

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION**

JOHN C. ROMANO,)	
)	
Plaintiff,)	
)	
v.)	CIVIL ACTION NO. 6:09-cv-00040
)	
CITY OF LYNCHBURG, VIRGINIA,)	
KIMBALL PAYNE, III, CITY MANAGER)	
CITY OF LYNCHBURG)	
COL. PARKS H. SNEAD, III)	
POLICE CHIEF, CITY OF)	
LYNCHBURG POLICE DEPT.)	
)	
Defendants.)	
)	

**ANSWER OF DEFENDANTS CITY OF LYNCHBURG,
KIMBALL PAYNE, III, AND PARKS H. SNEAD, III**

Preliminary Statement

On April 3, 2009, Lynchburg City Manager Kimball Payne held a meeting with John Romano, an experienced criminal investigator with the Lynchburg Police Department. The meeting was witnessed by Lynchburg Police Chief Parks Snead. The purpose of the meeting was to discuss a statement Romano had made to the Lynchburg City Council on March 10, 2009. In Romano's statement, which is attached as Exhibit B to the Complaint, he questioned the "dubious" implementation and management of the City's FY 2009 budget by the City Manager, suggesting that the budgeting process had not been "open" or "honest." Payne was not present at the Council meeting where Romano made his statement.

During a portion of his meeting with Romano on April 3, 2009, Payne became angry when Romano refused to discuss the accuracy of the charges he had made in his

March 10, 2009, statement to City Council. Payne stated he did not appreciate having his honesty or integrity publicly attacked, particularly when the attack was unfounded, and made by an employee such as Romano, whose attack could be expected to have more weight by virtue of the status of the speaker as a criminal investigator employed by the City.

While the Manager acknowledged Romano's right to address the Council, he told Romano that if he had truly had any concerns about the budgetary process or the implementation of the budget, it would have been more appropriate to have met privately with Payne to discuss his concerns. Payne advised Romano that in his experience, making a public attack on the integrity and honesty of an employee's boss was an unwise thing for any employee to do, whether or not the employer was a governmental entity.

As the meeting continued, the Manager apologized to Romano for getting angry, and stated that the matter was over as far as he was concerned. He assured Romano that there would be no adverse employment action or repercussions to Romano for having made the public statements questioned by Payne. In point of fact, no adverse employment actions or harm whatsoever was or has been inflicted on Romano, who remains a City employee, in the same position and with the same pay, benefits and seniority as Romano had before he addressed City Council and met with the City Manager.

The April 3, 2009, meeting ended on a cordial note, with an extended discussion of grandchildren, Romano's side business as a computer consultant for law enforcement agencies – a business which he had long stated he was planning to move to New Orleans, his home – how spammers obtain e-mail addresses, the changing nature of childhood, expectations of privacy in the internet age, various law enforcement matters, and the like.

Romano promised to set an appointment with the Manager to discuss his concerns about the budgetary process, though Romano never subsequently made an appointment to discuss his alleged concerns or to offer his help solving problems created by the City's budgetary shortfall,¹ as Romano had told the City Council he intended to do.

Rather than following through with a meeting with the Manager to discuss his alleged concerns, or simply letting the matter drop, Romano filed the present suit, alleging that the meeting with Payne had abridged his constitutional and statutory rights, causing him "loss of enjoyment of his profession," and "loss of enjoyment of his life as a citizen," for which he seeks \$500,000 in damages. He bases his suit entirely on a highly-abridged selection of statements taken out of context made by Payne during the April 3, 2009, meeting. Romano secretly recorded this meeting without the knowledge or consent of Manager Payne or Police Chief Snead. This recording is attached as Exhibit C to the Complaint.

Answer

1. Defendants admit that the plaintiff has been and remains a Lynchburg police officer, but deny all other factual allegations in paragraph 1 of the Complaint. The legal conclusions in this paragraph require no response, but the defendants deny that they have violated any of the plaintiff's constitutional or statutory rights under federal or state law.

2. Paragraph 2 of the Complaint states only legal conclusions, and therefore requires no response from the defendants. To the extent this paragraph contains factual allegations, they are denied.

¹ The central problem created by the budgetary shortfall at the time of Romano's March 10 speech to the City Council was whether and how to cut the City's personnel expenses. Police officers were objecting to and holding public demonstrations against applying a proposed across-the-board 3% cut in pay for all City employees to the pay of police officers.

3. Paragraph 3 of the Complaint states only legal conclusions, and therefore requires no response from the defendants. To the extent this paragraph contains factual allegations, they are denied.

4. Defendants admit the allegations in paragraph 4 of the Complaint.

5. Defendants admit the allegations in paragraph 5 of the Complaint.

6. Defendants admit the allegations in paragraph 6 of the Complaint that Defendant Payne has been and remains the City Manager of Lynchburg, and that the plaintiff is attempting to sue Defendant Payne in his individual, as well as his official capacity. The remainder of the allegations in this paragraph are legal conclusions, therefore requiring no response by the defendants.

7. Defendants admit the allegations in paragraph 7 of the Complaint that Defendant Snead has been and remains the Police Chief of Lynchburg, and that the plaintiff is attempting to sue Defendant Snead in his individual, as well as his official capacity. The remainder of the allegations in this paragraph are legal conclusions, therefore requiring no response by the defendants.

8. The defendants admit that Lynchburg has and continues to employ a City Manager and Police Chief to perform management and law enforcement functions in the City. To the extent paragraph 8 of the Complaint contains legal conclusions, no response is required by the defendants. To the extent this paragraph contains factual allegations other than those admitted in this response, the allegations are denied.

9. The defendants admit that the plaintiff was and remains a Lynchburg police officer as alleged in paragraph 9 of the Complaint. The defendants lack knowledge or information sufficient to form a belief as to the truth of the remainder of the allegations in this paragraph, and therefore deny the allegations.

10. The defendants admit that the plaintiff wrote the letter attached as Exhibit A to paragraph 10 of the Complaint, which speaks for itself. The defendants lack knowledge or information sufficient to form a belief as to the remainder of the allegations in this paragraph, and therefore deny the allegations.

11. The defendants admit that the plaintiff addressed City Council on March 10, 2009, stating the information reflected in Exhibit B to paragraph 11 of the Complaint. The statement in Exhibit B speaks for itself. Defendants deny the allegation in this paragraph that "at no time did he [the plaintiff] ever comment on any matter which was not part of the public discussion then occurring regarding the budget and financial issues being addressed...at that time."

12. The allegations in paragraph 12 of the Complaint are denied.

13. The allegations in paragraph 13 of the Complaint are denied.

14. The defendants admit that the plaintiff surreptitiously, and without the knowledge or consent of Defendants Payne and/or Snead secretly recorded a meeting on April 3, 2009, between the plaintiff and Defendants Payne and Snead. The secret recording of this meeting attached as Exhibit C to this paragraph speaks for itself. The remainder of the allegations in this paragraph are denied.

15. The secret recording of the April 3, 2009, meeting attached as Exhibit C to paragraph 14 of the Complaint, taken as a whole, speaks for itself. The portions of the meeting set out in paragraph 15 of the Complaint are taken out of context and are therefore misleading. To the extent further response is required to the factual allegations in this paragraph, they are denied. The legal conclusions in this paragraph require no response.

16. The factual allegations contained in paragraph 16 of the Complaint are denied. The legal conclusions in this paragraph require no response, but the defendants deny that the plaintiff has suffered any restraint, repercussions, punishment or legally cognizable harm of any kind or description as a result of his speech to City Council or his meeting with Defendants Payne and Snead, or the deprivation of any rights secured to him under the federal or state constitutions or laws.

17. Paragraph 17 of the Complaint states only legal conclusions, requiring no response by the defendants. To the extent this paragraph contains factual allegations, those allegations are denied.

18. The allegations in paragraph 18 of the Complaint are denied. The City of Lynchburg has no policy, custom or usage denying its employees the right to express their views on matters of public importance, to address City Council, or to reprimand or punish employees who do so.

19. The allegations in paragraph 19 of the Complaint are legal conclusions, and require no response by the defendants. To the extent this paragraph contains factual allegations, the allegations are denied.

20. The allegations in paragraph 20 of the Complaint are denied. The defendants have not violated any of the plaintiff's constitutional or statutory rights under federal or state law, and the plaintiff has suffered no restraint, repercussions, punishment or legally cognizable harm of any kind or description.

21. The plaintiff is entitled to no relief whatsoever.

22. All allegations in the Complaint not expressly admitted or previously responded to are denied.

Affirmative Defenses

1. The plaintiff's Complaint fails to state a claim upon which relief can be granted.
2. The City is not liable on a respondent superior theory of liability.
3. The City and its officials are not liable for punitive damages.
4. The City is immune from suit for the claims asserted in the Complaint.
5. The actions of the City officials are absolutely or qualifiedly privileged.
6. Any damages allegedly sustained by plaintiff are a direct and proximate result of plaintiff's own breaches, acts, and/or omissions.
7. Defendants have violated no legal duty owed to the plaintiff.
8. The plaintiff has unclean hands.
9. Defendants intend to rely on the defenses of failure to mitigate, waiver and/or estoppel.
10. The plaintiff's suit is frivolous, groundless, and unreasonable, and has been filed for improper reasons, and the defendants are therefore entitled to recover from the plaintiff reasonable attorneys' fees and costs expended in the defense of this lawsuit.
11. The plaintiff has suffered no legally cognizable harm or deprivation of rights.
12. The plaintiff has not alleged sufficient facts to entitle him to recover punitive damages from any of the individual defendants in their official or individual capacities.
13. The defendants intend to rely upon any and all other available defenses as may be developed through discovery and the evidence, including after-acquired evidence.

WHEREFORE, having fully responded to plaintiff's Complaint, defendants move this Court to dismiss this action against action against them, to strike this matter from the Court's docket, to award them their costs and attorneys' fees associated with the defense of this action, and for such other and further relief as the law and facts of this case may require and which this Court deems appropriate.

DATED: October 5, 2009

Respectfully submitted,

CITY OF LYNCHBURG, VIRGINIA
KIMBALL PAYNE, III CITY MANAGER
COL. PARKS H. SNEAD, III, POLICE CHIEF

By: /s/ Alexander W. Bell
Alexander W. Bell (VSB No. 13971)
BELL & SCHNEIDER, PLC
P. O. Box 739
Lynchburg, Virginia 24505-0739
Telephone: (434) 528-0411
Facsimile: (434) 845-3666
E-mail: awb@abellaw.com

By: /s/ Walter C. Erwin, III
Walter C. Erwin, III (VSB No. 15640)
City Attorney
Office of the City Attorney
900 Church Street
Lynchburg, VA 24504
Telephone: (434) 455-3980
Facsimile: (434) 847.9049
E-mail: walter.erwin@lynchburgva.gov

CERTIFICATE OF SERVICE

I electronically filed the foregoing on October 5, 2009, with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Michael A. Kernback, Esquire
BURGESS, KERNBACH & PERIGARD, PLLC
10680 Main Street, Suite 140
Fairfax, Virginia 22030-3811

/s/ Alexander W. Bell
Alexander W. Bell