

STATE OF MICHIGAN
COURT OF APPEALS

CAPITOL CITY LODGE NO. 141 OF THE
FRATERNAL ORDER OF POLICE and DAVID
KOST,

UNPUBLISHED
October 11, 1996

Plaintiffs–Appellants,

v

No. 182481
LC No. 92-72950-CL

INGHAM COUNTY SHERIFF and INGHAM
COUNTY BOARD OF COMMISSIONERS,

Defendants–Appellees.

Before: McDonald, P.J. and White and P. J. Conlin*, JJ.

PER CURIAM.

Plaintiffs appealed as of right the judgment for defendants affirming Kost’s discipline for violating Ingham County Sheriff’s Department rules and regulations. We affirm.

Plaintiff David Kost has been employed by the Ingham County Sheriff’s Department as a deputy sheriff corrections officer since 1982. In 1992, Kost decided to run for the Democratic party nominee for Ingham County Sheriff against his superior, Sheriff Wrigglesworth. Following the election, Kost was disciplined for six separate incidents that occurred during the campaign in which he allegedly violated departmental rules and regulations. Pursuant to the collective bargaining agreement between the parties, Kost appealed the discipline to the circuit court, claiming that the discipline violated his First Amendment right to freedom of speech. The trial court affirmed the discipline, finding that most of Kost’s statements were not entitled to First Amendment protection because they were either knowingly false when made or made with reckless disregard for their truth.

Although findings of fact are reviewed for clear error, this Court has made an independent review of the record because First Amendment issues are involved. MCR 2.613(C); *Rankin v*

* Circuit judge, sitting on the Court of Appeals by assignment.

McPherson, 483 US 378, 386 n 9; 107 S Ct 2891; 97 L Ed 2d 315 (1987). The trial court did not err in concluding that discipline was warranted for Kost's actions.

As a threshold matter, in cases addressing the First Amendment rights of a public employee, courts must consider whether the communications involved matters of public concern. *Waters v Churchill*, 511 US ___; 114 S Ct 1878, 1884; 128 L Ed 2d 686 (1994). This Court agrees with the trial court's conclusion that all the incidents for which Kost was disciplined involved matters of public concern. However, it is well settled that "the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection." *Garrison v Louisiana*, 379 US 64, 75; 85 S Ct 209; 13 L Ed 2d 125 (1964). In the instant case, it was established at trial that Kost had absolutely no factual basis for most of his allegations of impropriety in the sheriff's department. In order to invoke the protection of the First Amendment, "the employee's interest in expressing herself . . . must not be outweighed by any injury the speech could cause to the interest of the State" *Waters, supra* at 1884. Whatever interest Kost may have had in undermining public support for the sheriff's department with false information cannot be accorded any weight when balanced against the state's interest in fostering public cooperation with and respect for law enforcement agencies.

Although two of the incidents for which Kost was disciplined were arguably within the parameters of protected speech, this fact does not compel a different result than that reached by the trial court. Even if Kost's conduct in those instances was deserving of constitutional protection, ample grounds still exist for affirming the discipline based on the other incidents. *Waters, supra* at 114 S Ct 1891. For example, Kost's failure to safeguard an internal confidential report¹ was simply a dereliction of duty and did not involve First Amendment activity.

Because the departmental rules specifically prohibit statements by employees that are made with reckless disregard for their truth or falsity, the trial court did not clearly err when it concluded that Kost violated the rules when he alleged that the sheriff had engaged in illegal ticket quotas and discrimination, and that the department had failed an audit. MCR 2.613(C). Plaintiffs have presented no evidence demonstrating that the discipline, consisting of a temporary suspension without pay, was out of proportion to the conduct complained of.

Affirmed. Costs to appellee.

/s/ Gary R. McDonald

/s/ Helene N. White

/s/ Patrick J. Conlin

¹ We accept Kost's version of the incident in which he disclaimed responsibility for distributing the report to the local news media.