[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 16-10218
Non-Argument Calendar

D.C. Docket No. 0:15-cv-61072-RNS

EVAN ROWE,

Plaintiff - Appellee,

versus

THE DISTRICT BOARD OF TRUSTEES OF BROWARD COLLEGE, FLORIDA,

Defendant,

LULRICK BALZORA,

Defendant - Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(April 20, 2017)

Before HULL, MARCUS, and JULIE CARNES, Circuit Judges.

PER CURIAM:

Plaintiff Evan Rowe, an adjunct faculty member at a state college, asserts a First Amendment retaliation claim under 42 U.S.C. § 1983 against Lulrick Balzora, the department head in charge of assigning teaching slots. Rowe alleges that Balzora did not assign him classes to teach because he advocated for a union and higher pay for the adjunct faculty. The district court denied Balzora's motion to dismiss for failure to state a claim and on qualified immunity grounds. Concluding that Rowe sufficiently alleged that Balzora violated a clearly established constitutional right, we **AFFIRM**.

I. BACKGROUND

Lulrick Balzora ("Defendant") is the associate dean of the social studies department of Broward College, a state college in Florida. Defendant's responsibilities include assigning and scheduling faculty to teach classes each semester. Evan Rowe ("Plaintiff") was an adjunct faculty member in the social studies department of Broward College from 2004 until December 2014. To supplement his income, he became a freelance reporter for the *Broward and Palm Beach New Times*, a newspaper with a circulation of about 27,000 copies per week. Plaintiff's work included pieces that covered the employment grievances of the adjunct faculty at Broward College.

Plaintiff published a piece on March 11, 2014, in which he indicated that the adjunct professors at Broward College are underpaid and that they planned to unionize and possibly strike in response. Rowe himself was a leader in this organizing effort. Sometime after the March 11 article was published, Defendant released the summer teaching schedule, but did not assign Plaintiff to any classes. This was the first time Plaintiff had been left off the summer schedule since 2004. Plaintiff asked Defendant for an explanation why he was absent from the list, to which Defendant replied that he had received the March 11 article from a friend and did not want to put anyone who might strike onto the schedule.[1]

In May and June 2014, Plaintiff, along with other pro-union adjunct faculty, attended the monthly meetings of Broward College's Board of Trustees and made presentations about the low wages that adjunct professors received. The Board referred the matter to a committee, and a "very slight" pay increase was approved. Rowe was assigned fall classes shortly after these meetings.

Plaintiff was dissatisfied with the progress being made on the adjunct faculty pay issue, however. On October 14, 2014, Plaintiff published another article in the *New Times* describing the committee assigned to address the issue as "a joke." Plaintiff participated the next day in an informational picketing event on campus

[1] It is illegal for public employees in Florida to strike. Fla. Stat. § 447.505 ("No public employee or employee organization may participate in a strike against a public employer by instigating or supporting, in any manner, a strike.").

that he organized to coincide with a gubernatorial debate held there the same day. Shortly after the picketing event, teaching assignments for the next semester were released, but Plaintiff was not assigned any classes. Plaintiff again went to see Defendant, but Defendant did not offer Plaintiff an explanation for again omitting Plaintiff from the teaching list.

Plaintiff brought a First Amendment retaliation claim against Defendant under 42 U.S.C. § 1983.[2] Defendant filed a motion to dismiss, arguing that Plaintiff had not adequately pled a constitutional violation, and even if he had, Defendant was entitled to qualified immunity. The district court denied Defendant's motion to dismiss, and Defendant appealed.

II. DISCUSSION

A. Standards of Review

We review *de novo* the district court's denial of qualified immunity. *Cottone v. Jenne*, 326 F.3d 1352, 1357 (11th Cir. 2003). In evaluating whether Plaintiff's complaint sufficiently alleges a constitutional violation that can overcome qualified immunity, we accept as true all well-pleaded facts and construe them in Plaintiff's favor. *Id.*

[2] The complaint sets out separate counts for each First Amendment clause Plaintiff claims was violated: Press, Assembly, Petition, and Speech. Plaintiff's initial complaint and the First Amended Complaint name the Board of Trustees as a defendant, but the Board is not named as a party in the Second Amended Complaint, which is considered here.

1. Motion to Dismiss

To survive a motion to dismiss, Plaintiff's complaint must state a claim that is plausible on its face, which requires Plaintiff to "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While "detailed factual allegations" are not required, a complaint must offer "more than a sheer possibility that a defendant has acted unlawfully." *Id.* Accordingly, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* These pleadings that "are no more than conclusions[] are not entitled to the assumption of truth." *Id.* at 679.

2. Qualified Immunity

Qualified immunity completely "protects government officials performing discretionary functions from suits in their individual capacities unless their conduct violates 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Dalrymple v. Reno*, 334 F.3d 991, 994 (11th Cir. 2003) (quoting *Hope v. Pelzer*, 536 U.S. 730, 739 (2002)). In asserting a qualified immunity defense, a public official "must first establish that he acted within his discretionary authority." *Leslie v. Hancock Cty. Bd. of Educ.*, 720 F.3d 1338, 1345 (11th Cir. 2013) (internal quotation marks omitted). No one disputes that Defendant was acting in his discretionary authority when he made class

assignments, so Plaintiff bears the burden of establishing both that Defendant violated his constitutional rights and that the contours of those rights were clearly established. *Id.* For the second prong, Plaintiff must show that "the state of the law gave [Defendant] fair warning that [his] alleged treatment of [Plaintiff] was unconstitutional." *Vinyard v. Wilson*, 311 F.3d 1340, 1350 (11th Cir. 2002) (quoting *Hope*, 536 U.S. at 741).

Fair warning can come from materially similar precedent from the Supreme Court, this Court, or the Supreme Court of Florida. *See Terrell v. Smith*, 668 F.3d 1244, 1256 (11th Cir. 2012). Plaintiff can rely on broader principles of law if there is no materially similar precedent, provided the principles are "established with obvious clarity by the case law so that every objectively reasonable government official facing the circumstances would know that the official's conduct did violate federal law." *Leslie*, 720 F.3d at 1345 (internal quotation marks omitted); *see also Taylor v. Barkes*, 135 S. Ct. 2042, 2044 (2015) ("We do not require a case directly on point, but existing precedent must have placed the . . . constitutional question beyond debate." (internal quotation marks omitted)). Finally, "in a narrow category of matters, the conduct involved in the case may so obviously violate the [C]onstitution that prior case law is unnecessary." *Leslie*, 720 F.3d at 1346 (internal quotation marks omitted).

B. Merits of Plaintiff's First Amendment Claim

We apply a four-stage analysis to a public employee's First Amendment retaliation claim.[3] *Carter v. City of Melbourne*, 731 F.3d 1161, 1168 (11th Cir. 2013). Public employees accept some limitations on their First Amendment rights for the sake of protecting the government's interests as an employer, *Alves v. Board of Regents*, 804 F.3d 1149, 1159 (11th Cir. 2015), *cert. denied* 136 S. Ct. 1838 (2016), so the first two stages are questions of law that determine whether the First Amendment protects the plaintiff's speech. *Moss v. City of Pembroke Pines*, 782 F.3d 613, 618 (11th Cir. 2015). The court first asks whether the plaintiff spoke as a private citizen on a matter of public concern. *Id.* at 617. In what is known as *Pickering* balancing, the court then weighs the plaintiff's First Amendment interests against the government's interest in regulating the speech. *Id.* (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)). Relevant government interests can include promoting the efficiency of public services, ensuring "discipline by superiors or harmony among co-workers," preserving "close working relationships for which personal loyalty and confidence are necessary,"

[3] Although Plaintiff's complaint alleges violations of four separate First Amendment rights, the relevant inquiries in this appeal are the same for each count, so they will be considered together. *See Borough of Duryea v. Guarnieri*, 564 U.S. 379, 398 (2011) (noting that the framework governing Speech Clause claims applies to claims under the Petition Clause); *Cook v. Gwinnett Cty. Sch. Dist.*, 414 F.3d 1313, 1320 (11th Cir. 2005) (applying public employee free speech analysis to public employee's free association claim). While Plaintiff considers himself a member of the press, he is still a public employee. Plaintiff is not asserting any right uniquely held by the press, so his Press Clause claim will be analyzed in the same way as his Speech Clause claim.

and preventing actions that "impede[] the performance of [a worker's] duties or interfere[] with the regular operation of the enterprise." *Leslie*, 720 F.3d at 1346.

If the court determines that the speech is protected, the analysis continues to the second two stages, which address the causal link between the speech and the adverse employment outcome. *Moss*, 782 F.3d at 618. These are questions of fact reserved for the jury unless the evidence is undisputed. *Id.* The plaintiff has the initial burden of showing that the protected speech was a "substantial motivating factor" in the defendant's alleged retaliation. *Id.* The defendant can then avoid culpability if he can prove he would have taken the same action even in the absence of the protected speech.[4] *Id.*

Plaintiff alleges that Defendant left Plaintiff off the teaching schedule twice: once following the March 11 article, and again after the October 14 article and October 15 picketing event. Defendant did not provide the same justification for each omission, and Plaintiff was assigned to teach classes in the intervening fall semester. This suggests that these are separate retaliatory acts that merit separate discussion.

[4] Defendant has offered no argument that he would have acted in the same manner in the absence of the protected speech, so we do not consider this stage of the analysis here. *Akins v. Fulton Cty.*, 420 F.3d 1293, 1305 (11th Cir. 2005); *see also Gibbons v. McBride*, 124 F. Supp. 3d 1342, 1375–76 (S.D. Ga. 2015) (noting that considering a defendant's ability to prove alternative grounds for taking the same action is premature when reviewing a motion to dismiss).

1. Omitting Plaintiff from the Summer 2014 Teaching Schedule

Defendant concedes that Plaintiff spoke as a private citizen on a matter of public concern when he published the article, which is the first step in the *Pickering* analysis and which favors Plaintiff. But the next step requires that the court weigh a plaintiff's First Amendment interests against the governmental body's interest in regulating the speech. Defendant argues that Plaintiff fails this balancing test because, as a result of the March 11 article, Defendant legitimately feared that Plaintiff "might strike" and therefore it was proper for Defendant to remove Plaintiff from the summer teaching schedule.

We will assume for the purposes of this appeal only that if the undisputed facts indicate that Defendant left Plaintiff off the teaching schedule because of his fear that Plaintiff was about to strike, then Defendant would be entitled to qualified immunity because he would not have had fair warning that his actions were unconstitutional. Because *Pickering* balancing is an "intensely fact-specific" inquiry that rarely yields clear, bright-line rules, *Brannon v. Finkelstein*, 754 F.3d 1269, 1278 (11th Cir. 2014) (quoting *Maggio v. Sipple*, 211 F.3d 1346, 1354 (11th Cir. 2000)), qualified immunity should be granted unless "*Pickering* balancing would lead to the inevitable conclusion that the discharge of the employee was unlawful." *Dartland v. Metro. Dade Cty.*, 866 F.2d 1321, 1323 (11th Cir. 1989).

Concerning Defendant's first act of alleged retaliation, *Pickering* balancing does not necessarily favor Plaintiff because the prohibition of strikes by public employees informs a decision-maker in Defendant's position. While public employees have the same bargaining rights as private employers, these rights do not extend to the right to strike. *United Steelworkers of Am. v. Univ. of Alabama*, 599 F.2d 56, 61 (5th Cir. 1979);[5] *Dade Cty. Classroom Teachers' Ass'n, Inc. v. Ryan*, 225 So. 2d 903, 905 (Fla. 1969) ("We hold that with the exception of the right to strike, public employees have the same rights of collective bargaining as are granted private employees by [the Florida Constitution]."). Specifically, public employees in Florida may not "instigat[e] or support[], in any manner, a strike." Fla. Stat. § 447.505. Disallowing public-employee strikes directly serves the government interests implicated in *Pickering* balancing. Strikes by public employees most obviously "interfere with the regular operation of the [government] enterprise," but can also reasonably affect any of the interests listed above. *See Leslie*, 720 F.3d at 1346.

Further, the Supreme Court has noted that an employer need not wait until the disruptive behavior happens before taking action. *Connick v. Myers*, 461 U.S. 138, 152 (1983) ("[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working

[5] This Court adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

relationships is manifest before taking action."). In addition, the language of Florida's statute suggests that some actions short of actually striking might be included as unlawful behavior.

The immediate problem for Defendant as to this argument, however, is that the case is at the motion to dismiss stage. Based on the allegations made by Plaintiff, it is plausible that Defendant left him off the schedule for a reason other than fear that Plaintiff would strike. Plaintiff says the reason was not a fear that he would strike, but rather Defendant's disapproval of the criticism leveled by Plaintiff in the March 11 article. As the district court noted, this creates a "sharp divide in the parties' explanations for [Defendant's] action." When issues of fact like this arise, "qualified immunity must be denied because the court . . . must view the facts most favorable to the plaintiff" at the motion to dismiss stage. *Travers v. Jones*, 323 F.3d 1294, 1296 (11th Cir. 2003). As the district court further noted, discovery offers the opportunity to flesh out Defendant's motivation. So, given this question of fact, "qualified immunity must be denied because the court, at this stage of the proceedings, must view the facts most favorable to [Plaintiff]." *Id*. In short, we conclude the district court was correct to deny the motion to dismiss based on Defendant's first decision.

2. Omitting Plaintiff from the Winter 2015 Teaching Schedule

Defendant assumes for this appeal that Plaintiff's speech following the March 11 article—speaking to the Board, publishing the October 14 article, and organizing and attending the October 15 informational picketing event—was protected. The only stage of First Amendment retaliation analysis left to consider is whether Plaintiff has sufficiently alleged the "causal relationship between the adverse conduct and the protected speech." *Castle v. Appalachian Tech. Coll.*, 631 F.3d 1194, 1197 (11th Cir. 2011). Unlike the decision about summer classes, Plaintiff does not allege that Defendant offered a specific reason for leaving him off the winter teaching schedule; apparently, Defendant was silent. Instead, Plaintiff invites us to infer causation from the temporal proximity of Defendant's retaliation to Plaintiff's speech.

This Court has recognized that whether an act of protected speech played a "substantial part" in an employer's adverse decision can be inferred from the "close temporal proximity" between the events. *Akins v. Fulton Cty.*, 420 F.3d 1293, 1305 (11th Cir. 2005). However, we have noted that "mere temporal proximity, without more, must be very close," such that "[a] three to four month disparity between the [] protected expression and the adverse employment action is not enough." *Thomas v. Cooper Lighting, Inc.*, 506 F.3d 1361, 1364 (11th Cir.

2007) (citing *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001)).[6] Were we dealing only with Plaintiff's presentation to the Board of Trustees in June 2015, Plaintiff would perhaps be unable to show that his presentation was a substantial motivating factor in Defendant's omitting him from winter semester classes. The teaching assignments for winter 2015 were made no sooner than October 15, and Plaintiff last addressed the Board the previous June 24, which is not necessarily close enough in time to imply causation based on temporal proximity alone. More importantly, Plaintiff was assigned classes for the fall semester after he had presented to the Board, breaking any causal relationship between Plaintiff's actions and the alleged retaliation.

This causal inference is permissible, however, when one also considers the October 14 article and the picketing event the next day. Although the complaint does not specify exactly when the schedule was made, it is reasonable to assume that teaching assignments for winter semester were made close enough in time to Plaintiff's actions to properly imply a causal relationship between the two events.[7] Plaintiff has sufficiently alleged a claim of First Amendment retaliation.

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[6] While *Thomas* is a Title VII retaliation case, this Court has used Title VII cases to inform analysis of First Amendment cases. *See Akins*, 420 F.3d at 1301 n.2.

[7] Defendant argues that Plaintiff fails to provide sufficient factual justification to properly allege Defendant's knowledge of Plaintiff's First Amendment activities. While Plaintiff must show this knowledge to prevail ultimately on a retaliation claim, *see Castle*, 631 F.3d at 1197, at this stage in the proceedings, detailed factual allegations are not required. *Iqbal*, 556 U.S. at 678. Plaintiff plausibly alleges that Defendant was aware of his activities, and the facts alleged in the

Turning to the second prong of the qualified immunity analysis, we conclude that Defendant did have fair warning that the Constitution prohibited him from leaving Plaintiff off the teaching roster because of Plaintiff's First Amendment activities. Defendant had ample notice that retaliating against an employee for protected speech is unconstitutional. *Pickering*, 391 U.S. at 574 ("[A] teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."); *Carollo v. Boria*, 833 F.3d. 1322, 1334 (11th Cir. 2016) (holding that, in April 2014, public officials had fair notice that "terminat[ing] a colleague for speaking about matters of public concern that are outside the scope of his ordinary job responsibilities" is a First Amendment violation); *Travers*, 323 F.3d at 1295 ("The law is clearly established that an employer may not demote or discharge a public employee for engaging in protected speech.").

Defendant also had fair warning that Plaintiff's speech in this case was protected because, given Defendant's failure to offer any valid justification for this second act, the *Pickering* balancing test will invariably favor Plaintiff. *Dartland*, 866 F.2d at 1323. This case is similar in relevant ways to the situation in which the *Pickering* balancing test was first applied. In *Pickering*, a high school teacher was

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complaint provide "a reasonable expectation that discovery will reveal evidence of [Defendant's actual knowledge]." *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1295–96 (11th Cir. 2007) (internal quotation marks omitted).

fired for sending a letter to a local newspaper criticizing the way the county Board of Education and the district superintendent handled revenue raising proposals. 391 U.S. at 564. In holding that the teacher's rights had been violated, the Court noted that the letter was not directed at someone the teacher worked with on a daily basis; that "no question of maintaining either discipline by immediate superiors or harmony among coworkers" was presented; that the statements did not "impede the teacher's proper performance of his daily duties" or "interfered with the regular operation of the school[] generally"; and that there was no proof that he knowingly or recklessly made false statements. *Id.* at 569–70, 572–74.

Each of these factors also weighs in favor of Plaintiff here. *Cf. Moss*, 782 F.3d at 621 ("Indeed, we have recognized a heightened need for order, loyalty, and harmony in a quasi-military organization such as a police or fire department."). Similarly, there is no indication that Defendant had an interest in preventing Plaintiff from organizing and participating in the information picketing event on October 15. Indeed, that the picketers were confined to a "Free Speech" zone suggests that the college was aware of and approved the event.

Defendant does not separately discuss qualified immunity for his second act, but rather rests his entire qualified immunity defense on his claim that he was acting out of concern for a strike: a reason that seems to pertain only to Defendant's first act. In fact, the complaint specifically alleges that Defendant

gave no reason for his second omission of Plaintiff from the teaching schedule. If, in fact, Defendant had no reason for leaving Plaintiff off this second schedule except to retaliate because of Plaintiff's First Amendment activity, then obviously dismissal is not warranted. In short, it is not "evident from the allegations of the complaint alone that [Defendant is] entitled to qualified immunity" for his second act, so his motion to dismiss was properly denied. *See Johnson v. Breeden*, 280 F.3d 1308, 1317 (11th Cir. 2002).

III. CONCLUSION

Plaintiff has sufficiently alleged that Defendant retaliated against him for engaging in activities protected by the First Amendment. The law is clearly established that an employer cannot retaliate against a public employee for engaging in such activities, so Defendant is not entitled to qualified immunity at this stage of the proceedings. The district court's denial of Defendant's motion to dismiss is therefore **AFFIRMED.**