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MEMORANDUM

To: R.J. Morrison
From: Applicant
Re: Snyder v. University of California

Statement of Facts

Dr. Norman Snyder is a nephrologist and medical academician who has worked at the School of Medicine since 1982. Dr. Snyder currently serves as the Chair of the Department of Medicine, the largest department within the School of Medicine, a station he has held since 1986. In 2004, the University began consideration of relocating the University of Columbia School of Medicine to from its present location in Springville to a location in Palatine, Columbia, some 20 miles away. For many reasons, which are explained in the discussion below, Dr. Snyder had many concerns about the move. In support of his opposition to the relocation, Dr. Snyder wrote a report and circulated it among the Medical School faculty and attended several faculty and university-wide forums concerning the relocation. Later on, the Chancellor of the Health Sciences Center and the Dean of the Medical school asked Dr. Snyder to meet with them. In that meeting, they asked him to tone down his criticism of the relocation because they felt it was divisive. (Transcript at 5). Dr. Snyder explained his interest in fully debating the issue in order to guard both the Medical School's and the community's best interests. Dr. Snyder conceded that, if the decision to relocate was made, he cwould acceded, but that he "wouldn't go down without a fight." As part of his desire to make sure that the relocation was in the best interests of the School, his colleagues, and the Springville community, Dr. Snyder wrote a letter to the Star Bulletin. That letter spurred much community opposition to the relocation. In spite of the community opposition, and in spite of Dr. Snyder's presentation of his report, oral testimony, and a petition signed by 45 of the 50 faculty

colleagues, the Regents voted to relocate the Medical School. The next day, Dr. Snyder receive a letter from the Regents terminating his chairmanship of the Department of Medicine. He then contacted our office for assistance.

Discussion

In determining Dr. Snyder's likelihood of obtaining a preliminary injunction based on retaliatory employer action in violation of Dr. Snyder's First Amendment right to free speech under the State of Columbia Constitution I have analyzed the facts of Dr. Snyder's case under the four-factor test required to prevail on a preliminary injunction request. Additionally, I have relied on the salient facts of two relevant cases: Harlan v. Yarnell (Columbia Supreme Court, 2002) (hereafter, Harlan) and Elkins v. Hamel (Columbia Supreme Court, 2007) (hereafter, Elkins) which I believe will support an action for preliminary injunction by Dr. Snyder.

Preliminary Injunction

In order to obtain a prelim injunction, a party must demonstrate: (1) a substantial likelihood of prevailing on the merits; (2) irreparable harm in the absence of the injunction; (3) the threatened harm outweighs any damage to injunction may cause to the party opposing it; and (4) the injunction, if issued, will not be adverse to the public interest.

As stated in Elkins, "Plaintiffs retain their First Amendment rights under the Columbia Constitution. (2) Thus, Dr. Snyder may bring his action for preliminary injunction under the Columbia Constitution instead of the Federal Constitution.

I. LIKELIHOOD OF SUCCESS ON THE MERITS

In order to determine a plaintiff's likelihood of success on the merits, the proper

test within the state of Columbia is the Boyer test. The Boyer test is a 4-part test which is used to determine whether a public employer's actions impermissibly infringe on the free speech rights. It should be noted that Columbia does not use the more recent Garcetti case (2006) because Columbia has interpreted the words of the Columbia First Amendment (which is identical in language to the U.S. Constitution) more expansively than the U.S. Supreme Court. The Boyer test examines the following questions: (1) Does the speech in question involve a matter of public concern? If so, (2) the court must weigh employer's interest in regulating the speech of its employees so that it can carry on an efficient and effective workplace. (Boyer has a 5-part balancing test used here, which will be discussed below). Next, if the employee prevails on these two questions, the court must then proceed to next two steps: (3) The employee must show the speech was a substantial factor driving the challenged governmental action (i.e., the adverse employment action), and finally (4) The employer, in order to prevail, must in turn show that it would have taken the same action against the employee even in the absence of the protected speech.

The Boyer test will now be examined in light of the facts of Dr. Snyder's case to determine if he has a likelihood of success on the merits of his claim.

(1) Does the speech in question involve a matter of public concern?

In Elkins, two police officers sought injunctive relief to enjoin the police department from further disciplining them or threatening to discipline them in violation of their First Amendment rights. The two officers had sent emails from their private and work emails to other officers in the department. One of the officers sent a letter to the local paper. The emails and letter revolved around the feeling on the part of the two officers that an article written in the newspaper had racial tone to it. One officer was suspended for 1 day without pay; the other 15 days without pay. The court found that the plaintiff officers were unable to show a substantial likelihood of prevailing on the merits, irreparable harm if

injunctive relief were not granted, and they lost on the balancing of harms test with the court finding that the department's needs outweighed their prospective deprivation of First Amendment Rights. The court did not address the 4th component required to prevail for a preliminary injunction.

In the Elkins case, the court noted that for retaliatory discharge, when an employee speaks as an employee upon matters only of personal interest, the speech is not protected. In making that determination the court must look at content, form, and context of a given statement as revealed by the whole record. The court aims to determine whether the speaker's purpose was to bring an issue to the public's attention or to air a personal grievance. To that end, the court stated that speech must not be general regarding the public's interest. Rather, it must sufficiently inform the issue as to be helpful to the public in evaluating the conduct of government.

The difference between Elkins and Dr. Snyder's case stems primarily from the fact that police depts, as paramilitary organizations, are given more latitude in decisions regarding discipline than ordinary government employers. Here, Dr. Snyder's stated repeatedly that the relocation is detrimental to the needs of the community's indigent citizens. There is no public transportation available for the group of citizens who depend on the medical facility for all of their medical care. Additionally, from a fiscal standpoint, Dr. Snyder stated that the citizens of Columbia would be getting their money's worth since the bonds paying for the construction of the new facility would take 40 years to pay off and the citizens would not gain any benefits. Such comments are within the public interest.

In Harlan v. Yarnell (Columbia Supreme Court, 2002), the court also considered the motive of the speaker: was the speech calculated to redress personal grievances or did it have a broader public purpose? Here, Snyder's concern for the greater public evidences a broad public purpose and thus it satisfies the public concern requirement.

If so,

(2) the court must weigh employer's interest in regulating the speech of its employees so that it can carry on an efficient and effective workplace. This is the Boyer balancing test. Must weigh:

a. Whether the speech would or did create problems in maintaining discipline or harmony among co-workers

In the Harlan case, the court stated that Harlan's speech contributed to disharmony among co-workers, but court went further and said that the defendants were unable to convince the court that the disharmony caused disruption in teaching, research, or administration at the school, nor were defendants able to demonstrate long-term morale or discipline problems caused by the speech.

Dr. Snyder has stated that it is impossible to work as long as he has without making some enemies. He also iterated that he does not intimidate people -- that it is not his style. There are a few colleagues out to get him, Dr. Snyder feels, but he suggested that the petition signed by 45 of his 50 faculty colleagues shows that they supported his views on the relocation and that disharmony is not the rule in his department.

b. Whether the employment relationship is one in which personal loyalty and confidence are necessary

In the Harlan case, the court found that the nature of a relationship between a professor in a department and his superiors did not necessitate loyalty and confidence.

Here, Dr. Snyder heads a department in an educational institution, which is similar to a professor in an academic department. While Dr. Snyder's superiors stated that they want him to be a "team player," Dr. Snyder's employment relationship is so similar to Harlans that he will be able to prove this element.

c. Whether the speech impeded the employee's ability to perform his responsibilities

The Harlan found that Harlan's speech had no effect on his ability to perform his duties as professor. He continued to teach, hold office hours, etc. Similarly, Dr. Snyder continues to carry on his duties as chairman of the Department of Medicine.

d. The time, place, and manner of the speech, and

The Harlan court found that the plaintiff had followed authorized procedures and appealed to appropriate authorities.

Here, Dr. Snyder circulated a comprehensive report that he prepared soon after the relocation proposal was first made. He then attended university-sponsored forums where he voiced his concerns. He met with his superiors when asked. Although he told them he "wouldn't go down with a fight," he also reiterated that if they finally decided to go through with the relocation, he would go with their decision.

e. Whether the matter was one on which debate was vital to informed decision-making.

The Harlan court found that, because the charges Harlan brought against his colleague involved matters of public concern, not just public interest, debate was essential to potentially avoid the alleged wrongdoing of Mosser.

Similar to Harlan, the huge financial commitment required to relocate the medical school, as well as the potential deleterious effects on the indigent citizens who use the current facilities, debate is essential to informed decision making.

If the employee prevails on these two questions, then proceed to next two steps:

(3) The employee must show the speech was a substantial factor driving the challenged governmental action (i.e., the adverse employment action).

Harlan was able to easily show that his employer's motivation for transferring Harlan was his speech.

Here, Dr. Snyder's termination letter cites other reasons for terminating his chairmanship. Those reasons are listed in the next section. The letter does however acknowledge that it is Snyder's "singular mission to sabotage" the effort to move the location that has caused them to look at him as not being a team player.

If the employee succeds, then step 4.

(4): The employer, in order to prevail, must in turn show that it would have taken the same action against the employee even in the absence of the protected speech.

Harlan: Court wasn't persuaded that the court erred in finding that CSU would not have transferred Dr. Harlan in the absence of his speech. (see P. 12)
Dr. Snyder: In the letter from the Regents of the University of Columbia to Dr. Snyder, informing him of the Regents' decision to terminate his chairmanship of the Department of Medicine, the President of the Regents stated that the reason for the termination had nothing to do with Dr. Snyder's opinion about and

vehement expression of opposition to their decision to move the College. The letter further stated that the reason for the termination was the widespread disharmony among the faculty and administration of the University caused by Dr. Snyder's prominent role as an outspoken opponent of the relocation. Specific instances of expressions of faculty feelings of intimidation were noted. Because of these factors, the Regents concluded that Dr. Snyder's performance as department chair has been impaired (due to the discomfort on the part of the faculty members). The letter further stated that the Chancellor and the Dean felt that Dr. Snyder could no longer be trusted to work as part of the team to implement the relocation plan since it has now been approved.

Based on the above analysis, I beleive that Dr. Snyder will be able to show that he can prevail on the merits of his suit.

II. IRREPARABLE HARM

The loss of First Amendment freedoms, even for minimal periods of time, constitutes irreparable harm. The party seeking injunctive relief must demonstrate that there exists some cognizable danger of recurrent violation of its legal rights. The "irreparable harm" would be violation of the plaintiff's constitutional rights.

Note that damage to reputation, financial distress and difficulty finding other employment doesn't constitute irreparable harm. (Employees can be made whole w/ money damages after full trial on the merits.) Here, Dr. Snyder's damage is party for reputation and financial distress involved in delicate licensing negotiations with various pharmaceutical companies. He has stated that he cannnot attach a dollar amount to the damages that he and the University will experience. Additionally, years of research that he has done will go down the tubes since his big project, to create a new dyalisis method will not be able to go forward.

III. BALANCING OF HARMS

Here, the judge must balance the magnitude of loss to each side and the risk of error and he must choose the course of action that will minimize the costs of being mistaken. Both sides will experience harm, and the judge must pick least harm. Here, Dr. Snyder has said that he will go along with the decision of the Regents to relocate the school. He has a history of cooperating when a similar decision has not gone the way he wanted it to. Dr. Snyder stands to lose a great deal by termination of his chairmanship (as mentioned above), both in terms of his economic situation, reputation, professional prestige, future opportunities for reserch, publication opportunities, royalties from licenses, as well as limited speaking engagements and conferences. These harms will affect the college, as well, since they will not benefit from the money Dr. Snyder brings in from grants.

IV. NOT ADVERSE TO THE PUBLIC INTEREST

The public has a strong interest in vindicating an individual's constitutional rights, especially regarding the free flow of information and ideas under the First Amendment. Dr. Snyder's comments are not adverse to the public interest, and granting the request for injunction does not fly in the face of the public interest.

Based on the above analysis, Dr. Snyder has a good chance to prevail on his request for preliminary injunction.

END OF EXAM