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

MARK DAVENPORT, Plaintiff, vs. CITY OF CORNING, IOWA and LARRY DREW, Defendants.	)	NO. 1:02-cv-30047 RULING ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

This matter is before the Court on defendants' motions for summary judgment (## 21 and 17). This case involves longstanding ill feelings and incidents between plaintiff Mark Davenport and defendant Larry Drew, who is Chief of Police for the City of Corning, Iowa, which have resulted in several lawsuits, the present one number three. In this case, plaintiff makes a claim against Drew and the City of Corning under 42 U.S.C. § 1983 for violation of his civil rights arising from defendant Drew's actions toward him in retaliation for Davenport's exercise of his First Amendment rights under the U.S. Constitution (Count I). Davenport also pleads a state law defamation claim against Drew (Count II).

The Court has federal question jurisdiction over the civil rights claim, 28 U.S.C. § 1331, and supplemental jurisdiction over the state law claim, 28 U.S.C. § 1367(a). The undersigned has been assigned the case pursuant to 28 U.S.C. § 636(c).

I. SUMMARY JUDGMENT

Defendants are entitled to summary judgment if the affidavits, pleadings, and discovery materials "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Erenberg v. Methodist Hospital, 357 F.3d 787, 791 (8th Cir. 2004)(quoting Fed. R. Civ. P. 56(c)). The Court must view the facts in the light most favorable to the nonmoving party, and give that party the benefit of all reasonable inferences which can be drawn from them, "that is, those inferences which may be drawn without resorting to speculation." Mathes v. Furniture Brands Int'l, Inc., 266 F.3d 884, 885-86 (8th Cir. 2001)(citing Sprenger v. Federal Home Loan Bank of Des Moines, 253 F.3d 1106, 1110 (8th Cir. 2001)); see Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Erenberg, 357 F.3d at 791; Tademe v. St. Cloud State University, 328 F.3d 982, 987 (8th Cir. 2003); Lambert v. City of Dumas, 187 F.3d 931, 934 (8th Cir. 1999); Kopp v. Samaritan Health System, Inc., 13 F.3d 264, 269 (8th Cir. 1993). An issue of material fact is genuine if it has a real basis in the record. Hartnagel v. Norman, 953 F.2d 394, 395 (8th Cir. 1992) (citing Matsushita, 475 U.S. at 586-87 (1986)). A genuine issue of fact is material if it "might affect the outcome of the suit under governing law." Hartnagel, 953 F. 2d at 395 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)); see Hitt v. Harsco Corp., 356 F.3d

920, 923 (8th Cir. 2004); Rouse v. Benson, 193 F.3d 936, 939 (8th Cir. 1999).

It is the non-moving party's obligation to "go beyond the pleadings and by affidavits, depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue of material fact." Rouse, 193 F.3d at 939; see Hitt, 356 F.3d at 923. In assessing a motion for summary judgment a court must determine whether a fair-minded trier of fact could reasonably find for the nonmoving party based on the evidence presented. Anderson, 477 U.S. at 248; Herring v. Canada Life Assurance Co., 207 F.3d 1026, 1030 (8th Cir. 2000).

II. FACTUAL BACKGROUND

The factual background, viewed favorably to plaintiff where disputed, is as follows.

Plaintiff Mark Davenport is a resident of Corning, Iowa. Defendant Larry Drew is the chief of police of the City of Corning. Davenport was employed as a police officer by the City of Corning until 1999 when the employment relationship was terminated.

Davenport's termination had to do with allegations of harassment made by some female local residents. Davenport filed a lawsuit against the City of Corning, its mayor, Marvin Steffen, and Chief Drew in connection with the job termination. Davenport filed a separate lawsuit against the female residents, who filed counterclaims against Davenport. The parties in both cases reached

a settlement in January 2000 and the lawsuits were dismissed. Davenport is now employed by Carpet Liquidators, Inc. It appears from the summary judgment record that Davenport does not own the business, but operates it for another individual and receives a salary.

Following the employment lawsuit Davenport sued the City of Corning with respect to a dispute over a property line and his garage. The resolution of that lawsuit is not shown in the summary judgment record.

In the fall of 2001 Davenport ran for mayor of the City of Corning. During the mayoral campaign an individual named Greg Passley wrote a letter to the editor of the local paper, in which he criticized the police department and the mayor. Mayor Steffen asked Drew to find out who Passley was, as he was unknown to Steffen. (Pl. App. at 123). Drew also wanted to know who the author was and to talk to him about his complaints. Drew suspected that Davenport had actually written the letter. Drew ran a background check on Passley (id. at 82-93), then obtained a copy of the original letter from the editor of the newspaper, which included a telephone number. (Id. at 74). Drew called the number and talked to Marilyn Steele, who turned out to be the mother of Passley's girlfriend. (Id.) In the course of their conversation Drew made statements to Steele about taking a printer and having the DCI (Department of Criminal Investigation) investigate its connection

to the letter. Steele told Drew that her typewriter would not work and Passley wrote the letter on Davenport's computer. (Id. at 81). Drew was not investigating a crime and did not seize Davenport's printer. (Id. at 76). Drew made a written report to the city council concerning the result of his investigation (which is not included in the summary judgment record) and nothing more came of the incident.

Sometime before the election an individual named Rick McManus signed a criminal complaint against Davenport, which Drew had prepared, concerning a water spraying incident. A local state magistrate found no probable cause. (Pl. App. at 38-39, 137; Def. Joint Supp. App. at 69).

In the fall of 2001 Davenport appeared before the city council and complained about Drew's investigation of Passley. Davenport thought the investigation was politically motivated in support of Steffen's campaign. (Pl. App. at 10). The city council took no action but in conversation between Davenport, the mayor and city council Davenport was asked to put his complaints in writing. (Def. Drew App. at 8). Davenport did so after the election (which he lost in a close vote) in January 2002. He submitted a ten-page written specification of allegations about Drew's unlawful activities in support of Steffen's campaign, as well as additional instances of misfeasance by Drew in the performance of his duties. Davenport made specific claims of unlawful conduct by Drew. (Pl.

App. at 41-50; Def. Drew App. at 24-33). He provided the document to a local newspaper. (Def. Drew App. at 8). The city council voted 3-2 not to investigate Davenport's complaints. (Pl. App. at 51, 135-36).

Davenport then made written complaint about Drew's pre-election conduct to the Iowa Ethics and Campaign Disclosure Board, which investigated the complaint and cleared Drew. (Def. Drew App. at 8). A "concerned citizen" subsequently filed a complaint about Davenport's election conduct with the Board, which was resolved in Davenport's favor.

Davenport turned his submission to the council over to the county attorney. The county attorney convened a grand jury which on March 11, 2002 returned a two-count indictment against Drew for nonfelonious conduct in office, a serious misdemeanor, in violation of Iowa Code § 721.2(4). Specifically, Drew was charged with having improperly ordered the release of an arrestee, and instructing his officers to turn their radar off on a local highway and to not to enforce laws pertaining to "semi-trucks." (Pl. App. at 44-46; Def. Drew App. at 44-45; Def. City Supp. App. at 33). Davenport was one of four witnesses listed by the grand jury as providing information in support of the indictment. Drew was acquitted of the charges in a jury trial.

Shortly after the settlement in January 2000 of the lawsuit involving Davenport's termination of employment (Def. Drew

App. at 61), Drew purportedly received information from a person who asked to remain confidential that he/she had heard Davenport and his wife yelling, heard the wife screaming and later observed her upset and crying. The person thought Davenport's wife had been abused. (Id. at 47). Drew treated the matter as a domestic abuse investigation, but his investigation did not amount to much. Only Drew was involved. There is no written record of the investigation. From Drew's testimony it appears he did nothing other than listen to the informant and talk to another individual the informant had talked to and who came to Drew to discuss the matter. (Pl. App. at 57-58). Davenport believes the allegation was made up and that there was no informant. Drew has refused to identify the informant.

On February 1, 2002, after leaving Davenport's place of business Corning resident Vic Gray was pulled over by Drew for a seatbelt violation. Drew asked Gray if he was a friend of Davenport and told Gray "he is no friend of mine." Drew then asked Gray if he could get any "dirt" on Davenport. Gray promptly went to Davenport and reported the conversation. (Pl. App. at 88). Gray's information bothered Davenport because he had noticed that "it seemed like every time I looked out my front door" Drew was driving by in his squad car "glaring at my store." (Id. at 18). The summary judgment record contains a number of affidavits from friends and acquaintances of Davenport who have made the same observation, and

some have noticed Drew frequently driving by Davenport's residence as well, looking at his house. (Id. at 89-94).

Concerned about the drive-bys and the information from Gray, Davenport hired two private investigators in Des Moines to investigate. They both called Drew on the telephone. The calls were recorded and transcripts of the conversations are part of the record. The first investigator implied she had worked with Davenport at a jail in Des Moines and said she knew Gray and had been contacted by him for information about Davenport. She inquired why Drew wanted the information. Drew made his dislike of Davenport clear, mentioned the harassment allegations that had led to the termination of Davenport's employment, and the then on-going grand jury proceedings. Drew told the investigator he was looking for information to "get his ass out of here." (Pl. App. at 98). The first investigator said her boyfriend (a role played by the second investigator) would know more and she would ask him. The investigator inquired if other women had had problems with Davenport and, evidently referring to Davenport's wife, Drew responded "I've heard he beats her." (Id. at 99). The next day the second investigator called and referred to the conversation with his "girlfriend" the preceding day. Drew told the second investigator he was "looking for something to jab [Davenport] with." (Id. at 103). He asked the caller if he knew of any charges against Davenport, adding "I am looking for something formal."

(Id.) Drew said he thought Davenport "was doing some domestic crap" and, referring to Mrs. Davenport, continued "I think mentally, not so much physical but I don't know, she's such a nice lady." (Id. at 104).

Davenport has produced an affidavit from former Corning police officer Kelly Calvert, a friend of Davenport's, in which Calvert states Drew told him his job was on the line if he continued to be friends with Davenport after which Drew retaliated against Calvert by scrutinizing his work. (Pl. Ex. Q). Apparently this occurred after Davenport's employment lawsuit was settled.

Davenport has written numerous letters to the editors of local papers during the time frame involved in this case critical of Drew, Steffen and the City of Corning. He wrote as frequently as once a month. (Pl. App. at 14).

This lawsuit was commenced on November 12, 2002.

III.

Federal Civil Rights Claim

To survive a motion for summary judgment under 42 U.S.C. § 1983, "the plaintiff must raise a genuine issue of material fact as to whether (1) defendant acted under color of state law, and (2) the alleged wrongful conduct deprived plaintiff of a constitutionally protected federal right." Naucke v. City of Park Hills, 284 F.3d 923, 927 (8th Cir. 2002)(citing Wade v. Goodwin, 843 F.2d 1150, 1151-52 (8th Cir. 1988)). The allegations in this

case involve alleged retaliation by Drew against Davenport for criticizing public officials.

> "[C]riticism of public officials lies at the very core of speech protected by the First Amendment." Colson v. Grohman, 174 F.3d 498, 407 (5th Cir. 1999)(citing New York Times Co. v. Sullivan, 376 U.S. 254, 569-70, 84 S. Ct. 710, 11 L. Ed. 2d 686 (1964)). Retaliation by a government actor in response to such an exercise of First Amendment rights forms a basis for § 1983 liability. Pendleton v. St. Louis County, 178 F.3d 1007, 1011 (8th Cir. 1999). To establish a claim for retaliation . . ., a plaintiff must show "[he/she] was engaged in constitutionally protected activity, that [the government official's] adverse action caused her to suffer an injury which would 'chill a person of ordinary firmness from continuing . . . in that activity,' and that the adverse action was motivated in part by . . . exercise of [his/her] constitutional rights."

Naucke, 284 F.3d at 927-28 (quoting Carroll v. Pfeffer, 262 F.3d 847, 850 (8th Cir. 2001)(quoting in turn Block v. Ribar, 156 F.3d 673, 678 (6th Cir. 1998)). In other contexts the Eighth Circuit has said that unless sufficiently coercive or conscience-shocking mere threats made by a government actor do not state a basis for a § 1983 claim. See King v. Olmsted County, 117 F.3d 1065, 1067 (8th Cir. 1997); see also Kurtz v. City of Shrewsbury, 245 F.3d 753, 759 (8th Cir. 2001).

Davenport's criticisms of Drew, Steffen and the City, allegations of misconduct, and communications with the county attorney which led to the grand jury investigation, were constitutionally protected speech. The Court will assume Drew's

actions about which Davenport complains were motivated by that speech. There is plenty of evidence of retaliatory motive. The focus of the summary judgment inquiry in this case is the sufficiency of the evidence to demonstrate an actionable injury. The alleged injurious conduct is (1) the Passley investigation; (2) the McManus complaint; (3) the domestic abuse allegation; (4) the drive-bys; and (5) harassment of other police officers. (Pl. Supp. Brief Resisting Drew Motion at 3). The Court will discuss these in turn. Davenport claims economic harm to the carpet business and emotional distress.[1]

Davenport was the reason for, though not the subject of the investigation into who authored the Passley letter. Davenport makes much of the evidence that Drew threatened to seize for testing the printer used by Passley, but Drew did not seize anything and was apparently satisfied with the information from Ms. Steele that Passley wrote the letter on Davenport's computer.

The magistrate found no probable cause for the McManus complaint and it went nowhere. Davenport was not required to respond to the complaint. A complaint found lacking in probable cause is stillborn and without consequences. Cf. Garcia v. City of Trenton, 348 F.3d 726, 728-29 (8th Circuit 2003)(where parking

[1] Davenport posits harm to the carpet business as a violation of his property rights. The Court believes this is a damage issue and that the constitutional right implicated by Drew's alleged retaliation is the First Amendment right of free speech.

tickets had "concrete consequences" sufficient to create a jury question concerning First Amendment retaliation). Davenport believes the complaint affected the election, but there is no evidence in the summary judgment record that would support such a conclusion.

Regardless of whether Drew made up the domestic abuse complaint as Davenport alleges, Drew does not appear to have taken any affirmative steps to investigate the matter. The statements made by Drew to the investigators hired by Davenport were in response to artful questions from the investigators designed to get Drew to say something hurtful about Davenport for Davenport's use in his ongoing disputes with Drew.

Drew's frequent drive-bys of Davenport's home and place of business are a form of harassment. Davenport claims the business has been hurt. Because he is an employee and does not own the business, Davenport does not have standing to claim compensation for damage to the carpet business from Drew's drive-bys. See Audio Odyssey, Ltd. v. Brenton First Nat'l Bank, 245 F.3d 721, 729 (8th Cir. 2001), opinion reinstated after rehearing en banc, 286 F.3d 498 (8th Cir.), cert. denied, 537 U.S. 990 (2002). In any event, the summary judgment record does not contain adequate evidence of an injury to the business.

Finally, the evidence in support of the allegation that Drew harassed other police officers who were friends of Davenport's

is the affidavit of former Corning police officer Kelly Calvert who states on two occasions Drew threatened him with loss of his job unless he stopped associating with his friend Davenport. Calvert also claims to have suffered retaliation from Drew in the form of closer scrutiny of his work. Drew, however, did not fire Calvert and it appears Calvert and Davenport remain friends.

Though he does not stress it in his motion papers, Davenport testified in his deposition that his disputes with Drew have taken an emotional toll. His marriage has been affected and he has seen a counselor. (Davenport Depo. at 142-53, attached to Plt. Sept. 23, 2003 Brief). The complaint alleges damages in the form of emotional distress. (Complaint ¶ 13). Emotional distress can be an injury sufficient to support a § 1983 retaliation claim, but "'it would trivialize the First Amendment to hold that harassment for exercising the right of free speech was always actionable no matter how unlikely to deter a person of ordinary firmness from that exercise.'" Naucke, 284 F.3d at 928 (quoting Bloch v. Ribar, 156 F.3d 673, 679 (6th Cir. 1998), in turn quoting Bart v. Telford, 677 F.2d 622, 625 (7th Cir. 1982)). In the Court's judgment, none of the complained-of conduct by Drew described above could reasonably be found to have resulted in an injury which would "chill a person of ordinary firmness from continuing" to exercise the person's First Amendment right to criticize Drew and other officials of the City of Corning. Though the standard is an objective one, it is of

some significance that Davenport has not been deterred. See Garcia, 348 F.3d at 729.

Of the claims of injurious conduct two merit further discussion. The derogatory comments made to the investigators concerning Davenport's alleged involvement in domestic abuse are similar to comments the Eighth Circuit has previously found would not deter a person of ordinary firmness from speaking out. See Naucke, 284 F.3d at 926, 928 (publicly made derogatory comments by city administrator and council members which humiliated and ridiculed plaintiff not actionable). Speech alone, particularly in what the speaker thinks is a private conversation, is unlikely to be viewed as actionable retaliation. See Garcia, 348 F.3d at 729.

The most objectively unsettling conduct alleged is Drew's frequent drive-bys of Davenport's home and workplace. These can reasonably be viewed as constituting a nonverbal, implied threat or warning that "I'm watching you." The case law suggests, however, that such a threat is not a sufficient basis on which to claim a constitutional violation. See King, 117 F.3d at 1067; Harris v. City of West Chicago, 2002 WL 31001888, *4 (N.D. Ill. 2002)(frequent police drive-bys and threats "do not rise to the level of a constitutional violation.") Here the drive-bys are arguably in retaliation for speech protected by the First Amendment which is a distinguishing point from cases like Harris which hold that police harassment alone is not unconstitutional. Nevertheless,

King instructs that "emotional injury which results solely from verbal harassment or idle threats" usually is not sufficiently injurious to support a § 1983 claim. 117 F.3d at 1067 (quoting Pittsley v. Warish, 927 F.2d 3, 7 (1st Cir. 1991)). Here the threat or harassment from Drew's drive-bys was implicit, nonverbal and therefore objectively less likely to result in a cognizable emotional injury. This, together with the absence in the record of any reason to view the drive-bys as physically threatening, leads the Court to conclude the evidence is insufficient to find they have caused an injury which would "deter a person of ordinary firmness" from expressing his opinions.

It follows from the foregoing that defendant Drew is entitled to summary judgment on the First Amendment retaliation claim against him.[2] If the allegations about Chief Drew's conduct are true it is no commendation that his retaliation has not been bad enough to make a federal case. There is no readily apparent legitimate law enforcement purpose involved in a police chief's efforts to find embarrassing information to drive a resident from

[2] In a reply brief, Drew makes a brief, conclusory argument that he has qualified immunity from suit. (Def. Drew Reply at 2-3). The focus of defendant's argument has been on the sufficiency of the evidence on the merits of Davenport's First Amendment retaliation claim and the Court has addressed the summary judgment motions accordingly. As the evidence does not present a genuine issue of fact about whether Drew's conduct violated Davenport's First Amendment rights, Drew can claim qualified immunity. Saucier v. Katz, 533 U.S. 194, 201 (2001).

the community because of the resident's criticism of the police and other city officials.

As Drew is not liable on the federal claim, neither is the City and it also is entitled to summary judgment. See Bd. of Co. Commissioners of Bryan County, Okla. v. Brown, 520 U.S. 397, 415 (1997)(municipalities not liable under § 1983 "unless deliberate action attributable to the municipality directly caused a deprivation of federal rights" (emphasis original)); Wilson v. Spain, 209 F.3d 713, 717 (8th Cir. 2000)(where officer's acts found to be objectively reasonable, there was no claim for which city could be liable).

Defamation

The remaining claim in this case is a state law claim of defamation against defendant Drew based primarily on Drew's statements to the private investigators about Davenport's involvement in domestic abuse. As the federal claim on which the Court's original jurisdiction was based will be dismissed, the Court may decline to exercise supplemental jurisdiction over the remaining claim. Johnson v. City of Shorewood, MN, 360 F.3d 810, 819 (8th Cir. 2003); 28 U.S.C. § 1367(c)(3). Counsel has made brief argument regarding retaining supplemental jurisdiction of the defamation claim. The Court has carefully considered the arguments of counsel, and while appreciating the reasons urged in support of

retaining supplemental jurisdiction, believes the better course is to decline to do so.

In Koke v. Stifel, Nicolaus & Co., Inc., 620 F.2d 1340, 1346 (8th Cir. 1980), the Eighth Circuit discussed some of the factors relevant to a decision whether to exercise supplemental jurisdiction. See Willman v. Heartland Hosp. East, 34 F.3d 605, 613 (8th Cir. 1994), cert. denied, 514 U.S. 1018 (1995); Harris v. Hancock County Mem'l Hosp., 938 F. Supp. 1419, 1434 (N.D. Iowa 1996). Although trial is now set in this case for June 21, 2004, a state forum is readily available within a reasonable time period. This Court does have the benefit of familiarity with the facts of the case from ruling on the motions for summary judgment, but these facts are not complicated. The Court has not invested substantial judicial time in the state claims. The additional time and energy needed to resolve the remaining claims in state court is not disproportionate to that which would be required in this Court. "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine . . . will point toward declining to exercise jurisdiction over the remaining state-law claims." Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988)(quoted in Johnson, 360 F.3d at 819).

The defamation claim involves statements made by a police chief about a resident. Absent federal constitutional issues, state

courts are a much better forum in which to judge the conduct of local police officers under state law. The marginal economies in resources and time which would result from continuing the action in federal court do not, in my judgment, outweigh this interest. Simply put, the defamation claim by its nature belongs in state court.

IV.

Defendants' motions for summary judgment (## 21 and 17) are **granted**. Accordingly, the Clerk shall enter judgment substantially as follows:

> IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Count I of the Complaint brought under 42 U.S.C. § 1983 to address an alleged violation of plaintiff Mark Davenport's federal constitutional rights is dismissed and judgment is hereby entered in favor of defendants City of Corning and Larry Drew on said claim;
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Count II of the Complaint alleging defamation against defendant Larry Drew is dismissed without prejudice, the Court finding it should not exercise supplemental jurisdiction over said claim, and no judgment thereon in favor of any party is entered.
>
> IT IS SO ORDERED.
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> Dated this 9th day of April, 2004.

ROSS A. WALTERS
CHIEF UNITED STATES MAGISTRATE JUDGE