COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-555

FRANK CONDEZ

vs.

CIVIL SERVICE COMMISSION & another[1] (and a companion case[2]).

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The plaintiff, a sergeant of the Dartmouth Police Department (department), was disciplined for sending a letter to the select board of the town of Dartmouth (board) accusing the town's police chief of possible sexual exploitation of a child. The parties agreed to hold a hearing before an officer of the Civil Service Commission (commission) under G. L. c. 31, § 41A. The hearing officer found that the allegations were false and baseless, and concluded that the letter constituted conduct unbecoming a police officer and provided just cause for termination. The hearing officer also concluded that the letter was neither protected speech under the First Amendment to the United States Constitution nor a protected mandated report under

[1] Town of Dartmouth.

[2] Frank Condez vs. Leonard H. Kesten & Town of Dartmouth.

G. L. c. 119, § 51A (h). The commission adopted the hearing officer's decision.

The plaintiff then filed two complaints in Superior Court. The first was an action under G. L. c. 30A, § 14, appealing the decision of the commission, in which the town of Dartmouth (town) also appeared as a defendant. The second was a complaint alleging unlawful retaliation under G. L. c. 119, § 51A (h), in which the defendants were the town and Attorney Leonard Kesten, who represented the town in the disciplinary proceedings. A judge of the Superior Court affirmed the decision of the commission in the c. 30A action, and granted summary judgment in favor of the defendants in the unlawful retaliation action. Condez appealed from both judgments, and the appeals were consolidated in this court.

Before us, the plaintiff argues that the First Amendment prohibits his termination because it was in retaliation for the exercise of his right to free speech. He argues in the alternative that he made his statements in the letter in good faith as a mandatory reporter, and that the town unlawfully retaliated against him under G. L. c. 119, § 51A (h). We affirm.

Background. The following facts are taken from the decision of the commission that forms the basis of this appeal. The commission's subsidiary factual findings are undisputed.

The plaintiff, Frank Condez, began his employment with the department in 1998 and was promoted to sergeant in 2010. In 2000, he began to operate a small computer repair business on the side, which was approved by the department.

In 2011, the wife of Timothy Lee, the department's chief, damaged her laptop computer and was unable to access many files on it, including a large number of family photos. Lee brought the laptop to Condez and asked him to recover the files as part of the side business. Condez agreed. He performed all his work on the laptop while off duty, and Lee paid him like any other customer. Eventually, Condez was able to recover some of the files through a process called "cloning," using a device known as a "scratch drive" to temporarily retain the files. He purchased a new hard drive for the laptop, transferred the data onto the hard drive, and installed it in the laptop. He then returned the refurbished computer to Lee along with the old, damaged hard drive. He also gave Lee a thumb drive containing the data he had recovered. However, without telling Lee, he kept the scratch drive, which contained a copy of the data he had been able to recover from the hard drive. He later claimed that it was his normal practice to eventually wipe and reuse scratch drives for future projects.

For several years, Condez also performed some information technology (IT) work for the department, and was involved in

upgrading the department computers' hardware, software, and operating systems. Starting in March of 2013, some department computers began experiencing problems, and the department's IT director came to suspect that Condez had committed various types of misconduct, the nature of which is not relevant here, regarding the computer upgrades. Condez was placed on paid administrative leave on October 1, 2013. A subsequent internal investigation by the department concluded, on February 6, 2014, that Condez had committed misconduct regarding the upgrades.

In addition, on the day Condez was placed on administrative leave, but before he was so notified, he lodged a complaint that his department locker was entered and his department-issued firearm was missing. He was ordered to take a polygraph test on this issue, administered by a civilian, on October 20, 2013. That day, he entered the police station holding an application for a temporary restraining order to prevent the polygraph test. According to the commission, he believed in good faith that, according to law, polygraph tests could only be administered by police officers. Eventually, Lee told him that he would be fired if he did not take the polygraph test, and Condez complied.

The department leveled charges of misconduct against Condez related to the computer and polygraph incidents, and a hearing was scheduled before the appointing authority for April 17,

2014. See G. L. c. 31, § 41. On April 3, 2014, Condez's recently-retained attorney sought a continuance of the hearing, and the parties agreed on a new hearing date of June 9, 2014. On June 4 and 5, 2014, Condez, through his attorney, sought another continuance until July 1, 2014 or later due to a family medical situation. Counsel for the town responded that he was only willing to continue the hearing until June 17. The hearing, though, never took place.

On June 6, 2014, the day after town counsel rejected his proposed continuance, Condez hand-delivered a letter to the town administrator, addressed to the board. The letter, which was not on department letterhead, read as follows:

> "Attached are the photos which were recently discovered when initially recovered from Timothy Lee's personal laptop which was given to me by him to be serviced for a failing hard drive. The metadata encoded in these photos tie them to the same brand and model of digital camera used to take numerous other family photos. These are only two of multiple photos of this nature. There is also a possibility that some of the photos were taken out of state. The photos can, at best, be described as disturbing. They are more accurately, possible evidence of abuse or sexual exploitation of a child by him and could be indicative of serious liability for the Town should other victims be discovered. This is being shared with the Select Board in their role as Police Commissioners and based on their duty to supervise the Chief of Police.
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> "These photos have been provided to the Select Board in a redacted form so they are aware of this serious issue prior to it coming to them from an outside source. It is particularly disturbing to me and I'm sure it will be to the public as a whole that someone in a position of public trust would be involved and or condone this type of conduct. I'm sure I don't have to explain the severity of

something such as this and the duty of the Select Board to investigate something as serious as this. I will be happy to provide all of the original evidence to whatever entity or outside police agency the Select Board decides to have investigate this matter. Given the serious nature of the issues here I don't have to go into great detail as to the consequences for the Town should other victims be discovered given that the Town now has knowledge of the situation. Thank you for your prompt attention to this matter.

"Very Truly Yours,

"Frank Condez"

The first photo, which we shall refer to as Photo 1, is of a small child lying face up in a bathtub, smiling, surrounded by bath toys. The second photo, Photo 2, is of the same child, though apparently older, standing in a bathtub with his hands behind his back, with a square, apparently flat orange object with an image on it stuck to his body and covering his genitals. It is not clear from the picture exactly what the object is or exactly how it is adhered to the child's body. It appears that the object may be a bath toy or a piece of laminated paper and that it may be sticking to the child's body because he is wet. The image on the square object appears to be a pineapple. The photos are of Lee's son. Condez eventually claimed that he only first discovered them in May of 2014 when he was wiping scratch drives for reuse.

Lee was immediately informed of the letter, and that same day contacted the New Bedford office of the Bristol County

district attorney, and demanded to be investigated. The district attorney's office and the town conducted an investigation into the matter. Lee and his wife cooperated fully with the investigation, were interviewed without representation, and provided the thumb drive Condez had given them in 2011 as well as a CD copy of its contents. (They had thrown away the laptop in 2013 because it stopped working.) Subsequent examination of these materials revealed that the photos were in different sub-subfolders of a subfolder named "Pictures" of a folder named "Documents." The Photo 1 sub-subfolder contained 252 separate images. Photo 1 was one of a sequence of photos of a child playing in a bathtub, all clearly taken at one time. Photo 2 was in a sub-subfolder with 138 separate photos and was the only one of its kind.

On July 3, 2014, Condez walked into the Taunton office of the Department of Children and Families (DCF) and made a formal report under G. L. c. 119, § 51A. The report indicated that Condez was a "mandated reporter" and alleged neglect of Lee's son. The report stated, among other things, that the "[r]eporter said that he was asked by child's father to do some work on his personal laptop computer to retrieve some lost files. While working on the computer, the reporter came across family photos." On July 11, 2014, DCF screened out the report.

Later, on July 23, 2014, the investigator from the district attorney's office knocked on the door of Condez's home and asked to speak with him. Condez was not home, and his mother, with whom he lived, took the investigaor's business card and contact information. The next day, Condez made a DVD copy of the files on the scratch drive and "forensically wiped" the scratch drive, leaving no recoverable data or metadata on it. The lost metadata would have included when the files were accessed, which could have corroborated or contradicted Condez's explanation of when he first discovered them. Condez claimed that he forensically wiped the scratch drive because he did not want to be in possession of contraband.

While the department's charges against Condez on the computer and polygraph incidents were still outstanding, it added a final charge of conduct unbecoming a police officer based on Condez's letter to the board. The parties agreed to a hearing before the commission pursuant to G. L. c. 31, § 41A, which found no misconduct with respect to the computer and polygraph incidents, but found that Condez's delivery of the letter to the board constituted conduct unbecoming a police officer, because "Condez [made] false accusations amounting to charges that Chief Lee had committed a felony, i.e.[,] child abuse, either knowing them to be false or with reckless

disregard." The commission determined that Condez's termination was warranted.

Discussion. Before us, Condez argues that his letter was speech protected by the First Amendment or, alternatively, G. L. c. 119, § 51A, and that it cannot form the basis for his discharge. Subject to an exception discussed below, we are "bound to accept the findings of fact of the commission's hearing officer, if supported by substantial evidence." Leominster v. Stratton, 58 Mass. App. Ct. 726, 729 (2003). We address these arguments in turn.[3]

1. The First Amendment. The First Amendment limits the government's authority to restrict and punish public employees' speech. In evaluating a claim that a public employer's disciplinary action was impermissibly made in retaliation for engaging in speech protected by the First Amendment, we employ

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[3] The Superior Court judge granted summary judgment to the defendants in the unlawful retaliation action not on the merits, but because the commission's decision, which the judge had affirmed, barred on collateral estoppel grounds the unlawful retaliation claim. The judge also concluded that Condez's claim against Kesten failed because Kesten was not Condez's employer, and hence could not be liable under G. L. c. 119, § 51A (h). Condez does not challenge either conclusion on appeal, and instead states that the issues in both cases are "nearly identical." He has thus waived any objection to the judge's grant of summary judgment in favor of the defendants. Even were these arguments not waived, we agree with Condez that the issues in the unlawful retaliation action are essentially identical to the issues in the appeal from the commission's decision. Because we conclude that the judge was correct in affirming the commission's decision, judgment for the defendants in the retaliation action would also be appropriate on the merits.

the framework first articulated in Pickering v. Board of Educ., 391 U.S. 563 (1968), and later refined in Connick v. Myers, 461 U.S. 138 (1983), and Garcetti v. Ceballos, 547 U.S. 410 (2006). See Pereira v. Commissioner of Social Servs., 432 Mass. 251, 256-257 (2000). We proceed in two broad steps:

> "The first requires determining whether the employee spoke as a citizen on a matter of public concern. . . . If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. . . . If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public."

Garcetti, supra at 418. The second step, known as Pickering balancing, requires us to "balance . . . the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering, supra at 568. The protected status of speech is a question of law for the court, not a question of fact for the agency. See Connick, supra at 148 n.7.

a. Citizen speech and speech on a matter of public concern. We will begin by assuming without deciding that the speech in the letter was made by Condez as a citizen, rather than as a public employee, and that it was on a matter of public concern. Whether this was citizen speech is highly context-dependent, see Cristo v. Evangelidis, 90 Mass. App. Ct. 585, 592

(2016), and vigorously contested by the parties. We will assume that it was. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." Connick, 461 U.S. at 147-148. See Pereira, 432 Mass. at 257. There is at least strength to Condez's argument that the subject matter of the speech at issue -- a police chief's alleged sexual exploitation of a child -- can be "fairly considered as relating to any matter of political, social, or other concern to the community." Connick, supra at 146. So likewise, we will assume without deciding that it was on a matter of public concern. The fact finder found that it was made by Condez to a third party, it could damage Lee's reputation, it was made with knowledge of its falsity or reckless disregard for its truth, and it accused Lee of a crime, see Ravnikar v. Bogojavlensky, 438 Mass. 627, 628-630 (2003) (describing elements of defamation). We will also assume, however, without deciding that a statement that is actionable as false and defamatory under New York Times Co. v. Sullivan, 376 U.S. 254 (1964), may nonetheless be speech on a matter of public concern. Allowing the government to discharge an employee for uttering a defamatory falsehood might create a chilling effect on protected speech that has an insufficiently weighty social benefit if the defamatory falsehood is not harmful to the government, even though it is sufficiently

harmful to a private individual that the First Amendment poses no bar to recovery by that individual in a civil action. To the extent Condez's statement was made with knowledge of its falsity or with reckless disregard for its truth, we therefore consider that in the next step of our analysis.

b. Pickering balancing. Condez wrote that the two photos were "possible evidence of abuse or sexual exploitation of a child." This statement was found to be false, and this finding was supported by substantial evidence for the reasons that follow; indeed, to the extent it is a legal question whether the photos are possible evidence of abuse or sexual exploitation of a child, they are not. They are two out of hundreds of photos taken of this child on this hard drive that Condez, in choosing them, necessarily saw. It would be clear to anyone viewing the photos that they were of the child of the owner of the laptop. None of the photos on the hard drive depict anything that indicates sexual abuse or exploitation of the child. In all the bath photos except Photo 2, in which the child is standing, the child is sitting or lying in a bathtub full of water, surrounded by bath toys. Although his genitals are exposed in some of the photos, there is no indication that his genitals were manipulated or focused on. The photos are of the kind that many parents take of their small children, and are not evidence of sexual abuse or sexual exploitation. No other photos of the

child on the hard drive show him in a state of undress or in any way that might possibly be described as sexual or sexualized.

Further, the commission found that Condez made the statement with knowledge of its falsity or reckless disregard of its truth. "Because First Amendment values are at stake," we must make an "independent examination" of the commission's findings on the issue of recklessness or knowingness. Murphy v. Boston Herald, Inc., 449 Mass. 42, 49 (2007). "Although the independent examination is not 'de novo' in the literal sense, . . . core First Amendment values require a searching reassessment . . . ." Id. at 50. "[A] finding of 'reckless disregard' requires proof, not of mere negligence, but that the author 'in fact entertained serious doubts as to the truth of his publication.'" Id. at 48, quoting St. Amant v. Thompson, 390 U.S. 727, 730-731 (1968). "That information was available which would cause a reasonably prudent man to entertain serious doubts is not sufficient. In order to [find recklessness, the fact finder must] find that such doubts were in fact entertained by the [individual] . . . . The [fact finder] may, of course, reach this conclusion on the basis of an inference drawn from objective evidence . . . ." Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 867-868 (1975). Unlike the test for recklessness in the criminal law, the First Amendment recklessness test is "entirely subjective." King v. Globe

Newspaper Co., 400 Mass. 705, 719 (1987), cert. denied, 485 U.S. 940, and 485 U.S. 962 (1988).

It might be the case, and we need not decide, that an individual who viewed Photo 2 could believe, with a mental state less culpable than recklessness, that it was possible evidence of sexual abuse or exploitation of a child. It is a stand-alone photo, and an object whose nature is difficult to discern has adhered to the child's body covering his groin area. If Condez actually thought this was evidence of sexual abuse or exploitation, even if he was negligently wrong, of course, his statements would be protected.

The contents of his letter, however, demonstrated that Condez in fact understood both pictures to be nothing more than innocent bath photos. The letter stated that the attached photos were "only two of multiple photos of this nature." This statement implied, given what our independent examination of the record reveals as the obvious innocence of the other photos, that Condez subjectively understood that Photo 2 was nothing more than the innocent bath photo it is. That he then wrote otherwise is objective evidence that he knew his accusations were false, or, at the least, entertained serious doubts about their truth. We therefore conclude, based on our independent review of the record, that, as a matter of law, Condez's false and defamatory statements were made with at least reckless

disregard for their truth, if not knowledge of their falsity, and that his interests in making the statements were minimal.

By contrast, the efficiency of the government's operations was significantly hampered by Condez's statements. Condez's letter delayed his hearing on the computer and polygraph incidents. Moreover, Condez's false and inflammatory letter caused several unnecessary investigations into Lee, resulting in the needless expenditure of resources and the distraction of Lee and other town personnel from their normal duties. And the government, of course, has a strong interest in protecting the integrity of its law enforcement officers against baseless accusations that they are menaces to society. We therefore conclude that the Pickering balancing favors the town, and that the First Amendment does not bar Condez's discharge on the basis of this letter.

2. General Laws c. 119, § 51A. Condez also argues that his statement was protected by G. L. c. 119, § 51A (h), which provides, "No employer shall discharge, discriminate or retaliate against a mandated reporter who, in good faith, files a report under this section, testifies or is about to testify in any proceeding involving child abuse or neglect." But the letter was not a report under § 51A. It was not filed with DCF as required by the statute. Condez argues that this was a report filed pursuant to G. L. c. 119, § 51 (a), which provides,

> "If a mandated reporter is a member of the staff of a medical or other public or private institution, school or facility, the mandated reporter may instead notify the person or designated agent in charge of such institution, school or facility who shall become responsible for notifying the department in the manner required by this section."

Passing on whether the police department is a "public . . . institution . . . or facility" within the meaning of the statute, we see no error in the commission's conclusion that the letter was not a report filed in good faith under the statute. Condez filed a direct report with DCF about the photos less than thirty days after his letter to the board. If Condez sent the letter in the good faith belief that he was filing a report in fulfillment of his duty under the statute, there would have been no need for him to make a second, direct report to DCF. The commission's conclusion that this was not a report filed in good faith by Condez is therefore supported by substantial evidence.

Conclusion. In civil action no. BRCV2014-00836, the judgment is affirmed. In civil action no. 1673CV00796, the

judgment is also affirmed.

So ordered.

By the Court (Rubin, Sullivan & Neyman, JJ.[4]),

Joseph F. Stanton

Clerk

Entered: June 6, 2019.

[4] The panelists are listed in order of seniority.