

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Ernest E. Mize : CIVIL ACTION  
v. :  
Borough of Kennett Square, et al. : No. 96-2609

**MEMORANDUM AND ORDER**

Shapiro, District Judge

June 9, 1997

Before the court is plaintiff's Motion for Reconsideration of the court's April 1, 1997, order granting defendants' motion for summary judgment. Ernest Mize ("Mize") brought this action on the grounds that the Borough of Kennett Square ("the Borough") violated his substantive and procedural due process rights when it terminated his employment and disability benefits. Mize seeks the reconsideration of the summary judgment granted on the four counts in his amended complaint, but his memorandum in support of the motion contains new argument only on Count Two, alleging a violation of his free speech rights. Mize's Motion for Reconsideration will be denied on all counts.

"The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." Harsco v. Zlotnicki, 799 F.2d 906, 909 (3d Cir. 1985) cert. denied, 476 U.S. 1171 (1986). Mize must establish one of three grounds: 1) the availability of new evidence, 2) an intervening change in controlling law, or 3) the need to correct a clear error of law or to prevent manifest

injustice. Smith v. City of Chester, 155 F.R.D. 95, 96-97 (E.D. Pa. 1994). Mize may not submit evidence available to him prior to the court's granting summary judgment to defendants. Id. (citing DeLong Corp. v. Raymond International Inc., 622 F.2d 1135, 1139-40 (3d Cir. 1980)). A motion for reconsideration is "not properly grounded on a request that a court rethink what it has already considered." United States Fire Ins. Co. v. Aetna Casualty and Surety Co., 1997 WL 28710 (E.D. Pa. 1997) (citing Glendon Energy Co. v. Borough of Glendon, 836 F. Supp. 1109, 1122 (E.D. Pa. 1993)).

Mize seeks reconsideration of evidence surrounding the Borough's requests that Mize get independent medical evaluations in Fall, 1995. Defendants stated in their motion for summary judgment that Mize did not comply with those requests. Mize now explains that he intended to comply but was not able to make appointments by the time required by the Borough. Mize presents no new evidence and the evidence he does submit does not change the court's determination made in granting summary judgment that the Borough had independent reasons for terminating Mize's employment and disability.

Mize also disputes the Borough's evidence that he used a backhoe while he was on disability.<sup>1</sup> Mize is confused about

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1. Mize now denies that he ever used the backhoe, although he admits he owns one. Defendants, in their Opposition to the Motion for Reconsideration, append a newspaper article, dated August 21, 1996, in which Mize is quoted as saying that he owns a backhoe and uses it to clear the snow from his 300 foot driveway. (continued...)

the standard of law the court applied in granting summary judgment on Count Two. Where plaintiff can show that his protected speech was a motivating factor in his termination, the defendants must show that they would have reached the same result even in the absence of the protected speech. Mt. Healthy City Sch. Dist. Bd of Educ. v. Doyle, 429 U.S. 274, 284 (1977), Liotta v. Borough of Springdale, 985 F.2d 119 (3d Cir. 1993). Mize challenges the evidence the Borough relied on when it terminated him. In granting summary judgment, the court was satisfied that the Borough believed, and had evidence to believe, that Mize was not disabled when it terminated his employment and benefits, and that it would have believed that even without Mize's protected speech. Mize has presented no new evidence that the Borough was motivated to terminate him solely because of Mize's protected speech.

At the December 2, 1996, oral argument on defendants' motion for summary judgment, the court expressed the view that there might be disputed issues of fact allowing Mize's First Amendment claim to survive summary judgment. Defendants explained that they were entitled to summary judgment if they had an independent reason for the termination and cited Czurlanis v. Albanese, 721 F.2d 98 (3d Cir. 1983). In Czurlanis, the Court of

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1. (...continued)  
"The backhoe takes the physical work out of it [snow removal]. I can't shovel snow or dig holes." Defs' Opp. to Pl's Mot. for Recon., Ex. 3. The article was not available to the Borough at the time it decided to terminate Mize's benefits.

Appeals reversed the summary judgment for defendants because it held the protected speech was the reason the plaintiff was disciplined, and there was no independent reason for their actions. Czurlanis is not on point; defendants have established sufficient evidence that Mize's physical abilities were an independent reason for Mize's termination. After researching more pertinent case law, including Liotta, 985 F.2d 119, the court was persuaded that the Borough had independent reason to terminate Mize.

Mize argues his situation is distinguishable from Liotta. In Liotta, the plaintiff had a hearing on accusations of theft. Mize argues that he was not given a hearing before the Borough Council. That is not an issue before this court; Mize had sufficient opportunity to challenge the Borough's decision before the Civil Service Commission and in state court. In this case, as in Liotta, the Borough believed it had sufficient evidence of misconduct to terminate employment. Mize's misconduct, not his protected speech, motivated the Borough's decision. Mize has not persuaded the court that Liotta is not controlling.

The Court of Appeals recently applied the three part test in cases of terminated employment following protected speech, articulated in Green v. Philadelphia Hous. Auth., 105 F.3d 882, 885 (3d Cir. 1997) and followed by this court in its memorandum of April 1, 1997. In Latessa v. New Jersey Racing Commission, -- F.3d --, 1997 WL 236108 (3d Cir. 1997), the Court

of Appeals, reversing the summary judgment on the First Amendment claim, held there was sufficient evidence of retaliation to go to a jury. Latessa is distinguishable from the instant case, because Latessa's protected speech was followed the next day by a letter stating Latessa would not be reappointed to his state at-will position; the protected speech of Mize, a former police officer, predated by several months the Borough decision to terminate him. In Latessa, the New Jersey Racing Commission said Latessa was fired because he lied in conversations and memoranda; the Court of Appeals held a reasonable jury could conclude these allegations were a pretext. No reasonable jury could conclude in the instant case that the Borough, faced with substantial evidence that Mize was not disabled, would not have terminated him had he not spoken out against the Borough police chief. Latessa follows Green, as did this court; it does not overrule Liotta.

Mize has failed to provide the court with new evidence, new law, or reason to believe a clear error of law has been committed. For that reason, his Motion for Reconsideration will be denied.

An appropriate order follows.

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ORDER

AND NOW, this 9th day of June, 1997, upon consideration of plaintiff's Motion for Reconsideration and defendant's response thereto, it is **ORDERED** that:

1. Plaintiff's Motion for Reconsideration is **DENIED**.

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J.