JEFFREY SPANIERMAN, Plaintiff, v. ABIGAIL L. HUGHES, ANNE DRUZOLOWSKI, and LISA HYLWA, Defendants.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

2008 U.S. Dist. LEXIS 69569

September 16, 2008, Decided

OPINION BY: DOMINIC J. SQUATRITO

MEMORANDUM OF DECISION AND ORDER

The plaintiff, Jeffrey Spanierman ("the Plaintiff") brings this action against the defendants, Abigail L. Hughes ("Hughes"), Anne Druzolowski ("Druzolowski"), and Lisa Hylwa ("Hylwa") (collectively, "the Defendants"), pursuant to 42 U.S.C. § 1983, alleging violations of his rights under the First and Fourteenth Amendments to the United States Constitution. Now pending before the court is the Defendants' motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons that hereafter follow, the Defendants' motion for summary judgment is **GRANTED.**

I. FACTS

On January 2, 2003, the State of Connecticut, Department of Education ("DOE") hired the Plaintiff to be an English teacher at Emmett O'Brien High School ("Emmett O'Brien") in Ansonia, Connecticut. At all times relevant to this case: (1) Hughes was employed by the DOE as the Superintendent of the Connecticut Technical High School system, of which Emmett O'Brien is a part; (2) Druzolowski was employed by the DOE as the Assistant Superintendent of the Connecticut Technical High School system; and (3) Hylwa was employed by the DOE as the principal of Emmett O'Brien. The Plaintiff was part of a union that had a collective bargaining agreement ("the Agreement") with the DOE. Under the Agreement, a teacher reaches tenure after completing four years of full-time service.

This case involves the Plaintiff's use of MySpace.com ("MySpace"), a website that allows its users to create an online community where they can meet people. MySpace can be used to share photographs, journals, and "interests" with mutual friends. People with MySpace accounts can create a "profile," to which they can link their friends, and the owner of the profile can either invite people to become friends, or other MySpace users can ask the owner of the profile to become friends with the owner of the profile. If the owner of a profile accepts another MySpace user as a friend, the friend's profile picture is posted on the profile owner's MySpace page, along with a link to the friend's MySpace profile. The owner of a profile can kick friends off his profile, deleting that friend's profile picture from the owner's profile page. In addition, a profile owner can completely block other MySpace users from viewing his profile page. The owner of a profile can post blogs on his own profile page, allow other MySpace users to post comments on his profile page, or post comments on other users' profile pages.

The Plaintiff originally began to use MySpace because students asked him to look at their MySpace pages. The Plaintiff subsequently opened his own MySpace account, creating several

different profiles. One of his profiles was called "Mr. Spiderman," which he maintained on MySpace from the summer of 2005 to the fall of 2005. The Plaintiff has testified that he used his MySpace account to communicate with students about homework, to learn more about the students so he could relate to them better, and to conduct casual, non-school related discussions.

Elizabeth Michaud ("Michaud") was a guidance counselor at Emmett O'Brien. In the fall of 2005, Michaud spoke with Francesca Ford ("Ford"), a teacher at Emmett O'Brien, who informed Michaud that the Plaintiff had a profile on MySpace. Michaud alleges that she also received student complaints about the Plaintiff's profile page. After her conversation with Ford, Michaud viewed the Plaintiff's "Mr. Spiderman" profile page, reviewing it for about a half hour. Michaud has testified that she was disturbed by what she saw on the Plaintiff's profile page. According to Michaud, the Plaintiff's profile page included a picture of the Plaintiff when he was ten years younger, under which were pictures of Emmett O'Brien students. In addition, Michaud stated that, near the pictures of the students were pictures of naked men with what she considered "inappropriate comments" underneath them. Michaud further testified that she was disturbed by the conversations the Plaintiff was conducting on his profile page. Michaud stated that the Plaintiff's conversations with Emmett O'Brien students were "very peer-to-peer like," with students talking to him about what they did over the weekend at a party, or about their personal problems. Michaud felt that the Plaintiff's profile page would be disruptive to students.

After viewing the Plaintiff's "Mr. Spiderman" profile page, Michaud spoke with the Plaintiff about his email communications with students about things that were not related to school, and suggested that he use the school email system for the purpose of educational topics and homework. Michaud also told the Plaintiff that some of the pictures on his profile page were inappropriate. After Michaud spoke with the Plaintiff, he deactivated the "Mr. Spiderman" profile page. The Plaintiff then created a new MySpace profile on October 14, 2005 called "Apollo68."

Ford subsequently discovered the Plaintiff's new profile page and informed Michaud of it. The Defendants also allege that Emmett O'Brien students complained to Ford about the Apollo68 profile. Michaud and Ford separately viewed the "Apollo68" profile and came to the conclusion that it was nearly identical to the "Mr. Spiderman" profile. The Plaintiff admits that the "Mr. Spiderman" profile and the "Apollo68" profile had the same people as friends and included the same types of communications.

Michaud reported the existence of the "Apollo68" profile page to her supervisor, Debbie Anderson, the Director of Guidance. Michaud was then told to report the situation to Hylwa and to make sure that the Plaintiff had union representation. In November 2005, Hylwa met with the Plaintiff, explained that there would be an investigation, and placed the Plaintiff on administrative leave with pay. The Plaintiff deactivated the "Apollo68" profile when he was placed on administrative leave.

Rita Ferraiolo ("Ferraiolo"), an Education Labor Relations Specialist with the DOE, was assigned to investigate the Plaintiff's MySpace profiles. During the investigation, Ferraiolo obtained a list of the friends associated with the "Apollo68" profile. She was able to match several of the friends' profiles with Emmett O'Brien students. Ferraiolo also obtained comments posted on the "Apollo68" profile page, comments made by the Plaintiff on other individuals' MySpace profile pages, and blog entries posed by the Plaintiff on his own profile page.

On January 13, 2006, Ferraiolo met with the Plaintiff, the Plaintiff's union representative, and Hylwa to discuss his MySpace activities. At this meeting, the Plaintiff had the opportunity to explain his MySpace profiles. On March 30, 2006, Hylwa sent a letter to the Plaintiff explaining

that he had exercised poor judgment as a teacher. That same day, Druzolowski sent a letter to the Plaintiff informing him that the DOE would not renew his contract for the 2006-2007 school year. The Plaintiff then requested a hearing. Thus, on April 26, 2006, the Plaintiff and his attorney met with Hughes and Ferraiolo. The Plaintiff and his attorney were allowed to present evidence at this hearing. Despite the Plaintiff's efforts, Hughes ultimately agreed with Druzolowski's decision not to renew the Plaintiff's contract. The Plaintiff received his pay and benefits until the end of the summer of 2006, when his contract with the DOE for the 2005-2006 school year expired.

II. DISCUSSION

The Plaintiff has brought this action against the Defendants in their individual and official capacities pursuant to 42 U.S.C. § 1983, alleging that they violated his First Amendment right to freedom of speech.

FIRST AMENDMENT RETALIATION

The Plaintiff asserts that the Defendants violated his First Amendment rights. Specifically, the Plaintiff claims that the Defendants retaliated against him because he exercised his freedom of speech and freedom of association rights. The Defendants argue that both types of First Amendment claims fail as a matter of law.

1. Freedom of Speech

The Plaintiff alleges that the Defendants retaliated against him for exercising his right to free speech. As the Second Circuit has held,

> a plaintiff making a First Amendment retaliation claim under § 1983 must initially demonstrate by a preponderance of the evidence that: (1) his speech was constitutionally protected, (2) he suffered an adverse employment decision, and (3) a causal connection exists between his speech and the adverse employment determination against him, so that it can be said that his speech was a motivating factor in the determination.

Morris v. Lindau, 196 F.3d 102, 110 (2d Cir. 1999); see Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 283-87 (1977). If a plaintiff produces evidence of these three elements, the government may nevertheless escape liability in one of two ways. "One way the government may prevail is by demonstrating by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected speech." Mandell v. County of Suffolk 316 F.3d 368, 382 (2d Cir. 2003). "Alternatively, the government may show that plaintiff's speech was likely to disrupt the government's activities, and the likely disruption was sufficient to outweigh the First Amendment value of plaintiff's speech." Id. at 382-83. "The question of whether certain speech enjoys a protected status under the First Amendment is one of law, not fact."

Before the Court reaches these issues, however, it must first address a preliminary question-whether the Plaintiff expressed his views as a citizen, or as a public employee pursuant to his official duties. The Supreme Court has held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Garcetti v. Ceballos, 547 U.S. 410, 421 (2006). "Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government." Id. at 423.

"When a public employee speaks pursuant to employment responsibilities, however, there is no relevant analogue to speech by citizens who are not government employees." Id. at 424. This holding is limited "only to the expressions an employee makes pursuant to his or her official responsibilities, not to statements or complaints . . . that are made outside the duties of employment." Id.

The parties have not specifically addressed this threshold question of whether the Plaintiff made his statements pursuant to his official duties. It is clear to the court, though, that the Plaintiff, when using his MySpace, was not acting pursuant to his responsibilities as a teacher. There is no indication in the record that the Plaintiff, as a teacher, was under any obligation to make the statements he made on MySpace. Thus, the court finds that Garcetti does not extinguish the Plaintiff's First Amendment rights.

Because Garcetti is not dispositive, the court next turns to the three-prong prima facie case of (1) public concern, (2) adverse employment action, and (3) causal connection. "Central to this inquiry is whether the speech may 'be fairly characterized as constituting speech on a matter of public concern.'" Morris, 196 F.3d at 110 (quoting Connick v. Myers, 461 U.S. 138, 146 (1983)). In general, "speech on 'any matter of political, social, or other concern to the community' is protected by the First Amendment." Id. Nonetheless, as the Supreme Court has held,

> when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.

Connick, 461 U.S. at 147. The court must "focus on the motive of the speaker and attempt to determine whether the speech was calculated to redress personal grievances or whether it had a broader public purpose." Lewis v. Cowen, 165 F.3d 154, 163-64 (2d Cir. 1999). As noted by the Second Circuit, "expressing dissatisfaction with working conditions is not, by itself, speech on matters of public concern." Tiltti v. Weise, 155 F.3d 596, 603 (2d Cir. 1998); see Lewis, 165 F.3d at 164 ("[S]peech on a purely private matter, such as an employee's dissatisfaction with the conditions of his employment, does not pertain to a matter of public concern.").

The court notes that the contents of the Plaintiff's MySpace profile pages were varied. The profile page contained, inter alia, comments from the Plaintiff to other MySpace users, comments from other MySpace users to the Plaintiff, pictures, blogs, and poetry. The court, having reviewed the parties' submissions, concludes that almost none of the contents of the Plaintiff's profile page touched matters of public concern. The majority of the profile page consisted of personal conversations between the Plaintiff and other MySpace users or creative writing.

The only portion of the profile page that the Plaintiff argues is protected speech is a poem by the Plaintiff. According the Plaintiff, his "opposition to the Iraq War . . . was elegantly articulated" in this poem. The title of this entry on the profile page is "War poem (lyrics) whatever." The poem's lyrics read as follows:

> The damage is done. No Where [sic] to run.
>
> The sand and sun aren't any fun.
>
> They rain down all day in the fields where soldiers

lay [sic].

Their firearms held tightly.

Their steps fall lightly.

They watch for the enemy.

A man, woman or child they see.

He could be any of the three.

In houses they go hoping bombs won't explode.

For war of revenge that has no end.

The commander and [sic] chief much like a thief, will steal away at the dawn [*41] of the day.

But how many will die, for America's apple pie.

A slice of history that will remain a mystery.

The freedom we value is being stolen away, from a new people each and everyday [sic].

The soldiers then cry, watching friends die, defending our nation, they all find salvation.

They protect the peace and and [sic] continue to head East.

To a land of sand and sun, that isn't any fun and leaves them no where [sic] to run.

Leaving aside the question of whether one could call this bit of poetastry an "elegant articulation" of the current conflict in Iraq, the court concludes that, construing all ambiguities in favor of the Plaintiff, the poem could constitute a political statement. That is, one could consider this poem to be an expression of the Plaintiff's opposition to the Iraq War. As such, it would be protected speech under the First Amendment.

Because there is no question that the Plaintiff suffered an adverse employment action, the issue becomes whether there was a causal connection between the Plaintiff's poem and the decision to not renew his employment contract. "A plaintiff can establish the causal connection between protected expression and an adverse employment determination indirectly 'by showing that the protected activity was followed by adverse treatment in employment, or directly by evidence of retaliatory animus.'" Cobb, 363 F.3d at 108. The Plaintiff presents no evidence of retaliatory animus, and there is nothing in the record to indicate that the Defendants intended to retaliate against the Plaintiff because of the political views expressed in his poem. Therefore, the Plaintiff has not established a causal connection directly.

This leaves the indirect way of establishing a causal connection through the temporal proximity between the protected activity and the adverse action. In the court's view, the Plaintiff has not established this. Given the nature of MySpace, the court assumes, for the purpose of this analysis, that the Defendants were aware of all the contents on the Plaintiff's profile page, including the poem. A review of the record indicates that the Plaintiff posted the poem on his "Mr. Spiderman" profile page on October 2, 2005. Based upon the parties' submitted undisputed facts, Michaud viewed the profile page shortly thereafter, presumably before October 14, 2005, the date that the Plaintiff created his "Apollo68" profile page after being told by Michaud that the "Mr. Spiderman"

page was inappropriate. The adverse action at issue is the non-renewal of the Plaintiff's employment contract, which occurred on March 30, 2006. Thus, the time period here spans approximately five and a half months.

The Second Circuit "has not drawn a bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship between the exercise of a federal constitutional right and an allegedly retaliatory action." Although there is no such bright line rule, "courts in the Second Circuit have rejected finding a causal inference when there were gaps of four, five, or six months between the protected activity and the alleged retaliation." As a result, the court finds that the five- to six-month interval, by itself, is insufficient to demonstrate causation. There is no additional evidence that the Plaintiff's poem played any part in the decision to not renew the Plaintiff's employment contract. The Defendants' correspondences with the Plaintiff did not mention the poem at all; rather, they focused on the Plaintiff's contact with Emmett O'Brien students on his MySpace profile page. The court finds that the Plaintiff has failed to establish the necessary causal connection between his exercise of the right to free speech and the allegedly retaliatory action taken against him.

Moreover, even if the Plaintiff had established this causal connection, the Defendants could still prevail by demonstrating by a preponderance of the evidence that they would have taken the same adverse action in the absence of the protected speech, or that the Plaintiff's speech was likely to disrupt school activities, and the likely disruption was sufficient to outweigh the First Amendment value of plaintiff's speech. In the court's view, the Defendants would have taken the same adverse action absent the existence of the poem on the Plaintiff's MySpace page. All the evidence indicates that the action taken against the Plaintiff resulted from his interactions with Emmett O'Brien students. There is no indication that the poem in any way played a part in the decision to not renew the Plaintiff's employment contract.

In addition, the Defendants have submitted evidence supporting the argument that the Plaintiff's conduct on MySpace, as a whole, was disruptive to school activities. One example of the Plaintiff's conduct is a November 22, 2005 exchange with a student, using the profile name "Byczko," that went as follows:[1]

> Byczko: "yo, hows it going sir? i figured i would leave a comment because i'm bored :)"
>
> the Plaintiff: "Things are going well for me. Sorry that you are bored. I'll see you tomorrow. If you ever call me sir again, you will be serving a detention sooooo long that your great grandchildren will have to finish it out. LOL"
>
> Byczko: "hey, i think thats a threat, u and me might have to fight!!! SIR!!! lol, see ya tomorrow!"

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[1] The court has not altered the contents of this or any other exchange taken from the Plaintiff's MySpace profile page. The court takes notice that spelling and grammatical rules are not always closely followed in such casual or informal online exchanges, and that oftentimes certain phrases are abbreviated or expressed in a form of shorthand (e.g., "LOL" can mean "laughing out loud," and "LMAO" can mean "laughing my ass off"). Furthermore, such exchanges often contain so-called "emoticons," which are symbols used to convey emotional content in written or message form (e.g., ":)" indicates "smile" or "happy," and ":(" indicates "frown" or "sad").

the Plaintiff: "I would never threaten you. It's a straight out promise. I'll give you a choice you can serve detention until you've copied every page of every book in my room or you can stay from tomorrow until 11-22-3088"

(Id., Exs. 11 & 12.) Another example is a November 25, 2005 exchange with a student, using the profile name "repko," that went as follows:

the Plaintiff: "Repko and Ashley sittin in a tree. K I S S I N G. 1st comes love then comes marriage. HA HA HA HA HA HA HA!!!!!!!!!!!!!!!!!!!!!! LOL"

repko: "dont be jealous cuase you cant get any lol :)"

the Plaintiff: "What makes you think I want any? I'm not jealous. I just like to have fun and goof on you guys. If you don't like it. Kiss my brass! LMAO"

(Id.)

In the court's view, it was not unreasonable for the Defendants to find that the Plaintiff's conduct on MySpace was disruptive to school activities. The above examples of the online exchanges the Plaintiff had with students show a potentially unprofessional rapport with students, and the court can see how a school's administration would disapprove of, and find disruptive, a teacher's discussion with a student about "getting any" (presumably sex), or a threat made to a student (albeit a facetious one) about detention.

Moreover, there is evidence of complaints about the Plaintiff's MySpace activities. For example, in her affidavit, Ford states that Emmett O'Brien students informed her of the Plaintiff's MySpace conduct, which made some of them "uncomfortable." It is reasonable for the Defendants to expect the Plaintiff, a teacher with supervisory authority over students, to maintain a professional, respectful association with those students. This does not mean that the Plaintiff could not be friendly or humorous; however, upon review of the record, it appears that the Plaintiff would communicate with students as if he were their peer, not their teacher. Such conduct could very well disrupt the learning atmosphere of a school, which sufficiently outweighs the value of Plaintiff's MySpace speech.

In sum, the court finds that the Plaintiff has failed to establish a causal connection between his poem and the decision to not renew his employment contract. The court also finds that, even if such a causal connection were to exist, the Defendants would have taken the same adverse action even in the absence of the poem, and that the Plaintiff's speech was likely to disrupt school activities. As a result, the Plaintiff's First Amendment freedom of speech claim fails as a matter of law. Consequently, with regard to the Plaintiff's First Amendment freedom of speech claim, the Defendants' motion for summary judgment is **GRANTED.**