

786 F.2d 268, \*; 1986 U.S. App. LEXIS 22932, \*\*;

122 L.R.R.M. 2177; 4 Fed. R. Serv. 3d (Callaghan) 927

civil-rights actions. In addition, an Illinois state trial court in April 1974 had enjoined the enforcement of the Act at the Illinois-Indiana border against persons who purchased cigarettes for their personal consumption and not for resale. The DOR, [\*271] nonetheless, continued its enforcement activities, and as a result was held in contempt in December 1975 by the Illinois state trial court. Benson had testified on behalf of the DOR at the 1975 contempt proceedings. On July 21, 1976, after he had been terminated, Benson [\*8] filed an affidavit with the state trial-court judge. In the affidavit, he stated that he had been told by his superiors at the DOR to disregard the April 1974 injunction and to distort his testimony at the contempt hearing. Benson claimed further that DOR records had been destroyed and that others had been withheld or altered in violation of the state court's production order. He also discussed the alleged selective enforcement problem.

The Illinois Attorney General sent a letter to Allphin, dated September 2, 1976, which indicated that the State of Illinois, because of conflicts of interest, was withdrawing its representation of the DOR defendants, including Benson, in eight civil-rights suits pending in federal district courts. Allphin and Rummel decided to provide representation at the Department's expense to all DOR defendants except Benson. In addition to withdrawing legal representation for Benson, Allphin and Rummel maintained a campaign of harassment against their former employee. For example, they caused information to be sent to the Social Security Administration and the Internal Revenue Service to encourage investigations of Benson. The reason for these adverse actions [\*9] against Benson was Allphin and Rummel's dissatisfaction with Benson's disclosures within the DOR, to the press, and to the judiciary.

Benson filed this § 1983 action against Director Allphin and Associate Director Rummel in October 1977. Count I of the amended complaint alleged that, after Benson's termination, Allphin and Rummel conspired to harass him in retaliation for exercising his free-speech rights. Count II alleged that Benson was in fact terminated from his position at the DOR in retaliation for exercising his free-speech rights. The case finally came to trial in October 1983. The court dismissed Rummel as a defendant pursuant to his directed-verdict motion filed at the close of Benson's case-in-chief. At the close of the trial, the jury found in favor of Benson and against Allphin on both counts. It awarded Benson \$350,000 for the retaliatory discharge and \$3,000 for the failure to provide legal representation after the discharge. Allphin filed motions for a judgment notwithstanding the verdict and for a new trial.

The trial court issued a somewhat ambiguous order in ruling on Allphin's post-trial motions. The court first

found that, on the basis of the evidence presented, [\*10] a reasonable jury could conclude that Benson was terminated in retaliation for his "attempted exercise of the right of free speech" and that Allphin's proffered business justification for the termination was a pretext. The court went on to conclude that, under the Supreme Court's decisions in *Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983) and *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982), Allphin, as a high ranking government official performing discretionary functions, was entitled to qualified immunity from civil damages. The court found that Benson was exercising his free-speech rights primarily with reference to two matters: (1) the allegedly low settlements by the State of Illinois of large claims for delinquent sales or use taxes in contested cases brought and settled by Allphin and his legal advisors and (2) the refusal of Allphin to permit the arrest of Chicago police officers who were apparently buying cigarettes in Indiana and bringing them into Illinois without payment of the required tax. While the court acknowledged that these may be matters of public concern, it also found that [\*11] their disclosure undermined Allphin's authority and control over his office.

With reference to the low settlements, the court found that Benson did not have an unqualified right to speak out on this matter and that Allphin's efforts to maintain confidentiality were required under Ill. Rev. Stat. ch. 120, P 453.10b (1975). In the court's opinion, Allphin's interest in the [\*272] proper functioning of his office outweighed Benson's First Amendment interests in this regard.

With reference to the selective enforcement, the court noted that Allphin allowed Benson to bring the matter to the attention of the Chicago Police Department and that the DOR took steps to remedy the problem. With reference to the disputed photographs, the judge found that these were compiled as part of an investigatory file and that Benson was not privileged to disclose them to the press. The court also relied on para. 435.10b to support this conclusion. According to the court, Allphin acted in the best interests of the state by requiring that Benson go to the police department, rather than the press, with these allegations.

Thus, the trial court found that Allphin had imposed reasonable restrictions on [\*12] Benson's expression and also added that (although the question was never presented to the jury) there was "no evidence in the record to support a jury finding that defendant as a reasonable person under all the circumstances would have known that his termination of plaintiff's contract would violate any clearly established constitutional right."