IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

PATRICIA STONE, Plaintiff, v. TOM GREEN COUNTY, Texas; ALLISON PALMER, in her official capacity; and JOHN BEST, in his official capacity, Defendants.	Case No. 6:19-CV-61

REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants argue that the additional admonishment does not harm Stone because it does no more than confirm that she conferred with her client, even though it explicitly requires her (and only her) to say that she believes that each (and every) plea agreement she enters is constitutional. Defendants argue that *Velazquez* does not protect in-court speech from retaliation, even though that case explicitly discussed the rights of attorneys to make arguments in court. And Defendants argue that Stone's claims should fail because she was speaking pursuant to her official duties, even though in her capacity as an advocate for her client she could not possibly act pursuant to state authority.[1] Defendants' arguments fail, and Stone's motion should be granted.

A. The Additional Admonishment Harms Stone By Compelling Her Protected Speech

Defendants' core argument, in their summary-judgment motion and their response to Stone's, appears to be that the additional admonishment cannot form the basis of a constitutional claim because it does not harm Stone. (*E.g.*, Doc. 30 at 3 ("The admonishment does not preclude Stone from challenging the constitutionality of the plea bargain system in the future, a point that Stone argues in her brief."); *id.* at 9 ("The admonishment . . . does not require Plaintiff to disseminate anything."); *id.* ("It does not require Stone to aver that Carpenter's plea was constitutional, that any other plea is constitutional, or that the Texas plea bargain system is constitutional.").) As Stone explains in detail in her response to Defendants' motion, this characterization is false because Stone is the only attorney who must sign the admonishment, the admonishment is phrased in terms of Stone's personal belief, and the admonishment forces Stone

[1] Defendants argue that Tom Green County cannot be liable for actions that Palmer and Best took regarding plea bargains. (Doc. 30 at 10–12.) Stone addresses this argument in her opening brief and response. (Doc. 25 at 21–23; Doc. 28 at 11–15.) And Defendants argue that this case should be analyzed as an employment case because a sufficient relationship exists between Stone and Tom Green County. (Doc. 30 at 6–7.) Stone addresses this argument in her opening brief and response. (Doc. 25 at 5–8; Doc. 28 at 8–9.)

to negate her *Carpenter* argument that *all* plea bargains are unconstitutional by saying that each (and every) plea bargain she participates in is constitutional. (Doc. 28 at 1–3.) She clarifies only one point here: The question whether the admonishment would be effective at barring Stone from arguing against the plea-bargaining system is distinct from the question whether it forces her to voice speech with which she disagrees. Defendants argue that they may compel Stone to sign the admonishment because extracting a waiver from Stone (or her client) would not completely disable either of them from arguing in court that a plea bargain is unconstitutional. That is not the standard in First Amendment cases. For Stone's retaliation claim, the Court need only ask whether a person of ordinary firmness would be chilled from making arguments if she knew that she would be compelled to disavow them on pain of losing access to her chosen profession, *see Keenan v. Tejeda*, 290 F.3d 252, 259 (5th Cir. 2002); and for Stone's compelled-speech claim, the Court need only ask whether she is compelled to voice a statement with which she disagrees, *see, e.g.*, *Wooley v. Maynard*, 430 U.S. 705, 714–15 (1977). That the statement does not *also* completely disable a legal argument does not mean it is not harmful, or that it cannot constitute retaliation or compelled speech.

B. Supreme Court and Lower Court Caselaw Protect In-Court Speech from Retaliation

Defendants next argue that *Legal Services Corporation v. Velazquez*, 531 U.S. 533 (2001), and *Willey v. Ewing*, No. 3:18-CV-00081, 2018 WL 7115180 (S.D. Tex. Dec. 17, 2018), *report and recommendation adopted*, 2019 WL 313432 (S.D. Tex. Jan. 24, 2019), do not hold that in-court speech may be protected from retaliation. Defendants' first argument is incorrect and their second is irrelevant.

Defendants argue that *Velazquez* does not protect in-court speech because (a) the regulations at issue in that case also forbade consultation with clients on certain issues and (b) the

punishment for violating the regulations at issue in that case was visited on attorneys in the context of a government funding program. (Doc. 30 at 2–4.) *Velazquez* invalided on First Amendment grounds a restriction on "attorneys in advising their clients *and in presenting arguments and analyses to the courts* . . . ." 531 U.S. at 544 (emphasis added); the conclusion that "presenting arguments and analyses to the courts" is protected by the First Amendment is necessary to the Court's judgment because if it were not the Court could have invalidated the restriction only to the extent that it restricted "attorneys in advising their clients." *Id. Velazquez* held that in-court speech is protected by the First Amendment. And the presence of a government-funding program is not relevant to this case. In *Velazquez*, attorneys spoke in court and in consultation with their clients and as a result were threatened with loss of funds from a program that was ruled a limited forum. *Id.* at 542. Here, Stone spoke in court and suffered actionable retaliation. That no funding program is implicated by Stone's claims says nothing about whether they fall within *Velazquez*'s holding concerning in-court speech.

Defendants argue that *Willey* does not support Stone's case because that case concerned a motion to dismiss and, therefore, the court "need[ed] to consider the content, form, and context of the statements made, as revealed by the whole court record" later on in the case, 2018 WL 7115180 at *6, while here the record is complete. (Doc. 30 at 6.) The *Willey* court was waiting for what Stone has provided: a complete record of statements challenging "unconstitutional conduct" in Texas courts. 2018 WL 7115180 at *6. The *Willey* court rejected the defendant's argument that in-court speech was never protected from retaliation,[2] and ruled that speech concerning unconstitutional conduct in the criminal system presumptively addresses a matter of public

[2] *Compare Willey*, 2018 WL 7115180 at *6, *with* Motion to Dismiss, Doc. 14 at 24–26, *Willey v. Ewing*, No. 18-CV-0081 (S.D. Tex. July 11, 2018).

concern, *id.* Defendants' argument is irrelevant to the question before this Court because *Willey* indeed held that in-court speech could be protected from retaliation, and the fact that the court did not have a complete record for the motion on which it ruled does not change that.

C. Stone Could Not and Did Not Speak Pursuant to Official Duties

Finally, Defendants argue that because Stone was speaking in her role as attorney for Mr. Carpenter she was speaking pursuant to "official duties" and, therefore, cannot state a First Amendment claim. (Doc. 30 at 7–8.) In support of this argument, Defendants contend that *Polk County v. Dodson*, 454 U.S. 312 (1981), is not applicable to this case because it did not concern the speech rights of public defenders, and that *Flora v. County of Luzerne*, 776 F.3d 169 (3d Cir. 2015), supports their argument because that case held that a chief public defender was not speaking pursuant to his official duties when he took extraordinary action on behalf of a class composed of his office's clients. (Doc. 30 at 7–8.) Both arguments miss the point.

Stone relies on *Polk County* only for its clear holding: Attorneys cannot be state actors when they advocate on behalf of their individual clients. (*See* Doc. 25 at 11–12.) And if they cannot be state actors in their capacity as counsel for their clients, then their speech cannot be covered by the rule in *Garcetti v. Ceballos*, which disallows First Amendment claims based on speech pursuant to official government duties. 547 U.S. 410, 424 (2006). So although Defendants are correct that *Polk County* did not concern the speech rights of public defenders, the case is relevant here because it shows that public defenders cannot speak pursuant to official duties when they advocate for their clients. Indeed the *Velazquez* court explicitly recognized the relevance of this facet of the *Polk County* holding by explaining that *Polk County* stands for the proposition that appointed lawyers cannot speak for the government in court. 531 U.S. at 542 ("The LSC lawyer, however, speaks on the behalf of his or her private, indigent client. *cf. Polk Cty. v. Dodson*, 454

U.S. 312, 321–322 (1981) (holding that a public defender does not act "under color of state law" because . . . there is an "assumption that counsel will be free of state control"').").

Nothing in *Flora* is to the contrary.[3] There, the third circuit considered a *chief* defender's claim that he was protected from retaliation when he filed a class-action lawsuit on behalf of his clients arguing that his office was critically underfunded and therefore unable to provide constitutionally adequate representation. 776 F.3d at 178–80. Defendants contend that this means that individual defenders like Stone *are* speaking pursuant to official duties when they represent their clients in court. (Doc. 30 at 8.) *Flora* did not address the question raised by Stone's *Polk County* argument because the plaintiff in *Flora* was a chief public defender, and chief public defenders may be state actors when making policy for their offices even though individual public defenders cannot be state actors when representing their clients. *Compare Powers v. Hamilton County Pub. Def. Comm'n*, 501 F.3d 592, 611–13 (6th Cir. 2007) (holding that chief public defender made county policy when he acquiesced in his office's policy of not requesting indigency hearings for jailed debtors), *and Miranda v. Clark County*, 319 F.3d 465, 468–69 (9th Cir. 2003) (holding individual defender could not be liable for denying investigative resources to client who failed polygraph exam but that chief public defender could be liable for policy of diverting resources from clients who failed polygraph exams), *with Branti v. Finkel*, 445 U.S. 507, 517 (1980) (holding that constitution forbids firing assistant public defender because of partisan affiliation). Defendants' reliance on *Flora* is misplaced.

[3] Stone cites *Flora* for the proposition that "attorneys' personal speech rights are implicated when they face retaliation for in-court advocacy on behalf of their clients." (Doc. 25 at 10.) Defendants contend that the case supports their argument because of its holding on whether the plaintiff was speaking pursuant to official duties, but there can be no contention that *Flora* does not support the proposition for which it was cited: In that case, the court upheld a First Amendment claim based on the content of papers filed in a state court. *Flora*, 776 F. 3d at 178–80.

D. Conclusion

For the foregoing reasons, and for the reasons explained in Stone's brief in support of her motion for summary judgment (Doc. 25), her motion should be granted.

Respectfully submitted,

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