UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

LARRY CARPENTER

Plaintiff,

vs. CASE NO. 8:03-CV-451-T-17-EAJ

CITY OF TAMPA

Defendant.

______________________________________/

ORDER

This cause is before the Court on Defendant's Motion for Summary Judgment, filed on December 22, 2005 (Dkt. 13), and response thereto, filed January 21, 2005 (Dkt. 22).

BACKGROUND

Plaintiff, Larry Carpenter, was employed as a Traffic Maintenance Specialist in the Public Works Department by the City of Tampa. Carpenter began work for the City of Tampa on August 1, 1996, and worked until his employment was terminated on September 11, 2002. Carpenter was a member of the Sons of Confederate Veterans. As a result of his involvement in this organization, Plaintiff chose to display a Confederate flag license plate on his Ford pickup truck.

While employed by Defendant City, Plaintiff displayed a Confederate flag license plate on the front of his personal vehicle. The truck was never used in any official capacity by the City of Tampa. Plaintiff always parked his truck in Defendant's parking lot on the corner of 12th Street and Twiggs in the downtown Tampa area. This parking lot is traditionally used by City of Tampa employees, temporary employees, and guests.

Carpenter never personally received any complaints from his coworkers that his license plate was offensive; however, Transportation Department Head Elton Smith stated that a complaint was made to Plaintiff's supervisors about the license tag. On January 24, 2002, Carpenter's immediate supervisor, Brian Eddings, verbally ordered the

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removal of the license plate from the front of Carpenter's vehicle, but Plaintiff refused to comply. On January 25, 2002, Eddings asked Carpenter to sign a written account of his verbal warning to remove the Confederate flag. The meeting was not a formal hearing between Eddings and Carpenter. Plaintiff was a member of the Amalgamated Transit Union (ATU), Local Union 1464, and asked for a representative of the union to be present at the meeting. This request was denied and as a result, Plaintiff refused to sign any documentation.

On February 4, 2002, Plaintiff filed a written grievance protesting the order to remove his license plate and objecting to a lack of union representation at the informal meeting with Eddings. There is no written response to the grievance documented in evidence, but it is apparent that the order to remove his tag was not withdrawn. On February 24, 2002, Plaintiff appealed the order demanding the removal of his license plate. In response to this appeal, a grievance hearing was held on April 29, 2002, and Plaintiff's appeal was denied. The Department Head, Elton Smith, also wrote an official response to the grievance reflecting the outcome of the hearing. In the response, Smith stated that the City prohibits behavior found to be offensive or disruptive to other employees; however, the City of Tampa has no official written policy against the display of flags, signs, license plates, or other affiliations on vehicles owned by employees. Smith also told Carpenter, "If you wish to pursue your claim that the Confederate flag is not an offensive symbol and that your rights are being infringed upon, then you should continue to do so through the grievance process. However, in the interim, you should do as your supervisors have instructed and remove the flag."

Due to his failure to comply with the order, Plaintiff was repeatedly disciplined. On May 14, 2002. Plaintiff received a written reprimand. On June 11, 2002, he received negative comments on his yearly employee evaluation, only for the refusal to remove the tag. Between June and July 2002, Plaintiff was also suspended without pay on three occasions, each for a longer length of time. Plaintiff informed his superiors, Brian Eddings and Buddy Stokes, that he would not seek redress through the standard grievance procedure. In a letter sent to his immediate supervisors on July 7, 2002, Carpenter stated, "I feel that there will be no justice in the Grievance procedure as Employee relations is siding with Management." In a similar letter written July 22, 2002,

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Plaintiff wrote, "I do not concur with the last three Disciplinary Actions. Management and Employee Relations have already discussed this and I feel that a grievance is not necessary as justice will not be served." Defendant terminated Plaintiff's employment on September 11, 2002.

After his termination, Plaintiff filed for unemployment benefits and was initially denied benefits. The Unemployment Compensation Claims Adjudicator found that the Plaintiff was discharged for employee misconduct. At an appeal hearing, however, the Unemployment Compensation Appeals Referee found that his refusal to remove the license plate was not misconduct and the City's order violated Plaintiff's First Amendment rights. Plaintiff then received unemployment benefits. As a result of these events. Plaintiff filed an action against the City of Tampa claiming both a violation of his First Amendment rights under 42 U.S.C. § 1983 and a violation of the Florida Constitution Article 1 Section 4.

Defendant City now moves for a summary judgment claiming that the City of Tampa does not have an official policy against the display of Confederate flags and that the order to remove the license plate was not a violation of Plaintiff's First Amendment right.

STANDARD OF REVIEW

A federal district court will grant a summary judgment if there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56 (c). Issues of fact are genuine "only if a reasonable jury considering the evidence presented could find for the non-moving party." Anderson v. Liberty Lobby Inc., 477 U.S 242, 249 (1986). Material facts are those that would affect the outcome of the trial. Id. at 248.

Rule 56 further requires the entry of summary judgment against a party who fails 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. The moving party must state the basis for its motion, and must identify the portions of the record that show the absence of a genuine issue of material fact.

The burden can be discharged by "showing…that there is an absence of evidence to support the non-moving party's case." Celotex Corp. v. Catrett, 477 U.S 317, 323

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(1986). All doubt as to the existence of a genuine issue of material fact must be resolved against the moving party. Hayden v. First Nat'l Bank of Mt. Pleasant, 595 F. 2d 994, 996-997 (5th Cir. 1979).

DISCUSSION

Plaintiff's display of a Confederate Flag license plate on the front of his personal vehicle is speech protected under the First Amendment. To state a claim under 42 U.S.C. § 1983, a plaintiff must allege: (1) that a right secured by the Constitution or laws of the United States was infringed and (2) that the violation was committed by a person acting under the color of state law. Focus on the Family v. Pinellas Suncoast Transit Authority, 344 F. 3d 1263, 1276-1277 (11th Cir. 2003). Carpenter's complaint clearly meets these requirements as the relevant "speech" is clearly protected under the First Amendment and the violation was allegedly committed by the City of Tampa.

The City of Tampa argues that display of a Confederate flag on Carpenter's license plate was not protected speech. The Eleventh Circuit has established a four part test to determine whether a city has discharged a public employee in retaliation for protected speech. Morgan v. Ford, 6 F.3d 750, 754 (11th Cir. 1993); see also Rice Lamar v. City of Fort Lauderdale, 232 F.3d 836, 841 (11th Cir. 2000); Fikes v. City of Daphne, 79 F.3d 1079, 1084-1085 (11th Cir. 1996). According to the test, the court must: 1) determine if the speech addresses a matter of public concern; 2) weigh the employee's First Amendment rights against the government's interest in maintaining a productive working environment; 3) decide whether the speech played a critical role in the government's decision to terminate the employee; and 4) if the government did use the employee's speech as a reason to discharge the employee, the government then has the burden to prove by the preponderance of the evidence that it would have been reached the same decision in the absence of protected conduct. Morgan, 6 F.3d at 754.

The court must first decide whether the speech constituted a matter of public concern. Id. In Connick v. Myers, 461 U.S. 138 (1983) the Supreme Court held that speech addresses a matter of public concern when it can be "fairly considered as relating to any matter of political, social, or other concern to the community." Id. at 146. The display of a Confederate flag was a vivid symbol expressing a political and/or social idea of Carpenter. Further, in Dixon v. Coburg Dairy, Inc. 330 F. 3d 250 (4th Cir. 2003)

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vacated on other grounds by 2004 W.L 1152827 (4th Cir. May 25, 2005) (en banc), the Fourth Circuit held that "the act of displaying a Confederate flag is plainly within the purview of the First Amendment." Id. at 262. The court went on to say that a person had "a constitutionally protected right to fly the Confederate battle flag from his home, car, or truck." Id. Thus, Carpenter's display of a Confederate flag constituted a matter of public concern and was clearly protected by the First Amendment.

Second, the court must weigh the employee's First Amendment rights against the interest of the city, as an employer, in promoting a conducive the work place. Morgan, 6 F. 3d at 754. In performing this balancing test, a court must consider: (1) whether the speech at issue impeded the government's ability to perform its duties effectively; (2) the manner, time, and place of the speech; and (3) the context in which the speech was made. Id. The City of Tampa has an interest in preventing disruptive material from permeating the work place environment. However, the City of Tampa has not proved that the display of a Confederate flag on Carpenter's license plate caused such a disruption to justify the order to remove his tag. During his entire employment for the City of Tampa, Plaintiff displayed a Confederate flag on the license plate of his truck. Until this incident, a complaint was never made about the flag. The display of the flag did not impede Carpenter's own work as he still received excellent marks on his employee evaluation sheet. Further, the time, manner, and place of speech were not disruptive to the working environment. Carpenter displayed the flag on his personal vehicle, which remained parked in the city lot for the duration of the work day. He did not speak about the flag or what he thought it represented inside the work place or during work hours. Finally, the speech was made in the context of purely personal expression and was not overtly harmful to the City of Tampa's working environment.

Third, the court must determine whether the speech in question played a substantial role in the City's decision to discharge the employee. Id. In this case, the City of Tampa cited no other reason for terminating Carpenter's employment other than the display of the Confederate flag on his pickup truck. In all other areas regarding his employment, Carpenter was an exemplary employee, which is proven by the high marks he received on his employee evaluation sheet. The only cause stated for the termination of Carpenter is his insubordination in refusing to remove the Confederate flag license

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