IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

THOMAS COFFIN	)	
	)	
Coffin,	)	
v.	)	CIVIL ACTION NO:
	)	2009CV164580
	)	
CITY OF ATLANTA	)	
	)	
Defendant.	)	

ORDER

The above-styled matter came before the Court for oral argument on August 6, 2010 on Defendant's Motion for Summary Judgment. Having considered arguments of counsel, and after reviewing the record in its entirety, Defendant's Motion is DENIED in part and GRANTED in part.

SUMMARY OF FACTS

Thomas Coffin ("Coffin") brought this action against the City of Atlanta ("City") for: (1) Violation of O.C.G.A. § 45-1-4;[1] and (2) Violation of Right to Free Speech pursuant to the Georgia Constitution, Article I, Section 1, paragraphs 3, 5, and 9. Coffin brought these claims as a result of his termination from his Senior Arborist position with the City of Atlanta.

The City's Arborist Division enforces the City's Tree Protection Ordinance ("Ordinance"), a policy for safeguarding the City's trees. The Ordinance provides for the preservation, establishment, and maintenance of trees throughout the city of Atlanta by prohibiting their destruction and removal, except as allowed by the Ordinance. The Ordinance does not list specific enforcement mechanisms for arborists. Rather, it grants them discretionary enforcement authority:

---

[1] In his Complaint, Coffin claims the City violated O.C.G.A. § 45-1-4 by its retaliatory termination of him and improper disclosure of his identity as a whistleblower. Coffin later dismissed his improper disclosure claim in his Brief in Opposition to Summary Judgment.

"[T]he city arborist[s] have police power to do all acts necessary to ensure that the provisions of this article are not violated, including, but not limited to, the issuance of citations for the violation of any provision of this article." City of Atlanta Code of Ordinances § 158-33. The Division also has interdepartmental Standards of Practice ("SOPs"), which provide arborists enforcement guidance.

Coffin served as an arborist for the City from 2000 to 2008. In the summer of 2007, he applied for and was promoted to Senior Arborist. Upon accepting this position, Coffin's employment status changed to "unclassified." Unclassified employees do not retain the right to appeal any suspensions or terminations to the Atlanta Civil Service Board; they are at-will employees. As a Senior Arborist, Coffin supervised other staff arborists. Specifically, he directed and evaluated assigned staff, handled employee concerns and problems, assigned work, counseled employees, and recommended disciplinary and other personnel actions. These duties included ensuring that other staff arborists complied with the Ordinance and the Division's SOPs.

From February 2008 through June 2008, Coffin took various disciplinary actions against other staff arborists for perceived Ordinance violations: he issued oral admonishments; he reported the violations to his immediate supervisor ("Caldwell"); and he recommended that his supervisors also issue admonishments. Upon certain recommendations, Caldwell reprimanded Coffin's subordinates. In early July 2008, Coffin gave Caldwell a summary report of staff arborists' Ordinance violations. Later that month, three staff arborists, about whom Coffin had reported, met with Caldwell and Caldwell's direct supervisor. Caldwell and his supervisor recommended terminating Coffin, and Coffin was terminated on July 29, 2008. The City maintains that Coffin was terminated because of his "inability to supervise and coach subordinates and inability to promote a harmonious work environment," characteristics about which supervisors had previously warned Coffin. Coffin denies that he filed unfounded complaints against other arborists.

DISCUSSION

To prevail on a motion for summary judgment, the moving party must demonstrate that there is no genuine issue of material fact, and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law. O.C.G.A. § 9-11-56(c); Lau's Corp. v. Haskins, 261 Ga. 491 (1991). A defendant can meet this burden by "showing the court that the documents, affidavits, depositions and other evidence in the record reveal that there is no evidence sufficient to create a jury issue on at least one essential element of the defendant's case." Id. If the moving party discharges this burden, the nonmoving party cannot rest on its pleadings, but rather must point to specific evidence giving rise to a triable issue." Id.

1. Violation of the Whistleblower Act, O.C.G.A. § 45-1-4

O.C.G.A. § 45-1-4, the "whistleblower" statute, "prohibits public employers from threatening or taking any personnel action as a reprisal against public employees who complain [or provide information] about fraud, waste, and abuse in state programs and operations." Jones v. Bd. of Regents of the Univ. Sys. of Ga., 262 Ga. App. 75, 80 (2003) (citation omitted) (finding issue of fact where employee was terminated for disclosing information of fraud in connection with his internal investigations of other employees).

O.C.G.A. § 45-1-4(d)(2) provides:

> "[n]o public employer shall retaliate against a public employee for disclosing a violation of or noncompliance with a law, rule or regulation to either a supervisor or a government agency, unless the disclosure was made with knowledge that the disclosure was false or with reckless disregard for its truth or falsity."

"'[L]aw, rule or regulation' includes any . . . local statute or ordinances or any rule or regulation adopted according to any . . . local statute or ordinance." O.C.G.A. § 45-1-4(a)(2); see also Pattee v. Ga. Ports Auth., 477 F. Supp. 2d 1253, 1270-71 (S.D. Ga. 2006) (denying summary judgment as to the merits of plaintiff's Whistleblower Act violation when plaintiff made specific references to

Georgia Ports Authority rules because this showed plaintiff's whistleblowing dealt with a "rule" under the statute).

A jury issue exists as to whether Coffin's reports of his subordinate arborists' noncompliance dealt with a "local ordinance" under O.C.G.A. § 45-1-4(a)(2). The Ordinance, which city arborists enforce, is codified in the City of Atlanta Code of Ordinances. Additionally, the Ordinance charges arborists' with ensuring that the Ordinance is not violated. Because Coffin reported other arborists' failure to find Ordinance violations, he reported their noncompliance with the Ordinance. A trier of fact could determine that Coffin's reports specifically reference the Ordinance, a "local ordinance" under O.C.G.A. § 45-1-4(a)(2).

This Court also finds that an issue of fact exists regarding whether the City took "action" against Coffin for purposes of O.C.G.A. § 45-1-4(d). In Jones, the Georgia Court of Appeals identified factors for determining this: (1) proximity in time between the protected activity and the termination; (2) whether the employer directly interfered with actions related to the protected activity; and (3) whether plaintiff expressly denied his employer's pretextual reason for plaintiff's termination. Jones, 262 Ga. App. at 81.

Here, the City terminated Coffin within a relatively short period of time, less than a month, after his supervisor received Coffin's report about other arborists and after these arborists requested a meeting with upper management regarding Coffin's reports. A trier of fact could determine that this temporal proximity evidences a reprisal by the City for his disclosure of noncompliance. Further, the record shows that the City warned Coffin to stop making reports of Ordinance violations and met with the arborists who complained when Coffin reported them. Thus, a trier of fact could determine that the City interfered with his reporting of Ordinance noncompliance. Lastly, while the City claimed that Coffin was dismissed for his "inability to supervise his

subordinates and promote a harmonious work environment," Coffin denied that his disciplinary recommendations were unfounded. A trier of fact could determine that the City's reason for termination was pretextual, and that Coffin was terminated for reporting noncompliance with the Ordinance under O.C.G.A. § 45-1-14(d). Accordingly, this Court HEREBY DENIES Defendant's Motion for Summary Judgment for Coffin's Violation of O.C.G.A. § 45-1-4 claim.

2. Violation of Right to Free Speech under the Georgia Constitution

When a public employee claims he was wrongfully terminated for constitutionally protected expressive conduct, a court evaluates his speech under the analysis established by the United States Supreme Court in Pickering v. Bd. of Educ., 391 U.S. 563 (1968). See Taylor v. Bartow Co., Ga., 860 F. Supp. 1526, 1541 (N.D. Ga. 1994). The Pickering analysis is a question of law for the court to decide. Taylor, F. Supp. at 1542. Under this analysis, a court first determines whether the employee's speech may be "fairly characterized as constituting speech on a matter of public concern." Id. at 1541. Here, a court must discern whether the employee spoke on behalf of the public as a citizen, to raise an issue of public concern, or whether the employee spoke for himself as an employee, to further his own interest because an employee's speech is not protected if it is the latter. See Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) ("when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate them from employer discipline."). When determining if the speech involves a matter of public concern, a court examines the employee's efforts to communicate the concerns to the public and the employee's motivation in expressing the concerns. Id. Only if the court determines the employee's speech involves a matter of public concern does it apply a balancing test where it balances "the interest of the [employee], as

a citizen, in commenting upon matters of public concern, and the interest of the State, as an employer, in promoting efficiency of the public services it performs through its employees." Id.

Coffin's statements to his supervisor regarding other staff arborists were not constitutionally protected speech so as to insulate him from the City's terminating him. Coffin made reports and recommendations pursuant to his official duties as supervisor; he was not speaking upon a matter of public concern as a citizen. As a Senior Arborist, Coffin was required to supervise, direct, and evaluate assigned staff, including recommending disciplinary and other personnel actions. Coffin admits that he received a copy of the Job Specification for his position before he accepted the position, which included this provision. He also provided deposition testimony that he was aware of his position's requirements. Further, the record does not show that Coffin attempted to bring his concerns to the public's attention; his contact remained limited to his direct supervisors and subordinate arborists. Because Coffin's speech was made primarily in his role as an employee to recommend disciplinary action and not as a citizen, his speech is not protected from employer discipline. Therefore, this Court does not need to balance his interest against the City's. Coffin's speech was not constitutionally protected, thus his Right to Free Speech under the Georgia Constitution was not violated. Therefore, this Court HEREBY GRANTS Defendant's Motion for Summary Judgment for Coffin's Right to Free Speech Violation claim.

SO ORDERED this 5 day of November, 2010.

JUDGE JOHN J. GOGER
FULTON COUNTY SUPERIOR COURT

Distribution: