] Mr. Chaney's office on the afternoon of February 13th, and Mr. Manhardt indicated to me that Mr. Sturz had asked him to come to Mr. Chaney's office to talk about the meeting on the 15th. Mr. Manhardt indicated to me that during the conversation Mr. Sturz had attempted to convince Mr. Manhardt to support the motion to terminate my contract in the sense of having unanimity of those who are voting.
>
> Mr. Manhardt indicated he asked Mr. Sturz why it was at this time that Mr. Sturz was scheduling a meeting to terminate my contract. Mr. Manhardt told me that Mr. Sturz responded by saying because Bob Brown called me and has complained about

> Greg [plaintiff] harassing him again. There was an investigator from the state out there.

LaFond Dep., dkt. #21, at 228-29.

Manhardt's supposed statement is adverse only with respect to defendant Sturz and cannot be imputed to any other defendant. It appears from his briefs that plaintiff is convinced that defendants Sturz, Steuding and Elvig conspired with one another. However, he has not proffered evidence that would support drawing an inference of community of thought on their parts. In fact, in proposing facts, plaintiff has not pointed to any instance in which these defendants spoke with one another about their reasons for favoring the buy-out. (The most plaintiff proposed was that defendants Sturz and Elvig each contacted defendant Steuding, who spent the winters in Florida, regarding his ability to attend the upcoming meeting. In support of this proposed finding, plaintiff cited the deposition testimony of defendant Steuding. Plt. PFOF #19L, dkt. #33, at 6. In response to the question whether he had ever discussed with either defendant Sturz or defendant Elvig whether plaintiff's contract should be bought out or not, defendant Steuding answered, "The only discussion we had was when I got the phone calls and they said, 'We're looking into buying out Mr. LaFond's contract. Could you be home for the meeting?' and I said 'yes.'" Dft. Steuding Dep., dkt. #15, at 112.) A plaintiff's "gut feeling" is not enough to create a triable issue of fact. Palucki v. Sears, Roebuck & Co., 879 F.2d 1568, 1572 (7th Cir. 1989).

Defendant Sturz's motive also cannot be attributed to defendant City. It is well-settled that the City of Altoona cannot be liable for the actions of its agents on a theory of respondeat superior. Monell v. Department of Social Services, 436 U.S. 658, 691 (1978). Moreover, not every municipal employee has the authority to speak definitively for the municipality and thereby expose it to liability. Only officials who "speak with final policymaking authority for the local governmental actor concerning the action alleged to have caused the particular constitutional or statutory violation at issue'" can bind defendant City under § 1983. McMillian v. Monroe County, 520 U.S. 781, 784-85 (1997) (quoting Jett v. Dallas Independent School Dist., 491 U.S. 701, 737 (1989)). In this case, it is undisputed that the buy-out had to be approved by two-thirds of the council members and that, as mayor, defendant Sturz did not participate in the vote.

Accordingly, the statement is not an admission of defendant City. Although there is no "against interest" component, the statement must "be made by the party *against whom it is offered*." Aliotta v. National R.R. Passenger Corp., 315 F.3d 756, 761 (7th Cir. 2003) (quoting United States v. McGee, 189 F.3d 626, 631 (7th Cir. 1999) (emphasis added)); See also Fed. R. Evid. 801(d)(2)(D) (statement is not hearsay if it is "offered against a party and is . . . a statement by the party's agent or servant . . ."). This statement is not relevant to defendant City and therefore, cannot be offered against it. Although the statement might be offered against defendant Sturz individually, Manhardt is not an agent of defendant

Sturz. A statement of one defendant may be offered against a co-defendant in the conspiracy context, but only if the proponent makes the threshold showing. To do this, the proponent "must prove by a preponderance of the evidence that (1) a conspiracy existed; (2) the defendant and the person making the statement were members of the conspiracy; and (3) the statement was made during the course and in furtherance of the conspiracy." United States v. Westmoreland, 312 F.3d 302, 309 (7th Cir. 2002). Plaintiff has not made the requisite showing.

Even if evidence of defendant Sturz's motive could be offered against defendant City, it is unclear that Manhardt would qualify as an agent under Fed. R. Evid. 801(d)(2)(D). Before a statement can be received as an admission, there must be evidence of an agency relationship. Fed. R. Evid. 801(d)(2); see also Los Angeles News Service v. CBS Broadcasting, Inc., 305 F.3d 924, 934 (9th Cir. 2002); United States v. Pacelli, 491 F.2d 1108, 1117 (2d Cir. 1974). In this context, general principles of agency law apply. City of Tuscaloosa v. Harcros Chemicals, Inc., 158 F.3d 548, 558 (11th Cir. 1998) ("Because Fed. R. Evid. 801(d)(2)(D) does not define the term 'agent,' we must assume that Congress intended to refer to general common law principles of agency when it used the term."). At least one other court in this circuit has concluded that elected officials are likely not "agents" of the government they serve. Jarman v. City of Northlake, 950 F. Supp. 1375, 1378 n. 4 (N.D. Ill. 1997).

Typically, agents are selected or approved by the principal. Restatement (Second) of Agency, § 1 cmt. b. City council members are elected officials and appointed only in the event that there is a vacancy. Wis. Stat. § 62.09 (3); see also Ellis v. Kneifl, 834 F.2d 128, 131 (8th Cir. 1987) (fact that declarant was elected official undercuts implication of agency relationship). In addition, agents serve at the will of the principal, whereas city council members have set terms. United States v. Rioux, 97 F.3d 648, 660 (2d Cir. 1996) (declarant shown to be agent where hand-picked by defendant, served at defendant's pleasure and received instruction from defendant). Principals have a duty to compensate agents, Restatement (Second) of Agency, § 441; city council members are compensated only upon approval by three-fourths of the council. There is no indication that any payment had been authorized here. Wis. Stat. § 69.02(6).

By analogy, a corporation's board of directors are not agents of a corporation while corporate officers are. Restatement (Second) of Agency, § 14C (1957); see also Jarman, 950 F. Supp. at 1378 n. 4 (analogizing city council to corporate board of directors in concluding that council members are not agents). Although individual directors resemble agents in the sense that they owe a fiduciary duty of loyalty to the entity they serve, the distinguishing difference is that they are generally not subject to another's control, are elected by stockholders for set terms and are entitled to use their own business judgment in managing the corporation's affairs. Id. cmts. a and b. By comparison, council members are elected for

set terms, use their own judgment in making determinations and their discretion is not subject to immediate oversight. Undoubtedly, Manhardt was a fiduciary in relation to defendant City. However, plaintiff has not shown any basis for finding him an agent. This is an independent basis for concluding that rule 801(d)(2)(D) does not apply.

C. Manhardt's Subsequent Deposition Testimony

Finally, plaintiff asks the court to consider deposition testimony of Manhardt that was taken after the deadline for submitting summary judgment materials had passed and never incorporated in the parties' proposed findings of fact. Plaintiff brought this motion under Fed. R. Civ. P. 59, the purpose of which is to allow the district court to correct its own errors, sparing the parties and appellate courts the burden of unnecessary appellate proceedings. Charles v. Daley, 799 F.2d 343, 348 (7th Cir. 1986). A motion under this rule "may not be based on evidence that was available when the district judge took the motion for summary judgment under advisement." Navarro v. Fuji Heavy Industries, Ltd., 117 F.3d 1027, 1032 (7th Cir. 1997); see also Moro v. Shell Oil Co., 91 F.3d 872, 876 (7th Cir. 1996) (Rule 59(e) is not a vehicle for submitting evidence that could and should have been presented on time).

Defendants' motion for summary judgment came under advisement on May 26, 2004. Plaintiff does not indicate that Manhardt was not available before that time.

(Defendants took the deposition which plaintiff now wants the court to consider. In his brief, plaintiff stresses the fact that defendants did not depose Manhardt until after submitting all of their summary judgment materials, implying that defendants acted in a dilatory manner. It is plaintiff that bears the burden of proving his claims by a preponderance of the evidence. He is obliged to proffer evidence from which a reasonable trier of fact could conclude that he had satisfied his burden.)

A party may move to introduce new evidence that was not properly submitted with its summary judgment materials under Fed. R. Civ. P. 60. Rule 60(b)(1) and (2) permits a court to relieve a party from a final judgment, order, or proceeding because of "mistake, inadvertence, surprise, or excusable neglect," or "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Plaintiff does not suggest that any of these grounds are applicable. Instead, he argues that the court should consider the deposition "because of its importance." Accordingly, I will construe this portion of his motion as arising under rule 60(b)(6), which permits relief from a judgment for "any . . . reason justifying relief from the operation of the judgment." However, this provision has been interpreted as applying in situations in which extraordinary relief is sought and requires a showing of exceptional circumstances. See, e.g., Kagan v. Caterpillar Tractor Co., 795 F.2d 601 (7th Cir. 1986); Andrews v. Heinold Commodities, Inc., 771 F.2d 184 (1985).

Exceptional relief is not warranted if the testimony would not change the outcome, which is the situation in this case. Manhardt's testimony shows that defendant Sturz may have acted with a retaliatory motive. However, there is insufficient evidence of defendant Sturz's personal involvement to hold him liable under § 1983. In his deposition, Manhardt testified as follows:

> Q. [A]re there comments that Mayor Sturz made about Mr. LaFond whether you heard them or heard of them that you believe were untrue?
> A. One probably specifically a couple of days before the Saturday meeting where Greg was terminated, he told me that he had received a call from Bob Brown stating that Greg had sent somebody out, some official out to harass Bob Brown, and at that time, the mayor was fed up with it. He told me specifically that there was no citation[] issued, which I found out later was untrue. I don't know why he told me that, whether he was trying to sway my vote or again sway my opinion of Greg, but that's the only specific comment I remember.
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> . . .
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> Q. And the February 13th conversation that counsel just brought up that you had testified to earlier, that was Mr. Brown expressing dissatisfaction with being harassed in his opinion, correct?
> A. Yes.
> Mr. Erhard: Per the mayor?
> The witness: Through the mayor, right.
> Q. He was –
> A. It was the mayor's statement to me that Bob Brown was upset.
> Q. Correct. The mayor wasn't telling you that the mayor was

> upset, he was telling you –
> A. Oh, the mayor was certainly upset.
> Q. The mayor was upset about what . . . as you understand it?
> A. About Bob Brown being harassed by Greg LaFond, and he was fed up with it and was tired, tired of it, and he was going to put an end to it this Saturday, and he wanted to make sure that – well, I don't want to say that he wanted to make sure, but he did ask me if I would be around for the meeting.
>
> . . .
>
> Q. So now let me, so I make sure I understand, Jeff, tell me specifically what the mayor said to you regarding Bob Brown's contact with the mayor.
> A. Bob Brown, he told me Bob Brown had called him, was upset. There was apparently some, I'm trying to recall if it was DOT he said, but it's some type of official, state official or officials that were on his lot or had been on his lot, and he was very upset, and the mayor was specifically saying that he was tired of the hassles and was going to put it to a vote Saturday and asked if I would be there.

Manhardt Dep., dkt. #42, at 39, 53 and 56.

In the opinion and order of July 19, it was unnecessary to address defendants' argument that defendant Sturz had not been sufficiently personally involved to have any liability. Because plaintiff now points to otherwise admissible evidence from which it could be inferred that defendant Sturz may have acted with retaliatory motive, it is appropriate to address the issue of personal involvement.

It is well established that liability under § 1983 must be based on a defendant's personal involvement in the constitutional violation. Gentry v. Duckworth, 65 F.3d 555,

561 (7th Cir. 1995); Del Raine v. Williford, 32 F.3d 1024, 1047 (7th Cir. 1994); Morales v. Cadena, 825 F.2d 1095, 1101 (7th Cir. 1987); Wolf-Lillie v. Sonquist, 699 F.2d 864, 869 (7th Cir. 1983). "A causal connection, or an affirmative link, between the misconduct complained of and the official sued is necessary." Wolf-Lillie, 699 F.2d at 869. Defendants suggested that defendant Sturz was not personally involved because he did not vote. However, it is not necessary that a defendant participate directly in the deprivation. Smith v. Rowe, 761 F.2d 360, 369 (7th Cir. 1985). As plaintiff notes, "[t]he requisite causal connection is satisfied if the defendant set in motion a series of events that the defendant knew or should reasonably have known would cause others to deprive the plaintiff of [his] constitutional rights." Conner v. Reinhard, 847 F.2d 384, 396-97 (7th Cir. 1988).

In Conner, one of the defendants (Zopler), a member of the city ethics board, demanded that the plaintiff's supervisor, the city's comptroller, fire the plaintiff, a stenographer in the comptroller's office, for certain comments she made at a board of ethics meeting. Zopler threatened to have plaintiff's position eliminated if she was not terminated; the plaintiff's supervisor subsequently terminated the plaintiff. The court held that Zopler was not entitled to summary judgment because a jury could conclude that it was Zopler's pressure that caused plaintiff's termination. In reaching the conclusion that an individual could be held liable for acting in ways that he "knew or should reasonably have known" would cause a constitutional deprivation, the court discussed and relied on two cases: Miller

v. City of Mission, Kansas, 705 F.2d 368, 376 (10th Cir. 1983), and Soderbeck v. Burnett County, Wisconsin, 752 F.2d 285, 294 (7th Cir. 1985).

In Miller, 705 F.2d 368, a case similar to the present one, members of the city council were held liable in a § 1983 action in which a former city employee alleged that he had been discharged without due process despite the fact that the mayor had sole discretion to make termination decisions. The mayor had been under the false impression that only the council was authorized to terminate the plaintiff and accordingly, sought council approval before acting. He stated that he could not terminate the plaintiff without council approval at the council meeting before the vote. Thus, each council member was notified that the mayor would not have terminated the employee if the council had not given its consent and that the termination was essentially certain if the council did approve it. Accordingly, the court concluded that "ample evidence supports the jury's inference that the mayor would not have dismissed Miller without a hearing absent the support and encouragement of defendant council members." Id.

In Soderbeck, 752 F.2d 285, the court concluded that although a county law enforcement committee was not empowered to fire employees in the sheriff's department, its members could be held liable if they participated in the sheriff's decision to terminate the plaintiff. The evidence showed that the committee had hired the plaintiff, had been involved in other disciplinary matters in the sheriff's department, met regularly with the sheriff (the

sheriff had testified that he reported to the committee) and "may actually have approved rather than merely have refused to annul the [termination]." Id. at 294. The court reasoned that a jury could find that the committee had effectively ratified the termination and that this would satisfy the personal involvement component. In reaching this conclusion, the court made clear that "passively refusing to intervene" is insufficient. Id. In addition, it also noted that an individual council member could not be held liable for communicating the sheriff's termination decision to the plaintiff unless he advised the sheriff to make it or expressed approval of the decision. Id. at 293.

Plaintiff points to six acts of defendant Sturz that he argues shows that defendant Sturz "set in motion a series of events that the defendant knew or should reasonably have known would cause others to deprive the plaintiff of his constitutional rights": (1) he instructed the city attorney to prepare a notice of the meeting on February 7, 2003; (2) he contacted defendant Steuding about the meeting; (3) he instructed the deputy city clerk to publish notification of the meeting; (4) he spoke with Manhardt about wanting the buy-out; (5) he directed the city finance director to prepare calculations regarding the cost of the buy-out; and (6) he instructed two city attorneys to be present at the meeting.

In this case, unlike Miller, there is no indication that any council member looked to defendant Sturz for a cue before voting in favor of the buy-out. Unlike Conner, there is no evidence that defendant Sturz ever pressured any council member to vote for the buy-out

other than Manhardt, who cast the single dissenting vote. (I note that construing defendant Sturz's comments to be pressure on Manhardt is a fairly attenuated proposition. According to Manhardt, defendant Sturz expressed his dissatisfaction with plaintiff and then asked Manhardt whether he would be attending the meeting. This is a far cry from the strong arming in Conner.) Finally, unlike both Miller and Soderbeck, there is no evidence in this case that any council member was under an impression that defendant Sturz had any authority over their decision.

Plaintiff contests this conclusion by suggesting that it would be reasonable to infer that defendant Sturz made comments to other council members similar to those he made to Manhardt. But plaintiff again confuses reasonable inferences with speculation. "[T]he mere possibility that a factual dispute may exist, without more, is an insufficient basis upon which to justify denial of a motion for summary judgment." Posey v. Skyline Corp., 702 F.2d 102, 106 (7th Cir. 1983). Reasonable inferences are those that flow from the evidence, Euromotion, Inc. v. BMW of North America, Inc., 136 F.3d 866, 873 (1st Cir. 1998); plaintiff's theory calls for the fact finder to invent additional conversations out of whole cloth for which he apparently has no evidence. Cf. Boynton v. Vallas, 1994 WL 27880, *4 (N.D. Ill. 1994) (no individual liability under Conner standard where no evidence of content of defendant's statement to actual decision maker); see also Dft. Steuding Dep., dkt. #15, at 112 (only conversation he ever had with defendant Sturz about buy-out was about his

own ability to attend meeting); Dft. Sturz Aff., dkt.#27, ¶ 23 (never attempted to influence or instruct any council member on how to vote). At best, plaintiff might argue that by arranging the meeting, defendant Sturz expressed his approval of the buy-out. However, it would not be reasonable to assume that council members would vote to approve anything put before them at a meeting; to do so would be to assume that the council is little more than a rubber stamp. At least one other court in this circuit has held that simply holding a closed meeting is insufficient personal involvement absent any other act of coercion. Griffin v. Triton College, 822 F. Supp. 1322, 1325 (N.D. Ill. 1993).

Plaintiff suggests that arranging for cost estimates and having two lawyers present may have influenced the council members, but these actions are not even remotely suggestive of coercion. If anything, having hard numbers of the cost of the buy-out would more likely dissuade council members. Cf. Calloway v. Miller, 147 F.3d 778 (8th Cir. 1998) (ministerial acts are insufficient to establish § 1983 liability).

Absent evidence from which it could be reasonably inferred that defendant Sturz influenced any decision maker, no reasonable jury could conclude that he can be held liable under the standard set forth in the Conner line of cases. The testimony plaintiff asks the court to consider would not have affected the outcome of the case. Therefore, this is not one of those exceptional cases warranting relief under Rule 60(b)(6).

ORDER

IT IS ORDERED that plaintiff Larry LaFond's motion for reconsideration under Fed. R. Civ. P. 59(e) is DENIED. The motion of defendants Larry Sturz, David Elvig, Tom Steuding and City of Altoona for additional briefing is DENIED as moot.

Entered this 18th day of August, 2004.

BY THE COURT:

BARBARA B. CRABB
District Judge