

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

MICHAEL GOZA,)	
)	
Plaintiff,)	
)	Case No. 2:17-cv-2873-JPM-dkv
v.)	
)	
MEMPHIS LIGHT, GAS AND WATER)	
DIVISION,)	
)	
Defendant.)	

**ORDER AND OPINION
AND
ORDER DENYING LEAVE TO AMEND PLEADINGS TO CONFORM WITH THE
EVIDENCE**

This matter came before the Court for a nonjury trial from February 25 to February 27, 2019. (ECF Nos. 99-101; see O. Granting Mot. Strike, ECF No. 91.) Plaintiff Michael Goza alleges that Defendant Memphis Light, Gas and Water Division (“MLGW” or the “Division”) discriminated against him on the basis of his protected speech and on the basis of his race when it demoted and terminated him in October, 2017. (Pretrial O., ECF No. 98 at PageID 1491.) For the reasons set forth below, the Court finds that Goza succeeds on both claims.

The government does not have to turn a blind eye to the speech of its employees, but MLGW’s decisions in this case were based on unconstitutional factors. As the Court explains below, the proof at trial showed that MLGW did not actually believe that Goza would hurt customers or treat anyone unfairly on account of their race. Instead, the Court finds that MLGW

fired Goza because he expressed unpopular opinions and created a perception problem for the Division.

Public perception alone cannot justify a restriction on free speech – the First Amendment, after all, restricts the government even though the government is chosen by the people. See Don Herzog, The Kerr Principle, State Action, and Legal Rights, 105 Mich. L. Rev. 1 (2006) (“Ordinarily, the state should do what citizens want... But sometimes the law bars that responsiveness.”). Some of Goza’s statements may have been insensitive, offensive, and even bigoted, but they were protected by the Constitution nonetheless. MLGW thus violated Goza’s First Amendment rights when it demoted and fired him.

The Court also finds that MLGW terminated Goza in part because of his race. MLGW decisionmakers explicitly mentioned Goza’s race as a reason for his termination. MLGW also acted differently in the case of Deandre Stewart, a similarly situated African-American employee, who received only a three-day suspension after he advocated killing Asian-Americans because of their race. MLGW then took the unusual step of directing a subordinate to write a report with the implicit goal of exonerating Stewart and downplaying his remarks. The Court finds this to be an affirmative attempt to undermine the even-handed application of MLGW policy. The Court considers this to be particularly strong evidence that MLGW’s policies as applied to Goza were a pretext for discrimination.

I. Background

Michael Goza worked as a Customer Service Tech III (a “Tech III”) for MLGW, a division of the City of Memphis and the utility provider for electricity, gas, and water service for Memphis and Shelby County. (Pl.’s Resp. Def.’s Statement of Material Facts, ECF 45-1 at

585-86.) Goza's responsibilities included investigating and repairing problems with utility services in customers' homes. (Id. at 586.) Over thirty-two years of employment, Goza received customer compliments and good reviews but no customer complaints. (Def.'s Resp. Pl.'s Statement of Material Facts, ECF No. 48-1 at 803-804.)

On August 15, 2017, protesters gathered to support the removal of a statue of Jefferson Davis from a public park in Memphis. (Trial Exhibits 6, 7.) Goza did not have work that day and attended the rally to voice his opposition to the removal efforts. (Id.; Testimony of Michael Goza, ECF No. 115 at PageID 2149.) Footage of Goza appeared on the nightly news and some statements he made at the protest were reported in *The Commercial Appeal* the next day. (Trial Exhibits 6, 7.) *The Commercial Appeal* quoted Goza as saying, "What I'm tired of is being portrayed as KKK or a white supremacist simply because I'm a white guy who wants to preserve my heritage." (Trial Exhibit 7.)

On Facebook, Goza had made the following statements before the August 15, 2017 rally:

Lincoln himself wanted to send all of you back to Africa. Segregation? That's a whole other topic. What has it accomplished other than to cause more division between the whites and blacks. You want to be with your kind. I want to be with mine. Blacks make up 13% of the population, but yet are responsible for almost 80% of violent crime. Every city that's a third world crap whole [sic] is a majority black and ran by blacks. I could not agree more about what the federal government has done to blacks however. They're my enemy. I look at them as an enemy of Christianity. Planned Parenthood is defended by democrats mostly, but yet has murdered more blacks than all violent crime combined. I agree on the war on drugs. Its been used as an excuse to destroy our liberty while the government ships the drugs into our country and profits from it. Why else do you think that Heroin is epidemic while our troops guard the poppy fields in Afghanistan? So we may not agree on the South, but we can sure agree on the criminality of the federal government.

(Trial Exhibit 2.)

You want to be with your kind. I want to be with mine, There's no wrong it that. You celebrate your history, but you want to destroy mine. You have black history month, but being proud of white history is racist. That's the hypocrisy I will never be at peace with. I work the streets of Memphis daily. The real racists are blacks. 90% of the blacks who are murdered are done so at the hands of other blacks. So if black lives matter, why don't you clean up your own damn house before complaining about my history and blaming your problems on whitey.

(Id.) When an individual on Facebook stated, "Signing won't do shit. Until Southern supporters get to the streets and riot like the ones pushing for removal. Eye for an[] eye," Goza replied:

I couldn't agree more. We at the League of the South are doing much more. We are getting in the streets. New Orleans was only a beginning. Charlottesville is this weekend and over a thousand [are] planning on going. We're planning these all over South. The attacks have awakened more and more.

(Id.)

Goza's appearance at the rally attracted the attention of individuals who began to investigate Goza's social media activity. (See generally Trial Exhibit 5.) At some point, these persons learned that Goza worked for MLGW, perhaps because other MLGW employees told them or perhaps because one of Goza's Facebook pictures shows him in an MLGW truck. (See Trial Exhibit 2, Trial Exhibit 5.) One complaint about Goza's employment was shared twenty-one times on Facebook. (Trial Exhibit 5.) Stacey Greenberg, MLGW Community Relations Coordinator, testified that another post had been shared eighty-one times, although she was unable to produce documentation supporting her assertion at trial. (See Testimony of Stacey Greenberg, ECF No. 116 at PageID 2217.) Ten customers submitted complaints to MLGW about Goza, but MLGW received no complaints after August 29, 2017. (Id. at PageID 2224.)

Goza's appearance at the rally and his social media statements came to MLGW's attention as early as August 17, 2017. (Trial Exhibit 1.) Richard Thompson, an MLGW Senior Communications Specialist, wrote in an August 17 email to Gale Carson, Vice President of Communications, that "There is a vibrant movement to 'out' employees who are posting racist

memes, etc. on social media. Stacey [Greenberg] and I have encountered posts from folks who come to our FB page to inform us because these employees self-identify themselves on FB. This hasn't turned into a story yet but it's only a matter of time." (Id.) On August 18, Carson forwarded this email and the Facebook picture of Goza in an MLGW truck to: MLGW CEO and President Jerry Collins, MLGW General Counsel and Vice President Cheryl Patterson, Vice President of Customer Services Christopher Bieber, Vice President of Construction and Maintenance Nicholas Newman, and Vice President of Human Resources Von Goodloe. (Trial Exhibit 43.) Collins directed Goodloe to conduct a human resources investigation, and Goodloe in turn delegated this task to Virginia Leonard, the Acting Manager of Employment Services. (Trial Exhibit 1; Testimony of Virginia Leonard, ECF No. 114 at PageID 1670.) Leonard began her investigation on August 18, 2017. (Testimony of Virginia Leonard, ECF No. 114 at PageID 1677.)

Goza resumed work on August 17, 2017, two days after the Jefferson Davis protest, and worked without incident until August 21, 2017, when MLGW suspended him. (Testimony of Virginia Leonard, ECF No. 114 at PageID 1758; Pretrial O., ECF No. 98 at PageID 1506.) By August 21, MLGW had decided that Goza would be moved to a position in which he would not have any potential contact with customers, despite, at that time, being unable to articulate an MLGW policy that Goza had violated. (See Pl.'s Resp. Def.'s Statement of Material Facts, ECF 45-1 at 585-86; see also Testimony of Virginia Leonard, ECF No. 114 at PageID 1692; and see Emails, Trial Exhibit 31 (offering Collins's opinion that Goza should be removed from all customer contact).) On September 8, 2017, MLGW offered Goza the choice of working as a Material Handler or being terminated. (Pretrial O., ECF No. 98 at PageID 1506.) The Material Handler position had a twenty-two percent lower hourly pay rate than Goza's Tech III position

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