UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

WILLIAM JOHNSON,

Plaintiff,

v. **5:98-CV-903**
(FJS/GJD)

THE CAPITAL DISTRICT REGIONAL
OFF-TRACK BETTING CORPORATION;
THOMAS CHOLAKIS; JAMES ACCATTATO;
and MARTIN TUCZINSKI,

Defendants.

APPEARANCES	**OF COUNSEL**
OFFICE OF JOHN D. CHARLES P.O. Box 243 Northway 10 Executive Park Clifton Park, New York 12065 Attorneys for Plaintiff	**JOHN D. CHARLES, ESQ.**
THUILLEZ, FORD, GOLD, **& JOHNSON, LLP** 90 State Street Suite 1500 Albany, New York 12207-1715 Attorneys for Defendants	**MICHAEL J. HUTTER, JR., ESQ.**

SCULLIN, Chief Judge

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

Plaintiff William Johnson brings this civil action under 42 U.S.C. § 1983 against Defendants alleging that his First and Fourteenth Amendment rights were violated in connection with the termination of his employment with Defendant The Capitol District Regional Off-Track Betting Corporation ("CDROTB"). Plaintiff also alleges state law claims for wrongful termination by one who lacked authority and for accrued time credits.

II. BACKGROUND

Davis Etkin, then-CEO and Board Chairman of CDROTB,[1] hired Plaintiff on February 2, 1981, as an Assistant Maintenance Manager. Plaintiff had previously served as a member of CDROTB's Board of Directors, as the Montgomery County representative.

In 1983, Plaintiff was promoted to the position of Maintenance Manager. Duties related

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[1] CDROTB is a public benefit corporation created in 1972 under New York law to, among other things, operate facilities for off-track wagering on horse racing. *See* N.Y. Rac. Pari-Mut. Wag. & Breed. Law § 502(1) *et seq*. (McKinney 2000). The enabling legislation permits local governments to operate systems of off-track pari-mutuel betting as a method of raising revenues for local governments, the racing industry, and the State of New York. At all relevant times, CDROTB's participating municipalities included the counties of Albany, Clinton, Columbia, Cortland, Essex, Franklin, Fulton, Greene, Herkimer, Madison, Montgomery, Oneida, Renssalaer, St. Lawrence, Warren, and Washington, and the City of Schenectady.

CDROTB is governed by a Board of Directors, consisting of one member from each of the participating counties and the City of Schenectady. Directors are appointed by their municipalities' governing body. Directors so appointed must be reviewed by the State Racing and Wagering Board and are subject to removal for cause by that Board. The Board of Directors selects a Chairman of the Board, and the corporation's Chief Executive Officer, as well as other officers.

to the position of Maintenance Manager included the oversight of the betting parlors or other facilities that CDROTB operated.

In December 1987, Etkin named Plaintiff to the position of Director of Planning and Development. As Director of Planning and Development, Plaintiff assumed increased executive responsibilities and was charged with meeting with various county officials, responding to requests for information, and conducting presentations before County legislatures and Boards of Supervisors concerning CDROTB operations or expansion plans. Plaintiff characterized his role as that of a "liaison" with government officials and CDROTB directors, noting that he was out in the field representing CDROTB. Additionally, in his capacity as Director of Planning and Development, Plaintiff represented CDROTB at conferences, worked with individual members of the Board regarding problems in their counties, helped them in the selection of locations for off-track betting ("OTB") facilities in their counties, appeared at county board meetings with individual Directors to assist them in providing information concerning CDROTB operations, and represented CDROTB at meetings of local zoning and planning boards when required.

Beginning in 1991, CDROTB, generally, and the Etkin administration, specifically, came under extensive criticism regarding, among other things, the amount and nature of its expenditures and the low revenue distributions to the participating counties. Criticism that began in the local media drew increased attention with the release by the State Comptroller's office in April 1991 of an audit that was highly critical of CDROTB's spending practices. The State Comptroller's Office continued to examine CDROTB's spending practices and issued critical reports in November 1995, November 1996, and July 1998.

In April 1997, Albany County Executive Michael Breslin formed the Off-Track Betting

Task Force to examine CDROTB's management and financial practices. The Albany County Legislature subsequently passed four resolutions urging reforms at CDROTB. Moreover, the Task Force issued a draft report containing numerous findings critical of CDROTB's financial practices.

In July 1997, the State Racing and Wagering Board informed the members of CDROTB's Board that it would investigate the public allegations of mismanagement. In January 1998, the State Racing and Wagering Board issued its investigation report, also highly critical of CDROTB's and Etkin's management practices.

In 1997, Etkin asked Plaintiff to speak to the government officials in the counties he had been dealing with to assure them that the criticism was unfounded. Plaintiff did so, representing to the individuals and various county boards with whom he was speaking that the operations of CDROTB were sound, that the profits from CDROTB operations were increasing, and that Etkin was pursuing his management of CDROTB with the same zeal and honesty that he had demonstrated in his operation of CDROTB since its inception in the early 1970s.

In December 1997, Etkin publicly announced that he would not seek re-election as Chairman of the Board. At the January 12, 1998 Board meeting, Etkin announced that he was stepping down from his position as President and CEO of CDROTB effective March 15, 1998. Although his retirement would not become effective until March 15, 1998, Etkin relinquished his management powers on January 12, 1998.[2]

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[2] On February 28, 2000, Etkin pleaded guilty to a two-count Superior Court Information: Count One charged him with bribing a witness who was to testify against him before a Schenectady County Grand Jury, in violation of N.Y. Penal Law § 215(a); Count Two charged him with engaging in a systematic course of conduct with the intent to defraud CDROTB, in violation of N.Y. Penal Law § 195.20.

At the January 12, 1998 Board meeting, Defendant James Accattato was elected Chairman of the Board and Defendant Thomas Cholakis was elected to the position of Chief Operating Officer ("COO") with all the authority granted to the position of CEO. Defendant Cholakis appointed Defendant Martin Tuczinski as Director of Internal Affairs in February 1998. From September 1997 through 1998, each of the participating counties and the City of Schenectady selected new directors to serve on the CDROTB Board.

At the March 24, 1998 Board meeting, Cholakis was elected President and CEO. Upon his election, Cholakis began a review of CDROTB's personnel, focusing on members of the executive staff who were part of the Etkin management team. Cholakis initially dismissed fourteen employees, several others resigned. Plaintiff's employment was terminated on February 27, 1998, effective March 14, 1998.

Plaintiff filed this action on June 9, 1998. Presently before the Court is Defendants' motion for summary judgment on Plaintiff's federal claim and for dismissal of Plaintiff's state law claims for lack of subject matter jurisdiction.

III. DISCUSSION

A. Summary Judgment

A moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The ultimate inquiry is whether a reasonable jury could find for the non-moving party based on the evidence presented, the legitimate inferences drawn

from that evidence in favor of the non-moving party, and the applicable burden of proof. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

B. Plaintiff's First and Fourteenth Amendment Free Speech Claim

1. Protected Speech

The speech in question relates not to a particular statement of Plaintiff, but rather, to a course of conversation and commentary he engaged in from late 1996 through the date of his termination in February 1998. As stated in Plaintiff's complaint, deposition testimony, and in the affidavit filed in relation to the present motion, Plaintiff acknowledges that he "engaged in extensive conversations with Directors, County republican officials, office holders, newspaper reporters and anyone else who would listen" regarding, in his belief, unjust accusations of malfeasance leveled at Etkin, the financial and managerial soundness of CDROTB, and the notion that public charges of impropriety against Etkin were a calculated rouse intended to justify the "real goal of those making the charges . . . to obtain control over jobs that were available through OTB." *See* Affidavit of William Johnson, sworn to May 25, 2000, at ¶ 4.

In determining whether "speech" engaged in by a public employee is constitutionally protected, the Court must undertake a two-step inquiry. As a threshold matter, the Court must determine whether the public employee's speech can be "fairly characterized as constituting speech on a matter of public concern, . . ." *Connick v. Myers*, 461 U.S. 138, 146 (1983). Where the speech in question does not implicate a public concern, that is the end of the inquiry; "ordinary dismissals from government service . . . are not subject to judicial review . . . ." *Id.* Where, however, the Court finds that the speech falls within the rubric of matters of "public

concern," the Court must engage in a balancing of interests, weighing the "interests of the [employee], as a citizen, in commenting upon matters of public concern" with "the interest of the [employer] . . . , in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968).[3]

In determining whether the speech at issue is a matter of public concern, the Court looks to the "content, form, and context of a given statement, as revealed by the whole record." *Connick,* 461 U.S. at 147-48 (footnote omitted); *see also Lewis v. Cowen*, 165 F.3d 154, 163 (2d Cir. 1999). In the instant case, it is undisputed that the subject speech addressed an issue of public debate, as allegations of Etkin's mismanagement were being debated throughout the region covered by CDROTB. It is further undisputed that Plaintiff spoke on those subjects at the behest of his supervisor, then-CDROTB President Etkin, in Plaintiff's official capacity as a liaison to local government officials and regional CDROTB directors.

In *Lewis v. Cowen*, the Second Circuit held that where the speech touches both a public concern and a personal interest, such speech should be considered as addressing a public concern under *Connick*. *See Lewis*, 165 F.3d at 164. The *Lewis* court emphasized that "*Connick* precludes First Amendment protection for public employees when they speak upon matters *only* of personal interest." *Id.* In the instant case, the subject speech concerned not only a matter of personal interest, (i.e., Plaintiff was endorsing the work performed by his superior and by extension endorsing his own work), but pertained to a matter of public concern as well, (i.e., the management of CDROTB), thus, Plaintiff's speech is properly viewed as implicating both a

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[3] The determination of the protected status of the speech is a question of law, not fact. *See Connick*, 461 U.S. at 148, n.7; *Lewis v. Cowen*, 165 F.3d 154, 161-62, 164 (2d Cir. 1999).

personal and a public concern. Therefore, under *Lewis*, Plaintiff's speech must be afforded First Amendment protection necessitating consideration of competing interests under *Pickering*.

2. Pickering Balancing Test

The *Pickering* test provides that, "a government employer may fire an employee for speaking on a matter of public concern if '(1) the employer's prediction of disruption is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for the speech.'" *Locurto v. Safir,* Nos. 00-7628, 00-7632, 00-7634, 2001 WL 987141, *10 (2d Cir. Aug. 27, 2001) (quoting *Jeffries v. Harleston*, 52 F.3d 9, 13 (2d Cir. 1995)).

Pickering and its progeny instruct the reviewing court to consider whether the speech in question "'impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise.'" *Lewis*, 165 F.3d at 162 (quoting *Rankin*, 483 U.S. at 388, 107 S. Ct. 2891) (other citations omitted). To prevail, Defendants need only demonstrate "'likely interference' . . . not an actual disruption." *Id*. at 163 (quoting *Jeffries*, 52 F.3d at 13; *see also Waters*, 511 U.S. at 673, 114 S. Ct. 1878 (plurality opinion) (Court affords "substantial weight to government employers' reasonable predictions of disruption" caused by employee speech (other citations omitted)).

As noted in *Lewis*, "the nature of [Plaintiff's] responsibilities" within CDROTB are determinative. *Id*. at 165. Despite the duality of Plaintiff's position, serving as both Maintenance Manager and Director of Planning and Development, taken as a whole, Plaintiff

occupied an executive level policymaking position.[4] Among other responsibilities, Plaintiff served as the liaison between CDROTB and the local officials for county governments within the Capital District Region, a responsibility necessitating close working relationships, trust, and candor. It is, therefore, not unreasonable for CDROTB to predict that in view of Plaintiff's prior public statements denouncing the investigations of financial mismanagement and misfeasance under the Etkin administration as "unsound," that upon subsequent proof of such mismanagement, Plaintiff's abilities to effectively represent the new administration would likely be compromised. Similarly, Plaintiff's prior positions could reasonably be viewed as a tacit endorsement of the Etkin administration status quo, and thus, as implicitly resisting the management reform initiatives undertaken by the new administration of CDROTB. The potential for disruption is particularly acute where, as here, the new CDROTB administration assumed its authority with a mandate to remedy lingering perceptions of corruption and to regain the public confidence.

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[4]In determining whether an employee is a "policymaker" under the *Elrod-Branti* couplet, the Court weighs several determinative factors:

> whether the employee (1) is exempt from civil service protection, (2) has some technical competence or expertise, (3) controls others, (4) is authorized to speak in the name of policymakers, (5) is perceived as a policymaker by the public, (6) influences government programs, (7) has contact with elected officials, and (8) is responsive to partisan politics and political leaders.

Vezzetti v. Pellegrini, 22 F.3d 483, 486 (2d Cir. 1994) (citations omitted); *see also Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980).

The Second Circuit has condensed factors four through eight to ask "whether the employee in question is empowered to act and speak on behalf of a policymaker, especially an elected official." *Gordon v. County of Rockland*, 110 F.3d 886, 890 (2d Cir. 1997) (citation omitted); *see also Bavaro v. Pataki*, 130 F.3d 46, 50 (2d Cir. 1997).

While the *Pickering* balance presents a question of law, resolution of a First Amendment retaliation claim on a motion for summary judgment may not be appropriate where evidence of the defendant's improper motive predominates, as motive presents a question of fact. *See Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir. 1999). In the instant case, however, factual questions of motive cannot be said to predominate as Plaintiff fails to produce evidence, direct or circumstantial, of a constitutionally impermissible motive sufficient to survive Defendants' motion. Rather, the record suggests that Defendants' motive, recognized and sanctioned under *Pickering*, was the effective and efficient operation of CDROTB, that is to say, that Plaintiff was terminated "because of the potential disruption, and not because of the speech." *Sheppard v. Beerman*, 94 F.3d 823, 827 (2d Cir. 1996); *see also Lewis*, 52 F.3d 9, 13; *Waters*, 511 U.S. at 682. Thus, the Court is not constrained on that basis from considering Defendants' motion for summary judgment.

Therefore, the Court concludes, as a matter of law, that Defendants did not violate Plaintiff's First Amendment rights by terminating him based on the reasonable belief that Plaintiff's continued employment would impair the operations of the new CDROTB administration.

C. Plaintiff's First and Fourteenth Amendment Freedom of Association Claim

The gravamen of Plaintiff's free association claim is that he was impermissibly terminated because of his refusal to make financial contributions to the Republican Party at Defendant Tuczinski's request. Plaintiff, however, has failed to establish a prima facie case, and therefore, his free association claim fails as a matter of law.

To state a claim for free association retaliation, Plaintiff must show that Defendants acted with retaliatory intent. *See Greenwich Citizens Comm., Inc. v. Counties of Warren and Washington Indus. Dev. Agency*, 77 F.3d 26, 31-32 (2d Cir. 1996) (showing of "retaliatory intent is required for a retaliatory First Amendment claim"). In the case at bar, there is no evidence that Plaintiffs termination was in any way motivated by his failure to contribute to the Republican Party; therefore, his free association claim necessarily fails.

First, Plaintiff does not allege that Defendant Tuczinski specifically asked him to make a political contribution to the Republican Party, instead he relies on the generalized comments of Defendant Tuczinski to the effect that "OTB employees who were making 'good money' should be contributing." Second, even if a coercive request is assumed, Plaintiff fails to establish the requisite element of causation. Plaintiff's reliance on the fact that two other employees who had contributed were not terminated is insufficient to demonstrate the necessary causal nexus between Plaintiff's failure to contribute and his termination. Plaintiff's additional arguments alleging that his termination was part of a larger conflict among competing factions of the Republican Party is simply unsupported by the evidence in the record, and is, therefore, insufficient to overcome Defendants' motion for summary judgment.

D. Plaintiff's State Law Claims

Having dismissed all federal claims over which it has original jurisdiction, the Court declines to exercise supplemental jurisdiction over Plaintiff's pendent state claims. *See* 28 U.S.C. § 1367; *Maric v. St. Agnes Hosp. Corp.*, 65 F.3d 310, 314 (2d Cir. 1995).

IV. CONCLUSION

After carefully considering the file in this matter, the parties' submissions, and the applicable law, and for the reasons stated herein, it is hereby

ORDERED that Defendants' motion for summary judgment is **GRANTED** with respect to Plaintiff's First and Fourteenth Amendment free speech claim; and it is further

ORDERED that Defendants' motion for summary judgment is **GRANTED** with respect to Plaintiff's First and Fourteenth Amendment free association claim; and it is further

ORDERED that Plaintiff's pendent state law claims are dismissed without prejudice pursuant to 28 U.S.C. § 1367; and it is further

ORDERED that the Clerk of the Court enter judgment in favor of Defendants and close this case.

IT IS SO ORDERED.

Dated: September 28, 2001
Syracuse, New York

Frederick J. Scullin, Jr.
Chief United States District Judge