



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 19, 1996

The Honorable Earl R. Lord
Sabine County Attorney, Pro Tem
P.O. Box 1519
Hemphill, Texas 75948

Letter Opinion No. 96-139

Re: Whether a new sheriff may discharge at will employees of the former sheriff in a non-civil service county (ID# 38965)

Dear Mr. Lord:

You ask whether the incoming sheriff of Sabine County, Texas may discharge employees of the former sheriff upon taking office. As we understand it, because of the county's size, there is no county civil service system. You do not suggest that any of the employees in question have any written contracts protecting them against discharge, and we will assume for the purposes of this opinion that such is not the case.

"In Texas, employees of any elected official serve at the pleasure of the elected official, regardless of whether there is a statute which specifies at-will status." *Garcia v. Reeves County, Texas*, 32 F. 3d 200, 203 (5th Cir. 1994). "While no Fifth Circuit case squarely addresses the distinction between deputies and other employees of a Texas sheriff's department, . . . '[s]heriffs, like other elected county officials in Texas, have indisputably wide-ranging discretion in the selection of their employees. . . ." *Id.* "In Texas, absent any contractual limitations, either party may end an employment relationship at will, with or without cause." *Id.*

Assuming, therefore, that such employees have neither civil service nor contract protection, they "have no legal entitlement to their jobs as public employees; the sheriff may fire them for many reasons or for no articulable reason at all." *Barrett v. Thomas*, 649 F.2d 1193, 1199 (5th Cir. 1981). While a sheriff may fire at-will employees for any reason or for no reason, however, he may not discharge them for a constitutionally impermissible reason. "He may not condition continuation of public employment on an employee's relinquishment of the First Amendment liberties of political belief and association. The establishment of a political orthodoxy among public employees by an executive official is constitutionally impermissible." *Id.* at 1199-1200.

The case about which the incoming sheriff appears to have expressed concern, *Brady v. Fort Bend County*, 58 F.3d 173 (5th Cir. 1995), is one of a long series of cases in the United States Supreme Court and the United States Court of Appeals for the Fifth Circuit which seek to articulate the First Amendment constraints on the power of public employers, particularly sheriffs, to terminate their employees. See *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980); *Barrett v. Thomas*, 649 F.2d

1193 (5th Cir. 1981); *McBee v. Jim Hogg County, Texas*, 730 F.2d 1009 (5th Cir. 1984) (en Banc); *Garcia v. Reeves County, Texas*, 32 F.3d 200 (5th Cir. 1994); *Vojvodich v. Lopez*, 48 F.3d 879 (5th Cir. 1995); *Brady v. Fort Bend County*, 58 F.3d 173 (5th Cir. 1995).

Elrod v. Burns, 427 U.S. 347 (1976), is the beginning of this inquiry. In *Elrod*, the plaintiffs were Republican employees of the Cook County Illinois sheriff who were discharged when a Democrat was elected sheriff. The plurality opinion in *Elrod* took a highly critical view of the political patronage system responsible for such discharges, declaring patronage “to the extent it compels or restrains belief and association. . . inimical to the process which undergirds our system of government and . . . ‘at war with the deeper traditions of democracy embodied in the First Amendment.’” *Elrod*, 427 U.S. at 357. However, the rule of the case as stated in Justice Stewart’s concurrence was more simply that “a nonpolicymaking, nonconfidential government employee” cannot “be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs.” *Id.* at 374.

The distinction between “policymaking” or “confidential” public employees and those not so considered upon which *Elrod* rests, however, was somewhat altered by the later Supreme Court case of *Branti v. Finkel*, 445 U.S. 507 (1980). In *Branti*, the public employee plaintiffs were assistant public defenders in a New York county whose legislature had been taken over by the opposing political party. While it was arguable that such lawyers, like all attorneys, were persons in whom particular confidences were reposed, the Court held that such labels as “policymaking” or “confidential” did not end the inquiry:

In sum, the ultimate inquiry is not whether the label “policymaker” or “confidential” fits a particular position; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

Branti, 445 U.S. at 518.

In a series of cases, the United States Court of Appeals for the Fifth Circuit has attempted to apply the requirements of *Elrod* and *Branti* to the employment practices of sheriffs in Texas. In *Barrett v. Thomas*, 649 F.2d 1193 (5th Cir. 1981), the plaintiff, a sergeant in the Dallas County Sheriff’s Office, asserted *inter alia* that he was demoted and later discharged for political reasons. The jury in the district court agreed that “political considerations were a motivating factor in Barrett’s transfer and demotion,” but not in his discharge. *Barrett*, 649 F.2d at 1197.

The sheriff argued that, because under Texas law deputies serve “at the pleasure” of the sheriff, he was within his rights to dismiss the plaintiff. *Id.* at 1199. While

acknowledging the “wide-ranging discretion” afforded sheriffs under Texas law with respect to hiring and firing, the court nevertheless found “overriding limits on the sheriff’s discretion in employment matters.” *Id.* Nor did the court accept the sheriff’s description of his deputies as “confidential, policymaking employees” excepted from the rule of *Elrod*. *Id.* at 1200. Citing the *Branti* decision, the court found that, “[t]he terms ‘confidential’ and ‘policymaker’ illuminate the contours of the employee class that may permissibly be subjected to a political litmus test, but any specific application of the exception must turn on the importance of political loyalty to the execution of the employee’s duties.” *Id.* at 1201. Noting the size of the Dallas County Sheriff’s Office, the court ruled that, “[i]n a sheriff’s department with more than 700 employees, including approximately 550 deputies, the absence of political cohesion between sheriff and deputy can hardly be said to undermine an intimate working relationship.” *Id.*

The *Barrett* case was distinguished by a panel decision of the Fifth Circuit in *McBee v. Jim Hogg County*, 703 F.2d 834 (5th Cir. 1983), *vacated by* 730 F.2d 1009 (5th Cir. 1984) (*en banc*). The *McBee* panel took the view that the sheriff of Jim Hogg County, a significantly smaller county than Dallas with a vastly smaller sheriff’s office, could demand a higher degree of political loyalty than could Sheriff Thomas:

We believe it is possible for a sheriff in a small size office to make a plausible argument that his law enforcement staff falls within the *Elrod-Branti* exception. . . . Indeed, we find it difficult to imagine how such an office could have effectively carried out its vitally important duties in the public trust when the sheriff did not have absolute confidence in his small staff of deputies and dispatchers.

McBee, 703 F.2d at 841-42.

This “small office” exception to the rule of *Elrod* and *Branti*, however, was rejected by the Fifth Circuit *en banc*, which vacated the panel decision and remanded the case to the district court. *McBee*, 730 F.2d 1099 (5th Cir. 1984) (*en banc*). The *en banc* decision analyzes First Amendment employee discharge cases as “locate[d] on a spectrum,” with *Elrod* and *Branti* on “the extreme of the employees’ side” and cases of wholly disruptive political speech on the other. *Id.* at 1014. It characterized *Elrod* and *Branti* as cases in which

employees who were, it appears, both loyal and effective were discharged on the sole ground of their private and--for employment purposes--all but abstract political views. They did not campaign, they did not even speak: they merely thought.

Id.

The *en banc* decision found that the proper analysis in the case before it was one which would balance “the employee’s speech and associational rights as citizen and the state’s right as an employer to loyal and efficient service.” *Id.* The factors in this balancing test include “to what degree [the employee’s activity] involve[s] ‘public concerns’[;]. . . whether ‘close working relationships are essential to fulfilling . . . public responsibilities [involved]’[;]. . . whether the particular speech sufficiently disrupted the working relationship as to prevent effective performance[;]. . . the time, place and manner of the political activity[;]. . . [and] whether, taken in context, the particular activity could be considered sufficiently hostile, abusive or insubordinate as to disrupt significantly the continued operation of the office.” *Id.* at 1016-17.

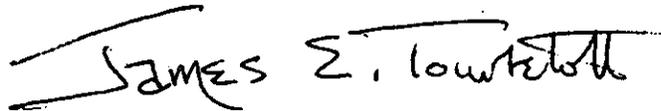
The *McBee* balancing test requires that the employee have engaged in some political activity, and that such political activity be describable as disruptive, see *Vojvodich*, 48 F.3d at 887. Absent an allegation that the acts of the sheriff’s employee did or could affect “the Sheriff’s Office’s ability to provide services, there simply is no countervailing state interest to weigh against the employee’s First Amendment rights.” *Id.* at 886.

To summarize, then, a Texas sheriff in a non-civil service county may discharge employees of his department who have no civil service or contract protection for any reason or for no reason at all, so long as he does not do so for a constitutionally impermissible reason. A sheriff may not, however, discharge an employee merely for holding political views opposed to his own, or for engaging in political activities opposed to the sheriff, unless the expression of such views or participation in such activities adversely affect the sheriff’s ability to provide services to the public. Courts will evaluate any such employment decision by examining such factors as the degree to which the employee’s activities involved matters of public concern; whether close working relationships were essential to fulfilling the employee’s responsibilities; the time, place and manner of the activities in question; and whether the activities could be considered sufficiently hostile, abusive, or insubordinate as to disrupt significantly the continued operation of the office. Accordingly, while a Texas sheriff may discharge the employees of his predecessor upon taking office, both law and prudence would dictate that he take care not to discharge such employees for their personal political views or non-disruptive political activities.

S U M M A R Y

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Yours very truly,

A handwritten signature in black ink that reads "James E. Tourtelott". The signature is written in a cursive style with a long horizontal line above the name.

James E. Tourtelott
Assistant Attorney General
Opinion Committee