GOVERNOR KANGICHI UCHAU and PELELIU STATE GOVERNMENT, Appellants,

v.

ANDRES NAPOLEON, HENCE SOWARD, NIXON SOLANG, CASINO ROBAT, SIMPSON ELBELAU, CARSON KODEP, FERLY MTOCHED, and HARLAN NICHOLAS Appellees.

CIVIL APPEAL NO. 10-038
Civil Action No. 10-042

Supreme Court, Appellate Division
Republic of Palau

Decided: October 7, 2011[1]

[1] **Constitutional Law:** Freedom of Expression

When a public employer fires or threatens to fire an employee based solely on that employee's personal political beliefs, the employer impairs the employee's fundamental right to freedom of expression. Relatedly, if the retention of one's public job rests on his coerced affiliation with or support of a candidate or group, the consequences for expression and belief are the same.

[2] **Constitutional Law:** Freedom of Expression

A plaintiff may succeed on a political patronage dismissal claim if he proves that he was dismissed from his public job based solely on his personal political affiliations or beliefs. This is a question of fact and may include expressions of support or non-support for a particular candidate or group. If the plaintiff makes the required showing, the burden shifts to the hiring authority to demonstrate that political affiliation or belief is an appropriate requirement for the effective performance of the public job at issue. This is also a question of fact based on the duties inherent to the position.

[3] **Constitutional Law:** Freedom of Expression

The fact that a plaintiff was an at-will public employee and could be terminated for many permissible reasons is irrelevant if that employee establishes that he was terminated based solely on the exercise of a constitutionally protected right.

[4] **Constitutional Law:** Equal Protection; **Constitutional Law:** Freedom of Expression;

Where appellees' equal protection claim rests entirely on their free expression claim, an equal protection analysis is not necessary and may be dismissed.

Counsel for Appellants: Salvador Remoket
Counsel for Appellees: J. Roman Bedor

[1] Upon review of the briefs and the record, the panel finds this case appropriate for submission without oral argument pursuant to ROP R. App. P. 34(a).

BEFORE: KATHLEEN M. SALII, Associate Justice; KATHERINE A. MARAMAN, Part-Time Associate Justice; RICHARD H. BENSON, Part-Time Associate Justice.

Appeal from the Trial Division, the Honorable ALEXANDRA F. FOSTER, Associate Justice, presiding.

PER CURIAM:

Appellants Governor Kangichi Uchau and the Peleliu State Government (PSG) appeal the judgment of the Trial Division in favor of Appellees Andres Napoleon, Hence Sowad, Nixon Solang, Casino Robat, Simpson Elbelau, Carson Kodep, Ferly Mtoched, and Harlan Nicholas on their wrongful termination claims. For the reasons set forth below, we **VACATE** the decision and judgment of the trial court and **REMAND** the matter to the trial court for further proceedings.

BACKGROUND

The following facts are largely uncontested.

Governor Uchau first prevailed in a special election in mid-2009 to fill out the term of Governor Jackson Ngiraingas, who left office for a position with the national government. In December 2009, another gubernatorial election was held in which Uchau defeated Dr. Caleb Otto. At that time, all of the Appellees were employees of PSG. Andres Napoleon was employed as a Peleliu State Ranger from January 2004 through January 2010. Hence Sowad was employed from 1992 through January 2010 as a builder and boat captain. Casino Robat was employed from 2005 to January 2010 as a public works employee. Simpson Elbelau was employed from 1996 through January 2010 as a boat crew member. Carson Kodep was a member of the boat crew and grounds crew from 1998 through January 2010. Nixon Solang was employed as a ranger for approximately two years prior to January 2010. Ferly Mtoched was employed from 2004 through January 2010 as a boat crew member and road crew member. And Harlan Nicholas was employed from 2008 to January 2010 in the Public Works Department. While some of the Appellees believed they were "permanent" employees of PSG, this was not indicated on any personnel documentation, and no laws or regulations protect PSG employees.[2]

Following the December 2009 election, Uchau summoned all PSG employees to a meeting where he announced that if any of the employees did not "support" him, they should leave. No one, including the Appellees, left the meeting, and Uchau congratulated them for their support. On January 1, 2010, Uchau was sworn in as governor. On January 4, 2010, Uchau again gathered the PSG employees and told them that if they did not support him during the election, did not come to his campaign headquarters, or did not vote for him, they should leave because they no longer have a job with PSG. The employees were then told to go to Uchau's office where his secretary would inform them if they still had a job.

The employees proceeded to Uchau's office. There they were each informed if

[2] In fact, each Appellee's Personnel Action Form indicates that they are "semi-permanent," though no definition of "semi-permanent" was established at trial.

Uchau had signed their Personnel Action Form (PAF). The Appellees were informed that Uchau did not approve their PAFs and they were no longer employed by PSG. New employees took over the Appellees' jobs that same day.

After their termination, the Appellees banded together and wrote a letter to Uchau on January 14, 2010, requesting reinstatement. Uchau responded on January 18, 2010, commending them on exercising their right to vote, and refusing to reconsider his position. He stated in the letter that "I approved and signed only the applications of the persons I believed we can work together in the 3 years of my tenure."

The Appellees then turned to the Peleliu State Legislature for support. The Legislature formed a Special Committee to investigate the allegations. The Committee interviewed the Appellees and heard from Uchau. On February 11, 2010, the Committee issued a report concluding that "it is clear beyond any doubt that [Appellees] were terminated and discharged from their employment with the State Government because they did not vote or support Governor Kangichi Uchau in the last general election." That day, the Legislature also adopted a resolution requesting that Uchau immediately reinstate the Appellees.

Uchau refused to honor the Legislature's request and the Appellees filed suit. The Appellees presented six claims: (1) violation of constitutional right to free expression; (2) violation of the constitutional right to vote; (3) violation of due process rights; (4) violation of the Voting Rights Act; (5) breach of employment contract; and (6) violation of the constitutional right to equal protection. Following a two day trial, the trial court issued its decision and judgment finding in favor of the Appellees with regard to their freedom of expression and equal protection claims. The court rejected the Appellees' remaining claims. This appeal followed.

STANDARD OF REVIEW

The trial court's findings of fact are reviewed for clear error. *Sun Ye Chin Fan v. Pacifica Dev. Corp*., 16 ROP 56, 59 (2008) (citing *Ongidobel v. Republic of Palau*, 9 ROP 63, 65 (2002)). The appellate court will not reweigh the evidence, test credibility of witnesses, or draw inferences from the evidence. *Nakamura v. Uchelbang Clan*, 15 ROP 55, 57 (2008) (quoting *Omenged v. United Micronesia Dev. Auth.*, 8 ROP Intrm. 232, 233 (2000). "'Under the clear error standard, the lower court will be reversed only if the findings so lack evidentiary support in the record that no reasonable trier of fact could have reached the same conclusion.'" *Id.* (quoting *Dilubech Clan v. Ngeremlengui State Pub. Lands Auth.*, 9 ROP 162, 164 (2002)). The trial court's conclusions of law are reviewed de novo. *Id.*

ANALYSIS

I. Freedom of Expression

The Appellants argue that the trial court erred by concluding that Uchau's actions in firing the Appellees violated the Appellees' right to freedom of expression. According to the Appellants, the Appellees were employed "at will" and could be terminated at any time for any reason. Moreover, the Appellants contend that Uchau did not interfere with the

Appellees' right to vote leading up to the election and therefore the Appellants could not have infringed on the Appellees' free expression rights.

The trial court assessed this claim under the analysis set forth in *April v. Palau Public Utilities Corp*., 17 ROP 18 (2009). In *April*, the plaintiff, an employee of a public corporation, claimed that her right to freedom of expression was violated after she was fired for allegedly making public statements unfavorable to the company. In determining whether the defendants' actions under the circumstances violated the plaintiff's right to free expression under Article IV, Section 2 of the Constitution, we looked to U.S. case law on point. We concluded that when a public employee speaks as a private citizen (and not as an agent of the government), the employer may be restricted in regulating the employee's expression. And, absent a powerful justification, punishing an employee for expressing herself on a matter of public concern violates that employee's constitutional right to free expression.

Here, the court below found that anonymous voting and political support (or non-support) qualified as "expression" for constitutional purposes. It also concluded that such expression falls under the mantle of "political speech" and is on a matter of public concern. Because the Appellees were fired based on their political speech as private citizens, and because the Appellants failed to present a powerful justification for their actions, the trial court concluded that the Appellants violated the Appellees' rights under Article IV, Section 2 of the Constitution.

While we do not fault the trial court for trying to square the facts of this case with our recent precedent, we believe that a more straightforward analysis is appropriate. The Appellees' claims, as articulated in their complaint and developed at trial, are based on allegations that they were fired not because they spoke out on the gubernatorial election, but because they did not support the winning candidate, Uchau. Such allegations are otherwise known as political patronage dismissals, which infringe on an employee's right to freedom of expression inasmuch as an employee retains his right to express (or not express) his personal political views[3] at the risk of losing his job.

Upon review of the record, we believe that the allegations and facts in this case fall neatly into the analysis of political patronage dismissals set forth by the U.S. Supreme Court in *Elrod v. Burns*, 96 S. Ct. 2673 (1976), *Branti v. Finkel*, 100 S. Ct. 1287, 1294-95 (1980), and their progeny, and that this analysis is proper to employ in Palau. Palau courts may look to U.S. case law for guidance, especially those cases interpreting identical or similar constitutional provisions. *See Yano v. Kadoi*, 3 ROP Intrm. 174, 181 n.1 (1992); *see also April*, 17 ROP at 23-24. Therefore, to clarify the law and provide proper precedent, we rely on our "independent power to identify and apply the proper construction of governing law," even if not raised by the parties. *See Ongalibang v. Republic of Palau*, 8 ROP Intrm. 219, 220 n.2 (2000) (quoting *Kamen v. Kemper Fin. Servs.,*

[3] The term "political" in this context does not mean affiliation with a particular party or group. It refers simply to personal views on government, policy, and leadership.

Inc., 111 S. Ct. 1711, 1718 (1991)).

Article IV, Section 2 of the Palau Constitution provides, in relevant part, that "[t]he government shall take no action to deny or impair the freedom of expression." The freedom of expression includes the right to be free of coerced expression—a right to silence. *See Riley v. Nat. Fed'n of the Blind*, 108 S. Ct. 2667, 2677 (1988) (noting that in the context of protected speech, the difference between compelled speech and compelled silence is without constitutional significance). At the heart of the freedom of expression is the belief that the government shall not prescribe public opinion, and that competition of ideas and open debate on public issues benefit the Republic. *See generally Wong v. Nakamura*, 4 ROP Intrm. 364, 372 (Tr. Div. 1994) (noting that the fundamental guarantees secured by Article IV, Section 2 of the Palau Constitution, including the freedom of expression, "rest on the idea that more speech, not enforced silence will benefit the people and the Republic"); *Elrod v. Burns*, 96 S. Ct. 2673, 2682 (1976) (plurality opinion) (noting that competition of ideas and governmental policies is at the core of the electoral process).

To frame the issue, we note that there is no right to public employment. The government may provide a benefit, such as a job, or take one away for any number of reasons. Concerns arise when the provision or denial of a benefit requires sacrifices to constitutional freedoms. As we stated in *April*, public employers are not generally permitted to force employees to surrender fundamental rights, such as the freedom of expression, as a condition of their employment. *April*, 17 ROP at 23; *see also O'Hare Truck Serv. v. City of Northlake*, 116 S. Ct. 2353, 2356 (1996) ("A State may not condition public employment on an employee's exercise of his or her First Amendment rights.").

[1] Yet when a public employer fires or threatens to fire an employee based solely on that employee's personal political beliefs, the employer impairs the employee's fundamental right to freedom of expression. *See Branti v. Finkel*, 100 S. Ct. 1287, 1294-95 (1980); *Elrod*, 96 S. Ct. 2673; *see also O'Hare Truck Serv*., 116 S. Ct. at 2356 ("If the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." (citation omitted)). Relatedly, if the retention of one's public job rests on his coerced affiliation with or support of a candidate or group, the consequences for expression and belief are the same.

Political patronage dismissals are not uncommon or unique, and though they infringe of an public employee's constitutional rights, such infringements may be permissible under certain circumstances. For instance, if an employee's private political beliefs would interfere with the discharge of his public duties, the government's interest in effectiveness and efficiency may outweigh the employee's right to free expression. *See Branti*, 100 S. Ct. at 1294; *see also Pleva v. Norquist*, 195 F.3d 905, 911 (7th Cir. 1999) ("Political affiliation is an appropriate criterion for public employment when the effective operation of government would be compromised by requiring the public official to retain a potential political enemy in a position of responsibility." (quoting *Warzon v. Drew*, 60 F.3d 1234, 1240 (7th Cir. 1995)).

"Ultimately, the defendant bears the burden in establishing that a plaintiff's position falls within the exception to the general prohibition on patronage dismissals." *Kiddy-Brown v. Blagojevich*, 408 F.3d 346, 354 (7th Cir. 2005) (discussing U.S. Supreme Court's analysis of political patronage dismissals in *Branti v. Finkel*, 100 S. Ct. 1287, and *Elrod v. Burns*, 96 S. Ct. 2673).

[2] With this background, we hold that a plaintiff may succeed on a political patronage dismissal claim if he proves that he was dismissed from his public job based solely on his personal political affiliations or beliefs. This is a question of fact and may include expressions of support or non-support for a particular candidate or group. If the plaintiff makes the required showing, the burden shifts to the hiring authority to demonstrate that political affiliation or belief is an appropriate requirement for the effective performance of the public job at issue. *See Branti,* 100 S. Ct. at 1295; *Lane v. City of LaFollette*, 490 F.3d 410, 419 (6th Cir. 2007). This is also a question of fact based on the duties inherent to the position. *Lane*, 490 F.3d at 419. Relevant inquiries include whether the nature of the position requires political judgment, advice on the implementation of broad goals, or policy making—merely ministerial positions with little discretion and little input on public policy often fall outside this exemption. *See, e.g., Branti*, 100 S. Ct. at 1294-95 (noting that it is not always easy to tell if a position is one in which political or candidate affiliation is a legitimate factor, and providing examples).

Though we have modified the analysis, we are still able to clear up some of the issues presented in this appeal. First, we reject the Appellants' challenge to the trial court's finding that Uchau fired the Appellees. According to the Appellants, the Appellees' positions with PSG somehow ended around the time that Uchau was sworn in, and he merely refused to rehire them. The trial court acknowledged the Appellants' argument on this point and disagreed. It noted that the Appellees testified that they never tendered resignations and that no previous governor had sought resignations or asked them to reapply for their jobs. In addition former governor Hinao Soalablai testified that in his experience, PSG employees did not have to reapply for their positions following an election. The Appellants point to nothing in the record that requires a finding in their favor, and inasmuch as there is evidence to support the trial court's findings of fact on this point, they will not be disturbed.

[3] Next, we reject the Appellants argument that because the Appellees were employed at will, they could be terminated at any time, for any reason. As discussed above, the fact that a plaintiff was an at-will public employee and could be terminated for many permissible reasons is irrelevant if that employee establishes that he was terminated based solely on the exercise of a constitutionally protected right. *See e.g., Lane*, 490 F.3d at 419 (noting that the U.S. Supreme Court has "squarely rejected" the argument that because plaintiff served at the pleasure of the hiring authority, he can be dismissed for any reason and cannot be heard to complain that termination violated his constitutional rights); *see also O'Hare Truck Serv.*, 116 S. Ct. at 2361 ("Government officials may indeed terminate at-will relationships . . . without cause; but it does not follow that this discretion can be exercised to impose conditions on expressing, or not

expressing, specific political views . . . .").

The Appellants also allege that "the court below erred when held [sic] that Appellees [sic] relationship to Dr. Otto is protected right [sic] and erred when it found Appellants liable on theory [sic] that Appellees did not raise." However, the trial court did not conclude that the Appellees' relationship to Otto was a "protected right" and it is otherwise unclear how the Appellants' assert reversible error on this point. The court engaged in a thorough discussion of the factors leading to the Appellees' termination. And, the Appellees alleged in their complaint that they were punished based on their political expression. For instance, the facts and arguments included in the complaint indicate that the Appellees were fired for voting for Otto, not voting for Uchau, and generally for exercising their constitutional rights. The Appellees further developed their arguments in their Motion for Summary Judgment, in which they contended that they were terminated from their positions because "they exercised their constitutional rights to vote and for free speech." The Appellants' argument that the trial court based its conclusions on issues never raised by the Appellees is therefore rejected.

However, while we reject the various grounds for reversal argued by the Appellants in their brief, we nonetheless remand the matter to the trial court for further proceedings. As noted, the Appellees' claims are best assessed as political patronage dismissals rather than private speech on a matter of public concern. The Appellants therefore must have the opportunity to rebut the Appellees' claims in light of this holding.[4]

II. Equal Protection

The Appellants also disagree generally with the trial court's conclusion that the Appellees' equal protection rights were violated when Uchau fired them based on their failure to support his campaign and their relationship to his opponent. Article IV, Section 5 provides in relevant part that "[e]very person shall be equal under the law and shall be entitled to equal protection," and that "[t]he government shall take no action to discriminate against any person on the basis of sex, race, place of origin, language, religion or belief, social status or clan affiliation."

On this point, the Appellees argued to the trial court that Uchau fired them for voting for Otto while retaining those employees that supported his campaign. They further argued that Uchau's decision to fire them for supporting Otto constituted discrimination based on "belief." The trial court assessed the claim by considering whether there was a rational relationship between the action taken and the objective. The court found that Uchau's objective in firing the Appellees was to purge the state government of employees who did not campaign for him, and that no rational basis existed for terminating the Appellees based on their political viewpoints.

[4] Upon review, we conclude that because the Appellees' equal protection claim rests entirely on their free expression claim, an equal protection analysis is not necessary. As

[4] The record in this case is ample. We leave it to the trial court to determine what proceedings may be necessary to resolve this matter on remand.

noted, the allegations giving rise to the Appellees' equal protection claim are identical to those giving rise to their freedom of expression claim. In essence, the Appellees contend that their equal protection rights were violated because they were punished based on their private political beliefs. As discussed, Article IV, Section 2 protects individuals against unconstitutional discrimination based on political beliefs and association. This claim may therefore be dismissed. *See Pagan v. Calderon*, 448 F.3d 16, 36-37 (1st Cir. 2006) (noting that allegation of discrimination based on political views and activities are not equal protection claims, but First Amendment claims); *Nestor Colon Medina & Sucesores v. Custodio,* 964 F.2d 32, 45 (1st Cir. 1992) (finding that in case alleging discrimination based on political views, there is no basis for considering equal protection claim that overlapped entirely with free speech claim).

CONCLUSION

For the reasons discussed above, we conclude that the Appellees may succeed on their claim that their rights to free expression under Article IV, Section 2 of the Constitution were violated if they can demonstrate that they were fired based solely on their personal political beliefs. This may include the decision to support or not support a particular political candidate. The Appellants should be given the opportunity to rebut the Appellees' freedom of expression claim by proving that the Appellees' personal political views are appropriate requirements for the effective performance of their public jobs. Moreover, we conclude that the Appellees' claim that their rights to equal protection under Article IV, Section 5 of the Constitution were violated overlaps entirely with their free expression claim and may be dismissed. Accordingly, we **VACATE** the decision and judgment of the trial court and **REMAND** this matter to the trial court for further proceedings.