UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

KEN S. SHERBACOW, Plaintiff, v. THEODORE R. ANSON AND WILLIAM R. ANDREWS, Defendants.	:	Civil No. 3:00CV01109(AWT)

RULING ON MOTION FOR SUMMARY JUDGMENT

The plaintiff, Ken S. Sherbacow ("Sherbacow"), brings a two count complaint alleging that the defendants, Theodore R. Anson ("Anson") and William R. Andrews ("Andrews"), terminated his employment in retaliation for his exercising his First Amendment rights, in violation of 42 U.S.C. § 1983, and without just cause, in violation of the State Personnel Act, Conn. Gen. Stat. §§ 5-193 et seq. The defendants are sued only in their individual capacities. The defendants have moved for summary judgment on both counts. For the reasons set forth below, the defendants' motion is being granted.

I. Factual Background

For purposes of this summary, the court views the

factual record in the light most favorable to the plaintiff; it accepts the plaintiff's evidence as true, and draws all reasonable inferences in his favor.

The plaintiff had been an employee of the State of Connecticut Department of Public Works (the "DPW") for approximately nine years when he was laid off in February 2000. Defendant Andrews has been employed by the DPW since August 1987, and has at all relevant times been responsible for the DPW's Human Resource Department. On January 27, 1995, defendant Anson was appointed as the Commissioner for the DPW, and he has served in that capacity at all times relevant to this case.

The plaintiff was appointed, in 1991, to the unclassified position of Executive Assistant to Bruce Morris, the then Commissioner for the DPW. In June 1994, the plaintiff was provisionally promoted to a classified position and was assigned to the leasing unit. After passing the appropriate state examination, the plaintiff became a classified employee on November 2, 1994.

In January 1995, the DPW had 382 employees. Governor Rowland's first budget, announced in 1995, recommended the elimination of the DPW. To implement that budget, Senate Bill 935, entitled *An Act Terminating the Department of*

Public Works and Transferring its Functions to Other State Agencies, was introduced. Anson immediately began restructuring the DPW by consolidating its three district offices into the Hartford central office, laying off 52 employees, and introducing the concept of client service teams. Senate Bill 935 was not enacted, and the DPW was not eliminated. Sherbacow received notice in April 1995, that his position was "at risk" of elimination as a result of the on-going restructuring effort, but his position was not eliminated at that time.

By June 1995, the DPW had 311 employees, ten of whom were in the leasing unit; this included the plaintiff. Then, in July 1996, Governor Rowland instructed all state agencies to reduce their 1996-1997 budgets by an additional ten percent. Consequently, by the end of 1996, the DPW had reduced its budget by an additional 11%, and Anson had finalized another phase of the DPW's reorganization.

In August 1995, the plaintiff was assigned to a newly created client service team to assist with project management. In November 1996, however, a bargaining unit of the state workers' union filed an unfair labor practice complaint against the DPW, alleging that three managers, one of them being the plaintiff, were performing the duties of

bargaining unit employees on the client service teams. The unfair labor practice complaint demanded that the DPW cease and desist the assignment of bargaining unit work to those three managers. The DPW agreed to remove the three managers from the teams. As a result, the plaintiff was reassigned to the leasing unit in April 1997.

In 1997, the Auditors of Public Accounts determined that the DPW had a $6.6 million deficit in its Capital Projects Revolving Fund. Anson decided to address this deficit in part through staff reductions. On June 20, 1997, the DPW's strategic planning committee developed a draft reduction plan, which included laying off dozens of employees, including the plaintiff and five other managers. The plaintiff received his second "at risk" letter on July 11, 1997. A total of 48 employees, five of whom were managers, received "at risk" letters in July 1997.

During the 1997 legislative session, the General Assembly enacted the Early Retirement Incentive Plan ("ERIP") in an effort to facilitate the streamlining of state government. Under the terms of an agreement worked out with the state unions, no layoffs could take place until after the effects of the ERIP had been determined. By August 1997, 47 DPW employees had participated in the ERIP,

leaving the DPW with 254 employees. Eight of these remaining employees, including the plaintiff, were in the leasing unit. This represented a 34% reduction of the DPW's workforce since January 1995. The plaintiff received notice in April 1998 that his position was no longer at risk.

In September 1999, the Office of Policy and Management notified all agency heads that the State was reducing each agency's second quarter appropriation allotment for the 1999/2000 fiscal year due to projected budget deficits. The DPW's second quarter allotment was reduced by $443,872. Anson asked his management staff to review the budget again to identify further reductions. The DPW looked at the six management positions that had been identified for elimination in the June 1997 budget reduction proposal. The people in four of the six management positions had either left the DPW or died. This left the plaintiff's position and the position of Director of Capital Projects and Bonding. In November 1999, Anson decided to eliminate both positions.

At this time, there were a total of six positions in the leasing unit; there were two supervisors, one secretary and three leasing agents. The plaintiff was one of the

supervisors, and Susan Amenta Hooper was the other. Hooper had more seniority, more experience, made less money, and performed all of the supervisory functions. Anson determined that there was no need for the leasing unit to have two supervisors for four employees, and, given Hooper's seniority, the plaintiff would be laid off. Andrews agreed with the decision.

On January 27, 2000, the plaintiff received written notice that his position was being eliminated. The notice informed the plaintiff he was being laid off due to "changes in departmental organization, insufficient appropriation, and abolition of position." The effective date of the layoff was February 24, 2000. This left five employees in the leasing unit as of March 2000: one supervisor, three leasing agents, and a secretary. Although a paralegal specialist was hired at some time prior to June 2002, the plaintiff's position has not been refilled.

The plaintiff contends that his employment was terminated because of the fact that, in early 1996, he gave information to the Auditors of Public Accounts, the Ethics Committee, and the press that (1) Anson was spending substantial periods of time during his duty hours playing golf and engaging in recreational activities, and (2) Anson

was giving preference in awarding contracts to those consultants and contractors with whom he had golfed or participated in recreational activities.

In May 1996, the plaintiff made his first complaint to the Auditors of Public Accounts concerning alleged activities of fellow DPW employees; this complaint did not involve Anson or Andrews. Auditor John Rasimas ("Rasimas") was assigned to the DPW, and he investigated the plaintiff's complaint. In July or August 1996, the plaintiff informed the Auditors that Anson and another DPW employee had attended a golf tournament on state time and the tournament fees had been paid by a contractor. The complaint, which also alleged other purported, similar misuse of state time and the improper acceptance of gifts, was assigned Audit No. 97-23.

On August 16, 1996, Rasimas interviewed Anson about the plaintiff's claims. Rasimas never revealed to Anson that the plaintiff was the source of the complaint. Anson expressed a concern about the source of the information Rasimas had received, and in response, Rasimas told Anson that the information was disclosed during a review to verify the timesheet of an employee named Terry Supple. Despite having conducted the investigation, Rasimas has no idea as

to whether Anson or Andrews knew the plaintiff was the source of the complaints. Moreover, during his investigation, Rasimas never uncovered anything that led him to believe that Anson retaliated against the plaintiff for his whistle blower complaints.

The Auditors forwarded Audit 97-23 to the Attorney General's Office and to the Ethics Commission. The Attorney General's Office also forwarded the complaint to the Ethics Commission, because it alleged violations of the ethics law. The Ethics Commission investigated the plaintiff's complaints and determined the filing of a complaint was not warranted. It conducted no further investigation into Anson's activities. Anson never investigated to determine who had initiated the complaints against him.

In addition to the complaints made to the Auditors, the plaintiff also made complaints about the DPW to Stan Babiarz ("Babiarz"), who was an employee of the State Property Review Board ("SPRB"), in September 1999. The SPRB has oversight authority over all real estate transactions in which the State is involved. The plaintiff's complaint related to the Board of Education and Services for the Blind lease ("BESB Lease"). Babiarz told the plaintiff he should report any complaints of impropriety at the DPW directly to

Anson before bringing them the SPRB. In Babiarz's experience, Anson was always very responsive to the concerns of the SPRB, and virtually always supported the SPRB in connection with its review of DPW matters. According to Babiarz, when the Chairman of the SPRB discussed with Anson the BESB Lease and whether the Auditors should be involved, Anson encouraged him to turn the matter over to the Auditors. There is no evidence that Andrews or Anson learned that the plaintiff had made complaints to Babiarz; the plaintiff merely speculates that they did.

In February 1997, Andrews was informed of a rumor that the plaintiff might be providing unfavorable information about the DPW to the press. Subsequently, Andrews told the plaintiff that two other DPW employees had told Anson that the plaintiff was the source of the leaks. Sherbacow assured Andrews that he had not provided any information about the DPW to the press, and Andrews states that he believed the plaintiff. Andrews told the plaintiff that he should meet with Anson to clear the air if he were concerned that Anson had heard the rumor.

The plaintiff asked to be placed on Anson's calendar for a private meeting. At the meeting, which lasted about 45 minutes, the plaintiff stated that he was concerned that

Anson had heard a rumor that the plaintiff was providing unfavorable information to people outside the DPW. The plaintiff then looked Anson in the eye and assured Anson that he as not the source of such information. The plaintiff also told Anson that he had been in the public eye for an unsavory matter himself, and thus he understood what that type of scrutiny could do to a person. Anson states that he believed the plaintiff and told him that he appreciated the plaintiff coming forward.

Later, the plaintiff informed Andrews that he had, in fact, met with Anson and told Anson that he was not the source of any leaks. Andrews has no recollection of talking with Anson about the rumor. The plaintiff states that it was his clear impression that Andrews and Anson did not believe him when he denied being the source of any leaks.

On February 25, 2000, the plaintiff appealed his layoff to the state's Employees' Review Board pursuant to Conn. Gen. Stat. § 5-202. The plaintiff asserted that Anson and Andrews terminated his employment in retaliation for disclosures by the plaintiff. The Board rendered a decision that Sherbacow had failed to establish that his layoff was in retaliation for any protected activity and that the DPW

had not violated the State Personnel Act, Conn. Gen. Stat. §§ 5-193 et seq. The plaintiff did not appeal the Board's decision.

II. Legal Standard

A motion for summary judgment may not be granted unless the court determines that there is no genuine issue of material fact to be tried and that the facts as to which there is no such issue warrant judgment for the moving party as a matter of law. Fed. R. Civ. P. 56(c). See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Gallo v. Prudential Residential Servs., 22 F.3d 1219, 1223 (2d Cir. 1994). Rule 56(c) "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." See Celotex Corp., 477 U.S. at 322.

When ruling on a motion for summary judgment, the court must respect the province of the jury. The court, therefore, may not try issues of fact. See, e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Donahue v. Windsor Locks Board of Fire Comm'rs, 834 F.2d 54, 58 (2d Cir. 1987); Heyman v. Commerce & Indus. Ins. Co., 524 F.2d

1317, 1319-20 (2d Cir. 1975). It is well-established that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge." Anderson, 477 U.S. at 255. Thus, the trial court's task is "carefully limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined . . . to issue-finding; it does not extend to issue-resolution." Gallo, 22 F.3d at 1224.

Summary judgment is inappropriate only if the issue to be resolved is both genuine and related to a material fact. Therefore, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. An issue is "genuine . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248 (internal quotation marks omitted). A material fact is one that would "affect the outcome of the suit under the governing law." Anderson, 477 U.S. at 248. As the Court observed in Anderson: "[T]he materiality determination rests on the substantive law, [and] it is the substantive law's identification of which facts are critical and which facts are irrelevant that

governs." Id. at 248. Thus, only those facts that must be decided in order to resolve a claim or defense will prevent summary judgment from being granted. When confronted with an asserted factual dispute, the court must examine the elements of the claims and defenses at issue on the motion to determine whether a resolution of that dispute could affect the disposition of any of those claims or defenses. Immaterial or minor facts will not prevent summary judgment. See Howard v. Gleason Corp., 901 F.2d 1154, 1159 (2d Cir. 1990).

When reviewing the evidence on a motion for summary judgment, the court must "assess the record in the light most favorable to the non-movant and . . . draw all reasonable inferences in its favor." Weinstock v. Columbia Univ., 224 F.3d 33, 41 (2d Cir. 2000)(quoting Del. & Hudson Ry. Co. v. Consol. Rail Corp., 902 F.2d 174, 177 (2d Cir. 1990)). Because credibility is not an issue on summary judgment, the nonmovant's evidence must be accepted as true for purposes of the motion. Nonetheless, the inferences drawn in favor of the nonmovant must be supported by the evidence. "[M]ere speculation and conjecture" is insufficient to defeat a motion for summary judgment. Stern v. Trs. of Columbia Univ., 131 F.3d 305, 315 (2d Cir. 1997)

(quoting W. World Ins. Co. v. Stack Oil, Inc., 922 F.2d 118, 121 (2d. Cir. 1990)). Moreover, the "mere existence of a scintilla of evidence in support of the [nonmovant's] position" will be insufficient; there must be evidence on which a jury could "reasonably find" for the nonmovant. Anderson, 477 U.S. at 252.

Finally, the nonmoving party cannot simply rest on the allegations in its pleadings since the essence of summary judgment is to go beyond the pleadings to determine if a genuine issue of material fact exists. See Celotex Corp., 477 U.S. at 324. "Although the moving party bears the initial burden of establishing that there are no genuine issues of material fact," Weinstock, 224 F.3d at 41, if the movant demonstrates an absence of such issues, a limited burden of production shifts to the nonmovant, which must "demonstrate more than some metaphysical doubt as to the material facts, . . . [and] must come forward with specific facts showing that there is a genuine issue for trial." Aslanidis v. United States Lines, Inc., 7 F.3d 1067, 1072 (2d Cir. 1993)(quotation marks, citations and emphasis omitted). Furthermore, "unsupported allegations do not create a material issue of fact." Weinstock, 224 F.3d at 41. If the nonmovant fails to meet this burden, summary

judgment should be granted. The question then becomes whether there is sufficient evidence to reasonably expect that a jury could return a verdict in favor of the nonmoving party. See Anderson, 477 U.S. at 248, 251.

III. Discussion

A. Count One: 42 U.S.C. § 1983

To prevail on a Section 1983 claim for termination of employment in violation of the First Amendment right to free speech, a plaintiff must establish "(1) that his or her speech can be fairly characterized as speech on a matter of public concern, and (2) that the speech was a *substantial* or *motivating factor* in the discharge." McCullough v. Wyandanch Union Free School District, 187 F.3d 272, 278 (2d Cir. 1999)(emphasis added). Here, the defendants do not dispute that the plaintiff's speech touched on a matter of public concern. Thus, Sherbacow would only need to establish that his speech was a substantial or motivating factor in the discharge. The court concludes that the defendants have met their initial burden of setting forth facts showing that Sherbacow's speech was not a substantial or motivating factor in the discharge, and that the plaintiff has failed to meet his burden of demonstrating that there is a genuine issue of material fact as to this

issue.

In setting forth his chronology of events, the plaintiff directs the court's attention to the fact that he was reassigned to the leasing unit in April of 1997, which was after the February 1997 discussion with Andrews about the leaks. (Sherbacow Aff. ¶ 14). However, there is no evidence to suggest that the plaintiff's reassignment to the leasing unit was not related to the unfair labor practice complaint. Also, the plaintiff states in the next sentence of Paragraph 14 of his affidavit that Anson and Andrews advised him that his position was "at risk." However, there is no evidence to suggest that, when he was so advised in July 1997, it did not come on the heels of the DPW's strategic planning committee's development on June 20, 1997 of a plan for laying off dozens of employees, including five other managers, in response to the Auditors' determination that the DPW had a $6.6 million deficit.

The plaintiff relies on the SPRB investigation, and has submitted a copy of a report by the Connecticut Attorney General. However, the report identifies another individual as the whistle blower, and there is no evidence that the defendants knew that the plaintiff had made complaints to Babiarz.

The plaintiff's allegation that the DPW placed his position "at risk" in April 1995 because he, along with 26 other employees, was an appointee of former Governor Lowell P. Weicker, Jr. is outside the scope of the complaint. The plaintiff first made this allegation in his opposition to the defendants' motion for summary judgment.

Finally, the plaintiff makes, in his affidavit, the conclusory statement that, when he spoke with Andrews and Anson and told them that he was not the source of any leaks, it was his clear impression that neither of them believed him. There is no evidence that either of them knew he was the source of the leaks or any complaints, and all of the other relevant evidence is to the contrary.

Based on the record here, a reasonable jury could not conclude that Sherbacow's speech was a substantial or motivating factor in the discharge. Accordingly, the defendants are entitled to summary judgment on this claim.

B. Count Two: State Personnel Act

The court does not have subject matter jurisdiction over the plaintiff's state law claim because he did not exhaust his administrative remedies. He failed to appeal the decision of the Employees' Review Board pursuant to the State Personnel Act, Conn. Gen. Stat. § 5-202(l), and the

Uniform Administrative Procedures Act, Conn. Gen. Stat. § 4-183. "[A] party who has a statutory right of appeal from a decision of an administrative agency may not bring an independent action to test the very issues that the statutory appeal was designed to test." Payne v. Fairfield Hills Hospital, 215 Conn. 675, 679 (1990).

Moreover, pursuant to Conn. Gen. Stat. Ann. § 4-165 (West Supp. 2002):

> No state officer or employee shall be personally liable for damage or injury, *not wanton, reckless or malicious*, caused in the discharge of his duties or within the scope of his employment.

(emphasis added). Based on this record, a reasonable jury could not find that the defendants' termination of the plaintiff's employment was wanton, reckless or malicious. For the reasons stated above, it could not conclude that Sherbacow's speech was a substantial or motivating factor for the discharge, and no other basis for such a finding has been suggested.

IV. Conclusion

For the reasons set forth above, the defendants' motion for summary judgment is hereby GRANTED as to both counts. The Clerk shall close this case.

It is so ordered.

Dated this 31st day of March, 2003, at Hartford, Connecticut.

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Alvin W. Thompson
United States District Court