IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

JOHN M. LICKTEIG,
Plaintiff,

v. MEMORANDUM and ORDER
05-C-045-S

KENNETH DENTICE and CITIES
AND VILLAGES MUTUAL INSURANCE
COMPANY,
Defendants.

Plaintiff John M. Lickteig commenced this civil action under 42 U.S.C. § 1983 claiming that defendant Kenneth Dentice violated his First Amendment rights. In his complaint plaintiff alleges that the defendant retaliated against him for speaking on a matter of public concern.

On June 1, 2005 defendants moved for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, submitting proposed findings of fact, conclusions of law, affidavits and a brief in support thereof. This motion has been fully briefed and is ready for decision.

On a motion for summary judgment the question is whether any genuine issue of material fact remains following the submission by both parties of affidavits and other supporting materials and, if not, whether the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. An adverse party may not rest upon the mere allegations or denials of the pleading, but the response must set forth specific facts showing there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317 (1986).

There is no issue for trial unless there is sufficient evidence favoring the non-moving party that a jury could return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

Plaintiff moves to strike the affidavit of John Walker, additional proposed finding of fact and additional legal arguments. This motion will be granted because they attempt to raise new issues that are waived because they could have been raised in their original motion.

FACTS

For purposes of deciding defendants' motion for summary judgment the Court finds that there is no genuine dispute as to any of the following material facts.

Plaintiff John Lickteig is an adult resident of Rhinelander, Wisconsin. Defendant Kenneth Dentice is the Director of Building

and Inspections for the City of La Crosse, Wisconsin. Defendant Cities and Villages Mutual Insurance Company is the insurance company that provides coverage for the City of La Crosse.

In December 2003 plaintiff was hired as the City of La Crosse Chief Inspector for the Building and Inspections Department and reported to Dentice. He began his probationary employment on December 29, 2003. The City of La Crosse Building and Inspections Department is charged with the enforcement of laws controlling and regulating zoning (land use), building and property maintenance and building construction.

On March 30, 2004 Dentice drafted a three-month employee status follow-up regarding plaintiff. Prior to this meeting Dentice had concerns about plaintiff making disparaging remarks to other employees and his ability to determine which building code to apply. Dentice did not mention these concerns at the March 30, 2004 meeting but had mentioned them to plaintiff previously. At the March 30, 2004 meeting Dentice noted that plaintiff was doing a good job learning the Department’s systems and that he was intelligent, hard working, detail oriented and an asset to the department.

On or about April 27, 2004 Rick Hamilton, a citizen of La Crosse, came to the inspection department and asked to speak to the chief inspector. Plaintiff spoke with him. Hamilton wanted plaintiff to inspect the levee at Riverside Park. Dentice told

plaintiff not to inspect the levee. During his lunch hour plaintiff conducted an inspection of the levee and told Hamilton he believed it was a public hazard. Plaintiff then told Dentice he wanted him to inspect the levee. Dentice was angry and told plaintiff he should not have conducted an inspection. Plaintiff wrote a report of his inspection.

After plaintiff inspected the levee Mr. Hamilton appeared at a public hearing of the Judiciary & Administration Committee and then at the subsequent Committee of the Whole Meeting of the Common Council. Hamilton told these committees that plaintiff believed there was a public safety hazard at Riverside Park. Dentice had to explain to the committees why he stopped plaintiff's investigation of the levee and why he would not let him finish his report.

In early May 2004 Dentice contacted Mr. Geissner, the head of human resources to express concerns about plaintiff's job performance. Geissner advised Dentice to document any problems and to be sure plaintiff understood his expectations and probationary status.

Dentice met with plaintiff on June 9, 2004 to discuss concerns about his performance. He then sent him a memo on June 14, 2004 and extended his probationary period until December 28, 2004. The memo stated that Dentice's concerns were as follows:

> Three department heads made comments about your unwillingness to be helpful to them. They were not specific, however, they felt strongly enough about it to ask a member of the Human Resources Staff, "Did you have anything to do with hiring that new Chief Inspector?"

> All of the Building and Inspections Department staff has(sic) expressed concerns about your performance and how it has affected departmental morale and the perception of the department in the building community.

At the end of the memo Dentice stated in part:

> John, I see in you the potential for becoming a very good Chief Inspector and I want to give you every opportunity to turn around your performance problems. In order to afford you the maximum amount of time in which to accomplish the improvement, I am extending your probationary period for six months until December 28, 2004 at which time I hope that I will have seen significant improvement in the areas of concern. As always, please feel free to come to me and ask questions whenever you are unsure about something.

In his deposition Dentice states that between June 14, 2004 and July 1, 2004 he did not observe any of the behavior of plaintiff about which his subordinates were complaining. He did not investigate any of the complaints he received during that time period.

Plaintiff was terminated from his employment by Dentice on July 1, 2004. The notification of termination stated that plaintiff’s performance had not met expectations.

MEMORANDUM

Defendants moved for summary judgment on plaintiff’s First Amendment retaliation claim. To prevail on his First Amendment claim plaintiff must first show that his speech is a matter of public concern. Connick v. Myers, 461 U.S. 138 (1983). Defendant

Dentice concedes for purposes of this motion that plaintiff was speaking on a matter of public concern, the safety of the dock area in relation to the citizens of the city.

Such speech is not protected where the employer can prove that the interest of the public employee as a citizen in commenting n the matter is outweighed by the interest of the government as employer in promoting effective and efficient public service. Pickering v. Board of Education of Township High School District 20,391 U.S. 563(1968).

The Pickering balancing test requires consideration of the following factors: 1) whether the speech would create problems in maintaining discipline or harmony among co-workers; 2) whether the employment relationship is one in which personal loyalty and confidence are necessary; 3) whether the speech impeded the employee's ability to perform his responsibilities; 4) the time, place and manner of the speech; 5) the context within which the underlying dispute arose; 6) whether the matter was one on which debate was vital to informed decision-making and 7) whether the speaker should be regarded as a member of the general public. Klunk v. County of St. Joseph, 170 F.3d 772, 776 (7th Cir. 1999).

Factual disputes remain as to whether plaintiff's speech was outweighed by the defendant's interest in promoting effective and efficient public service. See McGreal v. Ostrov, 368 F.2d 657, 676 (7th Cir. 2004).

Where plaintiff proves that his speech was protected by the First Amendment he would then have to prove that this protected speech was a motivating factor in defendant's adverse employment decision. Spiegla v. Hull, 371 F.3d 928, 935 (7th Cir. 2004). Plaintiff argues that defendant Dentice retaliated against him when he gave him a verbal reprimand, extended his probationary period and terminated his employment. Of these only the termination is an adverse employment action.

Plaintiff's protected speech was on April 27, 2004. Prior to this date there were no negative performance evaluations. The difference between Dentice's positive performance evaluation of plaintiff on March 30, 2004 and his negative June 9, 2004 review raises the inference that the plaintiff's April 27, 2004 speech was a motivating factor in plaintiff's termination.

Finally, the employer can prevail if it can show that it would have taken the adverse employment action even in the absence of the protected speech. Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 286 (1977). Dentice contends that he would have terminated plaintiff's employment absent the speech based on his performance. Since Dentice was the decisionmaker his state of mind remains a genuine issue of material fact. It is what the decisionmaker knew at the time of his decision which is relevant to his decision. This includes both plaintiff's speech and his performance.

Dentice stated in his affidavit that plaintiff's job performance suffered a significant and rapid deterioration after June 9, 2004. This opinion was based on complaints he received from others and not his own personal knowledge. Plaintiff disputes that his performance deteriorated. In the July 1, 2004 notification Dentice merely states that plaintiff's performance has not met expectations. There remains a genuine issue of material fact as to whether this reason was pretextual for retaliation.

Factual issues remain for trial. Defendants' motion for summary judgment will be denied.

Defendants also move for summary judgment on the basis of qualified immunity. Factual issues remain which prevent this Court from deciding the issue of qualified immunity. These factual issues are beyond the narrow legal issue of immunity which is subject to an interlocutory appeal. See Marshall v. Allen, et al., 984 F. 2d 787 (7th Cir. 1993).

ORDER

IT IS ORDERED that plaintiff's motion to strike the affidavit of John Walker, additional proposed findings of fact and legal argument is GRANTED.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is DENIED.

Entered this 12th day of July, 2005.

BY THE COURT:

/s/

JOHN C. SHABAZ
District Judge