IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-50462
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
February 23, 2018
Lyle W. Cayce
Clerk

MADELEINE CONNOR,

Plaintiff - Appellant

v.

ERIC CASTRO; NANCY NAEVE; GARY SERTICH; LEAH STEWART; CHUCK MCCORMICK,

Defendants - Appellees

Appeal from the United States District Court
for the Western District of Texas
USDC No. 1:16-CV-490

Before JOLLY, OWEN, and HAYNES, Circuit Judges.

PER CURIAM:*

Madeleine Connor appeals the district court's denial of her motion for leave to supplement her complaint. We AFFIRM.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

I.

In September 2015, Connor, an attorney, filed suit in Texas state court against the appellees, directors of the Lost Creek Municipal Utility District, on behalf of her neighbor and client, David McIntyre, seeking to enjoin the construction of sidewalks in the District. In November 2015, Connor filed an amended petition in which she added herself as a plaintiff and asserted a claim for money damages under 42 U.S.C. § 1983, alleging that the defendants had retaliated against the plaintiffs for exercising their First Amendment rights. In December 2015, the defendants removed the case to federal court.

The plaintiffs' Sixth Amended Complaint, filed in federal court, asserted a retaliation claim under § 1983 and alleged that the defendants made pejorative comments about the plaintiffs, orchestrated a campaign of personal destruction against the plaintiffs, participated in an action to recall Connor from her position as Lost Creek Neighborhood Association president, and were present and facilitated an aggressive mob of approximately 125 residents who jeered, shouted down, booed, cat called, and laughed at Connor for more than two hours during a neighborhood association meeting.

On April 8, 2016, the district court dismissed the federal claims and remanded the state law claims to state court. The district court held that the plaintiffs had pleaded insufficient facts to plausibly allege the defendants' involvement in all but two of the purportedly retaliatory acts. With respect to the allegation that the defendants had signed a petition to recall Connor as president of the neighborhood association, the court held that Connor had not alleged facts suggesting that the defendants acted under color of state law. With respect to the allegation that the defendants transmitted to the community an electronic update on plaintiffs' litigation that plaintiffs found pejorative, the court held that the update was not pejorative. This Court affirmed the dismissal. *McIntyre v. Castro*, 670 F. App'x 250 (5th Cir. 2016).

On March 14, 2016, while the appeal was pending in this Court, Connor filed an amended petition in state court. The only new factual allegation in support of the federal First Amendment retaliation claim was that the defendants unlawfully used tax funds to draft a bar complaint against her. The defendants removed the case to federal court and moved to dismiss Connor's claims. The district court stayed the action until this Court issued its judgment on appeal. The stay was lifted on March 21, 2017.

Meanwhile, on November 22, 2016, appellee McCormick sent an email to Connor's employer, Colonel Paladino, the executive director of the Texas Veterans Commission. Connor had been appointed as interim General Counsel for the Commission and was at that time under consideration for the position of General Counsel. The email states, in full:

> You and I knew each other at Camp Mabry from 2004-2010 when I was the Provost Marshal and ATFP Officer. As a retired FBI executive the TAG felt very comfortable having me as a civilian sitting in an O-6 slot, given my extensive Counterterrorism experience. I had the utmost respect for you sir, you are a true patriot and a man of unparalleled professional credibility and personal integrity. That is why I'm writing you now.
>
> I recently learned that you appointed Madeleine Connors [*sic*] as the Interim General Consul [*sic*] for your agency. I'm sure you had no knowledge that Ms. Connors [*sic*] is making it her mission to bring frivolous law suits against veterans in the Lost Creek community over the issue of sidewalks being built in the neighborhood which are intended to meet ADA requirements for the disabled. Ms[.] Connors has made it her mission to drain the budget of the Lost Creek Limited District, a governmental entity engaged in facilitating the transition of Lost Creek recently annexed by the City of Austin. This is a very complex process as you may know, but our community is vigorously supporting the federal mandate for sidewalks to improve safety for children getting on school buses, as well as disabled veterans and others protected by ADA. There can be nothing more common sense than this issue. Ms[.] Connors [sic] has brought seven law suits, all of which have failed to be accepted in state and federal court, and

most recently her appeal was denied by the 5th Federal Circuit Court of Appeals as having no basis in fact. So much for [M]s[.] Connor's pedigree. This is all verifiable in open court records.

I tell you this sir, for one reason and one reason only---your mission is to help veterans rise above their challenges and reach their full potential in life for themselves and their families after serving and sacrificing for their country and the State of Texas. I can't believe you would intentionally undermine your sacred mission by hiring a devious attorney with no morals, no credibility, and no integrity, who's [*sic*] goal to further cripple veterans and other disabled citizens as a manifestation of her Borderline Personality Disorder with histrionic features, and a vendetta against men as her former husband learned the hard way. That's why she was fired from the Texas Attorney General's Office, who settled her law suit just to get rid of her, and why the Lost Creek Neighborhood Association voted her off the Board by a resounding 90% against her.

I don't want to see you embarrassed Colonel Paladino, by acting in good faith on behalf of someone who has no faith, credibility, or integrity. I would strongly recommend you consider LTC Doug O'Connell, former TXMF JAG, Assistant DA proecutor, Green Beret, and a man of honor for the Interim position, and possibly the formal General Consul [*sic*] role. Please sir, don't ignore this issue. I guarantee it will bite you when you least expect it, and the true victims will be disabled Americans and veterans.

Sir, I wish you God speed and all God's blessings in your current calling. As a veteran I thank you and say, "Vaya con Dios."

Respectfully,

Chuck

Sent from my iPad

CHUCK McCORMICK, (FBI-Ret)
The Austin Institute, LLC
Strategic Consultants for
Risk, Vulnerability, Security
Assessment, Analysis, Mitigation

On March 21, 2017, after the district court lifted the stay, Connor moved for leave to supplement her complaint to assert a claim of retaliation under the

First Amendment based on McCormick's email to her employer. On April 25, the district court dismissed Connor's federal claims and remanded her state law claims to state court. It denied her motion for leave to supplement her complaint on the ground that it would be futile, because the allegation failed to show that McCormick sent the email as a state actor rather than as a private citizen.

Connor filed a timely notice of appeal.

II.

The sole issue Connor raises on appeal is whether the district court erred by not permitting her to supplement her pleading to add a claim of First Amendment retaliation based on the email that McCormick sent to her employer. Connor asserts that the email was sent in response to her lawsuit, and there are far too many references to the government in the email to disregard it as a "purely private act."

Rule 15(d) of the Federal Rules of Civil Procedure provides that the court "may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happened after the date of the pleading to be supplemented. The court may permit supplementation even though the original pleading is defective in stating a claim or defense." Fed. R. Civ. P. 15(d). We review the denial of a motion for leave to file a supplemental complaint for abuse of discretion. *Haggard v. Bank of Ozarks Inc.*, 668 F.3d 196, 202 (5th Cir. 2012).[1]

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[1] Although Rule 15(a) provides that leave to *amend* should be freely granted, Rule 15(d) does not contain such a provision with respect to *supplementation*. Although we ordinarily review a denial of leave to amend for an abuse of discretion, when a "district court's denial of leave to amend [is] based solely on futility, this court applies a de novo standard of review identical, in practice, to the standard used for reviewing a dismissal under Rule 12(b)(6)." *Thomas v. Chevron U.S.A., Inc.*, 832 F.3d 586, 590 (5th Cir. 2016) (internal quotation marks and citation omitted). Because the parties agree that the abuse of discretion standard applies to the district court's denial of leave to supplement, and because the result

We hold that the district court did not err by refusing to allow Connor to supplement her § 1983 retaliation claim based on the email that McCormick sent to her employer. Section 1983 "provides a remedy for deprivations of rights secured by the Constitution and laws of the United States when that deprivation takes place 'under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory." *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 924 (1982) (quoting 42 U.S.C. § 1983). "[T]he conduct allegedly causing the deprivation of a federal right [must] be fairly attributable to the State." *Id.* at 937. To determine whether private action is fairly attributable to the State, a two-part approach is applied. *Id.* "First, the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible." *Id.* "Second, the party charged with the deprivation must be a person who may fairly be said to be a state actor . . . because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Id.* "A purely private act is not considered to be done 'under color of' state law merely because the actor is a public official." *Smith v. Winter*, 782 F.2d 508, 512 (5th Cir. 1986).

Connor argues that McCormick's status as a state official meets both of the *Lugar* requirements. She contends further that his repeated references to her lawsuit against the government in the email demonstrate that his conduct was "otherwise chargeable to the State." We do not agree.

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would be the same under either standard of review, we do not consider whether de novo review should apply to futility-based denials of leave to supplement, as it does for futility-based denials of leave to amend.

As the district court noted, the email contains nothing that would indicate that it was sent by McCormick in his capacity as a director of the Lost Creek Municipal Utility District. It was sent from McCormick's personal email address. He identifies himself in the email "[a]s a retired FBI executive," he signed the email as "Chuck," and the signature block indicates his affiliation with a limited liability company, "The Austin Institute." The district court did not err by concluding that supplementation of the complaint to allege retaliation on the basis of the email would be futile, because the email fails to support any allegation that McCormick acted under color of state law, rather than as a private individual, when he sent it to Connor's employer.

The judgment of the district court is

AFFIRMED.[2]

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[2] The appellees filed a motion in this court to dismiss the appeal as frivolous and to impose sanctions under Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927. The motion is DENIED. Although Connor's appeal is without merit, we cannot say that it is frivolous. We lack the authority to impose sanctions under Federal Rule of Civil Procedure 11. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 406-07 (1990). Furthermore, an award of attorneys' fees under § 1927 is inappropriate for conduct that has occurred in other courts, not this court. *See Matter of Case*, 937 F.2d 1014, 1023 (5th Cir. 1991)

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ON PETITION FOR REHEARING EN BANC

(Opinion 02/23/2018 , 5 Cir., _____, _____ F.3d _____)

Before JOLLY, OWEN, and HAYNES, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE