PEPPERDINE UNIVERSITY

Journal of the National Association of Administrative Law Judiciary

Volume 19 | Issue 1 Article 7

3-15-1999

This ALJ Said Too Much: Prison Hearing Officer Charges Michigan Department of Corrections with First Amendment Violations and Race Discrimination

Carolyn Amadon

THIS ALJ SAID TOO MUCH: PRISON HEARING OFFICER CHARGES MICHIGAN DEPARTMENT OF CORRECTIONS WITH FIRST AMENDMENT VIOLATIONS AND RACE DISCRIMINATION

By Carolyn Amadon[1]

I. INTRODUCTION

The ability to conduct hearings as a fair and independent fact finder is one of the most important elements of the position of Administrative Law Judge. When independence is threatened by the possibility of unemployment or other retaliation, the ALJ can not perform his job properly. Hearing officers at the Michigan Department of Corrections (MDOC) were expected to find prisoner's guilty at a 90% rate when involved in conflicts with prison correction officers. As the first African-American hearing officer hired by the MDOC in 1988, Mr. Everett Perry was expected to meet this obligation. Although his first two years of employment passed without controversy, as Mr. Perry heard more cases he no longer met the MDOC requirement of a 90% prisoner conviction rate; his conviction rate slipped to 83% prisoner convictions. The friction between the MDOC and Mr. Perry increased from 1990 to 1995. The MDOC carefully created a paper trail of counseling memoranda, citing Mr. Perry for, among other things, believing the word of prisoners over correction officers in some cases. Mr. Perry continued to rule according to his conscience and exercise free and independent fact finding when he presided over prisoner hearings. His employment was terminated in November 1995.

On September 11, 1996, the U.S. District Court of the Eastern District of Michigan granted and denied in part a motion to dismiss the plaintiff's First Amendment and equal protection race discrimination claims, where plaintiff, Everett Perry, claimed that he was disciplined and terminated by the Michigan Department of Corrections (MDOC)[2]

---

[1] Third-year law student, Loyola University Chicago School of Law.

[2] The named defendants are Kenneth McGinnis, Director of MDOC, Marjorie Van Ochten, Administrator of the Office for Policy and Hearings for the Michigan Department of Correction; Leonard Den Houter, Hearing Officer/Supervisor, and Richard

for exercising free speech concerning his (1) written decisions and findings as an Administrative Law Examiner (ALE) in prisoner misconduct hearings, and (2) his assertions of race discrimination.[3]

In denying the First Amendment complaint, Judge Duggan stated that:

> The Court recognizes that plaintiff's findings at issue in this case may have been supported and appropriate in light of the evidence; however, the correctness of his decisions do not, in this Court's opinion, automatically entitle his decisions to First Amendment protection. In this unique context, this Court believes that plaintiff's First Amendment right to speak on matters of public concern (arguably prison misconduct hearing results) is outweighed by the MDOC's interest in disciplining its ALEs through the monitoring of their job performances via their hearing reports.[4]

The Judge considered the following in denying Mr. Perry's race discrimination claim:

> In this case, plaintiff's complaints and grievances of race discrimination were limited to internal administrative proceedings and meetings...Plaintiff's statement....that speech involving discrimination is 'inherently' a matter of public concern are insufficient to withstand ...Sixth Circuit case law."[5]

The court denied Plaintiff's motion for rehearing on his second amended complaint on March 14, 1997, stating that there was no palpable defect in the prior ruling that would require a different

---

Stapleton, Manager of the Hearings and Appeals Division of the Office of Policy and Hearings, in their official and individual capacities.

[3] Perry v. McGinnis, et al., no. 96-CV-71373 D.T., slip op. at 2 (E.D. Michigan Sept. 11, 1996).

[4] *Id.* at 5.

[5] *Id.* at 8, 9. At this point, plaintiff's First and Fifth Amendment claims dropped out, as well as his procedural due process claim. Plaintiff's equal protection and Elliott-Larsen Civil Rights Act claims were not dismissed. *See also* Perry v. McGinnis, et al., 2 F. Supp. 2d 952, 953 (U.S. D. Ct., S. Div.)(1998).

holding.[6] The MDOC's subsequent motion for summary judgment, regarding Everett Perry's equal protection and Elliott-Larsen Civil Rights Act race discrimination claims, was granted by the court on April 15, 1998.[7] The holding specified that, "plaintiff was not qualified for his job because he did not meet his employer's expectations....[his] objection go to the defendants' judgment regarding the way hearing officers should perform their jobs. This is not sufficient to prove a prima facie case of discrimination."[8] The court also found that plaintiff was not treated differently from white hearing officers who were similarly situated, because the plaintiff allegedly made errors that were, "repetitive and led to more complaints from institutional staff," and were of a more "fundamental nature," than the errors made by the white hearing officers.[9]

Plaintiff Everett Perry appeals the grant of summary judgment, in an action which will soon come before the United States Court of Appeals for the Sixth Circuit.

II. BACKGROUND

Hired in October 1988, Everett Perry was the first prison hearing officer of African-American descent to survive the probationary hiring period at the MDOC.[10] His three-month and six-month evaluations were both satisfactory; he continued to receive satisfactory ratings during his first two years of employment at the MDOC.[11] Beginning in 1990, Mr. Perry started receiving "counseling memoranda," issued by his supervisor after many of the prison staff

---

[6] *See* MAALJ Amicus Brief for Everett Perry at 3, ref no. 1996-03134 (Perry v. Department of corrections, Employment Relations Board). Plaintiff filed First Amendment free speech, Fifth and Fourteenth Amendment substantive due process claims, Fourteenth Amendment and state law (Elliott-Larsen) equal protection claims. Again, the court dismissed all but the Fourteenth and Elliott-Larsen equal protection and discrimination claims. *See also* Perry, 2 F. Supp 2d at 953.

[7] *See* MAALJ Amicus Brief at 4.

[8] Perry, 2 F. Supp. 2d 952 at 956.

[9] Perry, at 957.

[10] *See* Plaintiff-Appellant's Proof Brief at 5 (Perry v. McGinnis, et al., (no. 98-11607) U.S. Court of Appeals for the Sixth Circuit).

[11] *See id.*

who were ruled against in Mr. Perry's hearings complained to the MDOC's hearing division.[12] This resulted in a heightened scrutiny of Mr. Perry's work by his supervisor, Mr. Den Houter, under the direct instructions of the head of the hearings division, Ms. Van Ochten.[13] The "counseling memoranda," issued during the period from March 1990 to November 1993, analyzed Mr. Perry's opinions, citing deficiencies in his credibility findings for prisoners instead of prison staff and his lack of rational analysis and evidentiary bases for his decisions.[14]

One of the many examples of this criticism against Mr. Perry occurred in a situation where a prisoner had been disciplined, (given a ticket), for warning another prisoner that a guard was just pretending to leave in order to catch the other prisoner telling a joke about the guard.[15] At the hearing, Mr. Perry found that the "burden necessary for a finding of guilt on this charge is not sustained. I find the credibility of the inmate to be of the highest nature. I find from previous tickets officer Mitchell's credibility to be questionable and the facts as noted in the ticket to be unbelievable to me."[16] The resulting counseling memorandum prepared by Mr. Perry's supervisor states, "I believe you should re-evaluate your basic assumptions regarding credibility...It seems to me that you assume staff are fabricating reports until you have evidence that exonerates them....Your decision, as you know, must be based on evidence and not upon your assumptions about the motivations of particular individuals."[17]

The MDOC admits that it is a duty of the hearing officer to determine a prisoner's credibility or the weight of the evidence.[18] In

---

[12] *See* State Bar of Michigan, Administrative Law Section, Amicus Curiae Brief in support of Everett Perry, at 1 (case no. 97-87308-AA).

[13] *See id.* at 2.

[14] *See id.* at 4.

[15] *See* MAALJ Amicus Brief at 6, *citing* Exhibit G15, the case of Mr. Brigham.

[16] *See id. citing* Exhibit G15. Mr. Brigham's testimony in this case was collaborated by several other testimony from fellow inmates. *See id.*

[17] *See id.* at 7. The comment provided by the MAALJ (Michigan Association of Administrative Law Judges), remarks that, "all testimony, even from guards, should be evaluated with skepticism, as Mr. Perry as done in this case. DOC's hypersensitivity on this issue reveals more about DOC's interest as a litigant than Mr. Perry's competence as a judge." *See id.* at 8.

[18] *See id.* at 6.

prisoner misconduct hearings in Michigan, an ALE acts as fact-finder and judge for cases brought by the prison staff against the inmates for "major misconduct tickets."[19] Mr. Perry is required to be a fair, independent fact-finder;[20] the burden in a major misconduct hearing is on the prison, which must prove the prisoner's conduct by a preponderance of the evidence.[21] In the case of Mr. Perry, the MDOC questioned his "high" rate of acquitting prisoners, where the approved average of prisoner "not guilty" findings is 10%.[22] Mr. Perry turned in an average rate of 17 or 18% "not guilty" findings, for which he was subject to conferences by his supervisor, Mr. Den Houter, including regular notification of his monthly or quarterly "not guilty" rates.[23] In creating the paper trail necessary to terminate Mr. Perry, only a fraction of one percent of his estimated 12,000 to 24,000 hearing decisions were reviewed.[24] Many of the faults for which the plaintiff was disciplined were petty, including having typographical errors or using the wrong terms in his reports.[25] Some of the white hearing officers at the MDOC committed similar petty errors, but they did not receive any form of written discipline for their mistakes.[26]

The MDOC put Mr. Perry on interim conditional service rating (probation) in February 1993. The only other hearing officer to receive such a rating during this time period was an ALE who did not accurately report his time worked, was consistently late for work, and

---

[19] *See id.* at 4.

[20] *See* Michigan Rule of Professional Conduct (MMRPC) 6.5.

[21] *See* MAALJ Amicus Brief at 5.

[22] *See id.*

[23] *See id.*

[24] *See id.* at 8, 9. Hearing officers were expected to conduct 20 hearings a day. In the case of Mr. Perry, he probably had from 2,400 to 4,800 hearings per year over a five year period. *See id.*, p. 8. Out of all these hearings, only 121 were reheard due to complaints from prison staff. *See id.*, p. 13. Mr. Perry's supervisor, Ms. Van Ochten, did not conduct any sort of independent investigation of Mr. Perry's record and relied solely on Mr. Den Houter's and Mr. Stapleton's recommendation in their decision to fire Mr. Perry. *See id.* at 12.

[25] *See id.* at 9, 10. For example, plaintiff was disciplined for "failing to state why a razor blade is dangerous;" for, "failing to type the entire name of a charge at the top of his report;" for, "using the term, 'official notice;'" and for, "failing to state why an inmate was not guilty of a lesser included offense, when the inmate was found guilty of a major misconduct." *See id.* at 10.

[26] *See id.* at 11. *Citing* dispositions of other hearing officers: Craig, Bullock, Baerwalde.

took long lunch breaks.[27] Perry then sent a letter to Michigan Governor John Engler on March 16, 1993, complaining of the pressure to find prisoners guilty, the race discrimination and the retaliation by his supervisors because he told them that the pressure to find inmates guilty was illegal.[28] Plaintiff was terminated on November 5, 1995; he was replaced with a white hearing officer who had previously been laid off.[29] The grievance filed by Mr. Perry with the Civil Service Commission, (CSC), before his termination, complaining of the MDOC's threats of discipline for his pro-prisoner rulings, was heard and denied on June 21, 1994.[30] The Employment Relations Board, (ERB), reviewed this decision and reinstated Mr. Perry, stating that the number of decisions upon which plaintiff's termination was based was small in comparison to his total output and that some of the criticisms were trivial in nature.[31] When the CSC reviewed the ERB decision, it remanded to the previous CSC officer and instructed her to ignore the issue of pro-prisoner bias. The CSC officer affirmed plaintiff's discharge, stating this time that Mr. Perry, "places fairness foremost," did not articulate reasons, use rational analysis, or have evidentiary bases for his credibility decisions.[32]

Plaintiff Everett Perry appeals the district court's grant of summary judgment to the Defendant MDOC (April 15, 1998), claiming that summary judgment was improper; that he was denied his First Amendment right of free speech; that the MDOC retaliated against him for the exercise of these rights and for his assertions of their practice of race discrimination.

III. DISCUSSION

The United States District Court for the Eastern District of

---

[27] *See id.*

[28] *See id.* at 11. Copies of the letter were sent to J. Jackson, MDOC director McGinnis. *See id.*

[29] *See id.* at 12. Mr. Perry was the only hearing officer ever terminated. *See id.*

[30] *See* State Bar of Michigan Brief at 5. The CSC statement reads, in part, "The department has demonstrated...that the grievant was not truly impartial, as required by state statute and departmental rules. His discharge was for just cause." *See id.*

[31] *See id.* at 5, 6.

[32] *See id.* at 5.

Michigan erred on April 15, 1998 when it dismissed Plaintiff's equal protection and state Elliott-Larsen claim. It also erred previously on September 11, 1996 in dismissing Plaintiff's First Amendment and substantive due process claims. In both holdings, the court did not fully consider that plaintiff's claims presented genuine issues of material fact according to the appropriate standard for granting summary judgment[33]. The court did not view the complaint in the light most favorable to the plaintiff, nor did it accept the facts as alleged by the plaintiff as true.[34]

A. PLAINTIFF'S EQUAL PROTECTION AND ELLIOT-LARSEN CLAIMS

In granting summary judgment for the MDOC regarding the plaintiff's equal protection claims, the U.S. District Court found that a prima facie case of discrimination based on race was not established.[35] The court relied on the test articulated in *Manzer v. Diamond Shamrock Chemicals Co.*, which states that (1) the plaintiff must be a member of the protected class, (2) must suffer adverse employment action, (3) must be qualified for the position, and (4) be replaced by a person not of the protected class. [36] While the first two elements are sufficiently determined by the facts of the case, the court found that elements three and four were not met in this case.[37]

Regarding the third element, the plaintiff's qualification for the job, the court emphasized the poor performance ratings given to the Mr. Perry, which stating that, "plaintiff cannot raise a genuine issue of fact regarding the quality of his work by merely challenging the judgment of his superiors."[38] The court relied on the provision in *Ang v. Procter & Gamble*, that "a plaintiff is not considered to be qualified for his position if he fails to meet his employer's expectations."[39] As discussed

---

[33] *See* Fed. Rule Civ. P. 12 (b)(6).

[34] *See* Plaintiff's Proof Brief at 14, *citing* Sistruck v. City of Strongsville, 99 F.3d 194, 197 (6th Cir. 1996).

[35] *See* Perry, at 955.

[36] *See* Manzer v. Diamond Shamrock Chemicals Co. 29 F. 3d 1078, 1081 (6th Cir. 1994). *See also* Mitchell v. Toledo Hospital 964 F 2d 577, 582 (6th Cir. 1992).

[37] *See* Perry, at 956.

[38] Perry, at 956.

[39] Ang v. Procter & Gamble Co., 932 F.2d 540, 548 (6th Cir. 1991).

in the Plaintiff-Appellant's Proof Brief, the court did not address the further provision in Ang which requires that the expectations of the employer must be legitimate.[40] By relying on the allegations of the defense alone regarding the quality of Mr. Perry's findings and his frequency of 'not guilty' findings, the court did not properly consider the allegations of the plaintiff that employer's expectations were not legitimate. Among other complaints, the plaintiff specifically challenged MDOC's expectation that he find 90% of the prisoners guilty in the prison hearing process, expectations that were clearly not legitimate in light of statutory mandate to provide due process in prisoner hearings.[41]

Although the plaintiff's position was subsequently filled by a person in a non-protected class, thus fulfilling on its face the fourth element of the *Manzer* test, the court followed the analysis that the fourth element of the test could also be met by the plaintiff's showing that a, "non-protected person was treated better," and that, "for the same or similar conduct he was treated differently than similarly-situated non-minority employees."[42] In the case at hand, many of the plaintiffs fellow hearing officers who were white also committed the same types of petty errors as those for which the plaintiff was disciplined. These officers were not, however, subject to the same disciplinary memoranda and scrutiny that the plaintiff experienced. In spite of this, the court found that the white hearing officers were not similarly situated to the plaintiff, because plaintiff was fired, "based on his inadequacies in analyzing facts, assessing the credibility of witnesses, understanding the definitions of different forms of misconduct and making an adequate record of his cases."[43] The court also found that the errors committed by the white hearing officers were of a, "less fundamental nature," than the errors committed by the plaintiff.[44]

Contrary to the court's finding that the white hearing officers at the MDOC were not similarly situated, plaintiff, using the test in the

---

[40] *See id* at 548. *See also* Plaintiff's Proof Brief at 38.

[41] *See* Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963 (1974), where the Supreme Court requiring due process hearings for prisoners before they could be subject to discipline for prison misconduct. *See id.*

[42] *See* Mitchell, *supra* note 36, at 582.

[43] Perry, at 957.

[44] *See* id.

Ercegovich v. Goodyear Tire & Rubber Co. case, argues that his colleagues, "(1) dealt with the same supervisor, (2) were subjected to the same standards, and (3) engaged in similar conduct without such differentiating or mitigating circumstances that would distinguish his conduct or Defendants' treatment of him for it."[45] While there is no question that all the hearing officers had the same supervisor and were subject to the same standards, the court argues that the, "less fundamental nature" of the white hearing officers' errors as compared to the plaintiff's errors, and their, "repetitive nature," constituted "differentiating or mitigating circumstances" which would prevent the white officers from being similarly situated to the African-American plaintiff.[46] Again, the court has not viewed the facts as alleged in the light most favorable to the plaintiff. The court comes close to an impermissible factual finding in this case and does not apply a proper standard for summary judgment.

B. FIRST AMENDMENT AND SUBSTANTIVE DUE PROCESS CLAIMS

Plaintiff argues that his first amendment and substantive due process claims, which were dismissed on September 11, 1996, should be heard *de novo*: "the issue... is not whether a plaintiff will ultimately prevail but whether the plaintiff is entitled to offer evidence to support claims."[47] Rule 56 of the Federal Rules of Civil Procedure permits *de novo* review of grants of summary judgment.[48]

1. First Amendment Free Speech Claims

Plaintiff Everett Perry filed a properly pled complaint, in compliance with Section 1983 of the United States Code and applicable case law, which requires the plaintiff to state, (1) he was deprived of a right secured by the Constitution or the laws of the United States; and (2) the deprivation was caused by a person who was acting under the

---

[45] *See* Plaintiff's Proof Brief at 41, *citing* Ercegovich v. Goodyear Tire & Rubber Co., 1998 WL 546534*5 (6th Cir. August 31, 1998).

[46] *See* Perry at 957.

[47] See Plaintiff's Proof Brief at 14, *citing* Schueuer v. Rhodes, 416 U.S. 232, 236, 94 S. Ct. 1683, 1686 (1974).

[48] *See* Fed. Rule Civ. P. 56. *See also* Plaintiff's Proof Brief at 33, *citing* Gantt v. Wilson Sporting Goods Co., 143 F.3d 1042, 1045 (6th Cir. 1998).

color of state law.[49] Plaintiff, as a public employee acting in his official capacity, was acting under the color of state law, thus fulfilling the second element of the test.[50] The first element is met in the facts as alleged by the plaintiff in reference to his First Amendment rights and race discrimination claims; a government employee who is retaliated against for exercising his First Amendment rights of free speech has suffered a violation of a right secured by the Constitution.[51]

For speech to be protected under the First Amendment, the Supreme Court required in *Connick v. Meyers* that it must first be speech on a matter of public concern.[52] The court conceded that the plaintiff's speech regarding the operation of prison hearings was a matter of public concern in its September 11, 1996 ruling.[53] The plaintiff pled in his complaint that the MDOC retaliated against him for his complaints of race discrimination and for his criticism and refusal to abide by the MDOC's mandate of having a high percentage of 'guilty' findings in prison hearings. In fact, the plaintiff strived for fair-fact finding and independent decision making as mandated in *Wolff* and the Michigan legislature. [54] These allegations against a public employer, "who tried to curtail fairness and independence in the way its hearing officer dealt with inmates," is clearly a matter of public concern.[55]

After the court finds that the speech is a matter of public concern, a balancing test described by the Supreme Court in *Pickering v Board of Education* is applied, which requires a balance between the

---

[49] *See* Plaintiff's Proof Brief 16, *citing* 42 U.S.C. § 1983 and West v. Atkins, 487 U.S. 42, 48, 108 S. Ct. 2250, 2254-55 (a public Employee is usually acting under the color of state law where serving in his official capacity) *See id. See also* Bird v. Summit County, 730 F.2d 442,444 (6th Cir. 1984).

[50] See Plaintiff's Proof Brief at 17, *citing* West, supra note 49 at 2255.

[51] *See* Plaintiff's Proof Brief at 17, *citing* Connick v. Meyers, 461 U.S. 138, 142, 103 S.Ct. 1684, 1687 (1987), a government employee cannot, "condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *See id.*

[52] *See* Plaintiff's Proof Brief at 17, *citing* Connick v. Meyers at 1688.

[53] *See* Perry (1996) at 9.

[54] *See* State Bar of Michigan Amicus Brief at 20, *citing Wolff*, 418 U.S. 539, 94 S. Ct., 2966 and MRPC 6.5.

[55] *See* Plaintiff's Proof Brief at 24, *citing* Parate v. Isibor, 868 F2d 821, 828-830 (6th Cir. 1989), "public interest is near its zenith when ensuring that public organizations are being operated in accordance with the law." *See id.*

interest of an employee as a "citizen commenting upon matters of public concern," and government's interest in, "promoting the efficiency of the public services it performs through its employees."[56] In this case the interest of Everett Perry in ensuring equitable prison hearings must be balanced with the government's interest in disciplining prison hearing officers.

In this case, the interest put forth by the MDOC is that it, "*has* to be able to discipline its hearing officers for determinations made in prison misconduct hearing reports; otherwise all ALEs would be insulated from accountability for any statements made in that context."[57] Here again, the court did not view the facts as alleged in the light most favorable to the plaintiff. The plaintiff's complaint does not allege or imply that, "by allowing Mr. Perry to make determinations based on the law and the facts that 'all ALEs would be insulated from accountability [regarding their hearing determinations].'"[58] Yet, the court assumes that the outcome desired by Mr. Perry's complaint would result in just such an insulation of all ALEs from accountability. In this case, however, the court did not follow the additional requirement in *Meyers v. City of Cincinnati* that the interest of the government must be legitimate in order for the *Pickering* balancing test to tip in its favor.[59] Hindering the plaintiff's compliance with the mandates of *Wolff* which require fair prison hearings, does not constitute a legitimate interest on the part of the government. The plaintiff's free speech interest should outweigh the government's interest in disciplining its hearing officers, in the case at hand.

The third test which must be met in deciding if Mr. Perry's speech was protected under the First Amendment is presented in *Mt. Healthy School District v. Doyle*, that the speech was a substantial or motivating factor in the denial of the benefit that was sought.[60] In this case, the plaintiff's head supervisor responsible for the ultimate firing decision, Ms. Van Ochten, stated in deposition, "certainly the

---

[56] Pickering v. Board of Education, 391 U.S. 565, 568, 88 S. Ct. 1731, 1734-35 (1968).

[57] *See* Perry (1996) at 5 (emphasis in the original).

[58] *See id. See also* Plaintiff's Proof Brief at 2 6.

[59] *See* Meyers v. City of Cincinnati, 934 F.2d 726, 730 (6th Cir. 1991)

[60] *See* Mt. Healthy School District v. Doyle, 429 U.S. 274, 285-287, 97 S Ct. 568 (1977)

complaints of the wardens and deputies would have been one of the factors, if not the most important factor, in precipitating this request (for the review of Mr. Perry's work)."[61] Thus, plaintiff's speech in the form of his prison hearing rulings was a motivating factor in his dismissal and should thus be classified as speech protected by the First Amendment.

The *Mt. Healthy* test also requires a finding that absent the protected conduct, the act of government dismissal of the employee would have occurred in any case.[62] Given the fact that plaintiff's protected speech was arguably a motivating factor in his dismissal, and that plaintiff's disciplinary memoranda were based on his exercise of protected speech; it is not for the court to decide the issue of fact of whether the plaintiff's dismissal would have occurred in any case.

Thus, in applying the *Connick*, *Pickering* and *Mt. Healthy* tests, the plaintiff's speech should have been held protectable under the First Amendment; the court erred in granting a motion for summary judgment in the face of plaintiff's protected constitutional rights.

2. Race Discrimination Claim

Plaintiff's race discrimination claims were improperly dismissed by the lower court on September 11, 1996; the court misapplied Federal and Sixth Circuit case law. The court focused on the fact that plaintiff followed the MDOC internal grievance procedure and, therefore, his allegation of, "racially disparate treatment [did] not constitute a matter of pubic concern.[63] Although the Supreme court ruled in *Connick* that, "racial discrimination is a matter inherently of public concern.,"[64] the lower court cited a ruling in a Sixth Circuit case which held that the plaintiff's personal discrimination charge was part of his own, "personal employment dispute."[65] In the court's view, this indicated

---

[61] *See* ACLU Amicus Curiae Brief in Support of Everett Perry at 12 (case no. 98-1607) (Perry v. McGinnis, et al.), *citing* the deposition of Ms. Van Ochten, Aug. 14, 1997, at 125.

[62] *See* Mt. Healthy, *supra* note 60, at 287.

[63] *See* Perry (1996) at 6.

[64] *See* Connick, 461 U.S. at 149 n. 8, 103 S. C. at 1691 n. 8.

[65] *See* Plaintiff's Proof Brief at 28, *citing* Rice v. Ohio Dept. of Transportation 887 F.2d 716 (6th Cir. 1989).

that Mr. Perry's complaint of racial discrimination was not inherently a matter of public concern. The court ignored the guidance of the Supreme Court in *Connick*, which distinguished "matters" of public concern and "matters" of personal interest, and the guidance of the Sixth Circuit in *Chappel v. Montgomery County Fire Protection Dist. No. 1*, which provides that the question of motives of the plaintiff, "is clearly illogical and contrary to the broader purposes of the First Amendment."[66] Thus, the lower court did not properly apply governing case law in granting MDOC's motion for summary judgment of plaintiff's First Amendment claims.

The lower court should also have found that there was not legitimate government interest which could have outweighed the plaintiff's right under the First Amendment to charge the MDOC of race discrimination.[67] Generally, claims of discrimination should not be found to disturb the efficient operation of the government. Some cases have strongly held that, "There is simply no argument to be made that an employee's complaints of sex and age discrimination undermine "the effective functioning of the public employer's enterprise."[68] Thus the lower court would have had to consider the strong probability that the the government's interest would have been outweighed by the plaintiff's speech protected under the First Amendment had it properly reached this analysis by finding that plaintiff's speech was a matter of public concern.

IV. CONCLUSION

Plaintiff Everett Perry, who so conscientiously ensured that prisoner would receive fair hearings, merits the opportunity to present his claims in a court of law. Mr. Perry has properly pled his allegations against the MDOC. The court in this case did not review the facts therein by the appropriate standard for summary judgment. The

---

[66] *See* Plaintiff's Proof Brief at 30, *citing* Chappel v. Montgomery County Fire Protection Dist. No. 1, 131 F.3d 564, 575 (6th Cir. 1997).

[67] The court did not reach this analysis due to its finding that plaintiff did not have a protected First Amendment speech right.

[68] *See* Missouri Highway and Transportation Commission, 995 F. Supp. 1001, 1009 (E.D. Mo 1998). In this case, plaintiff alleged she was dismissed by her public employer for her complaints of age and sex discrimination. *See id.*

District court for the Eastern District of Michigan erred once in 1996 when it dismissed Mr. Perry's First Amendment claims; it erred again in 1998 when it dismissed his remaining Equal protection and state law race discrimination claims.

The appeal of the 1998 denial of Mr. Perry's equal protection and Elliott-Larsen Civil Rights Act race discrimination claims will soon be heard by the Court of Appeals for the Sixth Circuit. The outcome of this case could be a significant indication of the willingness of the courts to hear cases in which the independence of an administrative hearing officer is threatened, not only by the employers of the hearing officers themselves, but also by judges who are reluctant to give appropriate weight to a plaintiff's pleadings before granting summary judgment. A careful ALJ should recognize that fair judicial process may be easier to distribute to others than to obtain for themselves.