EFiled: Dec 15 2014 02:22PM EST
Filing ID 56472757
Case Number 477,2014C

IN THE SUPREME COURT OF DELAWARE

SHAWN BRITTINGHAM and
CHRISTOPHER STORY
Plaintiffs Below/
Appellants,

v.

TOWN OF GEORGETOWN, A
Municipal Corporation, WILLIAM
TOPPING, Chief of Police, RALPH
HOLM, Captain of Police,
Defendants Below/Appellees.

No.: 477, 2014

Court Below: Superior Court of
Delaware, In and For Sussex County
C.A. No.: S11C-01-004 RFS

REPLY BRIEF OF THE PLAINTIFFS BELOW/ APPELLANTS, SHAWN BRITTINGHAM & CHRISTOPHER STORY

/s/ Bruce A. Rogers, Esquire
Bruce A. Rogers, Esquire
Bruce A. Rogers, Esquire, P.A.
12 South Front Street
Georgetown, DE 19947
(302) 856-7161
Bar ID: 2426
Attorney for Appellants

Date: 12.15.14

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF CITATIONS ii

ARGUMENT ONE 1

Question Presented

Scope of Review

Merits of Argument

CONCLUSION 9

TABLE OF CITATIONS

CASES PAGE

Balas v. Taylor, 567 F. Supp 2d 654 (D. Del. 2008)……………………..…3

Burns v. Dept of Public Safety, 2013 WL 5421680 (2013)…………………8

Connick v. Myers, 461 U.S. 138 146 (1983)…………………………………5

Craig v. Rich Tp. High School Dist. 277, 736 F.3rd 110, 116 (7th Cir. 2013)..5

Czurlanis v. Albanese (721 F. 2d 98 3rd Cir. 1983)…………………………..3

Eaton v. Raven Transport, 2010 WL 4703397,
at 1 Del Super Nov. 15, 2010………………………………………..2

Ebersole v. Lowengrub, 180 A.2d 467 (1963)……………………………..…2

Justice v. Danberg, 571 F. Supp. 2d 602 (D. Del. 2008)……………………..4

Lipson v. Anesthesia Services, P.A., 790 A2d 1261 (Del. Super Ct., 2001)…7

Vaughn v. Jackson, 2013 WL 6667752 at 2 Del. Super Ct. Dec. 18,
2013……………………………………………………………….2

Watters v. City of Philadelphia 55 F 3rd 886, 893 3rd Cir. 1995………………5

STATUE PAGE

Del. Constitution, Art. 1 Sec. 5……………………………………………3

19 Del. C. 1703…………………………………………………….……6

ARGUMENT ONE

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO PLAINTIFFS' THIRD AMENDED COMPLAINT, WHERE IT FOUND THERE WAS NO "FREE SPEECH" CLAIM UNDER THE FIRST AMENDMENT. FURTHER, IN STRIKING THE SPEECH CLAIM, THE TRIAL COURT ERRRED IN HOLDING NONE OF THE OTHER COUNTS OF THE THIRD AMENDED COMPLAINT COULD SURVIVE SUMMARY JUDGMENT.

QUESTION PRESENTED

Was it an error of law or abuse of discretion for the trial court to grant Defendants' Motion for Summary Judgment as to Plaintiffs' Third Amended Complaint?

No specific reference or preservation of this question was preserved at trial or hearing as there was no trial or hearing on the issues set forth in the Third Amended Complaint. The trial court's ruling was based entirely upon the brief and what sparse written record before it. All of the questions raised on appeal were fairly presented to the trial court in the briefing by the Plaintiff below/ Appellant. No further record was developed other than these written submissions.

SCOPE OF REVIEW

On summary judgment, the Court's role is to ascertain whether genuine issues of material fact exist and to determine whether the moving party is entitled to judgment as a matter of law. If the court finds material facts are in dispute or that judgment as a matter of law is not appropriate, summary judgment will be

denied. Eaton v. Raven Transport, 2010 WL 4703397, at 1 Del Super Nov. 15, 2010. The moving party bears the initial burden of proof. The burden then shifts to the non-moving party to show a material issue of fact exists. Vaughn v. Jackson, 2013 WL 6667752 at 2 Del. Super Ct. Dec. 18, 2013. In reviewing the facts at the motion for summary judgment phase, the Court must view the facts in the light most favorable to the non-moving party. Id. Summary judgment may not be granted if the record indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the case at bar. Ebersole v. Lowengrub, 180 A.2d 467 (1962).

MERITS OF ARGUMENT

Appellees first argue the "Chain of Command" policy is constitutional and within the latitude afforded a paramilitary organization such as the Georgetown Police Department. Nothing set forth within the argument, however, rises to the level of supporting a grant of summary judgment. Appellees misapprehend the argument asserted by the Appellants and attempt to bootstrap their position by claiming this is a "chain of command" issue rather than a silence order prohibitive of the rights of these individuals.

The Appellees fail to address the claim that the silence order prohibiting the officers from speaking about any matter involving the Department to anyone other

than the Chief or Captain violates the First Amendment Free Speech Clause, the Petition Clause and the right of Delaware citizens "in an orderly manner to meet together, and to apply to persons entrusted with the powers of government, for redress of grievances or other proper purposes, by petition, remonstrance or address (the Delaware Meeting/Application Clause). *US Constitution, Amendment 1; Delaware Constitution, Art. 1, Section 16*. The Appellees continue to hide behind the "paramilitary nature" of a police department as protection for violating the constitutional rights of individuals who happen to be police officers. The attempt to either ignore or distinguish the holding of *Balas v. Taylor,* 567 F. Supp. 2d, 654 (D. Del. 2008), wherein summary judgment was granted in favor of an officer relating to free speech and denying qualified immunity to the paramilitary organization because a reasonable officer in the defendant's position could not have believed his actions to be constitutionally permissible is erroneous in this instance. Much the same situation occurs in the case at bar. The defense asserted by the Appellees is a "chain of command" in the paramilitary organization. This defense has failed previously and must not prevail – especially at the very preliminary stage of summary judgment.

It remains the position of the Appellants that the silence order in issue here is akin to the policy at issue in the case of *Czurlanis v. Albanese,* 721 F.2d 98 (3rd Cir. 1983), where nothing written in the policy offered set forth what issue – if any

– would be regarded as appropriate for public speech. The Third Circuit held such a policy unenforceable when used to justify retaliation against public employees (as here, with suspensions, demotions, and financial consequences).

Appellee argues:

> b. *The extensive record clearly demonstrates that Plaintiffs' speech at the Barlow meeting – addressing various workplace grievances- failed to rise to the level of constitutionally protected "citizen" speech on matters of "public concern." Further, the police employer's strong interest in maintaining discipline and order far outweighed any tangential First Amendment interest Plaintiffs had in the speech.*

Appellees' next argument claims the speech by the Appellants at the home of council person Barlow failed to rise to the level of constitutionally protected citizen speech on issues of public concern. This is not correct and not supported by the record below.

The officers in this instance engaged in a protected activity as they (1) acted as citizens; (2) expressed matters of public concern, and (3) the interests of the government in the efficiency of the public service operations did not outweigh their "substantial" First Amendment protections. See *Justice v. Danberg,* 571 F. Supp. 2d, 602 (2008). Appellees hide behind a misapplication of the law to these facts. Courts have clearly held that "…despite its lofty terminology, the 'matter of public concern' inquiry does not require that the speech relate to an issue of exceptional significance in order to be entitled to prima facie First Amendment protection. Public concern is something that is a subject of legitimate news

interest:…" (*Craig v. Rich Township*, 736 F. 3rd 1110, 1116 (7th Cir., 2013). Further, the test for this inquiry is that "a public employee's speech involves a matter of public concern if it can be fairly considered as relating to any matter of political, social or other concern to the community. *Connick v. Myers*, 461 U.S. 138, 146 (1983). The "public concern" legal inquiry is to be determined by the content, form and context of the public employee's speech as revealed by the whole record. *Watters v. City of Philadelphia*, 55 F. 3rd 886, 893 (3rd Cir. 1995).

In the case at bar, Appellees attempts to diminish the nature and context of the speech engaged in by the appellants is misplaced. The bar for "public concern" is not a high hurdle to achieve – especially when viewed in light of the record on summary judgment.

Appellee argues:

> *c. While the Superior Court did not reach the issue, Defendants would be entitled to qualified immunity, even if Plaintiffs has demonstrated that any constitutionally protected conduct occurred, as Defendants' conduct did not violate any clearly established constitutional right.*

The Appellees next assert in their Answering Brief that they would be entitled to qualified immunity even if the Appellees had demonstrated a constitutionally protected interest, but acknowledges the trial court did not reach this issue in its opinion and order on the summary judgment motion. As such, this argument is not properly before the Court at this instant.

Appellee argues:

> *2. The Superior Court properly granted summary judgment as to Count IV, Plaintiffs' "Whistleblower" claim, as there is no evidence whatsoever in the record that would satisfy the statutory elements of this claim.*

The sole point raised by the Appellees below on the matter of the Whistleblowers Protection Act (WPA) was whether the issue in this case involves a "violation" under the WPA. They asserted below the WPA claim failed "automatically" because the Officers never reported a violation of or deviation from a law, rule or regulation during the meeting with the council person. This is erroneous.

The WPA stands for the proposition that an employee's conduct is protected under the act when, for instance, he or she makes a good faith report based upon their reasonable belief that he or she is disclosing a violation of a law, rule or regulation. The law does not require that the officers/Plaintiffs know the law or articulate the nuances of the law or the violation for their conduct to be protected. *19 Del. C. 1703*. Even on the limited record available herein, the undisputed facts demonstrate that a conversation took place between the council person and the officers. The substance of that conversation is, without question, in dispute in the case below. Officers contend they collectively reported general issues of safety (including the dysfunctional state of the police force and the effect on public safety) to the council person as well as specific examples of that conduct which threatened the safety of the officers and the citizens of Georgetown. All of the

specific issues discussed with the council person (such as expired bullet proof vests) were issues pertinent to the overall theme of the meeting – which was to share grave concerns that the police force was dysfunctional and not fulfilling its purpose to protect citizens due to the actions and inactions of the Chief and Captain – consistent with the no-confidence vote. Because a there is a dispute as to the content of the discussions during the meeting and the issues raised therein, a jury should determine what was said, what the theme was, and whether, as a result of the meeting, the officer/plaintiffs' employment was adversely affected. In essence, summary judgment is not warranted on this issue at this stage.

Appellee argues:

> 3. *The Superior Court properly granted summary judgment as to Count V, Plaintiff Brittingham's claim for "constructive discharge" in violation of the covenant of good faith and fair dealing, as the Court correctly found that no evidence exists in the record in support of this claim.*

There is no support in law or fact that Officer Brittingham could not have been constructively discharged because something he supposedly said at some remote stage of these matters amounts to a "voluntary quit" of his position. It must be noted no such comments were made by Officer Brittingham. It is well-settled law that – even had he said what is attributed to him – whether the employee's conduct forced him from his job and whether it did so wrongfully are issues of fact for the jury to decide. *Lipson v. Anesthesia Services, P.A.,* 790 A.2d 1261, 1281 (Del. Super. Ct., 2001). This Court has stated that it will leave the "factual discrepancy

where it belongs – in the hands of the jury" because "to resolve the controversy at the summary judgment stage would require the Court to weigh conflicting evidence and to make credibility determinations, both of which are functions incompatible with summary judgment proceedings. *Id.* None of the statements attributed to Officer Brittingham are inconsistent with the position that he was forced to resign. He was humiliated by the Enhanced Sanctions imposed after he exercised his contractual, procedural and due process rights of appeal, which included a suspension without pay, reduction in rank and probation for one year thereby denying him the ability to apply for promotion. A just must be permitted to weigh the evidence and determine whether such circumstances were enough to compel his resignation. *See Burns v. Dept. of Public Safety,* 2013 WL 5421680 (2013).

CONCLUSION

The trial court erred in granting summary judgment on Plaintiffs Third Amended Complaint in numerous ways set forth hereinabove. The overall error committed by the trial court is straightforward. By forcing the entire controversy into a narrow view of the First Amendment claims of the Plaintiffs the trial court committed error. In essence, the trial court set up the "straw person" of the First Amendment and used a line of reasoning which is distinguishable from the true facts of this case and the law applicable to the inquiries, to ignore all but the First Amendment inquiry. Given the error of the trial court in using the analysis and finding related to the First Amendment to ignore the balance of Plaintiffs Third Amended Complaint, summary judgment was inappropriate as a matter of law. For the foregoing reasons, it is respectfully submitted the opinion and order of the trial court must be reversed, vacated and remanded for trial.

/s/ Bruce A. Rogers, Esquire

Bruce A. Rogers, Esquire
Bruce A. Rogers, Esquire, P.A.
12 South Front Street
Georgetown, DE 19947
(302) 856-7161
Bar ID: 2426
Attorney for Appellants

Date: 12.15.14

Note: Appellants current counsel acknowledges the materials contained herein which were originally set forth by predecessor counsel Connolly Gallagher LLP.