

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

LORNA JAMES, : CIVIL ACTION
Plaintiff, :
 : NO. 97-99
v. :
 :
VALLEY TOWNSHIP, et al., :
Defendants. :

M E M O R A N D U M

BUCKWALTER, J.

January 6, 1998

I. INTRODUCTION

Plaintiff, Lorna James ("James") has filed this § 1983 action against Valley Township and various members of the Board of Supervisors of Valley Township, ("Valley" or the "Board") claiming that her termination from the position of township treasurer amounted to a violation of her First Amendment right to free speech and her Fourteenth Amendment right to due process.¹ Presently, before the Court are the parties cross motions for summary judgment and James' motion to amend the complaint. For the reasons which follow, I dismiss James' motion to amend, deny James' motion for summary judgment and grant Valley's motion for summary judgment.

1. James has withdrawn count three of her complaint, a state law claim for wrongful discharge.

II. BACKGROUND

In 1994, when the treasurer/secretary position for Valley Township became available, Valley split the position and appointed James as treasurer and Charlotte Levengood ("Levengood") as secretary, in addition to Levengood's preexisting position as sewer secretary. James' appointment was subject to a six month probationary period.

In her role as treasurer, James discovered that Levengood had received a pay raise and mentioned the raise to Board Supervisor, Wilson Lambert ("Lambert"). Fearing that Levengood's raise was unauthorized, Lambert brought it to the attention of the rest of the Board at a public township meeting. The Board investigated the matter and determined that Levengood's raise was appropriate.

Shortly after, James received from Levengood a bill for \$233 to cover premium payments for a bond for Levengood. Once bonded Levengood would then have check signing capabilities. Up until that time only James was authorized to sign checks. Suspicious of the request, James refused to pay the bill and brought the matter to the attention of the Board. At a public meeting, James expressed her unwillingness to pay the bill, the topic was hotly debated and after being provided with an explanation as to why Levengood's bond was necessary, James was directed by the Board to pay the premium. James maintained her

refusal to pay the bill. At the expiration of James' six-month probationary period, at a non-public meeting in mid-May 1995, the Board decided to discharge James and relieve Levensgood of her secretarial duties, although she remained sewer secretary. The next day James was informed by the Board that she had been terminated. The reasons provided for her termination were insubordination and tardiness.

III. DISCUSSION

A. James' Motion to Amend the Complaint

In her original complaint, James omitted any discussion of Levensgood's bond in relation to her First Amendment claim. Presently, she seeks to amend her complaint to include such discussion. I find James' request unnecessary. The liberal system of "notice pleading" set up by the Federal Rules, which requires that a complaint include only "a short and plain statement of the claim showing that the pleader is entitled to relief" is equally applicable to § 1983 claims. See Fed. R. Civ. P. 8(a)(2); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993) (rejecting a "heightened pleading standard" in a case arising under 42 U.S.C. § 1983). Furthermore, Valley has known of the proximity between James' termination and the debate over payment of Levensgood's bond and therefore has been on notice of the possibility that such facts may be used to bolster James' First Amendment claim.

Accordingly, James' motion to amend the complaint is dismissed as moot.

B. Cross Motions for Summary Judgment

Both James and Valley have request summary judgment. Summary judgment may be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The standards by which a court decides a summary judgment motion do not change when the parties file cross motions. Southeastern Pa. Transp. Auth. v. Pennsylvania Pub. Util. Comm'n, 826 F.Supp. 1506, 1512 (E.D.Pa. 1993). When ruling on cross motions for summary judgment, the court must consider the motions independently. Williams v. Philadelphia Housing Auth., 834 F.Supp. 794, 797 (E.D.Pa. 1993). The facts are viewed in the light most favorable to James and all inferences shall be taken in favor of James, the non-moving party, on consideration of Valley's motion for summary judgment. See Carnegie Mellon Univ. v. Schwartz, 105 F.3d 863, 865 (3d Cir. 1997). As to James' motion, the facts and inferences shall be considered in the light most favorable to Valley. See Id.

1. First Amendment Claim

James claims that she was dismissed in retaliation for informing Lambert of Levengood's raise and for bringing Levengood's bond request to the attention of the Board and that her conduct in both instances was protected by the First Amendment. Valley argues that the conduct at issue does not relate to matters of public concern and therefore is not protected by the First Amendment. I agree.

In some cases, the First Amendment protects public employees from retaliation by their employers. Under 42 U.S.C. § 1983, public employees may sue to enforce that protection if (1) they spoke on a matter of public concern; (2) their interest in that field outweighs the government's concern with the effective and efficient fulfillment of its responsibilities to the public; (3) the speech caused the retaliation; and (4) the adverse employment decision would not have occurred but for the speech. Green v. Philadelphia Housing Auth., 105 F.3d 882,885 (3d Cir. 1997). This test represents the Supreme Court efforts to balance an employee's right to speak and the government-employer's duty to serve the public productively. Fogarty v. Boles, 121 F.3d 886, 888, 889 (3d Cir. 1997) (citations omitted). In striking this balance, the Court has concluded that "[t]he government's interest in achieving its goal as effectively and efficiently as possible is elevated from a relatively subordinate interest when

it acts as a sovereign to significant one when it acts as an employer." Waters v. Churchill, 511 U.S. 661 (1994) (plurality opinion).

The first step, the public concern inquiry, is a legal one. It is determined by the content, form and context of a given statement, as revealed by the record as a whole. See

Watters v. City of Philadelphia, 55 F.3d 886 (3d Cir. 1995).

An employee's speech addresses a matter of public concern when it can "be fairly considered as relating to any matter of political, social or other concern to the community." Holder v. City of

Allentown, 987 F.2d 188, 195 (3d Cir. 1993). Speech by a public

employee "as a citizen upon matters of public concern" is

distinguished from speech by "an employee upon matters of only personal interest" for which, "absent the most unusual

circumstances, a federal court is not the appropriate forum in

which to review the wisdom of a personal decision taken by a

public agency allegedly in reaction to an employee's behavior."

Connick v. Myers, 461 U.S. 138, 147 (1983).

In the instant action, two situations involving expressive conduct are at issue. First, James' conversation with Lambert in which she voiced surprise at the fact that Levensgood's hourly salary was higher than her own. James argues that this conversation concerned matters of public concern because, through her discussion, she brought to light a possible misappropriation

of municipal funds. Although, courts have recognized that an employees expressions regarding the mismanagement of government funds are protected, the record reveals that James' statement reflected her own personal discontentment with Levensgood's hourly rate, rather than concern for the public good. See e.g., Czurlanis v. Albanese, 721 F.2d 98 (3d Cir. 1983). Specifically, in her deposition James testified that she initiated the subject with Lambert because she was upset over the fact that "she [Levensgood] makes a lot of money and for it seems she has it pretty cushoiney [sic]." It was in fact Lambert, not James, who surmised that Levensgood's higher hourly pay may have been due to an unauthorized raise and felt compelled to make his conclusions public. Therefore, because it does not touch on matters of public concern I find that James' speech concerning Levensgood's raise is not protected by the First Amendment.

Second, James' expressed her concern with Levensgood's bond request in a memo to the Board, voiced her opinion during a public meeting and finally refused to pay the bill when directed to do so by the Board. It is clear, that through her actions and communications James expressed her opinion that paying for Levensgood's bond would be an unnecessary waste of public resources. James did not discuss her hours, pay or the conditions of her employment, but rather challenged practices of

Valley that she considered inefficient and wasteful. See Czurlanis, 721 F.2d at 104.

Valley argues that the "only reason why Plaintiff objected to paying the bond was that she did not want Charlotte Levengood moving in on her job or making mistakes which would be attributed to her." I am unpersuaded by Valley's argument. That James' speech may have been motivated, at least in part, by personal animus or self interest is not dispositive and complete reliance on James' motivation for speaking would be inappropriate. See Versarge v. Township of Clinton, 984 F.2d 1359, 1365 (3d Cir. 1993)(motivation is only one factor to consider); Rode v. Dellarciprete, 845 F.2d 1195, 1201 (3d Cir. 1988).

Therefore, in accordance with the law of this circuit and the Supreme Court, I conclude that James' speech and conduct regarding Levengood's bond related to a matter of public concern.² See e.g., Pickering v. Board of Education, 391 U.S. 563 (1968)(teacher's letter complaint about allocation of school funds protected by the First Amendment); Czurlanis, 721 F.2d at 104 (county auto mechanic's criticism of internal management of Department of Motor Vehicles).

Next I am called upon to balance James' need for protection against Valley's need for office efficiency. An

2. My conclusion is further supported by the fact that local papers found the bond controversy worthy of mention.

employer's interests are impaired where the speech causes disruption in the workplace. Swineford v. Snyder County 15 F.3d 1258, 1272 (3d Cir. 1994) (citations omitted). Valley argues that James' refusal to pay the bond after being directed to do so by the Board impeded the township's ability to effectively discharge its public duties. At a public meeting held on April 18, 1995, a motion was made to pay all outstanding bills. At this time James commented that it was unnecessary for Levengood to be bonded and therefore her bill should not be paid with township funds. After much debate, during which James received explanations from three Board members and the township's solicitor as to why the bond should be paid, James maintained her position. Finally, the Board ordered her to pay the bill. In response, James simply stated "you pay it." Thus, Valley was faced with a treasurer who refused to perform one of her primary duties, pay bills.

It is clear that James initially had a right to voice her concerns regarding Levengood's bond and the public had an interest in hearing such concerns. But this interest diminished as James coupled her expression with disruptive conduct, her refusal to pay the bill, which clearly impinged on the township's administrative ability. Therefore, on balance I find that Valley's interest in maintaining a functioning public office outweighed James' interest in expressing her opinion regarding

Levengood's bond, and therefore James' speech and conduct regarding the bond are not protected by the First Amendment. Accordingly, because James' expressions regarding Levengood's raise and bond are not entitled to protection, I grant summary judgment in favor of Valley on James' First Amendment claim.

2. Fourteenth Amendment Claim

James asserts that in terminating her employment Valley deprived her of liberty and property without due process of law.³ Under the due process clause of the Fourteenth Amendment, if plaintiffs possess property rights or liberty interests in their continued public employment, they are entitled to due process before the government may deprive them of their jobs. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985).

Valley correctly argues that because James had no property interest in her continued employment, Fourteenth Amendment protection is inapplicable to her claim. Property interests are not created by the Constitution, but by an external source such as state law. Board of Regents v. Roth, 408 U.S. 564, 577 (1972). In Pennsylvania, absent an express statutory or contractual right granting tenure in public employment, a public employee remains "an employee at will who could be discharged at any time." Harmon v. Mifflin County School District, 651 A.2d

3. In her complaint James simply states that she was deprived due process under the Fourteenth Amendment. I construe this allegation as referring to both liberty and property interests.

681, 686 (Pa. Commw. 1994). In addition, Pennsylvania law provides that public employees have no contractual entitlement to be dismissed only for cause unless the legislature has expressly provided tenure for a given class of employees. Rosenthal v. Rizzo, 555 F.2d 390, 392 (3d Cir. 1977) (citing Mahoney v. Philadelphia Housing Authority, 320 A.2d 459 (Pa. Commw. 1974)).

It is undisputed that Valley was under no contractual duty to maintain James' employment and James has not pointed to any relevant legislation promising continued employment. In fact because she was a probationary employee, James presumably understood the particularly precarious nature of her employment. See Blanding v. State Police, 811 F.Supp. 1084, 1092-93 (E.D. Pa. 1992) (Determining that without evidence of legislative intent to create a property interest in probationary employment, the fact that employment is identified as "probationary" indicates the opposite.) Therefore, I conclude that James has failed to identify a protectable property interest.

A government employee's liberty interest is implicated when he has been terminated and the government has made "a charge against him that might seriously damage his standing and associations in the community" or "impose on him a stigma or other disability that foreclose[s] his freedom to take advantage of other employment opportunities." Roth, 408 U.S. at 573. In Roth, the Supreme Court cautioned that although proof of

discharge might make a plaintiff somewhat less attractive to some other employer it would hardly establish the kind of foreclosure of opportunities amounting to a deprivation of liberty. Id at 574 n.13.

In support of her claim, James states "the reasons given and published for her discharge are those which damage her professional reputation." James' notice of termination indicated insubordination and tardiness as reasons for discharge. In an affidavit attached to her reply brief James claims that these reasons were announced "in a public manner." Although, seemingly unsupported by the record, I will presume, for purposes of summary judgment review only that James' claim of publicity is accurate. However, because I find the reasons for her termination, insubordination and tardiness, non-stigmatizing, I conclude that James' liberty interests have not been implicated. See Walker v. Elbert, 75 F.3d 592 (10th Cir. 1996)(Charges of insubordination or poor work habits are not considered to be stigmatizing.); Shands v. City of Kennett, 993 F.2d 1337 (8th Cir. 1993)(A charge of insubordination is normally insufficient to implicate a liberty interest.); R. Brouillette v. Board of Directors of Merged Area IX, 519 F.2d 126 (8th Cir. 1975)(Allegation of tardiness is minor and does not impair an employees ability to obtain future employment); Munson v. Friske, 754 F.2d 683 (7th Cir. 1985)(Calling an employee "uncontrollable"

is not stigmatic); Watson v. Sexton, 755 F.Supp. 583, 592 (S.D.N.Y. 1991)(Charges that employee abused sick time and lateness policy, even if false, did not reach the level required to support a deprivation of liberty claim). Accordingly, I grant Valley's request for summary judgment on James' Fourteenth Amendment claim.

An appropriate order follows.

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O R D E R

AND NOW, this 6th day of January 1998, upon consideration of (1) Plaintiff's motion to amend the complaint (Docket No. 14) and Defendants' answer (Docket No. 19); (2) Plaintiff's motion for summary judgment (Docket No. 15) and Defendants' answer (Docket No. 20); and (3) Defendants' motion for summary judgment (Docket No. 16) and Plaintiff's answer (Docket No. 19), it is hereby ORDERED that Plaintiff's motion to amend is **DISMISSED** as moot, Plaintiff's motion for summary judgment is **DENIED** and Defendants' motion for summary judgment is **GRANTED**. Accordingly, the Clerk shall enter judgment in favor of Defendants Valley Township, Grover Koon, Joanne Fryer, Joseph Leofsky and John Cuff Jr. and against Plaintiff, Lorna James, and shall mark this case **CLOSED**.

BY THE COURT:

RONALD L. BUCKWALTER, J.