

1997

James Cassidy v. The Salt Lake County Fire Civil Service Council : Reply Brief

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Mary J. Woodhead; Attorney of Appellant.

Douglas R. Short; Jerry G. Campbell; Attorney for Appellee.

Recommended Citation

Reply Brief, *Cassidy v. The Salt Lake County Fire Civil Service Council*, No. 970525 (Utah Court of Appeals, 1997).
https://digitalcommons.law.byu.edu/byu_ca2/1049

This Reply Brief is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

JAMES CASSIDY,

Plaintiff and Appellant,

-vs.-

THE SALT LAKE COUNTY
FIRE CIVIL SERVICE
COUNCIL,

Defendant and Appellee.

Case No. 970525-CA

PRIORITY NO. 15

REPLY BRIEF OF APPELLANT JAMES CASSIDY

APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY
HONORABLE HOMER F. WILKINSON DISTRICT JUDGE

COUNSEL:

MARY J. WOODHEAD (5581)
261 EAST 300 SOUTH, SUITE 300
SALT LAKE CITY, UTAH 84111
TELEPHONE:(801) 532-6367

ATTORNEY FOR APPELLANT

DOUGLAS R. SHORT (5344)
JERRY G. CAMPBELL(0555)
SALT LAKE COUNTY ATTORNEY'S
OFFICE
2001 SOUTH STATE, #S-3500
SALT LAKE CITY, UTAH 84190

ATTORNEYS FOR APPELLEE

**UTAH COURT OF APPEALS
BRIEF**

UTAH
DOCUMENT
K F U
50

.A10
DOCKET NO. 970525-CA

FILED

Utah Court of Appeals

JUN 30 1998

Julia D'Alesandro
Clerk of the Court

IN THE UTAH COURT OF APPEALS

JAMES CASSIDY,

Plaintiff and Appellant,

-vs.-

THE SALT LAKE COUNTY
FIRE CIVIL SERVICE
COUNCIL,

Defendant and Appellee.

Case No. 970525-CA

PRIORITY NO. 15

REPLY BRIEF OF APPELLANT JAMES CASSIDY

APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY
HONORABLE HOMER F. WILKINSON DISTRICT JUDGE

COUNSEL:

MARY J. WOODHEAD (5581)
261 EAST 300 SOUTH, SUITE 300
SALT LAKE CITY, UTAH 84111
TELEPHONE:(801) 532-6367

ATTORNEY FOR APPELLANT

DOUGLAS R. SHORT (5344)
JERRY G. CAMPBELL(0555)
SALT LAKE COUNTY ATTORNEY'S
OFFICE
2001 SOUTH STATE, #S-3500
SALT LAKE CITY, UTAH 84190

ATTORNEYS FOR APPELLEE

TABLE OF CONTENTS

ARGUMENT 1

I. THE SALT LAKE COUNTY FIRE CHIEF IS NOT A NECESSARY AND INDISPENSABLE
PARTY TO CASSIDY’S CLAIM. 2

II. CASSIDY HAS SUFFICIENTLY MARSHALED THE EVIDENCE IN SUPPORT OF THE
DECISION BELOW. 4

III. CASSIDY SUFFERED AN ADVERSE EMPLOYMENT ACTION. 5

IV. CASSIDY’S SPEECH WAS ON A MATTER OF PUBLIC CONCERN 6

V. THE MANNER IN WHICH CASSIDY EXERCISED HIS RIGHT TO SPEAK ON MATTERS
OF PUBLIC CONCERN DID NOT INTERFERE WITH THE EFFICIENT RUNNING OF
THE FIRE DEPARTMENT 7

VI. THE RECORD DOES NOT SUPPORT A FINDING THAT CASSIDY WOULD HAVE BEEN
DENIED A PROMOTION TO CAPTAIN WITHOUT CONSIDERATION OF HIS
PROTECTED SPEECH 10

CONCLUSION 15

MAILING CERTIFICATE 17

TABLE OF AUTHORITIES

CASES

Givhan v. Western Line Consolidated School District, 439 U.S. 410, 415-16 (1979) . . .	7, 11, 12
Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 287 (1977)	1,11
Pickering v. Board of Education, 391 U.S. 563, 568 (1968)	7
Rankin v. McPherson, 483 U.S. 378, 388 (1987)	7
Andersen v. McCotter, 100 F.3d 723, 725 (10 th Cir. 1996)	8
Kenworthy v. Conoco, Inc., 979 F.2d. 1462, 1471 (10 th Cir. 1992)	6
Metcalf v. Metropolitan Life, Inc., 961 F. Supp. 1536 (Utah 1997)	6
Bailey-Allen Co. v. Kurzet, 945 P.2d 180, 326 (Ct. App. 1997)	5
Seftel v. Capital City Bank, 767 P.2d 941 (Utah App. 1989)	4

STATUTES

Utah Code Ann. § 17-28-13	2
Utah Code Ann. § 17-28-2.4(2)	3
Utah Code Ann. § 17-28-2.6	3, 8
Utah Code Ann. §17-28-5(4)	6

ORDINANCES

Salt Lake County Ordinance 2.80.110(A).	9
---	---

ARGUMENT

Jim Cassidy ("Cassidy") through his counsel of record, files this Reply Brief in Support of his appeal from the decision of the Third District Court granting Summary Judgment to the Salt Lake County Fire Civil Service Council ("Council"). Salt Lake County Fire Chief Larry Hinman failed to promote Cassidy because Cassidy filed a grievance expressing his concerns about a potential threat to public safety arising out of a decision by the Fire Department to be less aggressive in enforcement of the fire code:

Q. Okay, You also made a comment that you didn't promote Mr. Cassidy because of an appeal he had filed with the Civil Service Council with regard to your enforcement of the fire code.

A. Yes.

Transcript at 217.

Once Cassidy showed that his protected activity played a substantial role in the decision not to promote him, the burden switched to the Fire Department to show "by a preponderance of the evidence that it would have reached the same decision as to [Cassidy's promotion] even in the absence of the protected conduct." Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 287 (1977).

The trial court's findings that Cassidy did not engage in protected speech are clearly erroneous and not supported by the evidence. As a result, the Court's failure to switch the burden to the Council to prove that it would have made the same decision anyway constitutes legal error requiring reversal of the decision below.

I. THE SALT LAKE COUNTY FIRE CHIEF IS NOT A NECESSARY AND INDISPENSABLE PARTY TO CASSIDY'S CLAIM.

On October 1, 1997, The Salt Lake County Fire Civil Service Council brought a Motion for Summary Disposition before this Court arguing that because the Council had no jurisdiction to hear Cassidy's promotion grievance, this Court was also without jurisdiction to hear Cassidy's appeal. This Court denied the Council's Motion. The Council's decision to raise the issue of indispensable parties is a thinly veiled attempt to again make the argument that the Council does not have jurisdiction to hear promotion cases. Essentially, the Council argues that the Salt Lake County Fire Chief must be named a party to this action because the Council itself cannot act on promotions.

To make this argument, the Salt Lake County Fire Civil Service Council asks this court to ignore the plain language of the statute which provides the basis for Cassidy's right to bring this action. Utah Code Ann. § 17-28-13 (1995) specifically provides:

Any person aggrieved by a determination of the County Fire Civil Service Council may, within 30 days after notice of the council's ruling, institute an action in the district court of the county or in the county of the aggrieved person's residence, *against the County Fire Civil Service Council* in its official capacity, setting out his grievance and his right to complain. In its answer, the council may set out any matter in justification.(emphasis added).

There is no question that Cassidy has complied with the dictates of the statute. However, the Council asserts that it's jurisdiction over promotions is "limited" and that only the Fire Chief can make promotions. Based upon this analysis, the Council alleges that the Fire Chief is an indispensable party and because "promotion" is at issue, Cassidy must name parties in addition to those required by the statute. This argument is without merit because the Council's analysis ignores the actual language of the statute with regard to grievances and promotions. The Fire Civil Service statute explicitly provides:

The County Fire Civil Service System rules shall provide for recruiting activities, including the recruiting of minorities and women, job-related minimum requirements, selection procedures, certification procedures, appointments, probationary periods, *promotion*, position classifications, recordkeeping, reductions in force, *grievances and complaints*, disciplinary action, work hours, holidays, and other necessary and proper requirements not inconsistent with this chapter.

Utah Code Ann. § 17-28-2.4(2)(*emphasis added*). Equally significant is another provision of the same statute:

The County Fire Civil Service System shall be established and administered in a manner that will provide for the effective implementation of the following merit principals:

(1) recruiting, selecting, and advancing employees on the basis of their relative ability, knowledge, and skills, including open consideration of qualified applicants for initial appointment.

...

(5) fair treatment of applicants and employees in all aspects of personal administration without regard to race, color, religion, sex, national origin, political affiliation, age, or handicap, and with proper regard for their privacy and *constitutional rights as citizens*;

...

(7) provision of a formal procedure for processing the appeals and grievances of employees without discrimination, coercion, restraint, or reprisal.

Utah Code Ann. § 17-28-2.6 (*emphasis added*). These provisions make clear that the system provides for grievances to the Council related to promotions and constitutional violations.

The statutory dictate to provide a system of grievances provided by the legislature for firefighters is inextricably intertwined with the requirement that employees be given a fair opportunity for promotion and a process free from retaliation.

Because Cassidy's retaliation grievance falls within the subject matter jurisdiction of the Civil Service Council, his compliance with the statutory appeal scheme is all that is required for this matter to go forward.

Utah law requires a two step inquiry to determine if parties are indispensable. Seftel v. Capital City Bank, 767 P.2d 941 (Utah App. 1989). First, the court must determine whether an absent party has sufficient interest in the action to make it a necessary one. Id. at 944. If a party is necessary, the court must then consider:

(1) to what extent a judgment rendered in the person's absence will prejudice him or her or those already parties; (2) the likelihood of reducing or avoiding prejudice by protective measures or provisions in the judgment; (3) the adequacy of the judgment which might be entered in the person's absence, and (4) the adequacy of the plaintiff's remedy if the action is dismissed for nonjoinder. In light of these factors, the ultimate test under Rule 19(b) is whether in equity and good conscience the action should proceed." (citations omitted).

Id. The legislature made a choice when it drafted the Fire Civil Service Statute to make the Council the legal representative of Salt Lake County and the Salt Lake County Fire Department in an appeal. Given this analysis, it is clear that Cassidy's claim should not be dismissed for failure to name the County Fire Chief.

II. CASSIDY HAS SUFFICIENTLY MARSHALED THE EVIDENCE IN SUPPORT OF THE DECISION BELOW.

The Council argues that Cassidy failed to marshal the evidence supporting the decision below. In fact, Cassidy cited in great detail the testimony which supported the relevant findings made by Judge Homer Wilkinson and cited testimony in support of every material finding made by the court below. For example, The Council argues that Cassidy did not cite evidence of Captain Scott Collins' belief that Cassidy was a disruptive firefighter. In fact, Cassidy cites this evidence throughout his brief. *See*; Opening Brief of Appellant James Cassidy, pp. 14-15, 21-22. Similarly,

the Council argues that Cassidy did not marshal direct this court's attention to the fact that Cassidy attempted to secretly tape his second promotion interview with the Fire Department. Contrary to that assertion, Cassidy addressed that incident in detail. *Id.* at 22.

Utah law requires that Cassidy marshal all evidence which support the trial court's findings. Bailey-Allen Co. v. Kurzet, 945 P.2d 180, 326 (Ct. App. 1997). The Council implies that this requires Cassidy to cite every negative reference to him in the record. That is not the rule. Rather, Cassidy is required to cite every piece of evidence which supports the ruling of the court below. He has done that, both in the section of his brief entitled "Marshaling the Evidence" and within the Argument section. Because Cassidy has complied with the requirement that he marshal the evidence, this Court should consider his appeal on its merits.

III. CASSIDY SUFFERED AN ADVERSE EMPLOYMENT ACTION.

The Council argues that the Fire Chief's failure to promote Cassidy to Station Captain was not an adverse employment action. This assertion is without merit. In support of its argument, the Council quotes cases which list examples of retaliatory conduct which happen not to include promotion. None of the cases cited stand for the proposition that a retaliatory decision to deny an employee a promotion is not actionable. In fact, the case law supports the opposite conclusion:

Examples of adverse employment actions include decisions that have a demonstrable adverse impact on future employment opportunities or performances, demotions, adverse or unjustified evaluations or reports; transfer or reassignment of duties; **failure to promote**, and unfavorable letters of reference to prospective employers.

Metcalf v. Metropolitan Life, Inc., 961 F. Supp. 1536 (Utah 1997), citations omitted, *emphasis added*. This view is consistent with the position taken by the United States Court of Appeals for the

Tenth Circuit in Kenworthy v. Conoco, Inc., 979 F.2d. 1462, 1471 (10th Cir. 1992) (Affirming judgment for plaintiff on claim of failure to promote in retaliation for bringing EEOC claim.)

IV. CASSIDY'S SPEECH WAS ON A MATTER OF PUBLIC CONCERN.

The Council's argument that Cassidy's speech did not address a matter of public concern is without merit. Cassidy's written complaints about the changes to the Fire Code Inspection process make reference to his concerns about the threat to human life should the changes remain in effect. R. 179-195. Similarly, the record testimony indicates that Cassidy's spoken concerns about the Wildland Fire Crew included a concern that unilateral creation of the crew violated the Civil Service Rules.¹ Both of these matters rise to the level of public concern.

The Council suggests that Cassidy's speech was not protected because it was made in private, rather than communicated to the public. This argument has been rejected. "Neither the [First] Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public." Givhan v. Western Line Consolidated School District, 439 U.S. 410, 415-16 (1979).

In Givhan, the Court considered whether an employee's speech was protected where she confronted her supervisor in his office regarding her concerns about race discrimination. The School District presented evidence of "a series of private encounters between petitioner and the school principal in which petitioner allegedly made 'petty and unreasonable demands' in a manner variously described by the principal as 'insulting,' 'hostile,' 'loud,' and 'arrogant.'" Id. at 412. Although these

¹ Eventually, after Cassidy's complaints, the Utah Code was amended to specifically allow for a Wildlands Fire Crew which functions outside the normal civil service process as Cassidy claimed was necessary. Utah Code Ann. §17-28-5(4).

conversations were lively and in private, as was Cassidy's conversation with Assistant Chief Berry, they were considered protected First Amendment speech.

To the extent the council asserts that Cassidy's speech was not a matter of public concern because it was not communicated to the public, the Council is in error. Because Cassidy's speech addressed matters relating to public safety and compliance with the civil service law, it is protected as speech on matters of public concern.

V. THE MANNER IN WHICH CASSIDY EXERCISED HIS RIGHT TO SPEAK ON MATTERS OF PUBLIC CONCERN DID NOT INTERFERE WITH THE EFFICIENT RUNNING OF THE FIRE DEPARTMENT.

Once an employee established that his speech involves a matter of public concern, he must show that his interest in the expression outweighs the government's interest in promoting the efficiency of the public services it performs through its employees. Pickering v. Board of Education, 391 U.S. 563, 568 (1968). In this regard, the "state bears a burden of justifying the discharge on legitimate grounds." Rankin v. McPherson, 483 U.S. 378, 388 (1987). These are questions of law for the district court.² Andersen v. McCotter, 100 F.3d 723, 725 (10th Cir. 1996). The Court below found, and the Council here asserts, that the manner in which Cassidy complained was sufficient to strip his speech of constitutional protection. This conclusion is not supported by the facts.

The speech which Cassidy claims is protected is speech related to enforcement of the fire code and the creation of the Wildlands fire crew. In neither case did was Cassidy's speech so

² This requirement is distinct from the Mt. Healthy burden that requires the public employer to prove that it would have taken the same action even without the protected conduct in that the issue here is whether the manner of the complaints themselves was so disruptive or threatening to efficiency as to make them unprotected.

disruptive as to be outside protection of the First Amendment and the statutory prohibition against retaliation.

Cassidy's grievance to the Fire Civil Service Council was in writing and followed the statutory directives regarding the various levels of appeal. Consequently, that appeal is protected by the non-retaliation provisions of Utah Code Ann. §17-28-2.6(7) which specifically prohibits retaliation against an employee for his use of the grievance process by mandating "provision of a formal grievance procedure for processing the appeals and grievances of employees without discrimination, coercion, restraint or reprisal."

The Fire Chief also indicated that he denied Cassidy a promotion because he brought his concerns about enforcement of the fire code to the attention of Salt Lake County Public Works Director Terry Holzworth. The manner of this complaint cannot be the basis for denying Cassidy the promotion to Station Captain because it is explicitly protected by the Salt Lake County Whistleblower ordinance which protects the right of employees "disclosure of information relating to . . . specific danger to public health or safety." Salt Lake County Ordinance 2.80.110(A).³

Cassidy's complaints about the Wildlands Fire Crew were also carried out in a manner which cannot defeat Cassidy's right not to be retaliated against for exercising his right of free speech. In one incident, Captain Scott Collins indicated that Cassidy disagreed with his views about the Wild Land Fire Crew:

³ The Council suggests that Cassidy's reference to the Whistleblower statute is an attempt to create a new cause of action based on the statute. Cassidy is not making any such claim. Rather, his argument is that as long as the manner of his complaints were consistent with the various avenues provided to employees by State law and County ordinance, the manner of those complaints cannot be the basis for a denial of Cassidy's promotion.

Q. Now were there other areas in which you felt that he was not up to par, if you will?

A. Yes. I think that whenever there's a controversial issue afloat in the fire department, Jim has to jump on it. I can name a few examples. Number one was the Wild Land Fire Crew. When the fire department, a year ago, came out with the Wild Land Fire Crew, I thought it was great. I thought it was a great idea.

He was telling everybody on the crew it was illegal, they can't do this, it's not right. On the other hand, I'm telling the crew that I think it's great because I'd love nothing more than to run medics or fight structure fires and watch somebody else up in the hills.

So I felt like he was countermanding me or undermining me in a way. I tried to tell him, hey Jim, I don't care whether you think it's legal or illegal. I think it's a great policy, I think it's great. I think it's something we've needed.

Transcript at 237-38. In this instance, it is clear that Collins' dispute with Cassidy was over the content of Cassidy's speech, not the fact that it occurred. Collins testimony does not evidence any dispute with the fact that the Wildlands Fire Crew was being discussed.

The other incident where Cassidy discussed the Wildlands Fire Crew was with Assistant Chief Don Berry:

Q. Okay, Did Jim ever take any overt action with regard to his opposition by going to the press or going to a public figure?

A. No. What he did was he came in my office one day and basically made what I thought were threats that if we went ahead with the Wild Land Crew he was going to take action to see that we didn't hire those people.

Q. What did he specifically say that indicated to you that it was a threat?

A. He said that he was going to take some kind of action in opposition to our hiring the Wild Land Crew.

Q. Well, wouldn't it also be considered action if he had gone and filed an objection within the department to the implementation of that program? Wouldn't that also be considered an objection?

A. Yes.

Q. Is there any difficulty with having someone take action or objection to public policy?

A. The difficulty I have is when the fire fighter walks into the deputy chief's office and says that I'm opposed to your programs and I'm going to take action against it. That's the problem. I saw that as a problem.

Transcript at 197. The conversation between Cassidy and Berry took place in Berry's office. There is no testimony whatsoever that Cassidy's concerns about the Wildlands Fire Crew had any effect on the crew or the efficiency of the Fire Department.⁴

Because all of Cassidy's complaints about the Fire Code were protected by either State statute or County Ordinance, the manner of his complaints cannot defeat Cassidy's claims. Moreover, Cassidy's complaints about the Wildlands Fire Crew cannot be considered so disruptive as to strip them of protection where the real objection was to Cassidy's viewpoint.

VI. THE RECORD DOES NOT SUPPORT A FINDING THAT CASSIDY WOULD HAVE BEEN DENIED A PROMOTION TO CAPTAIN WITHOUT CONSIDERATION OF HIS PROTECTED SPEECH.

Once Cassidy showed that his protected activity played a substantial role in the decision not to promote him, the burden switched to the Fire Department to show "by a preponderance of the evidence that it would have reached the same decision as to [Cassidy's promotion] even in the absence of the protected conduct." Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 287 (1977). Because the District Court erroneously concluded that Cassidy's speech was not protected, the issue of whether the Council met its burden pursuant to Mt. Healthy was never addressed.

⁴ The Council suggests that it has wide leeway in suppressing speech because of the quasi-military nature of the Fire Department. "The Pickering balancing test requires a 'fact-sensitive' weighing of the government interests." Anderson v. McCotter, 100 F.3d 723, 725 (10th Cir. 1996). The Council's general assertions in this regard, none of which are supported by facts on the record, are insufficient to overcome Cassidy's right to be free from retaliation.

In order to meet its burden, the Council must show that if all of Cassidy's protected activity were removed from the record, Cassidy would have been denied promotion for reasons not tainted with retaliation. The Council has failed to make a record which can support this conclusion. In its responsive brief, the Council asserts that Cassidy would not have been promoted anyway because "his actions and disruptive nature within the fire station, coupled with his attempt to set up the fire department with his concealed tape recorder, reflected a disloyal attitude." These assertions fail to rescue the Council.

In order to rely upon Cassidy's disruptive actions, the Council must cite conduct which is not associated with protected speech and which was relied on by the decisionmakers. As the court indicated in Givhan, 439 U.S. at 416, this Court must distinguish between evidence which demonstrates the same decision was justified and evidence demonstrating the same decision would have been made. "Appellants seem to argue that the preponderance of the evidence shows that the same decision would have been justified, but that is not the same as proving the same decision would have been made." Id. The Council cannot meet this requirement. The Council's general citations to Cassidy's "actions and disruptive nature" are certainly not sufficient. Moreover, the Council's citations, elsewhere in the brief, to the testimony of Scott Collins is also insufficient because there is no evidence that the decisionmakers ever spoke to Collins about the decision to promote Cassidy. The testimony in the record is that Chief Hinman considered three factors in making the decision not to promote Cassidy. First, he stated that he had conversations with Cassidy's station captain, Scott Hawkinson, about Cassidy's performance. Transcript at 210. There is no evidence whatsoever in the record about the content of this conversation. Second, Hinman indicated that he reviewed Scott Collins' substandard review of Cassidy's performance:

Hinman: Finally, I had reviewed Captain Collins' substandard evaluation of Mr. Cassidy and I felt that Captain Collins' comments attached to that evaluation indicated to me that Mr. Cassidy really had demonstrated a lack of support for administration policies and the goals of the fire department.

Q. I'm going to start from the back and go forward. You made reference to the substandard evaluati

A. That's right.

Q. So what substandard evaluation are you looking at.

A. That was the evaluation signed by Captain Collins. And I - -

Q. Of what year?

A. That was a prior evaluation.

Q. So you looked at an evaluation that was a year old instead of the evaluation that was most current?

A. Yes, I did.

Transcript at 216-217. Neither Cassidy's below standard evaluation or the his then current "above standard evaluation issued by Hawkinson were entered into evidence.⁵ Given the chief's emphasis on Collins' conclusions of "disloyalty," the Council cannot argue that this evaluation meets its Mt. Healthy burden of presenting evidence unrelated to Cassidy's protected speech. In addition to these factors, Hinman also testified that Cassidy's grievance regarding the Fire Code played a role in the decision to deny him a promotion:

Q. Okay, You also made a comment that you didn't promote Mr. Cassidy because of an appeal he had filed with the Civil Service Council with regard to your enforcement of the fire code.

⁵ Interestingly, the only evaluation entered into evidence is Scott Collins 1989 evaluation written before Cassidy's protected speech. In that evaluation, Collins stated "Jim performs an excellent job in the Acting Officer's Position at Station 51." Exhibit A to transcript of Civil Service Council Hearing.

A. Yes.

Q. Is the mandates of the Uniform Fire Code an issue of public policy in which the general public has right to be informed and knowledgeable of whether it's being properly administered?

A. It's a matter of public policy, yes. Anyone from the public can come in and request a copy of the Uniform Fire Code.

Q. Isn't there a policy that we have within the state where we encourage employees to speak out on public policy issues they don't believe are being enforced correctly?

A. Yes, I think the County has a policy --

Q. What is your position on that issue in silencing that effort that would be taken by that public employee bringing a complaint about how it was enforced?

A. At no time during that process did I attempt to silence Mr. Cassidy.

Q. If you use it as a factor to deny him his promotion, aren't you in fact silencing that active challenge to public policy?

A. I don't know That's history. It happened. It affected my judgment - -

Q. Well that's the basis as to why you denied him his promotion.

A. Yes - -

Transcript at 217-218.

The Council places great emphasis on the testimony of Scott Collins that Cassidy did not always perform perfectly during the time Cassidy worked for Collins. For example, Collins testified:

Q. Have you ever heard fire fighter Cassidy indicate to you that he was not going to follow administrative policies or he was going to take some major, in terms of messing around with them?

A. One time in particular - - And it could have been several times, I'm not sure. But one time in particular he mentioned to me that he liked screwing around with two or three ranks above him.

And I said, well wait a minute, I'm two ranks above you. Do you like screwing around with me? And he said, no, no. I mean the white shirts and administration. He says, they're stupid and it's so fun screwing with them.

...

But it was time for him to turn things around. The crew is sick and tired of it. I'm sick and tired of it. I'm sick and tired of hearing this isn't right and I'm going to fight this. And I've had a lot of crew members come up to me. They don't want to work around him, especially if he's the acting officer.

Transcript at 241. This testimony is only one example of a long recitation of Collins' dissatisfaction with Cassidy. Nonetheless, while Collins may have believed these things about Cassidy, there is no evidence anywhere in the record that he conveyed them to Hinman or anyone else making the promotion decision.⁶ As a result, Collins' views about Cassidy may justify the decision not to promote Cassidy, but they do not prove that the decision not to promote Cassidy would have been the same as is required by Givhan.

The Council and the Court below also placed great emphasis on the fact that Cassidy brought a hidden tape recorder into his last promotional interview. The District Court concluded that this incident demonstrated "a disloyal attitude towards the department by the plaintiff." R. 282. Consequently, the Court concluded that the department had good cause not to promote Cassidy. The difficulty with this analysis is that the evidence is undisputed that the incident with the tape recorder occurred after the decision had been made not to promote Cassidy. *See*; Statement of Facts, Brief

⁶ In its finding of fact, for example, the District Court found; "The Court finds that plaintiff's poor attitude was reflected in his interactions with Captain Collins where he reluctantly complied with directions or failed to perform." R. 282. While this evidence might have influenced a decisionmaker to deny Cassidy a promotion, there is no evidence anywhere on the record that the views of Captain Collins expressed on the witness stand were relied on by anyone at the time the decision not to promote Cassidy was made.

of Appellee, pp. 6-7, indicating that the decision not to promote Cassidy was made in October of 1992 and the incident with the tape recorder occurred during November 1992.⁷ As a result, the incident with the tape recorder cannot provide the non-discriminatory reason for the earlier decision not to hire Cassidy.

The burden is on the Council to prove that it would have refused to promote Cassidy even without the admitted anger against him for engaging in protected speech. The District Court committed error by refusing to make this analysis despite a proper request by Cassidy. R. 232. Based upon the record, the Court should conclude that the Council did not meet its burden in this regard and remand the case to the District Court with an Order to enter judgment on liability issues in favor of Cassidy.


CONCLUSION

Based upon the foregoing, this Court must reverse the finding of the District Court that Cassidy's use of the grievance process and exercise of his First Amendment rights did not play a determinative role in the decision not to promote him. The evidence is undisputed that Cassidy's use of the grievance process to complain about the changes to the fire code addressed a matter of public concern and played a substantial role in the decision to skip over Cassidy at the time he

⁷ The reason for this odd timeline is because the Department was required by Civil Service Rules to interview Cassidy and another firefighter for the open Station Captain positions but failed to do so before making its decision. Cassidy complained and the Fire Department notified him and the other firefighter that they would be granted interviews but that the original hiring decisions would stand. It was during this interview that Cassidy was discovered with the hidden tape recorder. T. 115-117

was first on the promotion list. As a result, Cassidy respectfully asks this Court to reverse the decision below as to liability and remand the case to the District Court for a hearing on damages.

DATED this 30th day of June, 1998.


MARY J. WOODHEAD
ATTORNEY FOR JAMES CASSIDY

MAILING CERTIFICATE

I hereby certify that on the 30th day of June, 1998 I caused a true and exact copy of the foregoing APPELLANT'S REPLY BRIEF to be mailed, first class, postage prepaid, to:

Douglas R. Short, Esq.
Jerry G. Campbell, Esq.
Salt Lake County Attorney's Office
2001 South State, #S-3500
Salt Lake City, Utah 84190

A handwritten signature in cursive script, appearing to read "Mary Mitchell", is written over a horizontal line.