

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF IOWA  
CENTRAL DIVISION

ROGER KOEHN,	)	
	)	
Plaintiff,	)	
	)	CIVIL NO. 4-02-CV-10273
vs.	)	
	)	
INDIAN HILLS COMMUNITY	)	ORDER
COLLEGE and JAMES LINDENMAYER,	)	
	)	
Defendants.	)	

The Court has before it defendants' motion for summary judgment, filed May 1, 2003. Plaintiff resisted the motion May 27, 2003, and defendant filed a reply on June 2, 2003. The motion is now considered fully submitted.

I. BACKGROUND

The following facts either are undisputed or are viewed in the light most favorable to plaintiff. Defendant Indian Hills Community College ("the College") is a public employer with its central place of business located in Ottumwa, Iowa. Plaintiff Roger Koehn began working for the College in March 1984 as a night shift custodian at the College's Ottumwa campus.

Throughout his tenure at the College, plaintiff was supervised by Randy Sias, Custodial Services Supervisor. At all times relevant to this action, James Lindenmayer served as Vice President of Personnel and Administration for the College. In this position, Lindenmayer handled the development and enforcement of the College's personnel policies as well as hiring, employee discipline

and the administration of the College's employee benefit program. In the summer of 2001, Sias began to report directly to Lindenmayer.

Plaintiff received "good" or "acceptable" evaluations throughout his employment history with the College. In fact, during the two years immediately preceding his termination, plaintiff received the highest possible rating in every applicable category.

Despite consistently strong performance evaluations, plaintiff admits to the presence in his employment file of at least four memoranda of "clarification" or "reprimand," one of which resulted in his not being recommended for an annual salary increase. Plaintiff asserts, however, that these memoranda did not accurately document the incidents at issue.

On July 12, 2001, Lindenmayer issued Koehn an "at will" letter of employment that reflected a salary increase effective August 26, 2001 and an increase in the contribution made by the College to plaintiff's flexible employee benefit plan account. Lindenmayer later testified in deposition that as of July 12, 2001, plaintiff was an employee in good standing.

Iowa Code § 260C.14(12) requires community colleges to publish an annual statement of disbursements. This statement must include the names of the recipients and the total amount paid to each. On August 9, 2001, the College published this statutorily-required criteria in the *Richland Plainsman-Clarion*. Richland, Iowa, where the newspaper is published, is located approximately 30-45 miles from Ottumwa.

Between August 9, and August 23, 2001, plaintiff drove to Richland and obtained copies of the newspaper issue in which the statement of disbursements appeared. At approximately 1:30 a.m. on August 24, plaintiff went to the Advanced Technology Center ("ATC") for his regular meal break. He

brought with him a copy of the August 9, 2001 edition of the *Plainsman-Clarion*. Custodians Will Heckart and Jack Moss also were on break in the ATC at that time, and examined the salary list while they talked with plaintiff.

Due to the random organization of the information, Will Heckart used a highlighter to identify salaries of individuals in which the group was interested. Among those whose salaries were highlighted were the College's then-president, Sias, Lindenmayer, members of the maintenance and ground staff and members of the custodial staff, including plaintiff and assistant supervisor Ron Jones.

Shortly thereafter, Jones came into the ATC with another custodian during his break, saw the highlighted list, and became upset when he saw that his compensation was less than several other night-shift custodians. Sias learned of the incident and told his supervisor, Lindenmayer. After discussing the incident with other custodians, Lindenmayer decided to terminate plaintiff's employment. Plaintiff contends that at the time of his termination, Lindenmayer told him he was an "antagonist," and that his services were no longer needed.

Following his termination, plaintiff filed a "prohibited practices complaint" with the Iowa Public Employment Relations Board, ("PERB"), alleging the College terminated his employment for exercising rights granted by the Public Employment Relations Act, Iowa Code §§ 20.1 *et seq.* In particular, plaintiff alleged defendants had violated his right to "[e]ngage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." IOWA CODE § 20.8(3). A hearing was held before an administrative law judge ("ALJ") on March 5, 2002. On August 14, 2002, the ALJ issued a Proposed Decision and Order recommending dismissal of plaintiff's complaint. On February 14, 2003, the PERB adopted the ALJ's conclusions of law and findings of fact, with

additional discussion, and formally dismissed plaintiff's complaint.<sup>1</sup>

Plaintiff filed the present action for wrongful discharge in this Court on June 10, 2002. Count I of his complaint, brought pursuant to 42 U.S.C. § 1983, alleges defendants' conduct violated his constitutional right to free speech. Count II sets forth a separate cause of action under state law for wrongful discharge in violation of public policy. Defendants now move for summary judgment on both counts.

## II. APPLICABLE LAW AND DISCUSSION

### A. Governing Law

Summary judgment is properly granted when the record, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Walsh v. United States*, 31 F.3d 696, 698 (8th Cir. 1994). The moving party must establish its right to judgment with such clarity there is no room for controversy. *Jewson v. Mayo Clinic*, 691 F.2d 405, 408 (8th Cir. 1982). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). An issue is "genuine," if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party. *Id.* at

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<sup>1</sup> In their reply memorandum, defendants urge the Court to give *res judicata* effect to the factual findings made by the PERB. Because the Court finds the present record also lacking in facts to suggest plaintiff's speech addressed matters of public concern, it need not address defendants' argument.

248. "As to materiality, the substantive law will identify which facts are material . . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

B. Whether Summary Judgment is Appropriate Under Count I

As set forth above, count I of plaintiff's complaint sets forth a cause of action under 42 U.S.C. § 1983, alleging defendants' conduct violated his constitutional right to free speech. Amended and Substituted Complaint and Jury Demand ("Complaint") ¶¶ 48-50. To establish a *prima facie* case of unlawful retaliation by a public employer for exercising First Amendment rights, an employee must demonstrate: "that he or she participated in a protected activity, that the employer took an adverse employment action against him or her, and that a causal connection existed between the protected activity and the adverse employment action." *Hudson v. Norris*, 227 F.3d 1047, 1050 (8<sup>th</sup> Cir. 2000); *see also Jones v. Fitzgerald*, 285 F.3d 705, 713 (8<sup>th</sup> Cir. 2002).<sup>2</sup> For purposes of defendants' motion for summary judgment, the Court will assume plaintiff can demonstrate the latter two elements: that an adverse employment action was taken against him that was causally connected to the speech at issue.<sup>3</sup> The sole issue before the Court on plaintiff's § 1983 claim is whether plaintiff engaged in "protected activity" when he discussed the College's salary list with fellow employees in the ATC.

As summarized by the Eighth Circuit in *Shands v. City of Kennett*, 993 F.2d 1337, 1343 (8<sup>th</sup> Cir. 1993): "[T]he initial question in determining whether an employee's speech is protected is whether

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<sup>2</sup> Assuming a plaintiff establishes her *prima facie* case, "the burden shifts to the employer to articulate a non-discriminatory reason for the adverse employment action." *Hudson*, 227 F.3d at 1050. The employee may then show that the articulated reason is pretextual. *Id.*

<sup>3</sup> Defendants' memorandum with regard to plaintiff's § 1983 claim focuses entirely on the issue of whether plaintiff's speech was in fact constitutionally protected.

the speech addressed a matter of public concern, that is, a matter of political, social, or other concern to the community." (Citing *Connick v. Myers*, 461 U.S. 138, 146 (1983)).<sup>4</sup> Whether an employee's speech "can be characterized as speech about a matter of public concern" is a question of law appropriately decided by the district court. *De Llano v. Berglund*, 282 F.3d 1031, 1036 (8<sup>th</sup> Cir. 2002). Relevant to this determination are "the content, form, and context of the speech, as revealed by the whole record." *Shands*, 993 F.2d at 147-48.

#### 1. Content

The Eighth Circuit has stated that "'speech about the use of public funds touches on a matter of public concern.'" *De Llano*, 282 F.3d at 1037 (quoting *Kincade v. City of Blue Springs*, 64 F.3d 389, 396 (8<sup>th</sup> Cir. 1995)). Nevertheless, "[n]ot every statement made by a public employee about [his] job addresses a matter of public concern." *Belk v. City of Eldon*, 228 F.3d 872, 879 (8<sup>th</sup> Cir. 2000). If an employee's speech relates solely to personnel matters, the speech will not be considered a matter of public concern. *Id.*

For example, in *Tuttle v. Missouri Department of Agriculture*, 172 F.3d 1025, 1033 (8<sup>th</sup> Cir. 1999), a former grain inspector alleged the Missouri Department of Agriculture violated his First Amendment rights by terminating him in part due to a conversation he had with his supervisors in which he criticized certain employment practices. The district court granted the defendant's motion for

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<sup>4</sup> "If the speech falls within this category, the court then balances the 'interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Washington v. Normandy Fire Protection District*, 328 F.3d 400, 404 (8<sup>th</sup> Cir. 2003) (quoting *Shands*, 993 F.2d at 1342) (other internal citations omitted). For the reasons outlined in the body of this Order, the Court need not address this second issue.

judgment as a matter of law on this claim, and the plaintiff appealed. *Id.* After reviewing the record regarding the content of the plaintiff's speech, the Eighth Circuit held that the topics covered during the conversation, which included layoffs, salary increases, promotions and safety issues, did *not* address matters of public concern. *Id.* at 1034. Accordingly, because the plaintiff was "speaking out as an employee, [and] not as a concerned citizen," the First Amendment was not implicated.

In the present case, the undisputed facts show that on August 24, 2001, plaintiff brought a copy of the August 9, 2001 edition of the *Plainsman-Clarion* to the ATC break room and discussed the salary list with several other custodians. *See* Plaintiff's Response to Defendants' Statement of Material Facts at ¶¶ 17-18. There is no evidence, however, that plaintiff spoke to his colleagues "as a concerned citizen." *See Buazard v. Meridith*, 172 F.3d 546, 548 (8<sup>th</sup> Cir. 1999) ("When a public employee's speech is purely job-related, that speech will not be deemed a matter of public concern . . . . Unless the employee is speaking as a concerned citizen, and not just as an employee, the speech does not fall under the protection of the First Amendment."). In *Buazard*, the Eighth Circuit was called to review the district court's grant of summary judgment on a § 1983 First Amendment claim made by a former assistant chief of police. *Id.* at 547. Specifically, the plaintiff alleged he was retaliated against for refusing to change statements he had prepared that summarized his conversations with officers who were fired for misconduct, as well as witnesses to the incident that led to the firings. In affirming the district court's grant of summary judgment, the Eighth Circuit held: "Although the incident which led to the firings may itself be a matter of public concern, there is no indication that Buazard, in making, or refusing to change, his statements, was taking any *action* as a concerned citizen . . . ." *Id.* at 548 (emphasis added).

Similarly, in the present case defendants do not seriously dispute that the salary list itself is a matter of public interest. The legislature effectively declared it a matter of public interest by enacting Iowa Code § 260C.14(12).<sup>5</sup> Nevertheless, absent evidence plaintiff showed public *concern* about the salaries, *i.e.*, questioned any of the salaries as a "misuse of public funds," or called for some form of change or action in the method for determining salaries, the Court finds plaintiff was speaking solely as an employee—and not as a concerned taxpayer. *See, e.g., Tuttle*, 172 F.3d at 1034 (employee's discussion of salaries and other issues found not to address matters of public concern); *Sparr v. Ward*, 306 F.3d 589, 594-95 (8<sup>th</sup> Cir. 2002) (although employee's allegations of harassment and misconduct could be viewed as matters of public concern, record showed employee wrote memorandum as an employee and not as a concerned citizen).

In his resistance to the present motion, plaintiff emphasizes the fact he believed he had a right to review the salary information as a tax-paying citizen. *See* Plaintiff's App. at 26; *see also* Public Employee Relations Board Decision on Appeal, Exh. B to Defendants' App. at 10 (concluding plaintiff "had obtained the published information simply because he was a curious taxpayer and felt he had a right to information about the College's use of tax dollars."). The fact plaintiff *obtained* the information as a member of the public does not change the fact he *reviewed* the information and shared it with his colleagues simply as a curious employee.

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<sup>5</sup> This provision requires the board of directors of each community college to publish annually the receipts and disbursements of all funds, expressly indicating the names of individuals and entities receiving disbursements, and the total amount paid to each. IOWA CODE § 260C.14(12).

## 2. Form and Context

Even assuming the content of plaintiff's speech reflected a matter of public concern, the *form* and *context* in which plaintiff's speech took place prevent a finding that the speech rose to a level warranting constitutional protection. "The form and context are examined to determine whether the public employee speaks as a concerned citizen informing the public that the government is not properly discharging its duties, or merely as an employee speaking about internal practices relevant only to fellow employees." *De Llano*, 282 F.3d at 1036 (quoting *Calvit v. Minneapolis Public Schools*, 122 F.3d 1112, 1117 (8<sup>th</sup> Cir. 1997)). As set forth above, the present case is devoid of evidence plaintiff was in any way critical of the salary information and/or the manner in which the College arrived at salary figures. Assuming he *had* harbored such criticisms or concerns, however, there is no evidence he voiced these concerns in any way, perhaps by discussing his concerns with his colleagues in the breakroom, writing a letter to the newspaper, or by raising the issue with a supervisor who might be able to bring about changes. *But see De Llano*, 282 F.3d at 1037 (certain portions of professor's letters to local newspaper, school newspaper, chancellor and university president found to address matters of public concern); *Calvit*, 122 F.3d at 1117 (fact social worker voiced his criticisms of magnet school's child abuse policy during meeting with his own supervisor, special education administrator and human resources administrator supported finding the speech involved matter of public concern). Based on the record as a whole, the Court therefore concludes plaintiff's speech with regard to the August 24, 2001 break room incident did not address matters of public concern, and does not

warrant First Amendment protection.<sup>6</sup> Summary judgment is granted in favor of defendants on plaintiff's § 1983 claim.

C. Whether Summary Judgment is Appropriate Under Count II

Count II of plaintiff's complaint alleges defendants wrongfully discharged him in violation of recognized Iowa and federal public policy protecting freedom of speech. Complaint at ¶¶51-57. Initially, the Court notes there is no dispute that plaintiff was an at-will employee. Under Iowa law, an employer generally may discharge an at-will employee at any time for any reason. *Huegerich v. IBP, Inc.*, 547 N.W.2d 216, 219 (Iowa 1996); *Borschel v. City of Perry*, 512 N.W.2d 565, 566 (Iowa 1994). The Iowa Supreme Court has recognized two exceptions to this rule: (1) if the discharge violates a "well-recognized and defined public policy of the state": and (2) if a contract has been created by an employee handbook or manual, and the contract is somehow breached. *Borschel*, 512 N.W.2d at 566 (quoting *Springer v. Weeks and Leo Co.*, 429 N.W.2d 558, 560 (Iowa 1988)). The public policy exception is at issue in the present case.

To recover damages under the public policy exception to the employment at-will doctrine, "a plaintiff must establish (1) engagement in a protected activity, (2) adverse employment action, and (3) a causal connection between the two." *Teachout v. Forest City Community School Dist.*, 584 N.W. 296, 299 (Iowa 1998). For the reasons outlined above, the Court finds as a matter of law that plaintiff

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<sup>6</sup> Plaintiff argues in his reply memorandum that the fact the discussion occurred in a semi-private forum does not change its status under the First Amendment. See Plaintiff's Resistance to Defendants' Motion for Summary Judgment at 10 (citing *Kincade v. City of Blue Springs*, 64 F.3d 389, 397 (8<sup>th</sup> Cir. 1995)). While the Court agrees with plaintiff's interpretation of the law, the fact remains plaintiff has produced no evidence that the "purpose of the speech was to raise issues of public concern." *Sparr*, 306 F.3d at 594.

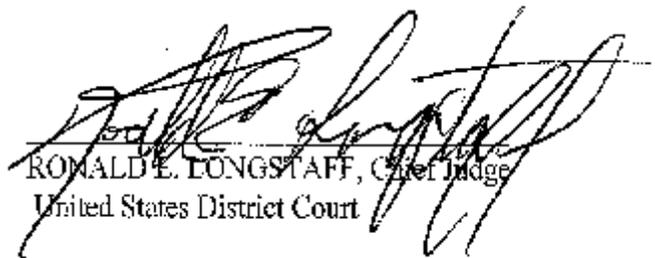
is unable to establish the first element, that he engaged in a protected activity. Accordingly, summary judgment is appropriately granted on count II of plaintiff's complaint.

### III. CONCLUSION

For the reasons set forth above, defendants' motion for summary judgment is granted in its entirety. The Clerk of Court is directed to enter judgment in favor of defendants and against plaintiff.

IT IS ORDERED.

Dated this 5<sup>th</sup> day of August, 2003.

  
RONALD E. LONGSTAFF, Chief Judge  
United States District Court