

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF TENNESSEE  
NORTHEASTERN DIVISION

RICHARD M. HOLT and wife,  
EDITH M. HOLT

Plaintiffs,

v.

CITY OF COOKEVILLE and  
JIM SHIPLEY, Individually  
and as CITY MANAGER OF  
COOKEVILLE,

Defendants.

No. 2:97-0038  
Judge Echols

MEMORANDUM

Presently pending before the Court are Motions for Summary Judgment filed by Defendants City of Cookeville (Document Entry No. 14) and Jim Shipley (Document Entry No. 17), to which Plaintiffs have responded in opposition. For the reasons discussed herein, the Defendants' motions are hereby GRANTED IN PART and DENIED IN PART. In particular, they are GRANTED with regard to Plaintiff Richard Holt's claims brought under the Tennessee Public Protection Act, TENN. CODE ANN. § 50-1-304 (1997); the Tennessee Human Rights Act, TENN. CODE ANN. § 4-21-101 (1997); and Tennessee common law. They are GRANTED with regard to Plaintiff Edith Holt's claim of loss of consortium and other damages. They are DENIED with regard to Plaintiff Richard Holt's claim brought against the City of Cookeville and Jim Shipley pursuant to 42 U.S.C. § 1983 (1998).

Plaintiffs brought this action for violation of civil rights under 42 U.S.C. § 1983 (1998) ("Section 1983") and for wrongful

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discharge under the Tennessee Human Rights Act, TENN. CODE ANN. § 4-21-101 (1997); the Tennessee Public Protection Act, TENN. CODE ANN. § 50-1-304 (1997) (commonly known as the "Whistle-Blower Statute"); and the public policy exceptions to the employment-at-will doctrine. Plaintiff Richard Holt ("Holt"), former police chief of the City of Cookeville, claims he was fired for investigating allegations of sexual harassment and physical abuse within the police department. Edith Holt joins in this case as his spouse, claiming loss of consortium. Plaintiffs demand reinstatement with back pay, compensatory and punitive damages, attorneys' fees and costs, and injunctive relief.

Defendants City of Cookeville and Jim Shipley filed the present Motions for Summary Judgment. Defendants contend they are entitled to summary judgment on the § 1983 claim because (1) Holt was an at-will employee whose "speech" concerning an internal investigation is not a matter of public concern and thus is not protected by the First Amendment, or (2) Holt was properly terminated for inadequate job performance even if his speech was protected by the First Amendment. Defendants further contend (1) Holt cannot maintain a cause of action under TENN. CODE ANN. § 50-1-304 because he was not terminated "solely for refusing to participate in, or for refusing to remain silent about, illegal activities" as the statute requires, and (2) Holt cannot maintain a cause of action under TENN. CODE ANN. § 4-21-101 because that statute only applies to discrimination based upon race, creed, color, religion, sex, age, or national origin. Additionally,

Defendant Shipley contends that (1) he is entitled to qualified immunity and (2) Plaintiff Edith Holt has no claim based on alleged violations of her husband's rights.

#### **STANDARD OF REVIEW**

In ruling on a motion for summary judgment, the Court must construe the evidence produced in the light most favorable to the non-moving party, drawing all justifiable inferences in his or her favor. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). A party may obtain summary judgment if the evidentiary material on file 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). The moving party bears the burden of satisfying the court that the standards of Rule 56 have been met. See Martin v. Kelley, 803 F.2d 236, 239 n.4 (6th Cir. 1986). The ultimate question to be addressed is whether there exists any genuine issue of material fact which is disputed. See Anderson, 477 U.S. at 248. If so, summary judgment dismissal is inappropriate.

#### **FACTS**

The circumstances giving rise to this action are as follows. Holt was hired as Chief of Police for the City of Cookeville in April, 1993. Holt replaced Chief Bill Benson, who had been asked

to resign by the city manager.<sup>1</sup> While Benson was chief, the atmosphere in the police department was characterized by "horseplay" and "locker-room" behavior, and officers slapped each other on the head, received spankings on their birthdays, and had physical encounters with Captain Wayne Bandy. This behavior continued after Holt became chief, and ultimately complaints about it set in motion the events that led to his termination. Those events are as follows.

On April 8, 1996, Holt received a complaint from police officer Reno Martin, who claimed that Police Captain Wayne Bandy had held a loaded gun to his head and threatened to kill him. Martin told Holt that, over a period of years, Bandy had repeatedly punched him in the groin and had recently placed him in a vascular neck restraint in the presence of other officers.

Holt began an investigation of these allegations and met with City Manager Jim Shipley on April 17 to say he was going to conduct a full investigation. Two days later, Shipley asked Holt to resign, though he subsequently retracted this request and Holt continued as police chief. Holt's investigation proceeded, and Bandy was placed on administrative leave pending its outcome.

Holt's findings over the next two weeks increased his concerns about the alleged harassment and abuse. He contacted Attorney General Bill Gibson, who then arranged a meeting with Shipley and

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<sup>1</sup>This manager was John Gentry, Defendant Shipley's predecessor in that office. In Cookeville, the City Manager is the chief administrator, with policy-making responsibility and the power to hire and fire city employees without consulting the City Council.

Holt to discuss the situation, including whether the Tennessee Bureau of Investigation should conduct a criminal investigation.

In the mean time, the investigation uncovered possible fraud involving a worker's compensation claim which had been submitted on behalf of police department employee Jeff Robichaud by second-in-command Major Fred White. White had filed a worker's compensation form designating Robichaud's injury as work-related, but Holt came to believe the injury had been inflicted by Wayne Bandy. Holt went to Shipley about this matter on May 6 and asked permission to place White on administrative leave pending the outcome of the investigation. He made this request again in writing on May 10. Shipley refused permission to put White on administrative leave and told Holt to drop the investigation. On May 13, Shipley terminated Holt.

Holt's success as police chief during his three-year tenure is disputed. Holt states that there were no problems with his performance and that Shipley had never been critical of it until April 19, 1996. Holt believes Shipley fired him to protect his friends on the police force, including Wayne Bandy. Shipley, on the other hand, claims he had concluded by April, 1996, that the police department needed new and more effective leadership. He claims he drew this conclusion because of complaints from officers that they were understaffed and underpaid, that Holt was out of town too much, and that Holt had a bad temper. He states he fired Holt for these reasons. Nevertheless, in his deposition, he was unable to recount specific complaints from specific people.

Furthermore, it is undisputed both that Holt lacked the power to hire additional officers or raise pay and that he addressed the manpower situation by obtaining federal grant money which he used to hire more officers. It is also undisputed that Holt's absences from the office were due to his attending required in-service training sessions, fulfilling National Guard duties, and taking vacations, all of which were done in accordance with departmental regulations.

After firing Holt, Shipley rehired Bill Benson as Cookeville's police chief. He also returned Wayne Bandy to active city employment as Superintendent of Public Works despite his knowledge that polygraph tests confirmed that Bandy had held a gun to Reno Martin's head and threatened to shoot him and despite Benson's recommendation that Bandy be fired. Shipley stated in deposition he is a friend of Bandy's and wanted to protect his pension.

Following his termination, Holt turned over the investigative file to the Federal Bureau of Investigation and filed the present action.

## **ANALYSIS**

### **HOLT'S § 1983 CLAIM**

Section 1983 prohibits "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States "under color of any statute, ordinance, regulation custom, or usage, of any State." 42 U.S.C. § 1983. Under this statute, a state or municipal government employer may

not discharge an employee on a basis that infringes upon his constitutionally protected interest in freedom of speech. Rankin v. McPherson, 483 U.S. 378 (1987), reh'g denied, 483 U.S. 1056 (1987). To do so constitutes retaliatory discharge in violation of the First Amendment. Ketron v. Chattanooga-Hamilton County Hosp. Auth., 919 F.Supp. 280, 285 (E.D.Tenn. 1996) (citing Boger v. Wayne County, 950 F.2d 316 (6<sup>th</sup> Cir. 1991)).

In evaluating such a claim on a motion for summary judgment, courts apply a three-part test, asking first whether the speech addressed a matter of public concern; second, whether the employee's First Amendment interests outweigh the employer's interests in promoting its efficiency; and third, whether the speech was a substantial or motivating factor in the termination. The first two issues are questions of law; the third is a question of fact. If the first two issues are resolved in the employee's favor and there are disputed issues of material fact as to the third, summary judgment is inappropriate unless the employer establishes by a preponderance of the evidence that it would have terminated the employee even in the absence of the protected conduct. See Barnes v. McDowell, 848 F.2d 725, 733 n.9 (6<sup>th</sup> Cir. 1988), reh'g denied Aug. 4, 1988, cert. denied, 488 U.S. 1007 (1989).

In order to prevail in a retaliatory discharge action under § 1983, a plaintiff must first establish that he or she engaged in speech which is constitutionally protected because it addressed a matter of public concern. Barnes at 732. Whether a plaintiff's

speech addressed a matter of public concern is a question of law. Id. at 733. It must be determined by the content, form, and context of a given statement, as revealed by the whole record. Rankin at 384-85.

The speech at issue is Holt's statements to Shipley and Gibson concerning alleged harassment, assault, and worker's compensation fraud within the Cookeville city police department. Statements alleging police officers' unlawful conduct concern a matter of public interest. Solomon v. Royal Oak Township, 842 F.2d 862, 865 (6<sup>th</sup> Cir. 1988); McMurphy v. City of Flushing, 802 F.2d 191, 196 (6<sup>th</sup> Cir. 1986). Unless such statements are false and made with knowledge of or reckless indifference to their falsity, they are protected by the First Amendment. Williams v. Commonw. of Kentucky, 24 F.3d 1526, 1535 (6<sup>th</sup> Cir. 1994), cert. denied, 513 U.S. 947 (1994). In fact, public interest is near its zenith when ensuring that public organizations are being operated in accordance with the law. Marohnic v. Walker, 800 F.2d 613, 616 (6<sup>th</sup> Cir. 1986).

Here, Holt's statements concerned possible ongoing violent and illegal activity on the part of city employees--the very employees charged with enforcing the law and keeping the peace. The public has a great interest in knowing about such activity so that it can be stopped. Furthermore, Holt made his statements in response to a victim of alleged wrongdoing, to a limited audience, after an initial investigation that supported the truth of the allegations, and in an attempt to rectify the wrongful situation. Considering

these factors, the Court finds that the content, form, and context of Holt's speech make it "speech addressing a matter of public concern."

If a plaintiff establishes that any part of his speech addressed a matter of public concern, the state then bears the burden of justifying the discharge on legitimate grounds. Rankin at 388; Barnes at 733. To determine whether the state has met its burden, the court balances the interests of the employee as a citizen in commenting upon matters of public concern and the interest of the state as an employer in promoting the efficiency of its public services. Rankin at 384; Barnes at 733. Factors relevant to this balancing analysis include the manner, time, and place of the employee's expression, and the context in which the dispute arose. Rankin at 388; Barnes at 733. Also relevant is whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, impedes the performance of the speaker's duties, or interferes with the regular operation of the enterprise. Rankin at 388; Barnes at 733. The balancing analysis is part of the ultimate issue of law--whether the speech is protected. Barnes at 733.

Citizens have a substantial interest in commenting upon suspected unlawful activity within their police departments. Holt made his comments to two people, both of whom shared with Holt the responsibility of deterring such conduct. Holt's action in talking to the city manager and the district attorney about unlawful

activity within the police department was appropriate in manner, time, place, and context, and there is no evidence that this action interfered with the operation of the police department or had a detrimental impact on working relationships there. If anything, such speech would tend to improve police operations and increase loyalty and confidence among officers, so long as the city took action to stop any unlawful conduct such as both Holt and Shipley believed had occurred. Under these circumstances, Holt's interest in speaking outweighs the employer's interest in infringing on the speech, and Holt's speech is protected as a matter of law.

Once a court determines that the employee's speech is protected, the burden shifts back to the employee to show that the speech was a substantial or motivating factor in the adverse employment decision. Barnes at 733. The plaintiff may meet this burden by showing (1) temporal proximity of the adverse action to the protected activity, combined with (2) circumstantial evidence of motivation to infringe on protected speech. See Harrison v. Metro. Gov't of Nashville, 80 F.3d, 1107, 1118 (6<sup>th</sup> Cir. 1996), cert. denied, 117 S.Ct. 169 (1996); Moon v. Transport Drivers, Inc., 836 F.2d 226, 229 (6<sup>th</sup> Cir. 1987). This issue is a question of fact. Barnes at 733 n.9.

In this case, Holt was fired less than a month after first telling Shipley about the suspected unlawful activity, and about two weeks after talking to Shipley and Gibson about these matters. Therefore, the termination was close in time to the protected speech. Plaintiffs allege other circumstances surrounding the

firing also support a causal connection. For example, Defendants attribute the firing largely to poor police morale, but they admit the morale problem resulted from having too few officers and too little pay. As the city, rather than Holt, controlled these factors, Plaintiffs claim it is unlikely they caused Holt's termination. Defendants also cite Holt's absenteeism as a factor in his discharge, but Plaintiffs have produced proof that Holt's absences were the result of police-related obligations, National Guard duty, or earned vacation time. Holt also opined that he did a good job as police chief, and he has produced deposition testimony from a city council member who agrees that Holt was a good police chief. The record further reveals Shipley was aware that polygraph tests taken by Reno Martin and a fellow officer indicated Bandy, in fact, had assaulted Martin, and that Shipley stated in his deposition that he believed the assault had occurred. With these facts as background, Shipley fired Holt and restored Bandy to active city employment.

Considering the temporal proximity between Holt's protected speech and his discharge, as well as the circumstantial evidence discussed above, the Court finds Plaintiffs have adduced sufficient evidence to raise a genuine issue of material fact as to whether Holt was fired for exercising his First Amendment rights.

Nevertheless, Defendants would still be entitled to summary judgment if the undisputed facts showed they would have terminated Holt anyway, even if he had not engaged in the protected activity. Defendants, however, have not adduced sufficient evidence to make

this showing. There is no evidence Shipley was dissatisfied with Holt's performance before April 19, 1996. His dissatisfaction after April 19 is attributed to reasons which are relatively vague and are disputed by Plaintiffs. These contested facts raise genuine issues which must be decided by a jury, and summary judgment would be inappropriate at this stage of the proceeding.

Defendants also allege that Plaintiffs fail to state a claim under Monell v. Department of Social Services, 436 U.S. 658 (1978). Under Monell, a plaintiff suing a municipal government under § 1983 must prove that the constitutional wrong complained of resulted from the corporation's official policy, custom, ordinance, regulation, or decision. Id. at 690. As a municipal corporation cannot be held liable under § 1983 on a respondeat superior theory, id. at 691-94, proof that the corporation employed a tortfeasor will not, standing alone, establish liability. Monell thus requires Plaintiffs to show that an official policy of punishing "whistle-blowers" caused Holt's discharge, in violation of his First Amendment right to free speech.

A single unlawful discharge, if ordered by a person "whose edicts or acts may fairly be said to represent official policy," id. at 694, may support an action against the municipal corporation. Rookard v. Health and Hosps. Corp., 710 F.2d 41, 45 (2<sup>nd</sup> Cir. 1983). Where an official has final authority over significant matters involving the exercise of discretion, the choices he makes represent government policy. Rookard at 45; see Bowen v. Watkins, 669 F.2d 979, 989 (5th Cir. 1982). An official

has final authority if his decisions, at the time they are made, for practical or legal reasons constitute the municipality's final decisions. Rookard at 45; see Familias Unidas v. Briscoe, 619 F.2d 391, 404 (5th Cir. 1980). The evidence is undisputed that Shipley, as city manager, was vested by the city council with power to hire and fire at his own discretion. His actions, then, may be fairly attributed to the city. As such, 's § 1983 claim meets the requirements set forth in Monell.

Finally, with regard to the § 1983 claim, Defendant Shipley argues he is entitled to qualified immunity. City officials are entitled to qualified immunity in a § 1983 action where their conduct does not violate clearly established statutory or constitutional rights. Kelm v. Hyatt, 44 F.3d 415, 421 (6<sup>th</sup> Cir. 1995). Qualified immunity is not available, however, where a plaintiff (1) identifies a clearly established constitutional or statutory right alleged to have been violated and (2) establishes that a reasonable official in the defendant's position should have known that the conduct violated that right. Davis v. Brady, 143 F.3d 1021, 1024 (6<sup>th</sup> Cir. 1998); Pray v. City of Sandusky, 49 F.3d 1154, 1158 (6<sup>th</sup> Cir. 1995). The appropriateness of qualified immunity is a threshold legal question for the district court. Veney v. Hogan, 70 F.3d 917, 920 (6<sup>th</sup> Cir. 1995), reh'g and reh'g en banc denied Jan. 24, 1996.

Here, Plaintiffs have identified a clearly established constitutional right--the right to free expression guaranteed by the First Amendment. A reasonable city manager would know that

firing someone for discussing alleged unlawful conduct on the part of the city's police would violate that right. Accordingly, the Court finds Shipley is not entitled to qualified immunity on the § 1983 claim.

For the foregoing reasons, Defendants' motions are DENIED with regard to Holt's § 1983 retaliatory discharge claim.

#### **HOLT'S COMMON LAW RETALIATORY DISCHARGE CLAIM**

Under Tennessee law, "a cause of action for retaliatory discharge arises when an at-will employee is terminated solely for refusing to participate, continue to participate, or remain silent about illegal activities." Watson v. Cleveland Chair Co., 789 S.W.2d 538, 544 (Tenn. 1989). However, "sovereign immunity is a complete defense for a governmental entity to a retaliatory discharge claim." Williams v. Williamson County Bd. of Educ., 890 S.W.2d 788, 790 (Tenn.App. 1994), perm. to appeal denied Dec. 5, 1994; accord Ketron, 919 F.Supp. at 283; Montgomery v. City of Covington, 778 S.W.2d 444 (Tenn.App. 1988), perm. to appeal denied Feb. 27, 1989. As the City of Cookeville is a governmental entity, the city may not be held liable on a claim of retaliatory discharge.

Furthermore, Tennessee courts have held that a supervisor of a governmental entity may not be held liable for the retaliatory discharge of a subordinate. Williams at 790. As Shipley was Holt's supervisor rather than his employer, Shipley may not be held liable for the acts complained of. Absent any evidence that a

defendant-supervisor acted outside his authority as agent for the employer, the liability is that of the employer alone. See Ketron at 284. Plaintiffs have adduced no evidence that Shipley acted outside the scope of his authority as city manager.

In light of these rules of law, Defendants' motions as to the claim of common law retaliatory discharge are GRANTED, and that claim is accordingly DISMISSED.

#### **HOLT'S CLAIM UNDER TENNESSEE'S "WHISTLE-BLOWER" STATUTE**

The Tennessee Public Protection Act ("TPPA") provides that "[n]o employee shall be discharged or terminated solely for refusing to participate in, or for refusing to remain silent about, illegal activities." TENN. CODE ANN. § 50-1-304 (a). As with common law retaliatory discharge claims, sovereign immunity is a complete defense to TPPA claims against governmental entities. Coffey v. Chattanooga-Hamilton County Hosp. Auth., 932 F.Supp. 1023, 1025-26 (E.D.Tenn. 1996). Individual defendants may not be held liable under the TPPA. Id. at 1026. For the same reasons stated concerning Holt's retaliatory discharge claim, Defendants' motions with regard to Holt's claim brought pursuant to the Tennessee Public Protection Act are GRANTED, and that claim is accordingly DISMISSED.

#### **HOLT'S CLAIM UNDER THE TENNESSEE HUMAN RIGHTS ACT**

Tennessee enacted the Tennessee Human Rights Act ("THRA") to

provide the same protections to individuals in Tennessee as were embodied in the policies and rights established in the Civil Rights Acts of 1964, 1968, and 1972; the Pregnancy Amendment of 1978; and the Age Discrimination in Employment Act of 1967. TENN. CODE ANN. § 4-21-101(a)(1). Accordingly, the THRA prohibits employers from discharging any person because of such person's race, creed, color, religion, sex, age, or national origin. TENN. CODE ANN. § 4-21-401(1). Its provisions only apply to discrimination based on these factors. Smith v. Peninsula Hosp., Inc., 1996 WL 308307 at \*3 (Tenn.App. June 10, 1996) (Franks, J., dissenting). Plaintiffs fails to allege Defendants discriminated against Holt for any of these reasons. Accordingly, Defendants' motions with regard to the Holt's THRA claim are GRANTED, and that claim is DISMISSED.


#### **PLAINTIFF EDITH HOLT'S CLAIMS**

Plaintiff Edith Holt predicates her claim for loss of consortium on her husband's claims under § 1983 and Tennessee state law. As a general rule, it is not possible for one to base a tort claim on his or her spouse's § 1983 claim. A § 1983 action is a "species" of tort committed against an individual whose constitutional rights have been denied. Carey v. Piphus, 435 U.S. 247, 253 (1978). "[B]y virtue of the explicit language of [§ 1983], [it] is a personal action cognizable only by the party whose civil rights had been violated." Jaco v. Bloechle, 739 F.2d 239, 242 (6th Cir. 1984). It grants a cause of action to "the party injured," id. at 241, not to the party's spouse. As such, Edith

Holt has no right to damages for a § 1983 violation of her husband's constitutional rights. Since Plaintiff Richard Holt's remaining claims have been dismissed, his wife, Edith Holt, cannot maintain a separate loss of consortium cause of action against Defendants. Accordingly, Defendants' motion with regard to Edith Holt's claims is GRANTED, and Edith Holt's claims are DISMISSED.

### CONCLUSION

In sum, Defendants' Motions for Summary Judgment are GRANTED IN PART and DENIED IN PART. They are GRANTED with regard to Plaintiff Richard Holt's claims brought under the Tennessee Public Protection Act, TENN. CODE ANN. § 50-1-304 (1997); the Tennessee Human Rights Act, TENN. CODE ANN. § 4-21-101 (1997); and Tennessee common law. They are GRANTED with regard to Plaintiff Edith Holt's claim of loss of consortium and other damages. They are DENIED with regard to Plaintiff Richard Holt's § 1983 claim against the City of Cookeville and Jim Shipley.

  
ROBERT L. ECHOLS  
UNITED STATES DISTRICT JUDGE