UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ROY L. PEARSON, JR.,	:	
Appellant,	:	
v.		**Appeal No. 09-7089**
	:	
DISTRICT OF COLUMBIA, *et al.*,	:	
Appellees.	:	

APPELLEES' MOTION TO STRIKE APPELLANT'S BRIEF

The District of Columbia defendants ("the District") move to strike appellant's brief. Fed. R. App. P. 32(a)(7)(B) limits a principal brief to 1,300 lines of *monospaced* text. According to Mr. Pearson's certificate of compliance, his brief contains 1,288 lines of *proportionally* spaced text. The brief thus appears to be far longer than he was allowed to file. Moreover, the certificate of compliance is itself defective because it does not state either "the number of words in the brief" or "the number of lines of monospaced type in the brief." Fed. R. App. P. 32(a)(7)(C).

Mr. Pearson's brief also violates Fed. R. App. P. 28(a)(9) by incorporating by reference documents filed in the district court—amounting to approximately 84 pages of text—thereby evading the type-volume limitation. This Court previously denied Mr. Pearson leave to exceed this Court's type-volume limitation, and his brief admits that he employed this tactic "[b]ecause of page limitations" imposed by this Court. Brief p. 34 n.4. Consistent with its earlier denial of leave to file an overlength

brief, this Court should strike the brief he has filed and direct him to file a brief that complies with the rules.

Fed. R. App. P. 28(a)(9) requires all arguments to be articulated fully in the body of a party's brief. It states that the "argument" section of the brief "must contain . . . appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies." In its *Handbook of Practice and Internal Procedures*, this Court explained that, according to this rule, "counsel may not refer this Court to sections of pleadings filed in the district court to support those contentions upon which it relies on appeal in lieu of addressing such arguments in the brief." *Handbook*, p. 43.

Mr. Pearson's brief violates this rule, incorporating by reference approximately 84 pages of text from documents filed in the district court.[1] He refers to 17 pages of argument in his Opposition to Defendants' Renewed Motion to Dismiss or for Summary Judgment. Brief 33-34 n.4, 56, 60 (incorporating by reference Docket No. 23, p. 23-26, 50-62). These pages support his argument that: (1) "defendants acted 'under color of law' and were 'final policymakers' implementing an 'official policy'" (Brief 33-34 n.4); (2) the District is not entitled to absolute or quasi-judicial immunity (Brief 56); (3) the non-federal counts of his

[1] Moreover, had Mr. Pearson replicated these arguments in his brief, they would have added considerably more than 87 pages because the district court filings were submitted in 12-point typeface, rather than the 14-point typeface required by this Court.

amended complaint state claims on which relief can be granted (Brief 60); and (4) the amended complaint states a claim supporting punitive damages (*Id.*). Mr. Pearson asks this Court to rule on all of these matters, although his brief contains no substantive argument in support.

Mr. Pearson's brief also incorporates by reference his entire motion for partial summary judgment and his related motion for a preliminary injunction—a filing totaling 67 pages.[2] Brief 56-58 (incorporating Docket No. 26 in its entirety). Mr. Pearson incorporates this document to support his argument that this Court should: (1) grant his motion for partial summary judgment (Brief 57-58, 64-65); (2) order the District to void certain regulations and adopt new regulations (*id.*); and (3) enter a preliminary injunction requiring the District to "immediately pay [Mr. Pearson] all back salary and his salary either until the trial of this case is concluded or . . . [it] reforms and adopts regulations that meet the due process requirements specified in this court's opinion and a new hearing is concluded on [his] reappointment application." Brief 65; *see* Brief 58-59. Again, Mr. Pearson's brief contains no substantive argument addressing these matters.

Finally, in support of his argument that he protected by the First Amendment due to his private lawsuit against a small dry-cleaning establishment, Mr. Pearson "adopts . . . by reference" the analysis of two circuit court cases—*San Filippo v.*

[2] Even eliminating the document's table of contents and affidavit, this filing's "memorandum of law" is 46 pages long.

Bongiovanni, 30 F.3d 424, 434-44 (3d Cir. 1994), and *Gable v. Lewis*, 201 F.3d 769, 771-72 (6th Cir. 2000)—without otherwise describing those cases or applying their analysis to the facts of this case. Brief 45. Although this Court's handbook does not specifically reference such a practice, this tactic also violates the spirit—if not the letter—of Fed. R. App. P. 28(a)(9). *San Filippo* alone contains ten pages of analysis supporting the Third Circuit's conclusion that a private lawsuit need not rise to the level of "public concern" to warrant First Amendment protection of a public employee. This Court has not yet considered this question, although other circuit courts have reached the opposite conclusion. *See Rendish v. City of Tacoma*, 123 F.3d 1216, 1218 (9th Cir. 1997); *Zorzi v. County of Putnam*, 30 F.3d 885, 896 (7th Cir. 1994). Mr. Pearson's "adopt[ion] . . . by reference" of *San Filippo*'s "reasoning" puts the District at a severe and unfair disadvantage. Had Mr. Pearson simply copied and pasted this analysis into his brief, it would have amounted to approximately 28 pages—or 560 lines—of additional text. The District cannot simply assume that this Court will disregard this argument as insufficiently articulated and apply the "public concern" test to Mr. Pearson's appeal. Instead, the District—which is bound by the same type-volume limitation as Mr. Pearson—must address *San Filippo*'s reasoning as if it were set forth fully in Mr. Pearson's brief. The Court should not allow briefing to become merely a list of relevant authorities.

Mr. Pearson's adoption and incorporation of previously filed documents and case law amounts to the addition of approximately 112 pages of argument to a brief, where the brief already appears to exceed the type-volume limitation of this Court. The District cannot fairly be asked to respond to all of Mr. Pearson's arguments while remaining within this type-volume limitation. The District therefore moves that Mr. Pearson's brief be stricken from the docket, and that he be instructed to re-file his brief in compliance with this Court's rules.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on January 25, 2010, a copy of the foregoing motion was served via this Court electronic notification service upon:

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/s/ Holly M. Johnson
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