

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

MICHALE A. CALLAHAN,)	
)	
Plaintiff,)	03-2167
)	
v.)	
)	
CHARLES E. BRUEGGEMANN,)	
DIANE CARPER, and STEVEN M. FERMON,)	
)	
Defendants.)	

ORDER

Plaintiff Michale A. Callahan ("Callahan") was hired by the Illinois State Police ("ISP") in 1980. Over the years, Callahan moved up through the ranks, holding various positions with the ISP in both Chicago and Champaign, Illinois. Defendants Charles E. Brueggemann, Diane Carper ("Carper"), and Steven M. Fermon ("Fermon") are also ISP employees. During the time relevant to this case, Callahan reported directly to Fermon, who, in turn, reported to Carper.

In April 2003, Callahan and others came to believe that Fermon was engaged in unlawful activity. The officers were concerned that Fermon was intentionally impeding a criminal investigation in a way that could compromise the safety of law enforcement informants and officials. Callahan voiced his concerns to an ISP deputy. Callahan alleges that when Fermon learned of Callahan's concerns, Fermon took steps to effect Callahan's reassignment by complaining to Carper about Callahan's work performance and requesting that he be reassigned. Thereafter, Callahan's job duties were materially altered; he was stripped of many of his official duties and prestigious investigation duties and assigned to a much less prestigious position.

Callahan filed this three-count complaint against the defendants, alleging various violations of his constitutional rights. Fermon filed a motion for summary judgment [#4], claiming he cannot be held liable for the alleged retaliatory action taken against Callahan because he is entitled to qualified immunity.

Callahan was granted time to conduct discovery relating to the motion, and filed his opposition to the motion on March 30, 2004.

ANALYSIS

I.

This case exemplifies the peril inherent in filing an early motion for summary judgment. After the parties conducted limited discovery, Fermon filed a motion to supplement his motion

for summary judgment [#16], and a reply to Callahan's response [#17]. Callahan then filed a motion to strike Fermon's reply brief [#18]. Fermon then filed a response to Callahan's motion to strike the reply brief [#19]. Before addressing the arguments raised in the motion for summary judgment, the court must determine the scope of the motion and the relevant documents that support or oppose the arguments raised therein.

The Local Rules of the United States District Court, Central District of Illinois, govern the process for disposition of motions. *See* CDIL-LR 7.1. A motion for summary judgment must be accompanied by a statement of undisputed material facts. CDIL-LR 7.1(D)(1)(b). The party opposing summary judgment must file a response accompanied by a statement consisting of separate subsections that categorize the movant's allegedly undisputed facts as conceded, disputed, or immaterial to the motion.¹ CDIL-LR 7.1(D)(2)(c)(1)-(3). The opponent also may submit additional material facts purporting to defeat the motion. CDIL-LR 7.1(D)(2)(c)(4). The movant's reply in support of the motion is limited to matters raised in the opponent's response. CDIL-LR 7.1(D)(3).

The movant's reply is not the place to raise new issues; the Local Rules do not allow a movant to expand its motion in this roundabout way. Fermon cites to additional facts from Carper's deposition to place her testimony in the "proper context or otherwise explain the matter raised in [Callahan's] response." However, the additional facts do not squarely address the issue raised in the original motion: whether Fermon had a hand in Callahan's reassignment. The court, in its December 31, 2003, order, granted Callahan leave to conduct *limited* discovery in order to respond to the motion for summary judgment. Callahan argues that he would have deposed additional witnesses before responding to the motion had the defendants raised these arguments in the original motion. Callahan did not push the limits of the court's order, and the court agrees it is improper for Fermon to expand his motion by asserting supplemental facts.

Accordingly, Fermon's motion to supplement his motion for summary judgment [#16] is denied. Callahan's motion to strike Fermon's reply brief [#18] is granted. Fermon's reply to Callahan's response [#17] is stricken for failure to adhere to the Local Rules.

II.

Summary judgment is granted "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 a judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is proper when "a party . . . fails to make a showing sufficient to establish the existence of an element essential to that party's case[.]" *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The court must consider the evidence in the light most favorable to the party opposing summary judgment. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). "Summary judgment is inappropriate when alternate inferences can be drawn from the available evidence." *Spiegla v. Hull*, 371 F.3d 928, 935 (7th Cir. 2004) (citing *Hines v.*

¹ Failure to respond is deemed an admission of the motion. CDIL-LR 7.1(D)(2).

British Steel Corp., 907 F.2d 726, 728 (7th Cir. 1990).

The burden of establishing that no genuine issue of material fact exists rests with the movant. *Jakubiec v. Cities Serv. Co.*, 844 F.2d 470, 473 (7th Cir. 1988). In order to be a “genuine” issue, there must be more than “some metaphysical doubt as to the material facts.” *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Once the movant has done so, the party opposing the motion bears the burden to respond, not simply by resting on the pleadings, but by affirmatively demonstrating that there is a genuine issue of material fact for trial. See Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 322-24.

Fermon argues he is entitled to qualified immunity from Callahan’s claim. The defense of qualified immunity shields a government employee from liability “insofar as [his] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The analysis entails a twofold inquiry: (1) whether the government employee violated a constitutional right; and (2) whether the right was clearly established at the time of the alleged violation. *Sullivan v. Ramirez*, 360 F.3d 692, 697 (7th Cir. 2004). Fermon argues that he did not make the decision to transfer Callahan; therefore, he committed no constitutional violation, and Callahan cannot meet the first prong of the qualified immunity analysis. Thus, the motion is limited to a narrow issue: whether Fermon’s actions constituted a violation of Callahan’s constitutional rights.

First, the court must address the matter of Fermon’s conduct. Fermon argues his actions did not cause any alleged constitutional violation. He claims Carper took the action that resulted in Callahan’s reassignment. Carper stated at her deposition that she, and not Fermon, made the recommendation to reassign Callahan. Carper asserts she made the recommendation without consulting Fermon or considering any recommendations Fermon made in regard to Callahan’s reassignment.

Callahan does not deny that Carper recommended his reassignment; however, he argues that a genuine issue of material fact exists as to whether Fermon’s actions played a substantial role in the reassignment. The court must view the evidence in the light most favorable to Callahan, construing all facts and drawing all inferences in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252-55 (1986). Fermon can be held liable if he “set in motion a series of events” that caused others to deprive Callahan of a constitutional right. *Conner v. Reinhard*, 847 F.2d 384, 397 (7th Cir. 1988). Callahan has submitted documentation to show that Fermon’s actions may have been the catalyst for the reassignment. The Carper and Fermon depositions and copies of ISP documents reveal a close temporal proximity between Callahan’s report of Fermon’s alleged wrongdoing and Callahan’s reassignment. Callahan voiced his concerns about Fermon’s allegedly wrongful conduct to the ISP’s Division of Internal

Investigation on May 8, 2003.² Fermon learned of Callahan's report shortly thereafter.³ On May 12, 2003, Fermon sent to Carper a twelve-page report on Callahan's work performance over the previous ten months.⁴ In the final paragraph of the report, Fermon expressed a desire to talk to Carper about reassigning Callahan.⁵ On May 16, Fermon contacted Carper's office and scheduled a May 21 meeting with her.⁶ When deposed, Carper stated that at some point, Fermon had "verbalized he felt there should be a reassignment of . . . Callahan."⁷ Carper further stated that she "felt the information was a little late for . . . Fermon to be bringing to the table," because she was already seriously considering that *Fermon* be reassigned.⁸ Carper could recall several other people with whom she discussed Callahan's situation, but to her recollection, only Fermon relayed specific (as opposed to generalized) information about Callahan.⁹ Callahan was reassigned on June 16, 2003. Construing these facts in Callahan's favor, Fermon's actions may have set in motion a series of events leading to Callahan's reassignment.

Next, the court must determine whether Fermon's actions constitute a statutory violation. A public employee possesses a First Amendment right to speak freely as long as his exercise of that right does not hamper the government's efficiency. *See Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). In order to succeed on a First Amendment retaliation claim, Callahan must show that (1) he spoke on a matter of public concern; and (2) his speech was a motivating factor in the retaliation against him. *McGreal v. Ostrov*, 368 F.3d 657, 672 (7th Cir. 2004).¹⁰ "Speech alleging government corruption and malfeasance is [a matter] of public concern[.]"

² Pl. Ex. 4, p. 1.

³ Pl. Ex. 4, p. 1. Fermon states he learned of the allegations beginning on May 9 and continuing through May 14, 2003.

⁴ Pl. Ex. 3, p. 1.

⁵ Pl. Ex. 3, p. 12.

⁶ Pl. Ex. 4, p. 3.

⁷ Carper Dep., p. 109, lines 9-11. Carper could not "recall a specific date, . . . but it came in proximity with the . . . document that he submitted" to her. Carper Dep., p. 109, lines 17-19.

⁸ Carper Dep., p. 110, lines 2-10.

⁹ Carper Dep., pp. 123-25.

¹⁰ Fermon applies the test articulated in *Galdakis v. Fagan*, 342 F.3d 684, 696 (7th Cir. 2003), which requires the plaintiff to prove "but-for" causation in order to prevail on a First Amendment retaliation claim. The Seventh Circuit recently disavowed that requirement as inconsistent with other Seventh Circuit cases and contrary to the rule applied in other circuits. *See Spiegla*, 371 F.3d at 941-42.

Spiegla, 371 F.3d at 937. Callahan's report of Fermon's allegedly unlawful activity certainly falls into this category. And as determined above, there exists a question of fact as to whether Callahan's report led to Fermon's efforts to have Callahan reassigned.

The burden then shifts to Fermon to show either that the ISP's interest in providing efficient service outweighed Callahan's right to speak freely, or that Callahan would have been reassigned even in the absence of his speech. *See McGreal*, 368 F.3d at 672. Fermon has not made the requisite showing on these issues.¹¹ At best, Fermon can show that Carper considered reassigning Callahan approximately two years before she received Fermon's reports. However, Carper's motivation at that time was her belief that Callahan would benefit from a reassignment in order to diversify his career and enhance his career development.¹² Also, an internal ISP investigation determined that a hostile work environment existed in Zone 5, but the results of the investigation are not presented in sufficient depth for the court to analyze this issue.

In sum, the court disagrees with Fermon's contention that the undisputed facts show he did not deprive Callahan of a constitutional right. Callahan may be able to show that Fermon's action, taken in retaliation for Callahan's exercise of a constitutional right, set in motion a series of events that led to Callahan's reassignment. Accordingly, Fermon's motion for summary judgment [#4] is denied.

CONCLUSION

It is ordered that:

- (1) Fermon's motion for summary judgment [#4] is denied;
- (2) Fermon's motion for leave to supplement his motion for summary judgment [#16] is denied;
- (3) Callahan's motion to strike Fermon's reply brief [#18] is granted; the clerk of the court is directed to strike the reply brief [#17] from the record; and
- (4) Fermon shall file an answer to Callahan's complaint within twenty (20) days of the date of this order.

Entered this 18th day of August, 2004.

s/Harold A. Baker

HAROLD A. BAKER
UNITED STATES DISTRICT JUDGE

¹¹ Fermon's proposed supplement attempts to flesh out these issues, but the facts contained therein are scant at best.

¹² Carper Dep., pp. 99-100.