

IP 03-1087-C Y/L Isaacs v Naylor
Judge Richard L. Young

Signed on 3/3/05

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

FINLEY ISAACS,)	
)	
Plaintiff,)	
vs.)	NO. 1:03-cv-01087-RLY-WTL
)	
GARY NAYLOR,)	
G. DOUG HOWARD,)	
RUSSELL SIDELL JR.,)	
)	
Defendants.)	

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION**

FINLEY ISAACS,

Plaintiff,

vs.

GARY NAYLOR and G. DOUG HOWARD,
Individually and in their official capacities as
Commissioners of Fayette County, Indiana,
and RUSSELL SIDELL, JR., in his official
capacity as a commissioner of Fayette
County, Indiana,

Defendant.

1:03-CV-1087-RLY-WTL

ENTRY ON DEFENDANT’S MOTION FOR SUMMARY JUDGMENT

This matter is before the court on Defendant’s Motion For Summary Judgment

BACKGROUND

Finley “Rick” Isaacs was hired in August 1998 to fill the position of General Foreman for the Fayette County Highway Department. The primary responsibility of the highway department is the maintenance of county roads. Isaacs was hired by the Board of Commissioners (“Board”) which, at the time, was composed of Russ Sidell, Gary Naylor, and Dave Pflum. As the general foreman, he inspected job sites, oversaw the work of department employees, coordinated vehicle maintenance, received and responded to complaints from the public and carried out the project plans made by the superintendent. When the superintendent was not present, Isaacs would serve as acting superintendent.

Isaacs’ boss, and the superintendent at the Highway Department when Isaac’s was hired,

was Howard Price. The Board decided not to reappointed Price as superintendent at the end of 2002. Prior to that decision, overtures were made to Isaacs with regard to serving as Prior's replacement, but Isaacs turned the opportunity down. With Price gone, Jerry Gobin, the county surveyor, was asked to serve as the interim superintendent of the Highway Department and he remained Isaacs immediate supervisor until Isaacs' employment was terminated on June 17, 2003. Isaacs alleges in this lawsuit that the termination of his employment was due to his exercise of his first amendment rights, speaking critically of the manner in which the defendant Commissioners were handling various county projects. He has sued all three Commissioners in their public roles and Commissioners Howard and Naylor in their individual capacities as well.

In 2001, Gary Howard was elected to the Board, filling the spot of Pflum. That same year, a company called Stabilization Technology was hired to provide for the stabilization and resurfacing of Fayette County roads. There were some problems with the quality of the work and the project was not entirely successful, thus necessitating further repairs. Isaacs was angry that the County had paid for the inferior work by Stabilization Technology and believed there were irregularities in the manner the contract was let. He brought the situation to the attention of Commissioner Sidell, but Sidell failed to act as quickly as Isaacs believed was necessary. Therefore, with the help and support of some of his coworkers, Isaacs circulated a petition in the summer of 2002 requesting that the State Board of Accounts conduct a special audit of the previous year's road repair project. Isaacs was also quoted twice in the local newspaper criticizing the way taxpayer dollars had been wasted on shoddy work. Isaacs did not reserve his complaints for the newspaper, for when Commissioner Howard stopped by a job site where Isaacs and another County employee were working, in August of 2002, Isaacs made sure Howard new how he felt. During the conversation Isaacs complained, in an animated fashion, to

Howard about the large amount of taxpayer money that the Board had wasted.

The petition effort garnered its intended results, with the State Board of Accounts conducting the special audit. In a report issued in January of 2003, the State Board of Accounts noted that the contract was not let in compliance with state law. Isaacs maintains that Commissioners Howard and Naylor were displeased with his criticism and attempt to expose the contract irregularities and later tapped that displeasure when deciding to terminate his employment. Both Howard and Naylor state in their deposition that they had no problem with the State Board of Accounts conducting the special audit, but felt it was an unnecessary expense paid for by the county they were already aware of the problem and had acted on it. Howard admits that he was well aware of the article in which Isaacs was quoted by the local newspaper about his anger as a taxpayer over wasted money and confirms that Isaacs was quite animated in his verbal complaints to him when they met on the job site.

Another major sticking point between Isaacs and Commissioners Howard and Naylor were the proposed repairs to the Fayette County Courthouse (“Courthouse”) in Connersville, Indiana. In the summer of 2002 a local disabled citizen filed a lawsuit in an effort to force the county to bring the courthouse into compliance with the Americans with Disabilities Act (“ADA”) requirements for accessibility to public buildings. In reaction to the lawsuit, the Board put forth a plan that included significant renovation of the Courthouse, beyond what the ADA required, and at a larger expense.

Isaacs disagreed strongly with the plan and was worried that this would be another waste of taxpayer dollars. He spoke out on a number of occasions against the plan, including in January of 2003 at the local VFW hall and in an appearance before the Board. He circulated another petition seeking signatures from those who opposed doing more than bringing the

Courthouse into compliance with the ADA. He made his opinion well known both at work and while out in public. He was also identified a number of times in articles and letters in the local newspaper as an opponent of the Courthouse plan. The Highway Department would play no role in the Courthouse construction plan, thus Isaacs was speaking as a concerned citizen and not in any employment capacity, though the record suggests that the letters to the editor he wrote which the newspaper printed would list his job title in addition to his name. Both Commissioner Howard and Commissioner Naylor complained to the interim superintendent with regard to Isaacs, telling Mr. Gobin that they thought Isaacs was disrupting the department by talking too much about the Courthouse project instead of work issues. Superintendent Gobin testified that he felt Howard and Naylor were hinting that Gobin might be able to “narrow Isaacs field of conversation.”

The final issue upon which Isaacs expressed his opinion and the last of the three criticisms or “First Amendment expressions” which he argues became the basis for his termination was the accusation of a conflict of interest Isaacs levied against Howard with regard to his management of certain real estate properties. Howard, like all the Commissioners, has a full-time job outside of his work on the Board. Howard works as a property manager. He was in charge of rental properties located on 4th Street in Connorsville, Indiana that were owned by Union Savings & Loan (“4th Street properties”). As a Commissioner, Howard is designated to sit on the Fayette County Economic Development Board (“EDB”), a private entity. In October of 2002, Howard advocated that for economic development purposes the EDB should purchase the 4th Street properties and tear down the existing buildings. He offered to manage the conversion of the properties free of charge if the EDB chose to vote in favor of the purchase. The EDB did vote by acclamation to purchase the property.

While attending a January 2003 Board of Commissioners meeting, Isaacs overheard an individual that he knew tell Howard that he thought Howard, as a member of the EDB, had a conflict of interest with regard to its purchase of property that he was managing. This incident caused Isaacs to want to further investigate the situation. On February 5th or 6th of 2003, Isaacs called the EDB from his workplace at the Highway Department and requested a copy of the minutes from its October 2002 board meeting. During that same phone call he complained to the EDB director that he believed Howard had a conflict of interest and that he did not like the way the Board was wasting taxpayer money. He also indicated he believed that the attorney who was acting as counsel for the Board and for the EDB had a conflict as well because the attorney also did legal work for the bank. Despite Isaacs volunteering to pick up a copy of the minutes, a copy of the minutes was faxed to him at the Highway Department by the director of the EDB, who also notified Howard of Isaac's request.

Still in early February, Isaacs ran into Judge Daniel Pflum, of the Fayette Circuit Court, in a local store. The conversation began as a discussion of the Courthouse renovation, which Judge Pflum supported. Isaacs told Judge Pflum that he opposed the courthouse project and was unhappy about how the county was spending taxpayers' money. He also told Judge Pflum that he thought Howard had a conflict of interest in voting for the purchase of the Fourth Street property. A misunderstanding of what was said caused Howard to be told by Judge Pflum that Isaacs accused him of making money on the transaction. The president of Union Savings & Loan was evidently told something similar because he telephoned Isaacs to ask if Isaacs was going around accusing Howard of making money on the deal. Isaacs denies making any accusation that Howard made money on the transaction, saying that he specifically told Judge Pflum that he did not know if Howard made any money on the deal. He says he told him: "I

don't care whether he got \$1 or \$250,000 ... [H]e shouldn't be voting on it." According to Isaacs, the conflict was that Howard was managing the 4th Street properties for the bank, which owned them and was selling them to the EDB.

An executive session of the Board was held on March 18, 2003, at the request of Commissioner Howard, for the purposes of discussing Isaacs continued employment with the department. Isaacs was in attendance along with the Commissioners and the Board's attorney. Howard opened the executive session by stating that he believed there were ongoing "morale issues" at the Highway Department and stating, "Personally, and this is just my personal opinion, Rick, I don't-,it upsets me greatly. I just wasn't brought up to bite that hand that feeds me, but that is your right. We are not here to discuss that today." The Board's legal counsel indicated that he had advised the Board that Isaacs had a right to speak his mind, but that if in speaking his mind while working, it interferes with the operations of the Department he has stepped outside his rights.

Howard then went on to explain how he thought Isaac's complaining in front of other Highway Department employees, along the lines of saying that the Commissioners did not know what they were doing, was not good management practice and was causing poor morale. He also chastised Isaacs for calling the Commissioners to task over things that did not involve the Highway Department and doing so both during work hours and while out in public. Isaacs was told that he should not be seeking out minutes from the EDB during work hours, receiving faxes and spending time on the phone complaining to others about alleged conflicts of interest and other issues that had nothing to do with the Highway Department. Commissioner Howard brought up Isaac's statement to Judge Pflum about him making money on the EDB property purchase and also mentioned a statement Isaacs made to him months before about Commissioner

Naylor benefitting from his relationship with certain contractors, indicating that Isaacs was making unfounded accusations.

Commissioner Naylor offered compliments to Isaacs with regard to his work with the Highway Department, stating that he was doing an excellent job with respect to the job description. However, he confronted Isaacs about his habit of publicly speaking out instead of dealing with the members of the Board on a one-on-one basis. Naylor went on to state, "I just ask you to refrain from trying to directly blacken the eye that feeds you any longer." Isaacs was cautioned not to use his job title in writing letters to the newspaper. He was encouraged to bring any disagreements he had to the Board directly, but told to keep his personal disagreements with the policies or actions of the Board away from work.

Following the executive session, on March 25, 2003 the Board publicly reached its decision regarding whether to discipline Isaacs, placing him on probation for 180 days. The written probation notice stated that "[Y]ou are notified hereby that the continuation of your employment by Lafayette County is absolutely in jeopardy and you are placed on a probationary employment status, effective immediately" The notice also contained a statement which read "in lieu of terminating your at will employment, ... your status as an employee will be reviewed by the Commissioners periodically during the next 180 days. [I]f, during any of the said reviews, there is further activity on your part which in any way conflicts with, or reflects poorly on, Fayette County, your employment will be terminated immediately."

After he was placed on probation, there were no performance review meetings between Isaacs and the Commissioners. However, incidents continued to take place which ultimately led to the firing of Isaacs. The first incident occurred in June when Howard requested booth location marks be painted in an area at a property where the EDB was operating a farmer's

market. Isaacs learned of the request while at work, but thought that this activity was outside the responsibilities of the Highway Department. Superintendent Gobin told him not to worry, he would take care of the request himself. When Howard found Gobin painting the requested booth space markings, he learned of Isaacs opinion that the same was outside the purview of the Highway Department. The second incident took place when Howard requested a "road closed" sign be placed near a railway crossing. Isaacs claims he did not clearly hear where the sign was to be placed and radioed back asking for the location, eventually meeting up with Gobin and other department employees to learn of where the sign was needed. At that time one of the other employees indicated he did not think it was the county's responsibility to put such a sign up at a location where there was railroad crossing construction - opining that it was the contractor's responsibility. Again, Gobin took it upon himself to go place the road closed sign where it had been requested.

A second executive session was called by Commissioner Howard for June 13, 2003. At that executive session he told Isaacs, "I have a real problem with people running up and down the street running their mouth with half the facts." The executive session included discussions of what Howard believed to be Isaacs continued poor attitude, including mentions of Isaacs' refusal to see that the booth marking painting was done and his failure to make sure the road closed sign was placed near the railroad crossing construction. Howard opined that Isaacs was wrong about whether various property was county responsibility or not, but argued regardless, he had no right to refuse to execute direct orders. Isaacs countered with a statement that he never refused to do anything his supervisor told him to do. He admitted that he might do them under protest, but he claimed to never refuse to do what his boss told him to do, and reminded the Commissioners that they have to act through majority action at a meeting, not by individual directives.

On June 17th, the Commission held a meeting and Isaacs was terminated by a 2-1 vote. Commissioners Howard and Naylor voted to terminate and Commissioner Sidell voted against termination. Howard claimed that Isaacs had been insubordinate and that he created employee unrest by publicly denouncing the Commission's decisions. Gobin, Isaac's direct supervisor, was not invited to the June meetings and has testified that he feels Isaacs was doing a good job and was never insubordinate. Commissioner Sidell also opined that Isaacs was performing well. Sidell also stated in his deposition that he felt there was no reason to fire Isaacs and that Howard and Naylor were attempting to "prove a point."

SUMMARY JUDGMENT STANDARD

Summary judgment is only granted if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Jay v. Internet Wagner, Inc.*, 233 F.3d 1104 (7th Cir. 2000). To determine whether any genuine fact exists, the Court must pierce the pleadings and assess the proof as presented in depositions, answers to interrogatories, admissions, and affidavits that are part of the record. *First Bank & Trust v. Firststar Information Services, Corp.*, 276 F.3d 317 (7th Cir. 2001). The Court also must draw all reasonable inferences from undisputed facts in favor of the non-moving party and should view the disputed evidence in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). When the moving party has carried its burden as set forth in Fed R. Civ. P. 56(c), an opponent must do more than simply show that there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). The non-moving party must move beyond mere allegations in the pleadings,

avoid conclusory statements in affidavits and support its contentions with properly admissible evidence. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

ANALYSIS

Defendants argue numerous bases for a summary judgment in their favor. Though not their primary argument, they maintain that Isaacs has insufficient evidence to show that his firing was motivated by his engaging in speech critical of the Board's actions on matters of public concern. The primary argument made by defendants is that Isaacs held a "policymaking position" and the First Amendment does not protect a person holding such a position from being terminated if they engage in speech critical of their superiors or their policies. They also argue that even if Isaac's did not hold a policymaking position, his speech was false and reckless which voids any First Amendment protection. Finally, Howard and Naylor claim that Isaacs may not prevail against them in their individual capacities because they are entitled to qualified immunity.

The later argument was never contested by the Plaintiff in his response brief. Howard and Naylor cite to Seventh Circuit authority for the proposition that as public officials they do not relinquish qualified immunity unless the existing law compels a conclusion that any reasonable government official in a similar position would know that the action being taken under the circumstances clearly violates federal statutes or the constitutional rights of others. *Khuans v. School Dist. 110*, 123 F.3d 1010, 1019-1020 (7th Cir. 1997). On first impression, their argument seems to be well taken. And, because Isaacs has failed to offer up a response to this argument, let alone point to any evidence of record which would support a conclusion that Howard and Naylor had surrendered their qualified immunity, the court need not expend further effort in deeper analysis. *Teumer v. General Motors Corp.*, 34 F.3d 542, 546 (7th Cir.1994).

Howard and Naylor, individually, are entitled to summary judgment.

The defendants argument that there is insufficient evidence to support a claim that Isaacs' open criticism of the Commissioners on an issue of public interest was the motivation for his firing is not at all well taken. All that is necessary is a cursory reading of the transcripts from the two Board executive sessions to know that not only is there evidence to support such a finding, but it is nearly an inescapable conclusion. While there may be a material question of fact with regard to other issues, such as whether the speech was reckless or the direct cause of dysfunctional department operations, there is little question that Isaac's speech with regard to various actions of the Commissioners, even outside the workplace played some role in the discussions which lead to the leveling of disciplinary action against him, including the termination. So, no summary judgment will be granted on the basis of that argument.

A public employee does not give up his right under the First Amendment to speak on matters of public interest by virtue of his government employment. *Connick v. Myers*, 461 U.S. 138, 140 (1983). However, the Supreme Court has also articulated the need for balancing the competing interests of First Amendment protections for government employees and the government's legitimate interest as an employer in promoting efficient public services in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). As a result, the *Connick-Pickering* balancing test has developed for courts to apply in determining whether speech is constitutionally protected. *Spiegla v. Hull*, 371 F.3d 928, 935 (7th Cir. 2004). The guiding principal of this test is that the government may not punish the speech of a public employee if it involves matters of public concern unless the state can prove that the needs of the government outweigh the speech rights of the employee.

Courts have come to recognize a "policymaking employee" exception that allows the

state to limit an employee's First Amendment rights. This has been achieved through a harmonization of the Supreme Court's decisions in *Pickering* and *Connick* as well as cases like *Elrod v. Burns*, 427 U.S. 347 (1976), and *Branti v. Finkel*, 445 U.S. 507 (1980), that have granted policymakers a limited right to discharge employees for their political beliefs. The fact that this state right is limited must be emphasized as "it is firmly established that a significant impairment of First Amendment rights must survive exacting scrutiny." *Elrod*, 427 U.S. at 362.

The definition of a policymaking employee is one whose position "authorizes, either directly or indirectly, meaningful input into government decision making on issues where there is room for principled disagreement on goals or their implementation." *Nekolny v. Painter*, 653 F.2d 1164, 1170 (7th Cir.1981). When looking to determine whether an individual qualifies as policymaker, the Court looks to the powers inherent in the position rather than the actual functions performed by the current occupant. *Tomczak v. City of Chicago*, 765 F.2d 633 (7th Cir. 1985). In this case, though the county's description of Isaacs' duties as general foreman at the Highway Department contains some elements that could be construed as indicating he has input into deciding how to go about the business of maintaining the county's roads, in the overall context of the department and county governance there is much less to suggest that he had meaningful input into matters which were much more than ministerial in nature. His job seems better described as one where his input was with regard to how something would be executed and not what plans would be executed. This is evident in Commissioner Howard's own executive session discussion wherein he chastises Isaacs for trying to assess whether or not particular tasks were within the purview of the department rather than simply following instructions. In any event, the decision of whether or not Isaacs held a policy making position should not be based on the job description alone and there is clearly insufficient evidence at this

point for the court to make that determination as a matter of law.

Further, Courts have typically applied the “policymaking employee” exception in political patronage cases. “The status of being a confidential or policymaking employee exposes a public employee to being fired for belonging to the wrong party...It may not--though this is a more difficult question--expose him to being fired for engaging in forms of expression that have no conceivable bearing on his job.” *Wilbur v. Mahan*, 3 F.3d 214 (7th Cir. 1993). Even if this court is willing to consider Isaacs as a “policymaking employee,” there is still the issue of whether he is being fired, at least in part, for statements offered as a public citizen and on a topic unrelated to his duties as general foreman. While the Highway Department was directly involved with the road stabilization project, there is evidence of record to support a conclusion that Isaacs’ demise was the result of comments he made or positions he espoused relative to the Courthouse project and Howard’s alleged conflict of interest with respect to the EDB’s purchase of the 4th Street properties from the bank which was paying him to manage the properties.

The “more difficult question” that is discussed in *Wilbur* is exactly what the Court finds itself faced with in the instant case and summary judgment is not an appropriate means to deal with such a fact sensitive and important question. As *Wilbur* concludes, there is nothing that says “an individual surrenders *all* his freedom of speech by becoming a confidential or policymaking employee of government.” *Id.*, 3 F.3d at 217. Isaacs speech is not completely without “conceivable bearing” on his job and the efficient running of the Highway Department; however, this is far removed from a political patronage situation and Isaacs’ status as a policymaking employee is simply not clear.

In addition, key determinations in this case turn in part on the credibility of witnesses. While the government is entitled to a balance of its interests in providing efficient government

service with Isaacs' constitutional rights, whether or not that efficiency was effected by the statements made by Isaacs' and just what those statements were are questions that are not amenable to clear or undisputed answers as the record stands now. What someone said or intended to communicate and the reasonableness of any interpretation of the communication are all up in the air to some degree at this point, and the credibility of the various parties will no doubt have an effect on the ultimate resolution.

CONCLUSION

Whether Isaacs was a policymaking employee under the law and, if so, whether he could be fired for his critical speech are key questions which can not be answered yet as there are both factual disputes and credibility issues that leave the record insufficient to support a summary judgment. Whether or not Isaacs engaged in rhetoric which was reckless and false is not factually certain either. But, Howard and Naylor, as elected public officials are entitled to qualified immunity and therefore are entitled to summary judgment in their individual capacities. Therefore, Defendant's Motion For Summary Judgment is GRANTED as to defendants Gary Naylor and G. Doug Howard in their individual capacities, but is DENIED in all other respects..

SO ORDERED this ____ day of _____, 2005.

RICHARD L. YOUNG, JUDGE
United States District Court
Southern District of Indiana

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