Little v. Palm Beach County

United States District Court for the Southern District of Florida, Subdivision

January 03, 2020, Filed

CASE NO. 19-80701-CIV-DIMITROULEAS

Reporter
2020 U.S. Dist. LEXIS 1130 *

AJ O'LAUGHLIN and CRYSTAL LITTLE, Plaintiffs, v. PALM BEACH COUNTY, a political Defendant.

Opinion

[*1] **ORDER GRANTING MOTION TO DISMISS**

THIS MATTER comes before the Court on Defendant's Motion to Dismiss the Complaint [DE 11] ("Motion"). The Court has carefully considered the Motion, Plaintiffs' Response, and the Reply and is otherwise fully advised in the premises.

I. BACKGROUND

Plaintiffs AJ O'Laughlin ("Plaintiff O'Lauglin") and Crystal Little ("Plaintiff" Little") (collectively "Plaintiffs") seek injunctive relief, enjoining the Palm Beach County Fire and Rescue Department ("Fire Department") from enforcing its social media policy. Plaintiffs bring claims under 42 U.S.C §1983, the First Amendment to the United States Constitution, Florida Statute Chapter 86, and Article I § 4 of the Florida Constitution.

On February 6, 2019, Plaintiff O'Laughlin made Facebook posts in an invite-only Facebook page he maintained while campaigning for the presidency of Local 2928 of the International Association of Fire Fighters. Compl. 2, DE 1. The posts concerned alleged misuse of a Union Time Pool by the union's First Executive Vice President, Captain Jeffrey L. Newsome ("Newsome"). Compl. ¶ 9.

Plaintiff O'Lauglin's Facebook posts alleged that Newsome was coordinating with Fire Department management to ensure he had Thanksgiving and Christmas Day off with pay. Compl. 2. To do so, Newsome tried to use Union Pool Time ("UTP"), which [*2] is a pool of hours of paid-time-off donated by union members for union officers to use when performing union duties. *Id*. The UTP allows officers to get paid their regular salaries for doing union business on days that they would otherwise be scheduled to work. Compl. ¶ 8. Plaintiff Little, a supporter of Plaintiff O'Laughlin's candidacy, commented on Plaintiff's post in support of its content. Compl. ¶ 13.

Plaintiffs were disciplined per the department's social media policy for the content of these posts. Compl. 2.

Defendant's social media policy prohibits or discourages it employees from displaying or disseminating a number of types of content, including "content that could reasonably be interpreted as having and adverse effect upon Fire Rescue morale, discipline, operations, the safety of staff, or the perception of the public." Compl. Ex. 1 at 3; Compl. ¶ 5. The social media policy also dictates that social media postings of off duty employees "shall not reflect negatively upon [the] agency or its mission." Compl. ¶ 18(c).

Plaintiffs allege that Defendant's social media policy is "constitutionally infirm" as it seeks to regulate "private conversations" in the form of Plaintiffs' posts [*3] and comment in a private Facebook group; as it is a content-based regulation, and as it constitutes a prior restraint of all speech critical of the Fire Department. Compl. ¶ 18. Plaintiffs allege that the content of O'Laughlin's Facebook post would be a matter of public concern and in no way related to the duties of either of the Plaintiffs or to their personal grievances. Compl. ¶ 19. Plaintiffs seek injunctive relief in the form of voiding of the discipline issued to them and cessation of future

enforcement of the policy as it regards both private speech and comments on matters of public

concern. Compl. 11-15.

II. LEGAL STANDARD

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires "a short and plain statement

of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). Under Rule 12(b)(6), a motion to dismiss should be granted only if the plaintiff is unable to articulate "enough facts to state a claim to relief that is plausible on its face." *Bell Atl.Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (abrogating *Conley*, 355 U.S. at 41). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." [*4] *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 556). The allegations of the claim must be taken as true and must be read to include any theory on which the plaintiff may recover. *See Linder v.Portocarrero*, 963 F. 2d 332, 334-36 (11th Cir. 1992) (citing *Robertson v. Johnston*, 376 F. 2d 43 (5th Cir. 1967)).

However, the court need not take allegations as true if they are merely "threadbare recitals of a cause of action's elements, supported by mere conclusory statements." *Iqbal*, 129 S. Ct. at 1949. In sum, "a district court weighing a motion to dismiss asks 'not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.'" *Twombly*, 550 U.S. at n. 8 (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *overruled on other grounds, Davis v. Scherer*, 468 U.S. 183 (1984)).

III. ANALYSIS

Defendant's arguments in favor of its Motion to Dismiss are three-fold. First, Defendant argues that Plaintiffs did not speak as citizens on a matter of public concern. Second, Defendant argues that the Fire Department's social media policy is not a prior restraint on speech. Finally, Defendant argues that O'laughlin's invitation-only Facebook page is not a non-public forum.

For the reasons set forth below, the Court agrees that Plaintiffs have not sufficiently alleged that the speech at issue related to a matter of public concern, rendering the Complaint due to be dismissed. 1

With regard to whether Plaintffs' [*5] speech related to a matter of public concern, Defendant argues that the content of Plaintiffs' Facebook posts and comment were personal in nature. In addition, Defendant contends that the form of the speech, posting in a private Facebook group was private in nature. Further, Defendant argues that the context and motivation behind the speech, suggests that it was not a matter of legitimate public concern. Defendant contends that the facts in the complaint demonstrate that Plaintiff O'Lauglin's online statements were based on his personal grievances with Newsome or his interest in the union election. Defendant also notes that the Facebook post and comment were made during a union election campaign, months after Newsome's use of the UTP time on holidays had been canceled.

For a public employee to bring a claim under the First Amendment against an employer the employee must have spoken as a citizen on a matter of public concern. *See Garcetti v.*

Ceballos, 547 U.S. 410 (2006); *Moss v. City of Pembroke Pines*, 782 F.3d 613, 618 (11th Cir. 2015) (noting that the "first threshold requirement" of such a claim is whether a plaintiff was

1 The Court notes that scope of the Florida Constitution's protection of speech under Article 1 § 4 of the Florida Constitution is identical to the protection provided for under the First Amendment to the United States Constitution. *See Dep't of Educ. v. Lewis*, 416 So.2d 455, 461 (Fla. 1982). Further, Defendant makes [*6] identical allegations in Count II as they do in their un-labeled Count I by incorporating every prior statement into Count II. Therefore, the Court addresses both Counts with an analysis of First Amendment doctrine.

speaking as a citizen on a matter of public concern). Whether a statement is a matter of public concern is a determination made based on the content, form and context of the speech. *See Moss*, 782 F.3d at 621. In evaluating the content, form, and context, Court's look at 1) "whether the 'main thrust' of the speech in question is essentially public in nature or private," 2) "whether the speech was communicated to the public at large or privately to an individual" and 3) "what the speaker's motivation was." *See Mitchell v. Hillsborough County*, 468 F.3d 1276, 1283 (11thCir. 2006) (citations omitted). Considering these factors, the Court finds that Plaintiffs fail to allege facts sufficient to demonstrate that the

speech at issue addressed a matter of public concern.

Here, the content of the speech addressed the potential misuse of a Union Time Pool, an internal, union-specific, paid-time-off sharing mechanism. The speech did not address misuse of public dollars or the Fire Department's budgeting priorities. *Cf Kurtz v. Vickrey*, 855 F.2d 723, 730 (11th Cir. 1988) (determining that memoranda that otherwise addressed personal personnel [*7] matters, related to issues of public concern when they discussed the spending priorities of a public university and the potential misuse of public dollars).

In addition, rather than being communicated to a public at large, Plaintiffs' statements were made in the form of posts and a comment in a private Facebook group. Further, the Facebook group was not built around a matter of public concern but rather Plaintiff O'Laughlin's union election campaign. Plaintiffs' allegation that they are suffering irreparable harm by not being able to more widely disseminate the information in the posts, is not alone sufficient to demonstrate that Plaintiffs' speech should be considered a matter of public concern. *SeeMitchell*, 468 F.3d at 1284 n. 18 (noting that "[n]ot all publicly communicated speech necessarily touches on a matter of public concern.") (citing *Deremo v. Watkins,* 939 F.2d 908, 911 n. 3 (11th 1991)).

Lastly, the context of Plaintiffs' speech, based on the allegations in the complaint, suggest Plaintiffs were motivated to speak by personal interests in electing Plaintiff O'Lauglin to a union leadership position. Plaintiffs' statements were made months after the potentially misused application of UTP was canceled. *See* Comp. ¶¶ 10, 11. Such statements made months after the [*8] alleged issues had been resolved suggest that the statements were made to serve personal interests. *See Deremo,* 939 F.2d at 912 (finding that a time gap between the resolution of alleged sexual harassment and the statements at issue in the case helped establish a context that overcame the presumption that wrongful conduct of a public official is typically a matter of public concern). The statements were made during Plaintiff O'Laughlin's campaign, and the speech focused on differentiating O'Laughlin's promised behavior from the alleged indiscretion of Newsome. *See* Comp. ¶ 12 ("when elected this will stop…Transparency is my campaign. So you will see the truth").

The requirement that the speech at issue in the complaint be speech made by Plaintiffs as citizens on matters of public concern, does not change even though Plaintiffs challenge the social media policy as a prior restraint. *See Martin v. City Of Dothan*, No. 1:05-CV-1172-MEEF, 2006 WL 3063461, at *5 n. 6 (M.D. Ala. Oct. 27, 2006) (citing *Maldonado v. City of Altus,* 433 F.3d 1294, 1310 (10th Cir.2006) abrogated on other grounds by *Argo v. Blue Cross & Blue Shield ofKansas, Inc*., 452 F.3d 1193, 1202 (10th Cir. 2006)); *Baumann v. D.C*., 987 F. Supp. 2d 68, 76 (D.D.C. 2013), *aff'd*, 795 F.3d 209 (D.C. Cir. 2015).

IV.CONCLUSION

The Court, accepting all well-pleaded facts as true, determines that Plaintiffs fail to sufficiently allege that they were speaking as private citizens on matters of public concern. As this is a threshold requirement of [*9] any First Amendment claim by a public employee against their

employer, Plaintiffs' Complaint is due to be dismissed. The Court will grant leave to amend in accordance with this order. The Court also notes that any amended complaint should attempt to cure any others pleading inadequacies identified by Defendants' motion. 2

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows:

1. Defendants Motion to Dismiss [DE 11] is here by **GRANTED**.

2. Plaintiffs are given leave to file an amended complaint on or before **January 23,**

2020; failure to do so shall result in the Court closing this case.

DONE AND ORDERED in Chambers at Fort Lauderdale, Broward County, Florida this

2nd day of January 2020.

Copies furnished to:

All counsel of record

2The Court does not indicate by referencing or highlighting specific issues herein that there are not other issues that may need to be addressed, nor does it decide whether the other alleged deficiencies have merit.