

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

DiCesare v. Town of Stonington

No. 19-148, United States Court of Appeals for the Second Circuit (August 14, 2020)

SUMMARY

****Key Legal Topics:**** First Amendment retaliation (public employee speech, matter of public concern), Fourteenth Amendment due process (pre-termination notice), FMLA retaliation, stigma-plus claim. ****Holdings:**** The Second Circuit affirmed summary judgment for the Town, holding that the plaintiff's emails were made pursuant to his official duties and thus not protected speech under **Garcetti**; that pre-termination notice was constitutionally adequate under **Loudermill** given prior discussions and post-termination arbitration; and that the FMLA retaliation claim failed due to insufficient temporal proximity and lack of pretext evidence. The stigma-plus claim was also defeated by adequate process.

CASE DETAILS

COURT	United States Court of Appeals for the Second Circuit
WRITING FOR THE COURT	Barrington D. Parker; Susan L. Carney; Lewis A. Kaplan
JURISDICTION	Federal
DECIDED	August 14, 2020
DOCKET	19-148
DISPOSITION	affirmed
PROCEDURAL POSTURE	Appeal from a judgment of the United States District Court for the District of Connecticut (Bolden, J.) granting summary judgment to defendants, dismissing the complaint, and declining supplemental jurisdiction over state law claims.
STANDARD OF REVIEW	de novo
PRECEDENTIAL VALUE	Unpublished
PARTIES	Louis DiCesare, II v. Town of Stonington and Barbara McKrell

TOPICS

employment law

retaliation

first amendment

due process

summary judgment

PRACTICE AREAS

QUESTIONS PRESENTED

1. Whether the District Court erred in dismissing the First Amendment retaliation claim because the emails were not protected speech.
2. Whether the District Court erred in dismissing the due process claim because the pre-termination process was constitutionally adequate.
3. Whether the District Court erred in dismissing the FMLA retaliation claim for lack of evidence of retaliatory intent and pretext.

HOLDINGS

1. The emails were made pursuant to DiCesare's official duties as a highway supervisor, not as a private citizen, and therefore are not protected by the First Amendment. Additionally, DiCesare failed to raise a genuine issue of fact as to whether the emails were a substantial motivating factor in the termination.
2. The pre-termination process provided to DiCesare was constitutionally adequate under *Loudermill* because he had notice of the charges and an opportunity to respond, and the post-termination arbitration through the CBA provided additional process.
3. DiCesare failed to make a *prima facie* showing of retaliatory intent because temporal proximity alone was insufficient where adverse actions began before he took FMLA leave, and he failed to produce evidence that the Town's legitimate reasons were pretextual.

KEY QUOTATIONS

“Retaliation against the airing of generally personal grievances is not brought within the protection of the First Amendment by the mere fact that one or two of a public employee’s comments could be construed broadly to implicate matters of public concern.” (3)

“When . . . a public employee is terminated, procedural due process is satisfied if the government provides notice and a limited opportunity to be heard prior to termination, so long as a full adversarial hearing is provided afterwards.” (5)

“Where timing is the only basis for a claim of retaliation, and gradual adverse job actions began well before the plaintiff had ever engaged in any protected activity, an inference of retaliation does not arise.” (6)

“produce not simply some evidence, but sufficient evidence to support a rational finding that the legitimate, non-discriminatory reasons proffered by the [defendant] were false, and that more likely than not [discrimination] was the real reason for the [employment action].” (7)

FACTUAL BACKGROUND

Louis DiCesare, II was a tenured public employee serving as a highway supervisor for the Town of Stonington. He was terminated after sending two emails in December 2014 and April 2015 that addressed work-related grievances and questions about town policies. He had taken FMLA leave from January 28 to March 23, 2015. The Town had performance concerns regarding a paving project, timesheet review, and daily reports. DiCesare

was suspended in late January 2015 and terminated on April 30, 2015 after a pre-termination hearing at which he declined to answer questions. The termination memorandum cited mismanagement of the Elm Ridge Road paving project, failure to review timesheets, and failure to produce planning and inspection reports. Post-termination, DiCesare pursued arbitration under the collective bargaining agreement.

PROCEDURAL HISTORY

Plaintiff-appellant Louis DiCesare, II sued the Town of Stonington and his supervisor Barbara McKrell alleging unlawful termination in violation of First Amendment free speech, Fourteenth Amendment due process, FMLA, and state statutes. The District Court granted summary judgment to defendants, dismissed the complaint, and declined supplemental jurisdiction over state claims. DiCesare appealed.

DISPOSITION

affirmed

CASES CITED

- *Garcetti v. Ceballos*, 547 U.S. 410 (2006)
- *Ruotolo v. City of New York*, 514 F.3d 184 (2d Cir. 2008)
- *Garcia v. Hartford Police Dep’t*, 706 F.3d 120 (2d Cir. 2013)
- *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985)
- *Gilbert v. Homar*, 520 U.S. 924 (1997)
- *Locurto v. Safir*, 264 F.3d 154 (2d Cir. 2001)
- *Harhay v. Town of Ellington Bd. of Educ.*, 323 F.3d 206 (2d Cir. 2003)
- *Segal v. City of New York*, 459 F.3d 207 (2d Cir. 2006)
- *Potenza v. City of New York*, 365 F.3d 165 (2d Cir. 2004)
- *Slattery v. Swiss Reinsurance Am. Corp.*, 248 F.3d 87 (2d Cir. 2001)
- *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708 (2d Cir. 1996)
- *DiCesare v. Town of Stonington*, No. 3:15-CV-01703 (VAB), 2018 WL 6592088 (D. Conn. Dec. 13, 2018)

OPINION

PER CURIAM.

19-148 *DiCesare v. Town of Stonington* UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT SUMMARY ORDER RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT’S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION SUMMARY ORDER).

A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL. 1 At a stated term of the United States Court of Appeals for the Second Circuit, 2 held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of 3 New York, on the 14th day of August, two thousand twenty. 4 5 PRESENT: 6 BARRINGTON D. PARKER, 7 SUSAN L. CARNEY, 8 Circuit Judges, 9 LEWIS A. KAPLAN, 10 District Judge.* 11 _____ 12 13 Louis DiCesare, II, 14 15 Plaintiff-Appellant, 16 17 v. 19-148 18 19 Town of Stonington and Barbara McKrell, 20 In their individual and official capacities, 21 22 Defendants-Appellees.

23 24 _____ 25 26 27 FOR PLAINTIFF-APPELLANT: Kristi D. Kelly and Bryan P. Fiengo, 28 Suisman, Shapiro, Wool, Brennan, Gray & 29 Greenberg, P.C., New London, CT. * Judge Lewis A. Kaplan, of the United States District Court for the Southern District of New York, sitting by designation. 1 2 FOR DEFENDANTS-APPELLEES: John G. Dolan and Gary C. Kaisen, Milano 3 & Wanat, LLC, Branford, CT.

4 5 Appeal from a judgment of the United States District Court for the District of Connecticut 6 (Bolden, J.). 7 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND 8 DECREED that the judgment of the district court is AFFIRMED 9 Plaintiff-Appellant, Louis DiCesare, II, a former employee of the Town of Stonington 10 (the “Town”), sued the Town and his former supervisor Barbara McKrell alleging that they 11 unlawfully terminated his employment in violation of his First Amendment right to free speech 12 and his Fourteenth Amendment right to due process.

See 42 U.S.C. § 1983. He also brought 13 claims under the Family and Medical Leave Act (“FMLA”) and several state statutes. The 14 District Court granted summary judgement to the Town, dismissed the operative complaint and 15 declined to exercise supplemental jurisdiction over the state-law claims. DiCesare v. Town of 16 Stonington, No. 3:15-CV-01703 (VAB), 2018 WL 6592088, at *12 (D.

Conn. Dec. 13, 2018). 17 We assume the parties’ familiarity with the facts, procedural history and issues on appeal. 18 DISCUSSION 19 I. 20 DiCesare contends that the District Court erred in dismissing his First Amendment claim 21 because contested issues of fact exist as to whether the Appellees retaliated against him for 22 sending two emails—emails that DiCesare contends concerned matters of public concern.

We 23 disagree. As noted by the District Court, DiCesare’s statements in his December 2014 and April 24 2015 emails were made primarily to address issues relating to his official duties and work-related 2 1 grievances.

For example, the December 2014 email, entitled “Winter operations,” concerned 2 DiCesare’s grievances with McKrell, his new supervisor, and her changes in winter operating 3 procedures.

App'x at 166. In that email, DiCesare expressed disagreement with certain of her 4 instructions to him and with policy and staffing changes she had made.

We agree with the 5 District Court that these statements concerned McKrell's official duties as a Town employee and 6 were intended to address work-related grievances. 7 Similarly, DiCesare's statements in his April 2015 email were, for First Amendment 8 purposes, made as an employee not as a private citizen. That email addressed calls from town 9 residents on two issues on which DiCesare sought guidance.

The first call related to an 10 employee's alleged use of personal equipment for a Highway project and the second call 11 concerned a resident seeing a Town truck in a nearby area. As to the second call, DiCesare 12 explained that it "[wa]s [his] belief that raw materials were being disposed of at T. Kenna's 13 property," which "[wa]s another practice that had occurred in the past and was discouraged." 14 App'x at 288.

DiCesare concluded by asking "if there has been a change in the Town's position 15 regarding th[ese] issues" so that he could "accurately answer questions" from the public. Id. 16 These statements were made pursuant to DiCesare's responsibilities as a highway supervisor, not 17 as a private citizen. See *Garcetti v. Ceballos*, 547 U.S. 410, 421-22 (2006). 18 DiCesare contends that some of his statements in the two emails could be construed as 19 addressing matters of public concern.

Appellant's Br. at 29-31. However, "[r]etaliatio[n] against 20 the airing of generally personal grievances is not brought within the protection of the First 21 Amendment by the mere fact that one or two of a public employee's comments could be 22 construed broadly to implicate matters of public concern." *Ruotolo v. City of New York*, 514 F.3d 3 1 184, 190 (2d Cir.

2008) (internal quotation marks and brackets omitted). In any event, DiCesare 2 has not offered evidence raising a genuine issue of fact as to whether the statements in the two 3 emails were "at least a substantial or motivating factor in the [adverse employment action]." 4 *Garcia v. Hartford Police Dep't*, 706 F.3d 120, 130 (2d Cir. 2013). 5 II. 6 DiCesare further contends that the District Court erred in dismissing his due process 7 claim.

Again, we see no error. It is not disputed that, as a tenured public employee who could not 8 be fired except for "cause," DiCesare enjoyed a protected property interest in his continued 9 employment. *Gilbert v. Homar*, 520 U.S. 924, 928-29 (1997) ("[P]ublic employees who can be 10 discharged only for cause have a constitutionally protected property interest in their tenure[.]").

11 Defendants-Appellees do not dispute the property right asserted or the deprivation that resulted 12 from his termination. Where the parties differ is whether the Town afforded him adequate pre- 13 termination process in connection with his termination. 14 Before termination, "[a]s a tenured public employee[,] he was entitled to oral or written 15 notice of the charges against him, an

explanation of the employer's evidence, and an opportunity 16 to present his side of the story.”
Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985).

17 Although DiCesare did not receive a written memorandum detailing the rationale for his April
18 30, 2015 termination until shortly after he was terminated, that memorandum—when reviewed,
19 as it must be, in the context of the parties' dealings over the months before his discharge— 20
reveals that the Town had identified the substance of the issues listed in the memorandum and 21
the evidence supporting the related concerns to DiCesare well before it took action.

Accordingly, 22 DiCesare had knowledge of and an adequate opportunity to respond to the
allegations during the 4 1 meeting since the issues were well known to him: we see no basis in the
record for concluding 2 otherwise. 3 In particular, the termination memorandum focused on
DiCesare's alleged 4 mismanagement of a paving project on Elm Ridge Road, his failure to review
employee 5 timesheets, and his failure to produce “daily planning and end of the day inspection
reports.” 6 App'x at 86-87.

The record reflects that, in March, about one month earlier, McKrell asked 7 DiCesare to prepare a
written explanation for alleged deficiencies in his work on Elm Ridge 8 Road—deficiencies that
had been detailed in a report prepared by the Town Engineer. Similarly, 9 DiCesare's numerous
documented interactions with McKrell leave no doubt that McKrell had 10 repeatedly expressed
her concerns about DiCesare's failure sufficiently to review employee 11 timesheets and timely to
produce planning and inspection reports; thus, these concerns were also 12 well known to
DiCesare by April 30.

Thus, on April 30, when DiCesare received notice of a 13 hearing to discuss what the Town saw as
his “deficiencies,” exactly what conduct the Town 14 considered objectionable by then was well
known to him. App'x at 290. Then, at that hearing, 15 McKrell asked DiCesare further questions
about the alleged mismanagement of the Elm Ridge 16 Road project and gave him an opportunity
to respond.

DiCesare declined to answer. He was also 17 asked about his failures to comply with requirements
bearing on timesheets and the planning and 18 inspection reports. Again, he declined to answer.
Indeed, he did not answer seven of the eight 19 questions put to him, although the relevant facts
were within his personal knowledge.

In this 20 context, we comfortably conclude that the pre-termination notice that he received was
21 constitutionally adequate under Loudermill. 22 We also note the substantial post-termination
proceedings afforded to DiCesare through a 5 1 collective bargaining agreement (“CBA”)
grievance and arbitration process.

We have been clear 2 that “[w]hen... a public employee is terminated, procedural due process is
satisfied if the 3 government provides notice and a limited opportunity to be heard prior to

termination, so long as 4 a full adversarial hearing is provided afterwards.” *Locurto v. Safir*, 264 F.3d 154, 171 (2d Cir. 5 2001).

As noted by the District Court, DiCesare took advantage of the CBA’s arbitration process 6 by filing multiple grievances contesting his discipline and participating in lengthy arbitration 7 proceedings held on his behalf. See *Harhay v. Town of Ellington Bd. of Educ.*, 323 F.3d 206, 213 8 (2d Cir. 2003) (“Courts have held that such post-deprivation [CBA arbitration] procedures, 9 providing for a hearing to contest a challenged employment decision, are sufficient to satisfy due 10 process.”).

1 11 III. 12 DiCesare also argues that the District Court erred in dismissing his FMLA retaliation 13 claim. To make out a prima facie FMLA claim, DiCesare “must establish that: 1) he exercised 14 rights protected under the FMLA; 2) he was qualified for his position; 3) he suffered an adverse 15 employment action; and 4) the adverse employment action occurred under circumstances 16 giving rise to an inference of retaliatory intent.” *Potenza v. City of New York*, 365 F.3d 165, 168 (2d Cir.

17 2004). 18 The District Court correctly concluded that DiCesare did not make a sufficient showing 19 on the fourth element of his FMLA claim. DiCesare, 2018 WL 6592088, at *10. DiCesare’s 1 DiCesare also contends that the district court erred in dismissing his stigma-plus claim.

However, this same pre- and post-deprivation process also defeats his stigma-plus claim. See *Segal v. City of New York*, 459 F.3d 207, 213 (2d Cir. 2006) (“the availability of adequate process defeats a stigma-plus claim”). 6 1 argument for retaliation is essentially temporal. He alleges that because he took leave under the 2 FMLA from January 28, 2015 through March 23, 2015, the Town unlawfully retaliated against 3 him by terminating his position in April 2015.

However, this temporal proximity is insufficient 4 to support an inference of retaliation. We have stated that “w]here timing is the only basis for a 5 claim of retaliation, and gradual adverse job actions began well before the plaintiff had ever 6 engaged in any protected activity, an inference of retaliation does not arise.” *Slattery v. Swiss 7 Reinsurance Am.*

Corp., 248 F.3d 87, 95 (2d Cir. 2001). Here, the Town suspended DiCesare in 8 late January 2015 based on several work-related issues arising in 2014 well before he took 9 FMLA leave. 10 DiCesare also argues other evidence in the record supports an inference of retaliatory 11 intent.

For example, DiCesare contends that while on FMLA leave, two of his co-workers were 12 asked to prepare affidavits regarding his performance as a supervisor on certain projects. See, 13 e.g., Appellant’s Br. at 17. However, even assuming that this assertion is some evidence 14 supporting an inference of retaliatory intent, DiCesare failed to produce evidence from which a 15 reasonable

fact-finder could find that the non-discriminatory reasons given by the Town— 16 DiCesare’s subpar performance and his insubordination—were pretextual.

To make a sufficient 17 showing of pretext to survive summary judgment, DiCesare must “produce not simply some 18 evidence, but sufficient evidence to support a rational finding that the legitimate, non- 19 discriminatory reasons proffered by the [defendant] were false, and that more likely than not 20 [discrimination] was the real reason for the [employment action].” Van Zant v. KLM Royal 21 Dutch Airlines, 80 F.3d 708, 714 (2d Cir.

1996) (internal quotation marks omitted). The District 22 Court correctly concluded that he did not do so. 7 1 We have considered DiCesare’s remaining arguments and we find them to be without 2 merit. 3 CONCLUSION 4 For the foregoing reasons, we AFFIRM the judgment of the District Court. 5 6 FOR THE COURT: 7 Catherine O’Hagan Wolfe, Clerk 8