

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

MARLENE H. TURNER,)
DAVID W. EVANS,)
STEVEN M. JACKSON,)
JAMES DONALD GREEN,)

Plaintiffs,)

vs.)

NO. 2:04-cv-00028-JDT-WGH

KEVIN D. BURKE,)
GEORGE RALSTON,)
LYNN FRANCIS,)
PATRICK GOODWIN,)
CITY OF TERRE HAUTE, INDIANA,)

Defendants.)

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MARLENE H. TURNER,
DAVID W. EVANS,
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and JAMES DONALD GREEN,

Plaintiffs,

vs.

2:04-cv-28-JDT-WGH

KEVIN D. BURKE, individually and as
Mayor of the City of Terre Haute, Indiana;
GEORGE RALSTON, individually and as
Chief of Police of the City of Terre Haute,
Indiana; LYNN FRANCIS, individually and
as City Attorney for the City of Terre Haute,
Indiana; PATRICK GOODWIN, individually
and as City Engineer of the City of Terre
Haute, Indiana, and the CITY OF TERRE
HAUTE, INDIANA,

Defendants.

ENTRY ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (DKT. NO. 35)¹

Defendant Kevin Burke is the mayor of Terre Haute, Indiana. He is a Democrat who defeated the Republican candidate for mayor, Duke Bennett, in the general election of November 2003. Perhaps more importantly, earlier that year Burke defeated the incumbent Democrat Mayor, Judy Anderson, in that party's primary.² Defendant

¹ This Entry is a matter of public record and will be made available on the court's web site. However, the discussion contained herein is not sufficiently novel to justify commercial publication.

² Pundits have observed that the true election process in Terre Haute city politics occurs in the Democratic primary.

George Ralston is the police chief of Terre Haute, appointed by Burke. Defendant Patrick Goodwin is the city engineer and was also appointed by Burke. Former City Attorney Lynn Francis is also a Defendant and served as the chief legal officer of the city for Mayor Anderson and Mayor Burke until she left the city's employment at the end of 2004.

Plaintiff Marlene Turner was the secretary to Police Chief James Horrall, who served as chief under Mayor Anderson's administration. David Evans, Steven Jackson and James Donald Green all worked for the City of Terre Haute in the building inspections department until Mayor Burke eliminated that department when he took office. Along with Turner, as Plaintiffs they allege that their employment with the city was terminated on the basis of their political affiliation with former Mayor Anderson and, in the case of Turner, with mayoral candidate Bennett. As a group, the Plaintiffs also ask this court to declare that Police Chief Ralston was appointed in contradiction to the laws of the State of Indiana and that his appointment is therefore void. The City of Terre Haute is also a named Defendant.

A motion for summary judgment under Fed. R. Civ. P. 56 has been filed on behalf of all the Defendants, claiming no material question of fact remains to be decided and that all Defendants are entitled to a judgment in their favor as a matter of law. For the reasons discussed in this entry, that motion will be granted in part and denied in part.

Summary Judgment Standard

Summary judgment is appropriate when the record shows “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); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A dispute about a material fact is “genuine” if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). In deciding whether a genuine issue of material fact exists, the court construes, as it has in this matter, all facts in the light most favorable to the nonmoving party and draws all reasonable inferences in favor of that party.³ *Id.* at 255.

³ The Local Rules of this district require the moving party to include in a supporting brief “a section labeled ‘Statement of Material Facts Not in Dispute’ containing the facts potentially determinative of the motion as to which the moving party contends there is no genuine issue.” S.D. Ind. L.R. 56.1(a). The opposing party is to file a response brief which “shall include a section labeled ‘Statement of Material Facts in Dispute’ which responds to the movant’s asserted material facts by identifying the potentially determinative facts and factual disputes which the nonmoving party contends demonstrate that there is a dispute of fact precluding summary judgment.” S.D. Ind. L.R. 56.1(b). “For purposes of deciding the motion for summary judgment, the Court will assume that the facts as claimed and supported by admissible evidence by the moving party are admitted to exist without controversy, except to the extent that such facts: are specifically controverted in the opposing party’s ‘Statement of Material Facts in Dispute’ . . .” S.D. Ind. L.R. 56.1(e).

While Plaintiffs, as the opposing party here, did not include a section in their response brief entitled “Statement of Material Facts in Dispute,” they did include a section in their brief entitled “Response to Defendants’ Statement of Material Facts in Dispute.” However, this section makes no attempt to identify the potentially determinative facts and spends little if any time even attempting to describe those particular facts set out by Defendants which Plaintiffs dispute. Instead, the section amounts to a long narrative with occasional citations to the record and a great deal of speculation and argument. As counsel for Plaintiffs well knows, the clear intent of the Local Rule is to have the parties help the court focus its attention on the key material

(continued...)

A party moving for summary judgment “bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex*, 477 U.S. at 323. A party moving for summary judgment on a claim on which the non-moving party bears the burden of proof at trial may discharge its burden by showing, “that is, pointing out” an absence of evidence to support the non-movant’s case. *Id.* at 325.

Analysis

Applicable Law

As a general rule, public employees are protected against suffering adverse employment actions as a result of their political beliefs or affiliations. *Elrod v. Burns*, 427 U.S. 347 (1976). An exception exists where the “hiring authority” can show that political affiliation is an appropriate requirement for the effective performance of the public position involved. *Branti v. Finkel*, 445 U.S. 507, 518 (1980). Such jobs have

³(...continued)

facts and whether or not they are in dispute. Plaintiffs have offered up factual “spin” and argument within the section of their brief which is supposed to do nothing more than identify material facts in dispute. That is not what is intended by the Local Rule and it in no way furthers the analytical process. Failing to specify what material facts are truly in dispute is not only an ineffective method of arguing the motion, but such a failure also risks the court simply adopting the facts as set forth by the moving party because of the Local Rule violation. Indeed, where it is unclear to the court whether or not Plaintiffs in this case take issue with a particular fact set forth by the Defendants, the court will assume the fact as alleged by the Defendants is admitted.

drawn the shorthand moniker of “confidential” or “policy-making” positions. See *Carlson v. Gorecki*, 374 F.3d 461, 464 (7th Cir. 2004).

To successfully make out a prima facie case of discrimination based upon political affiliation or motivation, a plaintiff must show: 1) that he or she engaged in conduct which is constitutionally protected, and 2) that the protected conduct was a substantial or motivating factor in the defendant’s decision with regard to the adverse employment action. *Hall v. Babb*, 389 F.3d 758, 762 (7th Cir. 2004). In this case, in addition to suing the city, the Plaintiffs have brought suit against the various individual Defendants in both their official and personal capacities. Government office holders are generally provided with qualified immunity from suit for discretionary actions, but may be found liable in their individual capacities if, based upon the circumstances of the particular case at issue, it is found that the law prohibiting the official’s conduct was “clearly established” at the time the action was taken. *Gregorich v. Lund*, 54 F.3d 410, 413 (7th Cir. 1995). Whether the right allegedly violated was clearly established is a question of law for the court and Plaintiffs bear the burden on that question. *McGrath v. Gillis*, 44 F.3d 567, 570 (7th Cir. 1995).

Plaintiff Marlene Turner

Ms. Turner can make her prima facie showing. The record shows that she was an adamant supporter of Burke’s primary opponent and then mayor, Judy Anderson. She wore Anderson campaign buttons, wore campaign shirts and attended parades and rallies. She wrote letters to the editor in support of Anderson which were published by

the local paper. At one of the Democratic primary functions she publicly confronted Burke with the notion that he was promising jobs to get elected. After the primary, Turner continued to oppose Burke by coming to the aid of the Republican candidate for mayor, Duke Bennett, and writing letters to the editor endorsing his candidacy. In short, there is no doubt that Turner engaged in protected political support activities and that Burke was aware of it,⁴ thereby establishing the first of the two prima facie requirements.

In anticipation of winning the general election, Burke consulted with City Attorney, Lynn Francis, regarding whether or not Turner held a policy-making or confidential position. Having received a legal opinion that the position of secretary to the chief of police was a confidential position for which political allegiance could be considered in connection with hiring and firing, Burke wrote to Turner immediately following the 2003 general election to alert her to the fact that her services would no longer be needed come January. Two weeks later, on November, 24 2003, sitting Chief of Police, James Horrall, authorized a transfer of Turner to the records department for the police. Turner wrote to Burke that same day and notified him that she had been transferred effective December 1, 2003, and that the new chief of police could hire or choose his own personal secretary.

⁴ Burke admits to knowing that Turner was a supporter of Mayor Anderson. During his campaign he read most letters to the editor and also heard that Turner had dropped party allegiance to support Bennett in the fall election campaign.

During December, Turner was trained in the records department and began performing some of the responsibilities of a records clerk along with continuing to attend to the diminishing secretarial responsibilities for the outgoing police chief. After November 2003 the city accounted for her pay under the budgetary account designated for "clerk-typist" as opposed to the account designated for "secretary." On December 16, 2003, Burke came to the office of the police chief and told Turner that he received her earlier letter and that there must have been some misunderstanding because he had previously terminated her employment effective January 2004, after which she would no longer be an employee of the city. Turner said there was no misunderstanding and that she would be taking legal action. She treated the December 16, 2003, confrontation with Burke as a discharge and did not show up for work after the end of that year.

Turner claims that Burke had no power to terminate her employment prior to his taking office and, consequently, could not have terminated her prior to her becoming a records clerk, which is not a confidential or policy-making position. While she attempts to raise some question of fact with regard to the confidential nature of the position of secretary to the police chief, any such argument is not well taken because it is clear that, at least with respect to the duties contemplated by the new Chief, George Ralston, the position qualifies as one requiring political allegiance and a great degree of confidentiality, exercised with appropriate discretion. The thrust of Turner's argument is that she received a transfer consistent with historical precedent, which would allow her to continue employment in a position not subject to political patronage and also allow

Ralston to choose his own secretary. In reply, Burke ignores the argument that he lacked authority to terminate Turner prior to her transfer and simply reiterates his position that he terminated her from a secretarial position subject to change for political allegiance reasons. He suggests that the transfer was purely political and made in response to his initial letter providing Turner with notice that her services would not be needed in his administration.

So, the court is left with a question that can be worded a bit differently depending on the angle from which the issue is examined. Does a mayor elect have the authority to terminate an employee, effective upon the installation of his administration, in advance of actually holding the office? Or, can an employee in a position which is subject to political patronage have her employment saved by the lame duck administration's last minute transfer of her to a non-patronage position? Despite much effort, and to this court's surprise, the court has been unable to find precedent with a set of factual circumstances close enough to the situation at hand to provide meaningful legal insight or direction. What is clear from the case law is that with respect to positions which are not subject to political patronage, it is unlawful not only to take an adverse employment action against a person holding the position, but it is equally unlawful to hire, promote or transfer to such a position on the basis of political allegiance. *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990); *Hall v. Babb*, 389 F.3d 758, 762 (7th Cir. 2004); *Goodman v. Pa. Turnpike Comm'n*, 293 F.3d 655, 663 (3rd Cir. 2002).

If the record supported a determination that Turner was placed in the records clerk position based purely on political allegiance or the action motivated by political allegiance, the court would have no problem finding that the transfer was ineffective and that she was subject to removal by Burke and his administration. On the other hand, if the evidence of record supported a determination that Turner was qualified for the records clerk position, did not displace another individual and received the transfer in line with past practice and typical procedural requirements, there would seem to be no basis for Burke to complain or initiate a termination. However, the record is remarkably empty of the type of admissible evidence that would assist the court in reaching a determination on this issue. There is no record with regard to how many employees the records department was authorized to have or budgeted for, whether an opening existed or another employee was let go, or even if others similarly situated had been placed in such positions in the past. The court has only speculation from the Defendants that Turner either replaced someone or filled a position that may have been more appropriately filled by others who were more qualified. It has equally inadmissible hearsay and speculation from the affidavit of former Chief Horrall, submitted by Plaintiffs, wherein he says there was a past practice of other chiefs in transferring secretaries to the records department in order to preserve their employment with the city. No one with direct knowledge has offered testimony and no documentation has been provided. Consequently the record is insufficient to allow the court to make a determination - either way.

Plaintiff David Evans

Evans became the zoning inspector for the city in the summer of 2002. That position existed in the city's building inspections department and required him to inspect construction projects for code and zoning compliance as well as performing some code enforcement activity with regard to weeds, trash, abandoned cars and the like. He claims to have accepted the position during Mayor Anderson's term with the understanding that it was a position from which he could not be removed for political reasons. However, the position was eliminated in connection with Burke's restructuring of city operations and he was not retained by the city in any other capacity. Evans maintains that he and other employees of the building inspections department were the victims of a political ruse wherein supporters of Anderson were removed from their jobs in favor of Burke supporters under the guise of a restructuring.

The building inspections department had responsibility for construction compliance inspections and permitting as well as ordinance enforcement. A major issue in Burke's campaign was the quality of the performance of that department. He maintained that under the Anderson administration the department was ineffective. So, after winning the primary election, Burke contacted Pat Goodwin to secure his commitment to serve as city engineer and to help Burke with a reorganization or restructuring of the functions of the building inspections department. Following the general election, Burke announced that his administration was recommending the elimination of the building inspections department to the city council with the responsibilities of the department being split up and assigned to either the police

department or the engineering department. Construction compliance responsibilities would be under the supervision of the city engineer and the police department would take on the more behavioral code enforcement issues with a new environmental protection division. All positions in the building inspections department would be eliminated and those who had worked in that department would be required to reapply for new positions with the engineering department or the police department.

By letter dated December 8, 2003, Burke let Evans know of his intent to eliminate the building inspections department and invited him to submit his resume and an application for any of the new positions created in the departments taking on the responsibilities of the building inspections department. Evans had no interest in the enforcement positions with the police department. He did submit an application for the position of housing inspector in the engineering department, though.

The city council passed an ordinance allowing for the restructuring. On January 15, 2004, City Engineer, Patrick Goodwin, wrote to Evans notifying him of the elimination of the building inspections department and indicating that his services were no longer needed. The position of building commissioner was eliminated. Goodwin had already recruited John Akers to fill the newly created position of lead inspector with the engineering department, which took on many of the responsibilities previously held by the building commissioner. The lead inspector also became responsible for the inspection duties that Evans and others had been responsible for previously. Randy Readinger, who worked in the building inspections department under the Anderson administration, was chosen by Akers to fill the position of housing inspector, which

answered to the lead inspector. Goodwin approved of Akers's choice of Readinger. Akers had worked with Readinger in the past and chose him for the position after interviewing and considering building inspections employees Evans, Bud Manning, James Donald Green and some outside candidates, because he considered Readinger the most experienced in the areas of responsibility for that job. Akers states that he was not told by anyone whom to hire or whom not to hire.

Evans's political activity was not as great or visible as Turner's. His activities in support of Anderson's primary campaign included a single day of putting out campaign signs in the yards of supporters who requested them and attendance at several rallies.⁵ He saw Burke, Ralston and Goodwin at some multi-candidate functions where he was cheering for Anderson, but could not say with certainty that they saw him. In fact, he and Burke had never met. He was acquainted with Ralston and had worked with Goodwin in the past. Evans is of the opinion that his support of Anderson cost him his job. Unfortunately for him, the evidence does not support that conclusion.

Evans's support for Anderson was protected activity. However, he has offered only speculation and opinion to support the notion that his engaging in such activity was

⁵ Evans submitted an affidavit which accompanied Plaintiffs' response brief. In that affidavit he contradicts his earlier sworn deposition testimony where he denied passing out campaign literature and said he had an interview with Akers regarding the housing inspector position that lasted only a few seconds. The affidavit also offers speculation and rank opinion regarding the nature of and reasons for the restructuring of building inspection responsibilities. The court will disregard any affidavit testimony which contradicts previous sworn testimony or amounts to self-serving speculation not grounded in first-hand knowledge or established fact. See *Patterson v. Chi. Ass'n for Retarded Citizens*, 150 F.3d 719, 723-724 (7th Cir. 1998).

the reason he lost his job. First and foremost, nobody has offered any evidence to contradict the testimony from Burke confirming that the poor performance of the building inspections department (or at least his perception of its deficiency) was a significant issue in his campaign. As such, after election, it was absolutely consistent for his administration to successfully pursue a reorganization or restructuring of the responsibilities of that department. Nor should it be a surprise that some of those who worked in the department Burke had criticized did not make the cut for the new positions established through the restructuring. There is no evidence that Burke knew who Evans was or who he supported prior to his decision to eliminate the building inspections department. And, Evans offers only speculation that Ralston and Goodwin knew of his support for Anderson. Even if the court assumes that it is not unreasonable to suspect that Burke and his advisors were aware that the people whose performance, in general, was being criticized by the Burke campaign might be supporting a different candidate, there simply is no basis for finding that Evans lost his job because he attended rallies for Anderson and put signs out one Saturday. He lost his job because of a reorganization which split his prior duties between the police department and the engineering department. His effort to continue employment with the city in the engineering department as its housing inspector was unsuccessful because Readinger had eight years of experience as a housing inspector with the city and Akers and Goodwin were comfortable with his work ethic.

Plaintiffs Steven Jackson and James Donald Green

Steven Jackson worked as a code enforcer in the building inspections department. Their responsibilities included receiving and investigating municipal code compliance complaints and issuing warnings or citations when violations were confirmed. They dealt with property issues such as weeds, trash, abandoned cars and similar circumstances. Jackson served as an enforcer during the 1970s and returned to that position in April of 2003 while Judy Anderson was mayor. Green came out of retirement from the fire department in August of 2002 to accept the code enforcer position and trained under Randy Readinger.

Jackson worked on Anderson's campaign in 1999 and 2003, occasionally passing out literature, putting up signs and attending rallies and democratic primary events. He is confident that Burke knew who he was supporting because he asked a very poignant question of him at one of the democratic primary events which garnered an angry response, according to Jackson. After the primary, Jackson visited Burke at his place of business in an attempt to demonstrate his willingness to support Burke and his efforts to improve the code enforcement process, spending about an hour with Burke discussing who he was, what he did and his ideas for improving code enforcement. Jackson believes the restructuring was a sham aimed at getting rid of those who supported Anderson in the primary election and giving jobs to Burke supporters.

Green assisted Anderson's campaign in 1999 and 2003 by helping to get people registered to vote and picking up absentee ballots. He also attended rallies and democratic political functions. He met Burke for the first time at a "shrimp peel" prior to the general election. He was introduced to Burke by Randy Readinger. When he met Burke, Green told him that he was a code inspector in the department he heard Burke found to be a "big headache." Green does not know whether Burke, Ralston or Goodwin knew of his support for Anderson, but is of the opinion that he lost his job because Burke was out to get rid of Building Commissioner Chuck Nichols and did not like the job Nichols's department was doing.

In separate but identical letters dated December 8, 2003, Burke wrote to Jackson and Green regarding his intention to eliminate the building inspections department and the likely approval of the same by the city council at its January 15, 2004 meeting. He indicated that their jobs, like others in the department, would be eliminated, but that they were welcome to submit their resumes and an application for any of the new positions which would be formed in the other departments. Green submitted his resume through a city councilperson on December 17, 2003, and interviewed with Ralston on December 22, 2003, for a job as an enforcement officer. Jackson provided his resume to incoming Police Chief Ralston on December 23, 2003. Immediately thereafter, he interviewed with Ralston for a position as a code enforcement officer with the police department. Ralston informed Jackson that he had already filled the code enforcement officer positions, but that if a position came open or the city council agreed to fund an

additional officer, he would consider hiring Mr. Jackson. Ralston then asked Jackson to help train the new officers on completing the code citation paperwork.

Earlier in December, Ralston had decided to hire Bud Manning, Marty Dooley, Rance Baranaby, Tim Manley and Gene Francis to fill the five code enforcement officer positions which were to exist in the police department. Ralston received no direction from Burke with respect to whom he should or should not hire. Bud Manning was a code enforcer in the building inspections department during the Anderson administration and by all accounts was particularly despondent about the possibility of losing his job when Burke was elected. On December 22, 2003, Ralston attempted to hire Green instead of Manning for the last available position. Green found Ralston the next day and told him to go ahead and hire Manning since Manning had more seniority.

Dooley and Barnaby were retired from the police and fire departments respectively. Ralston had worked with Dooley both in the police department and at a local hospital. Ralston knew Barnaby as an employee of an affiliate of the hospital as well as from Barnaby's days as an arson investigator for the fire department. Dooley and Barnaby both learned of the potential new code enforcement positions with the police department from Ralston who was aware of Burke's intention, if elected, to do away with the building inspections department and split the responsibilities between the engineering department and the police department. Barnaby and Dooley assisted the Burke campaign during the general election by placing yard signs.

Manley did not assist with the campaign but did have a Burke yard sign in his yard. He learned of the new positions in the police department from Ralston's son, who worked with Manley as a third shift correctional officer at the Vigo County Jail. Manley had not met Burke prior to receiving the job from Ralston. Gene Francis worked with the Pfizer Company in the animal research department and was a farmer for many years prior to receiving the enforcement officer position. His experience with animals and the need to enforce animal control ordinances prompted his application and Ralston's choice of Francis to serve as one of the enforcement officers. Francis did not know Ralston or Burke prior to applying for the position and did not assist in the election campaign in any fashion.

The Plaintiffs argue that the restructuring was a pretext to disguise a move to oust Anderson supporters in favor of Burke's people. They point to an unpublished decision from the Northern District of Illinois as a basis for finding that where a questionable reorganization is accompanied by the appointment of a political ally to assume many of the old duties of the person adversely affected by the reorganization, the temporal sequence and lack of actual substantive reorganization is enough evidence of pretext to allow the issue to be decided by a jury. See *Corso v. Orr*, No. 92 C 0184, 1995 WL 625488 (N.D. Ill. Oct. 23, 1995). In addition to the fact that decisions from district courts hold little if any precedential value, see *TMF Tool Co. v. Muller*, 913 F.2d 1185, 1191 (7th Cir. 1990), the problem with Plaintiffs' reliance on the unpublished decision is that the facts here are significantly different.

In *Corso* the employing officer did receive a “Blue Ribbon Panel” recommendation for reorganization, but it was after he had already gotten rid of the plaintiff and hired his political supporter on the same day. As the court discussed earlier in connection with Evans’s claim, there is no evidence in this case tending to contradict Burke’s openly stated pre-election dissatisfaction with the performance of the building inspections department. The evidence points to a restructuring or reorganization that was rooted in an opinion, right or wrong, that the department was ineffective. And, while all the same tasks were going to be performed by the people filling the new positions, the tasks were split up differently, based on whether a violation was behavioral or technical in nature, and also fell under different supervision.

Of the five employees hired by Ralston to serve as enforcement officers in the police department, only two could be considered as performing any significant role in Burke’s campaign and there is no significant difference between their qualifications and those of Green and Jackson. Indeed, Green’s action of turning down the offer of continued employment with the city in favor of Manning serves to estop him from claiming he was fired for political reasons. There is no evidence that allegiance to Anderson played any role other than perhaps serving as a defensive tactical choice on the part of the employees of the building inspections department who were the target of Burke’s pre-election criticism. Burke believed the work of the department could be done better. In fact, Green’s deposition as to what cost him his job is quite enlightening in that regard:

Q: Okay. So you think your job was – your employment with the city was effected (sic) because Mayor Burke didn't want Chuck Nichols as building commissioner anymore?

A: He didn't like our job, yeah.

Q: What do you mean, he didn't like your job?

A: Evidently, we wasn't (sic) doing it to his satisfaction.

Performance below expectations is still a legitimate reason for a public employer to terminate employees, regardless of political affiliation. Consequently, summary judgment for the Defendants is appropriate as to the claims of Jackson and Green because they can not establish that their political activity played any significant role in the decision to terminate their employment.

Defendants Lynn Francis and Patrick Goodwin

Since the only claim that survives at this point is that of Plaintiff Turner, and Plaintiffs have come forward with no evidence at all that Lynn Francis or Patrick Goodwin had anything to do with any of their terminations or their failure to be hired to fill new positions, Francis and Goodwin are entitled to summary judgment in their favor on the entirety of the Complaint.

Qualified Immunity for Defendants Burke and Ralston

If Marlene Turner's last minute reassignment to the records department was legitimate, she may have had her First Amendment rights violated. However, because steps were taken toward termination of her employment before she was transferred and because Burke and Ralston would have reason to believe that they were not acting in

violation of her rights, the two Defendants are protected by qualified immunity. There is no question that the transfer appeared to them be less than routine and on its face the timing could easily be viewed by a reasonable person as suggesting the invocation of a somewhat desperate procedure. Unless the right allegedly violated by a public official is clearly established, courts do not demand that public officials dig into their own pockets. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Burke and Ralston in their individual capacities enjoy the benefit of this immunity as the facts regarding Ms. Turner's reassignment sufficiently clouded reasonable municipal officials' understanding of whether she could be fired without violating her First Amendment rights.

Request for Declaration That Appointment of Ralston Violated Indiana Law

Ralston was retired from the Terre Haute police force at the time he was appointed as chief by Burke. Without any case law to support their position, Plaintiffs argue that Burke's appointment of Ralston as police chief violated Indiana Code § 19-1-29.5-1 *et seq.*, an argument that is misstated to begin with since Title 19 of the Indiana Code has been repealed and replaced with various provisions in Title 36. Under the provisions of Indiana Code § 36-8-3.5-1(b) a city could elect to keep its existing merit system, as formed under former Title 19, and forgo the new legislative merit system mandates, so long as it adopted an ordinance which contained all of the provisions of the former code section under which the merit system was formed. Terre Haute did just that, and its merit system ordinance contains language requiring that a chief of police be appointed to his previous rank upon expiration of his term as chief. What Plaintiffs

appear to actually be asking for is a declaration that Ralston's appointment violated the Terre Haute merit system ordinance and therefore any action he has taken is void.

Plaintiffs point to nothing in the ordinance which requires a police chief to be appointed from the existing ranks of the department. Nor do they explain why Indiana Code § 36-8-4-6.5, the Indiana statutory requirements applicable to all cities with regard to the appointment of a police chief, does not apply.⁶ That statute provides that a police chief must have five years of immediately preceding service with the force, but also allows the city's chief executive to waive that requirement. Plaintiffs simply assert that since under the ordinance the police chief is required to return to a certain rank in the force at the end of his term as chief, it follows that he is required to come from within the ranks of the force. Where this analysis fails is in the assertion that it is the police chief who is required to return to a certain rank. Obviously, indentured servitude does not exist and the police chief is certainly not required to continue as a policeman of any rank after his term has been completed. The provision is clearly aimed at protecting the police chief if he does wish to continue on with the department. Without language requiring that the chief be selected from the ranks of active officers and without explanation as to why Indiana Code § 36-8-4-6.5 would not apply, allowing the mayor to

⁶ Chapter 3.5 of Title 36, Article 8 of the Indiana Code sets forth merit system requirements for police and fire departments. The first section of that Chapter provides a city with an existing merit system the opportunity to opt out of the requirements of the chapter by adoption of an ordinance setting forth all the requirements that existed in the merit system statutes which Chapter 3.5 replaced. Ind. Code § 36-8-3.5-1. That section does not provide a city with an exemption from Chapter 4 of Title 36, Article 8 of the code, which is said to apply to all cities. Ind. Code § 36-8-4-1.

waive the immediacy requirement of the five years of previous experience, there is no basis for the court to provide the declaratory relief sought.

Conclusion

No basis exists to find that Burke's appointment of Ralston as police chief violated the law. The Burke administration's elimination of the building inspections department prompted a legitimate elimination of jobs and restructuring of responsibilities. Consequently, Plaintiffs Evans, Jackson and Green have failed the second prerequisite to establishing a prima facie case of discrimination based on political affiliation, that is that their protected political activities were a motivating factor in their dismissal. Accordingly, Defendants are entitled to summary judgment with respect to the claims of those three Plaintiffs. Defendants Francis and Goodwin are entitled to summary judgment with respect to all claims, as there is no evidence to support that either of the two were decision-makers with respect to the termination of any of the Plaintiffs' employment.

The record as it exists now does not support a summary judgment in favor of Defendants Burke or Ralston with respect to Turner's claim in all respects. While there is little which implicates Ralston in the decision to terminate her employment, Turner was the existing secretary to the police chief and Ralston was assuming that position. The fact that the evidence could support an inference that Ralston assisted in or instigated Burke's termination of Turner is sufficient at this point to keep both Defendants, in their official capacities, in the case. However, the record is not sufficient

to support any determination with regard to whether or not Turner's transfer to the records department was legitimate and served to protect her from a political based firing. Further, Defendants Burke and Ralston are entitled to qualified immunity in their individual capacities.⁷

However, presentation of claims to the jury against the Mayor and Chief of Police in their official capacities in addition to a claim against the City of Terre Haute would be redundant, unnecessary and potentially confusing. This was not addressed in the summary judgment briefing, but this will be cleaned up as a matter of trial preparation.

"[A]n official capacity suit is, in all respects other than name, to be treated as a suit against the [municipal] entity . . . for the real party in interest is the entity." *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) (internal citation omitted). This has a corollary, too, often unrecognized by claimants against municipal entities:

There is no longer a need to bring official-capacity actions against local government officials, for under *Monell, supra*, local government units can be sued directly for damages and injunctive or declaratory relief.

Id. at 167 n.14.

⁷ It may seem odd that Ralston and Burke escape personal liability because of qualified immunity, yet their alleged conduct as policymakers keeps the City of Terre Haute and them in their official capacities in the case for trial. However, it must be kept in mind that the qualified immunity determination is *not* a conclusion that Turner's First Amendment rights were not violated. *Cf. Los Angeles v. Heller*, 475 U.S. 796 (1986) (per curiam). The jury will have to decide whether the facts demonstrate such a violation.

Where the defendant individual is a municipal officer or employee, there is no reason to include a claim against the individual in his or her official capacity. Proof of a constitutional harm resulting from a municipal custom or policy will be required, and that proof can be in the form of a single act by policymakers for the municipality. The same proof would be needed to sustain a claim against the Mayor and Chief of Police as would be required to sustain a claim against the city. In fact, to retain both the official capacity defendants and the municipality as parties might lay the groundwork for an inconsistent verdict in which the jury finds in favor of the official capacity defendants and against the municipality, when the liability of the municipality clearly depends on the actions of the official capacity defendants.

Luke v. Abbott, 954 F. Supp. 202, 203 (C.D. Ca. 1997), discusses the redundancy of official capacity/entity suits, and then proceeds to consider the precise question of “whether the plaintiff can choose between naming the government agency or naming its official capacity officer--in other words, whether the official capacity officer is a proper defendant at all.” Given the “[t]here is no longer a need to bring official-capacity actions against local government officials” language in *Graham*, the district court rightly concluded:

Unless a plaintiff intends to state a cause of action against a local government official in a personal capacity, the local government entity, not the official, should be named . . . it is no longer necessary or proper to name as a defendant a particular local government officer acting in official capacity. To do so only leads to a duplication of documents and pleadings, as well as wasted public resources for increased attorneys fees. A plaintiff cannot elect which of the defendant formats to use. If both are named, it is proper upon request for the Court to dismiss the official-capacity officer, leaving the local government entity as the correct

defendant. If only the official-capacity officer is named, it would be proper for the Court upon request to dismiss the officer and substitute instead the local government entity as the correct defendant.

Id. at 203-4.

A similar conclusion was reached in *Spell v. McDaniel*, 824 F.2d 1380, 1396 (4th Cir. 1987), *cert. denied*, 484 U.S. 1027 (1988), where the Court of Appeals noted that where a plaintiff brought a claim against officials in their official capacities, but not their individual capacities, a “simpler, technically correct, and by far more preferable structuring would have been to name the City as the sole defendant.”

Accordingly, as the case is presented to the jury, the sole remaining defendant will be the City of Terre Haute. The jury will be instructed that the city can be liable if actions of its policymakers constituted a custom or policy of the city which deprived Ms. Turner of her First Amendment rights. The redundant official capacity claims against the Mayor and Chief of Police will be dismissed.

Defendants’ Motion for Summary Judgment (Dkt. No. 35) will be **GRANTED IN PART**, insofar as judgment will be entered in favor of Defendants Francis and Goodwin and against the Plaintiffs on the entirety of the Complaint and in favor of Defendants Burke, Ralston and the City of Terre Haute and against Plaintiffs Evans, Jackson and Green on Counts II, III, IV and V of the Complaint and the official capacity claims against Burke and Ralston will be dismissed. Entry of judgment, however, awaits disposition of the remaining claim of Ms. Turner against the City of Terre Haute since

this claim is so closely interrelated to the claims on which summary judgment will be granted.

ALL OF WHICH IS ENTERED this 4th day of August 2005.

John Daniel Tinder, Judge
United States District Court

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