

BEFORE THE MISSISSIPPI EMPLOYEE APPEALS BOARD

ALBERT BROWN

FILED

APPELLANT

VS.

JUL 28 2015

DOCKET NO. 15-015

**MISSISSIPPI BOARD OF HEALTH
(MISSISSIPPI STATE DEPARTMENT OF HEALTH)**

EMPLOYEE APPEALS BOARD

RESPONDENT

ORDER

There came on for hearing on June 5, 2015, Albert Brown's (hereafter "Mr. Brown" or "Brown") appeal to the Mississippi Employee Appeals Board.

Mr. Brown's appeal concerns a written warning dated March 16, 2015, that he received on March 17, 2015. The written warning alleged that Mr. Brown committed the Group Two offense of insubordination. Mr. Brown filed his Notice of Appeal with the Mississippi Employee Appeals Board on April 14, 2015.

Mr. Brown filed, on March 18, 2015, an inter-agency grievance. In his March 18, 2015, inter-agency grievance, Brown sought "to have his 'written warning' permanently removed from my personnel file. Also to have the discriminatory/retaliatory harassment acts to cease against me and that I be left alone to do my job."

The gist of Brown's March 18, 2015, inter-agency grievance is that he should not have been provided a written warning by bypassing his chain of command and contacting the MSDH Board members directly. Further, Mr. Brown contends that being required to follow the chain of command, as set forth in the Mississippi State Employee Handbook, as well as Mitchell Adcock, MSDH's Chief Administrative Officer's written directive to Mr. Brown on June 16, 2014, requiring Mr. Brown follow the chain of command was retaliation or discrimination for his previous lawsuits against the MSDH and the State of Mississippi. Brown contends that the First Amendment to the

United States Constitution allows him to bypass his chain of command and contact the Mississippi State Department of Health Board Members directly.

Having considered Mr. Brown's March 18, 2015, inter-agency grievance, this tribunal finds that Mr. Brown failed to meet the burden of proof that MSDH's March 16, 2015, written warning for Mr. Brown contacting the Mississippi State Department of Health Board Members directly, as opposed to following the chain of command, was a violation of his First Amendment rights, retaliation or for a discriminatory reason. The reasons for this decision follow.

To determine whether a public employee's speech is entitled to First Amendment protection, courts engage in a two-step inquiry. *See, Lane v. Franks*, 134 S. Ct. 2369, 2378 (2014). The first step requires determining whether the employee spoke as a citizen on a matter of public concern. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). If the employee has spoken as a citizen on a matter of public concern, then a First Amendment claim may arise. *Id.* The second step of the inquiry requires determining "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Id.*; *see also, Lane*, 134 S. Ct. at 2380.¹

For an employee's speech to be entitled to First Amendment protection, he must be speaking as a citizen, not an employee, on a matter of public concern. *See, Garcetti*, 547 U.S. at 418; *see also, Hurst v. Lee County, Miss.*, 764 F.3d 480, 484 (5th Cir. 2014). Whether a statement is made as an employee or as a citizen is a question of law. *Davis v. McKinney*, 518 F.3d 304, 315 (5th Cir. 2008). Furthermore, whether a statement addresses a matter of public concern is a question of law that is

¹To succeed on a First Amendment retaliation claim, a plaintiff must also demonstrate that the employer took an adverse employment action and that the employee's speech motivated the employer's conduct. *See, Juarez v. Aguilar*, 666 F.3d 325, 332 (5th Cir. 2011).

resolved by the court. *Salge v. Edna Independent School District*, 411 F.3d 178, 184 (5th Cir. 2005).

When a public employee speaks pursuant to their official duties, they do not speak as a citizen and their statements are not entitled to constitutional protection. *Garcetti*, 547 U.S. 421. The Fifth Circuit Court of Appeals has acknowledged, “*Garcetti* did not explicate what it means to speak ‘pursuant to’ one’s ‘official duties.’” *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 692 (5th Cir. 2007) (per curiam) (citation omitted).

Recently, the Supreme Court has provided direction to aid courts in determining whether speech is made as a citizen rather than as a public employee. *See, Lane*, 134 S.Ct. at 2379. The Supreme Court in *Lane* held “the critical question under *Garcetti* is whether the speech at issue is itself ordinary within the scope of an employee’s duties, not whether it merely concerned those duties.” *Id.*

In this case, Mr. Brown’s employment duties with MSDH was that of a Systems Manager I. In the position of Systems Manager I, the speech at issue (contacting the Board members) was not in itself, so far as the record establishes, within the scope of Mr. Brown’s duties. Thus, Mr. Brown’s statement was made as a private citizen and not a MSDH employee.

The next question is whether Mr. Brown’s speech as a citizen addressed a matter of public concern. Speech involves a matter of public concern if it can be “fairly considered as relating to any matter of political, social or other concern to the community.” *Connick v. Myers*, 461 U.S. 138, 146 (1983). Further, to determine whether speech addresses a matter of public concern, there must be an evaluation of the “content, form and context of a given statement, as revealed by the whole record.” *Connick*, 461 U.S. at 147-48.

Mr. Brown’s June 12, 2014, email message to the Mississippi Board of Health Members Dr.

Lampton and Dr. Anthony stated:

Dr. Lampton/Dr. Anthony,

I really hate to trouble you two again but I needed to let you know that Mitch Adcock did indeed bring in Kevin Gray, on June 1, 2014 and introduced him (Kevin Gray) as the Health Informatics Director. However, it is my understanding that Kevin Gray is being contracted by MSDH through ITS (another state agency). Meaning that MSDH has entered into a contract to pay ITS for Mr. Kevin Gray and Mr. Gary Leblanc to provide a service to the MSDH agency.

The problem with this setup, in my opinion, is that it is against state policy for someone from another agency to have Signature Authority and/or Decision Making Authority at a State Agency which he/she is not directly employed over agency employees. Several employees have brought official agency documents/forms to me that have Kevin Gray's signature (as the approving authority) on them.

It is my sincerest belief that you (The Board of Health) have worked diligently to ensure that, under your watch, this agency's business is conducted professionally and properly and when you discover that there may be someone who is not adhering to this ideology you taken the necessary steps to correct it. Because of this I truly Thank you.

Albert Brown, Jr., M.Sc. Computer Science, MCSE
email address: albrow6@bellsouth.net

Mr. Brown's November 5, 2014, email message to the Mississippi Board of Health Members

Dr. Anthony and Dr. Lampton stated:

Dr. Anthony/Dr. Lampton,

Based on the fact the things appear to be business as usually at this agency, Personnel Director (Ron Davis) continues to defend whatever higher management does or tells him to do (Org. Chart changes made daily, people given position because of color and/or friendship even though they are not qualified for the position, discriminating and retaliating, etc) I feel that my only recourse now to hopefully affect some kind of change in this agency is to go to the media.

This is a last resort for me because I hoped that the Board of Health

would began to take steps to show that changes were on the way. However, since it is apparent that no one in the current administration has any intentions of changing even though what they are doing is clearly against the policies and procedures of not only the agency but also the State Personnel Board as well as state and federal laws.

When I saw that Marc Wilson and Mike Lucius were removed from their positions at the agency I believed in my heart of hearts that the Board was acting to fix the problems within the agency. But Mitch Adcock has come in and done so many more acts that are against policy than Mike ever did. I am therefore beginning to be skeptical of any substantive changes coming to this agency without outside influence.

I had hoped that after the United State Supreme Court refuse to even hear the agency's argument (posted October 6, 2014) trying to reverse the judge/jury findings of \$440,000.00 awarded to me, that someone with authority would now say enough is enough. However, if that has happened then the Dr Currier's administration is doing a great job covering it up, since everyone is doing everything they always did.

Albert Brown, Jr.

Considering the content, form and context in which the emails were made, this tribunal finds that the emails, as a whole, addressed a matter of public concern, to-wit - whether MSDH had engaged in discrimination against Brown, whether MSDH had improperly hired Kevin Gray and provided signature authority to an employee who should not - under state policy - hold signature authority for MSDH.² Clearly, discrimination and whether a state employee exceeds his authority are matters of public concern.

²Parts of Brown's email dated November 5, 2014, do not relate to a matter of public concern. Specifically, the last paragraph of Brown's November 5, 2014, email are comments by Brown concerning his prevailing against MSDH in his lawsuit. That paragraph does not address a matter of public concern in this tribunal's view. However, taken as a whole the remaining portion of Brown's November 5, 2014, email address matters of public concern.

Having found that Mr. Brown spoke as a private citizen on a matter of public concern, the remaining question is whether the MSDH “had an adequate justification for treating [Brown] differently from any other member of the general public.” *Garcetti*, 547 U.S. at 418. This tribunal answers that question in the affirmative. Specifically, this tribunal finds as a fact that the MSDH had an adequate justification for treating Mr. Brown differently from any other member of the general public in MSDH requiring that Brown follow the chain of command and to not directly contact MSDH board members Lampton and Anthony. In addition, this tribunal finds as a fact that Mr. Brown failed to demonstrate that his interest of speaking as a citizen on a public concern outweighed the MSDH’s interest. In reaching this conclusion, this tribunal recognizes its responsibility to “strike a balance between ‘the interests of Brown, as a citizen, in commenting upon matters of public concern’ and the interest of the Mississippi State Department of Health, as an employer.”

In performing this balancing test, this tribunal considers whether Mr. Brown’s statements to the Mississippi Board of Health Members impairs discipline by Mr. Brown’s superiors. *Graziosi v. City of Greenville, Mississippi*, 775 F.3d 731 (5th Cir. 2015); *Rankin v. McPherson*, 483 U.S. 378, 388 (1987). Clearly it does. To accept Mr. Brown’s argument that an employee of the MSDH - or any other state agency employee - can ignore the rules established by the Mississippi State Personnel Board, the *Mississippi State Personnel Board Policy and Procedures Manual*, and their supervisor’s directives in disregard of established personnel rules would eviscerate the chain of command and personnel rules established by MSDH and other State agencies. Doing so would adversely affect the administration of MSDH business, MSDH’s responsibilities to the citizens of the State of Mississippi and would undermine MSDH superiors disciplinary authority of their subordinates.

Further, Mr. Brown had an adequate remedy for any perceived improper conduct of his

superiors for alleged discrimination claim, or to address his concerns about Mr. Gray. *Mississippi State Personnel Board Policy and Procedures* 10.5.4³ provides as follows:

Special Procedure for Claims of Harassment or Discrimination

If the employee's grievance is a complaint of unlawful discrimination or harassment and the source of the alleged discrimination or harassment is in the employee's chain of command, the employee may skip the source of the alleged discrimination or harassment's level of management by proceeding to the next step in the process and filing the grievance directly with the discriminating or harassing supervisor's supervisor. If the alleged source of the discrimination or harassment is the employee's agency head, then the employee may contact the MSPB Executive Director for assistance and may be advised to file an appeal directly with the Employee Appeals Board without exhausting agency level remedies.

Likewise, Mr. Brown's claim of retaliation is without merit. To succeed on a First Amendment retaliation claim, a Plaintiff must demonstrate that the employer took an adverse employment action and that the employee's speech motivated the employer's conduct. *See, Juarez v. Aguilar*, 666 F.3d 325, 332 (5th Cir. 2011).

While Brown has demonstrated that the MSDH took an adverse employment action in issuing a written warning for the Group II offense of insubordination, Brown failed to meet his burden of proof that his speech motivated the MSDH to issue the written warning. This tribunal, after hearing testimony from Brown's superior and Brown concerning the March 16, 2015, written warning, finds that the MSDH did not issue the written warning of insubordination in retaliation for Mr. Brown exercising his First Amendment rights, or for any other improper or illegal reason, but for Mr. Brown's failure to abide by his supervisor's directive as set forth in Mitch Adcock's June 16, 2014,

³ At his appeal hearing, Brown admitted he was not aware of *Mississippi State Personnel Board Policy and Procedures* 10.5.4.

email to Mr. Brown directing Brown to address his grievance(s) through the proper chain of command.

Mr. Brown also alleges in his inter-agency grievance that in addition to MSDH's alleged retaliation and violation of his First Amendment rights, that he was the recipient of discrimination. As this tribunal understands Mr. Brown's alleged discrimination claim, it centers around his work hours being changed, and comments by MSDH's outside attorney in Brown's discrimination suit to Brown's attorney in the discrimination lawsuit.⁴ Having considered Mr. Brown's discrimination claim, this tribunal finds that he failed to carry his burden of proof that the MSDH's changing of his work hours was because of his race or retaliation as opposed to a non-discriminatory reason. Mr. Brown failed to prove an element of a racial discrimination claim, i.e., that a person of a non-protected class was treated differently from Brown under nearly identical circumstances. Specifically, Brown failed to put forth sufficient evidence that the MSDH treated a non-African American, who worked as a Systems Manager I (or otherwise), different than Brown under nearly identical circumstances. Because Mr. Brown failed to meet his burden of proof that a person of the Caucasian race was treated differently than Mr. Brown, under nearly identical circumstances as

⁴This tribunal finds that Brown's March 15, 2015, email to Dr. Anthony and Dr. Lampton was not a matter of public concern. This tribunal finds that Brown's March 15, 2015, email to Dr. Anthony and Dr. Lampton focused on personal matters of Brown and cannot fairly be considered to relating "to any matter of political, social or other concern to the community." *Connick* at 146. Even if Brown's March 15, 2015, email to Dr. Anthony and Dr. Lampton was made by Brown as a private citizen and it addressed a matter of public concern, MSDH's need for Brown to work 9:00 a.m. to 5:00 p.m. outweighed Brown's desire to work other hours, even though he has previously worked from 6:30 a.m. to 3:30 p.m. and 5:00 a.m. to 2:00 p.m. Brown, as a Systems Manager I, was in charge of the IT Help Desk and his assistance was needed during normal working hours of 8:30 a.m. to 5:00 p.m.

Brown, Brown's discrimination claim fails as a matter of law. *Lee v. Kansas City S. Ry Co.*, 574 F.3d 253, 259 (5th Cir. 2009).

In summary, this tribunal has reviewed all exhibits entered into evidence, it has considered the testimony of all witnesses and has gauged the credibility and demeanor of all witnesses. Having done so, this tribunal finds in favor of the MSDH on all of Mr. Brown's claims as set forth in his March 18, 2015, inter-agency grievance. Mr. Brown's appeal to the Mississippi Employee Appeals Board of his March 18, 2015, inter-agency grievance is dismissed, with prejudice.

SO ORDERED, THIS THE 27th DAY OF JULY 2015.

MISSISSIPPI EMPLOYEE APPEALS BOARD

By:



MICHAEL N. WATTS
Presiding Hearing Officer