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FEATURED CASE:

Speech: Police Captain Made Allegations of Bias and Conspiracy Among Judge, DA, and Sheriff as Private Citizen

Bevill v. Fletcher, no. 20-40250 (5th Cir. Feb. 11, 2022).

In a web of political intrigue, the Fifth Circuit upholds a lower court determination that when a police captain filed an affidavit seeking transfer of a criminal proceeding due to bias by the local judge, DA and sheriff – who then pressured the mayor and police chief to fire the captain – he was acting as a private citizen, and the relevant law was clearly established.

In April 2017, the *Kilgore News Herald* published an article in which newly-elected Texas state judge Jeffrey Fletcher (Fletcher), noted his excitement about working together with Wood County Sheriff Tom Castloo (Castloo) and Wood County District Attorney James Wheeler (Wheeler). Two months later, Terry Bevill (Bevill), captain of Wood County's Quitman Police Department (QPD), filed an affidavit supporting a venue transfer for the criminal trial of former Wood County Jail Administrator David McGee (McGee). The affidavit, which was filed at the request of McGee's lawyer, stated that McGee would not receive a fair trial in Wood County for facilitating the escape of an inmate and tampering with government records because of the close personal relationships among Fletcher, Castloo, and Wheeler (collectively, Defendants). The affidavit stated that "[a]s a longtime resident and law enforcement officer in the Wood County area, Bevill was familiar with the local players and political climate, including the relationships between and among the sheriff, district attorney and judge." Bevill did not sign the affidavit in his capacity as a QPD, and did not speak with anyone at QPD about the affidavit prior to signing it.

Defendants thereafter approached Quitman's mayor, David Dobbs, (Dobbs) to discuss Bevill's continued employment with QPD, and threatened to withhold resources from Quitman and support for QPD if Bevill was not fired because of the affidavit. Dobbs then pressured the QPD Police Chief (Chief) to fire Bevill because of Defendants' threat. Bevill was placed on administrative leave and a subsequent investigation concluded that Bevill violated city policies that bar members of QPD from "seek[ing] to obtain any continuance of any trial in court out of friendship for the Defendant or otherwise interfere with the courts of justice" and "conduct[ing] themselves in a manner which ... discredit[s] the Peace Officer profession or their employing agency." The Chief then fired Bevill, later telling the Texas Workforce Commission that the decision to terminate Bevill was based in part on Wheeler's threat to not "take any more cases from the City of Quitman" unless Bevill was fired.

McGee's case was never transferred, and a jury found him guilty. After McGee's criminal trial concluded, Fletcher issued a warrant for Bevill's arrest for perjury, but the charge was later dismissed. Bevill averred that while the perjury charges were pending, Fletcher placed "extreme and unreasonable conditions" on Bevill's bond for the perjury charge, including (1) turning over his firearms, (2) submitting to drug testing every two weeks at personal cost to Bevill, (3) obtaining written permission from Wood County officials or Judge Fletcher before leaving the county, (4) reporting to Wood County officials every two weeks, and (5) abstaining from the consumption of alcohol. He also alleged that Wheeler "refused to bring [his perjury] case before a grand jury in an effort to prolong the pending criminal action as long as possible in retribution for the affidavit."

Bevill then sued (1) Quitman and Dobbs for terminating his employment in retaliation for his affidavit; (2) Quitman, Dobbs, and Defendants for conspiring to terminate his employment in retaliation for his affidavit; (3) Wood County and Castloo for unconstitutional oppression, intimidation, and retaliation; and (4) Wood County and Defendants for conspiring to arrest and prosecute Bevill in retaliation for his affidavit. The district court declined to dismiss the case and concluded Defendants were not entitled to qualified immunity on Bevill's claim for conspiracy to commit retaliatory employment termination, also determining that Bevill plausibly averred that Defendants formed an agreement to violate his First Amendment rights.

The Fifth Circuit affirmed.

Discretionary Authority: On appeal, the Circuit first considered Bevill's argument that the Defendants were not entitled to qualified immunity because they were not acting within the scope of their discretionary authority when they threatened to withhold resources from Quitman and support for QPD. Applying the Circuit precedent that officials act within the scope of their discretionary authority when they "perform[ ] non-ministerial acts within the boundaries of [their] official capacit[ies]," the court rejected Bevill's contention. In their positions as sheriff, district attorney, and state judge, respectively, Defendants were responsible for allocating resources within the boundaries of Wood County, which included Quitman and the QPD. its police

department. Thus, each of the Defendants was entitled to assert a defense of qualified immunity.

Constitutional Right: To establish his First Amendment retaliatory-discharge claim, Bevill had to prove that (1) he suffered an adverse employment decision, (2) he spoke as a citizen on a matter of public concern, (3) his interest in the speech outweighed the government's interest in the efficient provision of public services, and (4) the protected speech motivated the adverse employment action.

The Circuit reprised well-known principles from *Garcetti*: When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom, because the public employer, like any principal, has an interest in controlling the activities of its agents, including employee speech that contravenes the public employer's policies or impairs the proper performance of its functions. But that interest is nevertheless balanced against the employee's own interests: '[A] citizen who works for the government is nonetheless a citizen,' and '[t]he First Amendment limits the ability of a public employer ... to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." As the Supreme Court held in *Lane v. Franks*, "The importance of public employee speech is especially evident in the context of ... public corruption" since "speech by public employees regarding information learned through their employment" is the "very kind of speech necessary to" reveal malfeasance among public officials.

Official Duty: The balance between the employee's rights as a private citizen and those of the public employer is determined by the capacity in which the statement was made. If the public employee is speaking "pursuant to [his or her] official duties." (*Garcetti)* the speech is not protected under the First Amendment. Here, the Circuit did not find Bevill to be speaking pursuant to his official responsibilities:

The alleged facts suggest that Bevill did not write his affidavit pursuant to an official duty. Bevill voluntarily submitted the affidavit as a friend of McGee. He alleged that he was never asked to and did not sign the affidavit in his capacity as an officer of QPD. He did not speak to anyone at QPD about the affidavit before signing it. Although Bevill may have learned about potential bias in McGee's upcoming trial through his work as a policeman, that "does not transform that speech into employee—rather than citizen—speech."

Even though Bevill prominently presented his job title in his transfer affidavit directly after stating his name–thereby giving his affidavit the imprimatur of his position–the Circuit found that merely demonstrated "Bevill's knowledge of the close personal relationships among Defendants, not that he spoke according to an official duty.."

Defendants also argued that Bevill spoke as an employee, rather than a citizen, because city policies prevented him from submitting the affidavit. Given that city policies controlled Bevill's right to submit an affidavit regardless of whether he voluntarily submitted it, Defendants asserted, he spoke pursuant to an official duty and therefore

had no viable cause of action. The court disagreed. "[F]or speech to be subject to the employer's 'control' for present purposes, it must 'owe[ ] its existence to' the 'public employee's professional responsibilities,' *id.*, or otherwise be 'for the benefit of the employer,'" Obviously, Bevill did not speak for QPD's benefit when he submitted an affidavit on McGee's behalf, and his speech did not owe its existence to QPD.

Clearly Established: Given that Bevill had adequately pleaded a violation of his constitutional rights, the court had to determine whether that right was clearly established at the time it was infringed: would it be clear to a reasonable official that his conduct was unlawful in the situation he confronted? Defendants argued that the law was not clearly established that "any person other than the ultimate decision-maker could be liable for First Amendment retaliatory termination," until the Circuit issued its opinion in *Sims v. City of Madisonville*, 894 F.3d 632 (5th Cir. 2018). According to Defendants, because their purported unconstitutional conduct occurred a year before *Sims*, they were entitled to qualified immunity.

But the court found ample support, predating *Sims,* for the proposition that other officials –including those who are not coworkers of the plaintiff–can be held liable for influencing decision makers to terminate another employee. To clarify its analysis, the Circuit provided a series of diagrams illustrating various precedents and employment configurations" "The factual distinctions between *Kinney, Sims*, and the present action are perhaps most easily recognized with reference to a series of simple diagrams." The result was that Bevill's right to be free from outside retaliatory influences motivating his termination was clearly established.

Conspiracy: Bevill contended that Fletcher's statements made in the April 2017 *Kilgore News Herald* article and Bevill's own "familiar[ity] with the local players and political climate, including the relationships between and among the sheriff, district attorney and judge" together implied that Defendants "were close and often worked in concert." That allegation, added to evidence of the meeting involving mayor Dobbs, was sufficient at the pleading stage to "raise[ ] a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action."

Conclusion: The order of the district court denying Defendants' motions to dismiss was affirmed..

DISSENT: Judge Oldham dissented. He could not find the relevant law to be clearly established:

> [A]ll agree that Bevill cannot overcome qualified immunity unless "the court [can] point to controlling authority—or a robust consensus of persuasive authority—that defines the contours of the right in question with a high degree of particularity." The majority finds the requisite authority in *Kinney v. Weaver*, 367 F.3d 337, 347 (5th Cir. 2004) (en banc). Yet it takes the majority seven pages of writing—plus one page of elegant geometric diagramming—to explain how *Kinney* clearly established the right the defendants allegedly violated. *Ante*,

> at 13–20, 136 S.Ct. 305. And never mind that *Sims v. City of Madisonville*, 894 F.3d 632 (5th Cir. 2018), which we decided shortly after the events giving rise to this case, described the law in this area as "confus[ed]" and "unsettled" before trying to "provide the overdue clarification." *Id.* at 638, 640–41.
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> Whatever one might think about qualified immunity, I think we're duty bound to say the law is not clearly established when it takes a full-page flow chart to hold otherwise. I respectfully dissent.

LINK

Short Summaries:

7th Circuit – State Action – Color of Law – Sexual Assault

Sometimes bad facts don't make bad law because a court doesn't fall into the trap of finding a constitutional violation or federal claim in what should be and is a state law matter. Without any doubt these are bad facts if true as alleged. A woman visiting a paramedic, slipped in the shower and was incapacitated. The paramedic, who was off duty, rather than providing EMS services, rinsed the blood from her head, moved her to his bedroom and as she drifted in and out of consciousness sexually assaulted her. Despite the gravity of the claim and the horrible facts, the court recognized that an off-duty paramedic is not acting on behalf of the government employer in any way when in his own home he sexually assaults an injured person who was injured in his home. The fact that the Defendant was "on call" and accepted at least one call during the event does ot change the result which as stated by the court is: "Panatera's "actions were those of a private citizen in the course of a purely private social interaction." Id. Any action or inaction was not under color of state law." Congratulations to the great legal team in Chicago for this win.

DiDonato vs. Panatera
LINK

7th Circuit – Qualified Immunity – Misstatements in Search Warrant Applications

A 7th Circuit panel dealt with a difficult case and overturned the grant of qualified immunity to an officer who had applied for a search warrant and arrest warrant. A brief synopsis of the facts: The officer got information from a confidential informant about a felon with a gun. The CI took the officer to the person's home which was in a multi-dwelling unit. The CI described the unit and how to get to it. Rather than include that information in the warrant, the officer guessed at the address and was wrong. The warrant issued to the supposed address, but the officer having the CI's description executed the warrant at the correct person's dwelling. That person was not there and

the described gun was not there, but a handgun was present. The officer then sought a warrant for a felon in possession. Long story short, the court admonished the police for guessing at an address on the basis that it would have taken too long to confirm it and denied the officer qualified immunity.

As someone who once worked with police officers in reviewing warrant applications, I think it fair to say that getting a warrant is not like on TV and it can be a long process (even more so before we had computers and the Internet), often stretching for long hours into the wee hours of the morning. Despite how long it might take, the key learning lesson for police and prosecutors should be that there are no short cuts. An application that describes with specificity how to get to a unit in a multi-unit dwelling may be sufficient even without the specific apartment number; so, describe it. The Court discussed the sufficiency of the officer's description of the reliability of the CI and found it lacking but found it negligent as opposed to reckless or false. Another key learning lesson for all of us should be to provide sufficient information for a court to judge the reliability of a an anonymous CI without including so much information that the CI's identity can be discovered. If time does not allow a full research of something like an address, explain why in the application and how the alternative to the research offers sufficient clarity to offer probable cause. Although the court reversed one aspect of the case, the Chicago legal team did a great job defending the city and its officers in this case.

Taylor vs Hughes
LINK

10th Circuit – Climate change – Federal Officer – Removal

In a suit brought by the Board of County Commissioners of Boulder County and supported by IMLA as an amicus, the 10th Circuit on remand from the Supreme Court again concluded that the basis for removing the case to federal court did not meet he six part test. (Previously, the court had limited itself to the federal officer question.) Thus, the case is remanded to the state courts. IMLA supported the County and the other Plaintiffs in fending off this effort by the fossil fuel industry to keep the matter in federal court. Congratulations to the team and to IMLA's pro bono attorney Robert S. Peck, Center for Constitutional Litigation, P.C.

Board of County Commissioners of Boulder County vs Suncor Energy
LINK

11th Circuit – Excessive Force – Qualified Immunity

As the court noted at the beginning of the opinion many cases involving qualified immunity are tragic. This was such a case. The police responded to a 9-1-1 call but the dispatcher misled the police as to the location and when they responded late in the night they seem to have caused the dogs to bark. A homeowner suspicious of the

commotion arose from bed, dressed, got his pistol and went outside to the driveway. His wife followed. Once there he looked around and raised his pistol hand toward an officer shielded in the darkness, who fearing for his life fired and killed the homeowner. Excessive force? Qualified Immunity? The Plaintiff argued that before shooting the officer was required by the constitution to issue a warning. The panel concluded that QI applied as there is no clear right to a warning. We'll likely see this case cited as another reason for ending QI as a defense, but from a purely constitutional viewpoint, is it excessive force to shoot someone pointing a gun at you?

Powell v. Snook
LINK

Massachusetts Supreme Judicial Court – Social Media – 4th Amendment – Friend

I learned of this case via Professor Volokh's blog – A person accepts a "friend" request from a person not known to him and who is an undercover officer. The person then posts a picture that the officer records and uses to arrest and prosecute the person. Is that a violation of privacy rights and subject to exclusion under the 4th Amendment. NO. No bright line rule here but the rule of reasonableness applies and since the officer did not mislead the person there was no reasonable expectation of privacy.

Commonwealth v. Carrasquillo
LINK

MD Ct of Special Appeals – CRB – Standing

The legal team in Baltimore does an outstanding job and faces a number of difficult issues and this case suggests some of the difficulties they face. In 1999 the state legislature created a Civilian Review Board to review police conduct in Baltimore City. Some members of the community believed that the CRB was not fully representing their interests and that the city itself had too much control, so they sued. The Court concluded that the Plaintiffs didn't have standing because the CRB was established to protect the interests of the public in general and even as a taxpayer suit the Plaintiffs needed to show a specialized interest that affected them as the basis for their suit.

Paula vs. Mayor and CC of Baltimore
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