UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

SANDRA HERNDEN,

an individual,

Plaintiff,

v.

CHIPPEWA VALLEY SCHOOLS BOARD OF EDUCATION, a government body, FRANK BEDNARD, in his official capacity as President of Chippewa Valley Schools and in his individual capacity, and ELIZABETH PYDEN, in her official capacity of Secretary of Chippewa Valley Schools and in her individual capacity.

Defendants.

Case No.: 2:22-cv-12313-MAG-DRG

PLAINTIFF'S BRIEF IN RESPONSE TO DEFENDANT CHIPPEWA VALLEY SCHOOLS' MOTION TO DISMISS

PLAINTIFF'S BRIEF IN RESPONSE TO DEFENDANT CHIPPEWA VALLEY SCHOOLS' MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION

This case concerns the extent that a public-school board, and the individual officials on that board, can retaliate against parents engaged in political speech. Here, Plaintiff spoke out against Defendant Chippewa Valley Schools' (the "Board") COVID-19 policies. As a result, Defendant Pyden contacted Plaintiff's supervisor, which eventually led to Plaintiff being investigated in her workplace. Similarly, Defendant Bednard later forwarded some of Plaintiff's communications to the United States Department of Justice ("DOJ") for investigation. It is unclear whether Plaintiff is currently under investigation by the DOJ.

STATEMENT OF FACTS

1. The parties.

Plaintiff, Sandra Hernden, is a police officer and the mother of a child that previously attended Chippewa Valley Schools. Plaintiff's son has learning disabilities which made it difficult for him to learn in a remote or partially-remote environment.

Defendant Chippewa Valley Schools is a seven-member legislative body elected by residents of the Chippewa Valley school district. The Board is a government entity responsible for developing policies applicable to public schools within the school district.

Defendant Bednard is the former president of the Chippewa Valley school board and is being sued in both his official and personal capacities.

Defendant Pyden is the former secretary of the Chippewa Valley school board and is being sued in both her official and personal capacities.

2. General background.

This case arises as a result of the COVID-19 pandemic, Plaintiff's opposition to the Board's policies in response to that pandemic, and the subsequent retaliation she faced for her opposition. During the pandemic, Plaintiff's saw her son's academic performance sharply decline, from a 3.5 GPA to a 1.5 GPA. Plaintiff attributed this decline to remote learning policies adopted and enforced by the Board.

In an effort to convince the Board to change these policies, or otherwise provide alternatives for those students needing additional help, Plaintiff began attending school board meetings and emailing the Board. As these exchanges progressed, Plaintiff began to believe that Defendants' policies were not based in science, and were instead tied to the political beliefs of the Board's members. As time went on, these exchanges became more heated, with the relationship between the parties growing tense. This is particularly true with respect to Defendant Pyden.

3. Retaliation by defendant Pyden.

On December 10, 2020, Plaintiff electronically sent the Board an editorial published by the Chicago Tribune which questioned the wisdom of remote learning. PageID.20. This resulted in a response by Defendant Pyden, and an exchange followed that eventually deteriorated into heated email exchanges between Plaintiff and Defendant Pyden. Page ID.18-20. The subject of these exchanges was the Board's policies, the motivating factors behind the adoption of those policies, and Plaintiff's protests against them. In response, Defendant Pyden forwarded her emails with Plaintiff to Plaintiff's then-boss, Police Chief Vince Smith. PageID.17. Chief Smith then forwarded Defendant Pyden's email to Deputy Chief Ted Stager for an

investigation. PageID.16. An investigation was conducted, and Plaintiff's supervisors concluded that she had not violated any departmental rules. PageID.16.

4. Retaliation by defendant Bednard.

Plaintiff continued her opposition to the Board's policies despite Defendant Pyden's retaliation. On October 4, 2021, Plaintiff forwarded to the entire Board a case decided by the 6th Circuit Court of Appeals which related to parents protesting against a different school board suppressing opposition to pro-gun views, as well as limiting the scope of their First Amendment rights during a public comment period. PageID.24. Plaintiff, believing her rights to have been similarly violated when she spoke during the public comment period of the Board's meetings, then admonished the board. Plaintiff stated, "Once again, law on parents side. Maybe a lil more due care and caution at the next meeting Frank. You know, when you let your hatred you have for me take hold and you interrupt me. 1st 2 were free…" (grammatical errors original). PageID.24.

Despite Plaintiff's admonishment clearly referring to her being interrupted during the public comment period of the Board's meeting, Defendant Bednard apparently perceived Plaintiff's comment as a threat. In response, Defendant Bednard drafted an email that it appears he sent to the DOJ. PageID.24, 26. In this email, after referencing Plaintiff's attendance and comments at meetings, Defendant Bednard stated: "Anything that could be done to curb this behavior by these people would be greatly appreciated by our board, administration, and our community." PageID.26. Defendant Bednard's email was sent on October 5, 2021, one day after Attorney General Merrick Garland released a memo instructing the Federal Bureau

of Investigation to assist governmental leaders in assessing and reporting threats against school officials. PageID.28. It is unclear whether the DOJ acted on Defendant's complaint, as Plaintiff received these documents as a result of a FOIA request submitted by a third-party.

STANDARD OF REVIEW

The standard of review for Fed. R. Civ. Pro. 12(c) motion is similar to Fed. R.. Civ. Pro. 12(b)(6) in that it is construed in favor of the non-moving party:

> For purposes of a motion for judgment on the pleadings, all well-pleaded material allegations of the pleadings of the opposing party must be taken as true, and the motion may be granted on if the moving party is nevertheless clearly entitled to judgment. But we need not accept as true legal conclusions or unwarranted factual inferences. A Rule 12(c) motion is granted when no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law.

Moderwell v. Cuyahoga County, Ohio, 997 F.3d 653, 659 (6th Cir. 2021) (internal quotations and citations omitted).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. The plausibility standard "does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal [conduct]." *Twombly*, 550 U.S. at 556. "[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." *Erickson*

v. Pardus, 551 U.S. 89, 94 (2007). That presumption does not apply, however, to legal conclusions. *Iqbal*, 556 U.S. at 678.

ARGUMENT

Defendant claims that based on its reading of the Complaint, Defendant Board cannot be determined to be liable based on the facts alleged. Defendants' misunderstand municipal liability and ignore direct references to concerted Board action from its president indicating or implying the Board was acting *in toto*. Similarly, Defendants fail to recognize an ongoing Board custom of ignoring First Amendment retaliation by its members.

I. Plaintiff has adequately pled a *Monell* claim against the Board.

"To establish municipal liability under *Monell* v. *Department of Social Services,* [436 U.S. 658 (1978)] a plaintiff has four ways to show that a municipality had a 'policy or custom' that caused a violation of his rights. The Plaintiff can prove: '(1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance or acquiescence of federal rights violations." *Barrow v. City of Hillview, Kentucky*, 775 Fed. Appx. 801, 814-15 (6th Cir., 2019), citing *Burgess v. Fischer*, 735 F.3d 462, 478 (6th Cir., 2013). The complaint sounds in the first and fourth prong of *Monell*.

a. Defendants Bednard and Pyden acted on behalf of the Board, and their actions represent official board policy.

If Defendants Bednard or Pyden acted on behalf of the Board, their actions are sufficient to render the Board liable for First Amendment retaliation under the first

prong of *Monell*. In *Monell*, 436 U.S. at 690, the Supreme Court determined that public bodies could be found liable where the "action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." Presently at issue in this case are two separate decisions: Defendant Pyden's decision to contact Plaintiff's employer, and Defendant Bednard's decision to refer Plaintiff to the DOJ for a criminal referral. Either decision, if undertaken on behalf of the Board, would satisfy the requirements for the Board to be liable under *Monell*.

i. School boards can take official action outside of public meetings, although doing so is illegal.

Defendant Board's motion argues that since the Board took no official act at a public meeting, it cannot be found liable in this matter. PageID.128. This argument overlooks, however, that as a matter of Michigan law, school boards have been found to have undertaken official acts outside of public meetings.

Much of the relevant caselaw relating to when a public body has officially acted, despite not having done so at a public meeting, is associated with the Michigan Open Meetings Act, M.C.L. 15.261 *et. seq*. The Open Meetings Act defines a "decision" of a public body as "a determination, action, vote, or disposition upon a motion, proposal, recommendation, resolution, order, ordinance, bill, or measure on which a vote by members of a public body is required and by which a public body effectuates or formulates public policy." M.C.L. 15.262(d).

Numerous public bodies have been found to have reached a "decision" on a matter outside of an opening meeting, despite such a meeting being required by law.

In *Booth Newspapers, Inc. v University of Michigan Board of Regents*, 444 Mich. 211 (1993), the University of Michigan narrowed a list of candidates for the position of University president through the use of subquorum groups, which, taken together, represented a quorum of the University's Board of Regents. When challenged, the University argued that because it had not taken a vote on candidates, it had not made a "decision," and was therefore not subject to the act.

The Court disagreed, stating, "The board also contends that open meetings are only required when 'formal' voting occurs. The defendant has once again misconstrued the statute. As currently worded, the OMA's plain meaning clearly applies to 'all decisions' by public bodies." These decisions include those taken through consensus building outside of a formal public meeting. The Court continued, stating:

> "[A]ny alleged distinction between the committee's consensus building and a determination or action…is a distinction without a difference. Even members of the committee acknowledged that its 'round-the-horn" decisions and conferences achieved the same effect as if the entire board had met publicly, received candidate ballots, and 'formally' cased their votes."

Booth Newspapers, Inc., 444 Mich. at 229.

School boards are supposed to only make decisions effectuating or formulating public bodies at meetings, which must be open to the public. Accord M.C.L. 380.1201 with M.C.L. 15.263. Yet when a quorum of board members deliberates on a matter of public policy, and then acts based on those deliberations, they have nevertheless reached a "decision." To hold otherwise would be to tacitly permit school boards to violate Michigan law by communicating outside of a public meeting and acting on

those communications, be it at a subsequent meeting or through communications outside of a public meeting.

Other cases involving Michigan's Open Meetings Act have upheld the principle recognized by *Booth Newspapers*, namely, that a public body can reach a decision even without a formal vote at a public meeting. In *Nicholas v. Meridian Charter Tp. Bd.*, the Michigan Court of Appeals found that a quorum of a public body engaged in deliberations had violated the Open Meetings Act despite the fact those members did not intend to reach a decision at that meeting. *Nicholas v. Meridian Charter Tp. Bd.,* 239 Mich. App. 525 (2000) (overruled on other grounds by *Speicher v. Columbia Tp. Bd. of Trustees*, 497 Mich. 125 (2014)). Simply put, a meeting of the public body occurs whenever a quorum is present and deliberates on a matter of public policy.

The materials available to Plaintiff pre-discovery strongly suggest that the Board had a "meeting" for purposes of the Michigan Open Meetings Act, and allow the reasonable inference that a decision was reached. Plaintiff's initial email was to the entire Board, and Defendants Bednard's subsequent correspondence was an advisory to the Board that he had forwarded Plaintiff's email to the Department of Justice. It is not unreasonable for the Court to infer that additional correspondence exists between the Board members discussing this matter. Should that correspondence reveal that a quorum of the Board deliberated on the matter and reached a decision thereon, the Board would have unlawfully reached a decision regarding the proper response to Plaintiff's correspondence. Such a decision would

reflect the official policy of the Board, and would render it directly liable for the violations of Plaintiff's Constitutional rights under *Monell*.

ii. There is sufficient evidence to support the inference that defendant Bednard's correspondence was on behalf of the board.

Still related to the first prong of *Monell*, and even assuming the Board did not act through unofficial means as described above, Defendants' claim that Plaintiff has failed to plead sufficient evidence of Board Action overlooks the language used in Defendant Bednard's retaliatory communication. Defendant Bednard's email contains numerous instances that would allow the inference he is speaking on behalf of the Board, and at its direction. When discussing Plaintiff, Defendant stated "*We* understand that Sandra has no children in our schools…." (emphasis added). PageID.26. He further described Plaintiff as attending "our" meetings. *Id.* Subsequently, he describes how "[w]e know [Mothers of Liberty] has not gained any traction," and closes with the statement that "[a]nything that could be done to curb this behavior by these people would be greatly *appreciated by our Board*, administration, and community." *Id.* (emphasis added).

These statements each suggest that Defendant Bednard was speaking on behalf of the Board in his official capacity. This inference, which must be made in Plaintiff's favor, would allow Plaintiff's claims against the Board to continue. *Hindel v Husted*, 875 F.3d 344, 3477 (6th Cir. 2017), quoting *Twombly*, 550 U.S. 570. This is particularly true in light of Paragraph 60 of Plaintiff's Complaint, which alleges Defendant Bednard's email "reflects joint action by each of [the Board's] members." PageID.11. The parties should be permitted to advance to discovery on the question

of whether Defendant Bednard was authorized to speak on the Board's behalf, given that his correspondence suggests he was doing so.

b. If Defendant Pyden or Bednard acted without the Board's permission, the Board remains liable on the basis that it has a custom of ignoring the retaliatory acts of its members.

Turning to the fourth prong of *Monell*, if Defendants Pyden and Bednard were not acting on behalf of the Board, it nevertheless remains liable for permitting an ongoing custom of allowing Board members to retaliate against members of the public for speaking messages with which they disagree. A claim under *Monell* can exist where a Plaintiff can demonstrate "the existence of a custom of tolerance or acquiescence of federal rights violations." *Barrow*, 775 Fed. Appx. at 814-15 (6th Cir., 2019), citing *Burgess v. Fischer*, 735 F.3d at 478 (6th Cir., 2013). In *Monell*, the Court described this liability as arising from "constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking (sic) channels." *Monell*, 436 US at 690-91.

"In order to state a claim against a municipality under section 1983, a plaintiff must show the municipality itself, through custom or policy, caused the alleged violation." *Haverstick Enterprises, Inc. v. Financial Federal Credit, Inc.*, 803 F. Supp. 1251, 1256 (E.D. Mich, 1992), citing *Monell* at 658. There are two requirements for liability based on custom: (1) the custom must be attributable to the city through actual or constructive knowledge on the part of the policymaking officials; and (2) the custom must have been the cause of and the moving force behind the constitutional deprivation. *Haverstick*, 803 F. Supp at 1256.

With respect to Defendant Pyden, there can be no doubt that the Board had actual or constructive knowledge of her correspondence with Plaintiff's supervisor. On February 8, 2021, Plaintiff emailed the entire board and discussed Defendant Pyden's actions. Exhibit A, February 8, 2021 Email. In this correspondence, Plaintiff explained that Defendant Pyden had retaliated against her for her protected speech, contacted her employer, and jeopardized her career:

> ….This board has shown how far it will go to silence anyone who defies them, The extent they will go to take away the First Amendment rights of parents and how willing they are to push a false narrative.
>
> As a board members know I have been an advocate a face-to-face learning voicing my opinion via emails. I never identified myself as a public employee bus allowing me to speak not only as a taxpayer but are concerned and loving parent exercising their First Amendment right. And December 11, 2020 Liz Pyden Send an email to my chief of police regarding my emails. In her email she identified herself as a CVS school board member and represented the school board taking away her right as a private citizen and acting in her official capacity. Liz Pyden stated that I was a racist, apparently because of my job as a police officer. After all racist cops get fired. Obviously when she doxed me and couldn't find anything negative about me on the Internet that was her fallback response. She contributed to the false narrative across the nation regarding lawn Forssman officers. As if officers are worried enough about things these days now we can't even voice our opinions as a concerned and loving parent. Liz also demanded I be stripped of my awards that show my hard work and dedication to my community. She also demand she take part in deciding the disciplinary actions that would be taken against me. This is prima facia Evidence that the school board and its members will stop at nothing to push their agenda and silence those who defined them. The petulant behavior of Lis Pyden needs to be addressed by the school board. Liz is in an employment attorney and knew what she was doing. Also as a sworn attorney and member of the school board she violated the oath she took to uphold the Constitution of the United States. Except this is my formal complaint as no forms were available on the CVS website.
>
> I expect and demand a full investigation, sanctions, and this board to encourage her to step down immediately to preserve the dignity, integrity, and reputation of this board.

Id. (errors original, cleaned up).

Thus, as of February 8, 2021, the Board had actual knowledge that one of its members had retaliated against Plaintiff for her protected speech. Upon information and belief, the Board took no adverse action against Defendant Pyden for her actions.

Defendant Pyden's complaint to Plaintiff's supervisor amounted to a threat to her economic livelihood, and was designed to induce Plaintiff's supervisor to take some adverse employment action that would chill her from speaking further. In *Fritz v Charter Township of Comstock*, the Court recognized that this was sufficient to support a claim of retaliation. 592 F. 3d 718, 728 (6th Cir. 2010). In that case, an insurance agent brought a §1983 action against a township and its supervisor, claiming they had retaliated against her for exercising her First Amendment rights at township meetings. *Fritz*, 592 F.3d 718. There, the plaintiff alleged that the township supervisor had contacted her employer with the intent to threaten her economic livelihood should she continue to speak during the township's public comment period. *Id*. at 725. The township moved to dismiss the plaintiff's claims on the grounds she had failed to plead sufficient evidence. The Court concluded that such a threat was likely to deter a person of ordinary firmness from continuing to engage in protected activities. *Id*. at 728.

Thus, in light of Plaintiff's email, the Board was on notice that Defendant Pyden's actions were an abridgement of Plaintiff's constitutional rights, but appears to have done nothing to remedy the issue or prevent similar breaches moving forward.

Defendant Bednard's complaint to the DOJ reflects this fact. Plaintiff's communications with the Board were related to a matter of public interest, namely, the Board's COVID-19 policies and the ways in which the Board regulated public comment at its meetings. By referring Plaintiff to the DOJ, Defendant Bednard retaliated against plaintiff in a way that would deter a person of ordinary firmness from engaging in continued protests against the Board. Courts in the 6th Circuit have repeatedly held that the threat of a criminal investigation is an adverse consequence that would deter an ordinary person from engaging in protected conduct. See, *Haggart v. City of Detroit*, No. 2:19-CV-13394, 2021 WL 5040293, at *4 (E.D. Mich. Oct. 27, 2021) (noting that enduring a criminal investigation is sufficient to deter an ordinary person, particularly where that investigation was initiated); *Wurzelbacher v. Jones-Kelley*, 675 F.3d 580, 584 (6th Cir. 2012) (recognizing the threat of a continuing governmental investigation would deter an ordinary person). The clear intent of Defendant Bednard's email was a request that DOJ take steps to "curb this behavior," namely, Plaintiff's protected First Amendment Activity:

> Hello, DOJ.
>
> I appreciate your looking into these groups of people who bring such threats to anybody that stands in their way. The email I included below is from Sandra Hernden. This woman, Sandra Hernden, comes to our every meeting to harass our board, administration, and community who oppose her views. She is over dramatic, and refuses to listen to any direction I may give her about her inappropriate and threatening comments. Last week, she compared the tattoos Nazi Germany gave Jewish people to identify them in WW2 to Masking mandate of today. We understand that Sandra has no children in our schools, is not a resident of our district, and goes around to school board meetings throughout the tri county area to promote her agenda in any way she can including threats and intimidation. She is part of a group called, "Mothers of Liberty" that attend our meetings. This group of people

> attend every meeting, and because their threats and demeanor are so intimidating, no community members who oppose their message will come to the meeting to speak because they are afraid of what this group would do to them for standing up to them.
>
> Our school district has over 15,000 students. We know that they have not gained any traction as it is the same 10-15 people that show up at every meeting to intimidate, threaten, and harass. *Anything that could be done to curb this behavior by these people would be greatly appreciated by our board, administration, and our community*.

PageID.26 (emphasis added).

Defendant's characterizations of Plaintiff's activity as designed to "intimidate, threaten, and harass" parallels Attorney General Garland's memo of the day prior, which indicates the DOJ's willingness to get involved in activity involving "threats of violence or efforts to intimidate individuals based on their views." PageID.28. That memo continues, recognizing the DOJ's "is committed to using its authority and resources to discourage these threats, identify them when they occur, and *prosecute them when appropriate*." *Id.* Taken together, these communications allow the Court to make the reasonable inference that Defendant Bednard's communications were intended to trigger a criminal investigation by the DOJ.

The fact the Board does not appear to have taken action against Defendant Bednard for this constitutional violation demonstrates a custom of tolerating First Amendment retaliation. There has been no evidence produced which demonstrates that the Board took any action to deter Defendant Bednard from referring Plaintiff to the DOJ. Defendant Bednard specifically informed the board that he had forwarded Plaintiff's e-mail of October 4, 2021 to the DOJ. Upon information and belief, the complaint Defendant Bednard forwarded was the one quoted immediately

above. There has been no correspondence evidencing the Board, or even a single one of its members, objected to Defendant's decision. At best, this demonstrates the Board acquiesced to Defendant Bednard's conduct; at worst, it represents an endorsement of it.

Had the Board taken action against Defendant Pyden for her retaliatory acts, Defendant Bednard may have been deterred from also retaliating against Plaintiff. Instead, the Board's failure to act established a policy of allowing members to violate federal rights. Defendant Bednard's correspondence with the DOJ evidences this, and to the extent the Board took no adverse action against him for that correspondence, presents additional evidence that the Board's custom was to permit retaliation.

II. Dismissal of the board prior to discovery would be premature.

The Sixth Circuit has previously recognized that dismissal is premature when discovery could lead to the uncovering of information that would demonstrate retaliation. Plaintiff already believes she has already pled sufficient facts to overcome a motion to dismiss, but to the extent the Court disagrees, dismissal would nevertheless be premature. *Fritz*, is again illustrative.

In *Fritz*, the Court found that the plaintiff had satisfied the burden of proof necessary to survive a motion to dismiss despite neither pleading "specific facts to support her claim that Defendant Hudson specifically threatened her business, nor that he attempted to persuade Farm Bureau to terminate its contract with Plaintiff." The Court reach this determination based on the conclusion that there was certain a "set of facts" which, if accepted by the trier of fact, "would entitle [Plaintiff] to relief."

Id. at 725, quoting *Conley v Gibson*, 355 U.S. 41, 45-46 (1957) and *Twombly*, 550 U.S. at 561-63. The Court continued:

> "It remains a question of material fact, discoverable through depositions of the parties involved, as to what the content of the conversations were. If Defendant Hudson in fact made statements that were designed to communicate to Farm Bureau that it would be in the business' interests in terms of its dealings in Comstock to reign in Plaintiff's exercise of her First Amendment rights, or that it would be better for Farm Bureau to cancel its contract with Plaintiff, that would be an adverse action sufficient to support a claim of retaliation. The complaint alleged that such threats were made, even if generally alleged, which is sufficient at this stage of the litigation to put Defendants on notice of the claim and to raise a possible claim of adverse action."

Fritz, 592 F.3d at 725-26.

Further discovery is likely to strengthen Plaintiff's already well-pled Complaint.

RELIEF REQUESTED

For the reasons stated above, this Court should deny Defendant's motion. In the alternative, this court should permit Plaintiff to amend her complaint pursuant to Fed. R. Civ. Pro. 15(a)(2).

Respectfully Submitted,

/s/ Stephen Delie
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April 14, 2023

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

SANDRA HERNDEN,

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CHIPPEWA VALLEY SCHOOLS BOARD OF EDUCATION, a government body, FRANK BEDNARD, in his official capacity as President of Chippewa Valley Schools and in his individual capacity, and ELIZABETH PYDEN, in her official capacity of Secretary of Chippewa Valley Schools and in her individual capacity.

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PLAINTIFF'S BRIEF IN RESPONSE TO DEFENDANT CHIPPEWA VALLEY SCHOOL'S MOTION TO DISMISS

INDEX OF EXHIBITS

Exhibit	**Description**
A	February 8, 2021 Correspondence

Exhibit A

Delie, Steve

From: sandra hernden <herndens883@yahoo.com>
Sent: Tuesday, June 21, 2022 10:53 AM
To: Delie, Steve
Subject: Fwd: Formal complaint
Attachments: DOC122120-12212020142901.pdf

Sent from my iPhone

Begin forwarded message:

> **From:** sandra hernden <herndens883@yahoo.com>
> **Date:** February 8, 2021 at 7:13:56 PM EST
> **To:** psibley@cvs.k12.mi.us, dbrosky@cvs.k12.mi.us, daquino@cvs.k12.mi.us, apatzert@cvs.k12.mi.us, lcardamone@cvs.k12.mi.us, rroberts@cvs.k12.mi.us, fbednard@cvs.k12.mi.us
> **Subject: Formal complaint**
>
> My name is Sandra Herndon a parent of two CVS students. “The suppression of critical commentary regarding elected officials is the quintessential form of viewpoint discrimination against which the first amendment guards“
>
> With that being said the CVS school board is no exception. It is your job as an elected official to except scrutiny at every level. The nefarious malicious and pre-meditated ask taken by this board against me because I dared to voice my opinion and scrutinize your decisions has undoubtedly called into question the dignity and integrity and of the school board. The X taken part by the school board shows the lack of respect for concerned parents. This board has shown how far it will go to silence anyone who defies them, The extent they will go to take away the First Amendment rights of parents and how willing they are to push a false narrative.
> As a board members know I have been an advocate a face-to-face learning voicing my opinion via emails. I never identified myself as a public employee bus allowing me to speak not only as a taxpayer but are concerned and loving parent exercising their First Amendment right. And December 11, 2020 Liz Pyden Send an email to my chief of police regarding my emails. In her email she identified herself as a CVS school board member and represented the school board taking away her right as a private citizen and acting in her official capacity. Liz Pyden stated that I was a racist, apparently because of my job as a police officer. After all racist cops get fired. Obviously when she doxed me and couldn’t find anything negative about me on the Internet that was her fallback response. She contributed to the false narrative across the nation regarding lawn Forssman officers.As if officers are worried enough about things these days now we can’t even voice our opinions as a concerned and loving parent. Liz also demanded I be stripped of my awards that show my hard work and dedication to my community. She also demand she take part in deciding the disciplinary actions that would be taken against me. This is prima facia Evidence that the school board and its members will stop at nothing to push their agenda and silence those who defined them. The petulant behavior of Lis Pyden needs to be addressed by the school board. Liz is in an employment attorney and knew what she was doing. Also as a sworn attorney and member of the school board she violated the oath she took to uphold the Constitution of the United States. Except this is my formal complaint as no forms were available on the CVS website.
> I expect and demand a full investigation, sanctions, and this board to encourage her to step down immediately to preserve the dignity, integrity, and reputation of this board.
> In closing I have cause for concern for speaking up. I hope and pray my children will not fall victim to

further harassment at the hands of their teachers, their coaches, the superintendent, any school board member, Liz Pyden, Maryanne Levine, or any of her minions, or any other teacher/school board member in neighboring districts.
I will expect to have my request resolved and decision submitted in writing without further delay.

I have included a copy of all emails that I obtained via a FOIA sent by Liz Pyden.

Respectfully,

Sandra Hernden

Sent from my iPhone

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

SANDRA HERNDEN,

an individual,

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Appendix of Unpublished Authority

Exhibit	**Description**
A	*Barrow v. City of Hillview, Kentucky*, 775 Fed. Appx. 801 (6th Cir. 2019)
B	*Haggart v. City of Detroit*, No. 2:19-CV-13394, 2021 WL 5040293 (E.D. Mich. Oct. 27, 2021)

Appendix A

775 Fed.Appx. 801
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S.Ct. of App. 6th Cir. Rule 32.1.
United States Court of Appeals, Sixth Circuit.

James S. BARROW, Plaintiff-Appellant,
Leo Daniel Cook, Intervening Plaintiff-Appellant,
v.
CITY OF HILLVIEW, KENTUCKY; Glenn A. Caple, in his individual capacity; Kenneth Straughn, in his individual capacity, Defendants-Appellees.

No. 18-5045
|
Filed May 31, 2019

Synopsis

Background: Police officer brought action against city, former chief of police, and police major for civil conspiracy, First Amendment retaliation, and a state-law claim of tortious employment reprisal. The action was removed, a motion to dismiss was denied, and a second officer filed an intervening complaint. The United States District Court for the Western District of Kentucky, Charles R. Simpson, Senior District Judge, granted city's, chief's and major's motion for summary judgment. Officers appealed.

Holdings: The Court of Appeals, White, Circuit Judge, held that:

[1] intracorporate-conspiracy doctrine precluded police officers from making conspiracy claim;

[2] there is no "independent personal stake" exception to the intracorporate-conspiracy doctrine;

[3] officers were not discharged, as required to claim public policy wrongful discharge under Kentucky law;

[4] officers' statements to FBI regarding wrongdoing by police chief were protected against retaliation under First Amendment; and

[5] the District Court did not consider correct legal theory in support of police officers' *Monell* claim against city.

Affirmed in part, reversed in part, vacated in part, and remanded.

West Headnotes (8)

[1] Federal Courts Waiver of Error in Appellate Court

Plaintiffs abandoned for appeal their claim that defendants violated state constitution on the basis that their actions constituted exercise of arbitrary governmental authority, where district court dismissed the claim, and plaintiffs did not contest this decision on appeal. Ky. Const. § 2.

[2] Conspiracy Civil rights conspiracies

Disciplinary decisions by chief of police and police major were within scope of their employment, and thus intracorporate-conspiracy doctrine precluded police officers from making claim of conspiracy to obstruct justice or intimidate party or witness, arising out of officers' involvement in federal investigation into wrongdoing by chief; chief and major were responsible for enforcing police discipline, disciplinary decisions were connected to police department and its policies, and decisions were made during work hours, on city property, by police department's management team. 42 U.S.C.A. § 1985(2).

2 Cases that cite this headnote

[3] Conspiracy Personal stake or interest
Conspiracy Civil rights conspiracies

There is no "independent personal stake" exception to the intracorporate-conspiracy doctrine, which precludes a claim for conspiracy to obstruct justice when all of the defendants are members of the same collective entity and they act in their official capacities. 42 U.S.C.A. § 1985(2).

3 Cases that cite this headnote

[4] **Municipal Corporations** Grounds for removal or suspension

Public Employment Grounds for and Propriety of Adverse Action

Police officers were not discharged, and thus officers, who were allegedly disciplined for their involvement in federal investigation into wrongdoing by police chief, could not claim public policy wrongful discharge under Kentucky law, despite contention that claim should have been for "tortious employment reprisal" because limiting claim to discharged employees would allow employers to take any adverse employment actions short of termination without recourse.

[5] **Constitutional Law** Police and other public safety officials

Municipal Corporations Grounds for removal or suspension

Public Employment Protected activities

Police officers' statements to FBI regarding wrongdoing by police chief pertained to matters of public concern, as would support claim that speech was protected against retaliation under First Amendment; one officer contacted FBI because he suspected that chief had committed crime by ordering that evidence of methamphetamine manufacture be removed from mayor's property where it was found, FBI was investigating political corruption, and officers' speech was not made in employment grievance, personnel dispute, or complaint regarding internal management. U.S. Const. Amend. 1; 42 U.S.C.A. § 1983.

6 Cases that cite this headnote

[6] **Constitutional Law** Police and other public safety officials

Municipal Corporations Grounds for removal or suspension

Public Employment Protected activities

Police officers' statements to FBI regarding wrongdoing by police chief were outside ordinary responsibilities of their employment, and therefore statements were speech as a citizen, rather than public employee, which supported claim that speech was protected against retaliation under First Amendment; even though officers had general responsibility to uphold the law and report unlawful conduct, officers' ordinary job responsibilities did not include reporting allegations of public corruption to outside authorities or secretly recording conversations with police chief and police major, and officers' speech was made without knowledge or consent of superior officers. U.S. Const. Amend. 1; 42 U.S.C.A. § 1983.

4 Cases that cite this headnote

[7] **Constitutional Law** Police and other public safety officials

Municipal Corporations Grounds for removal or suspension

Public Employment Protected activities

Government, based on its needs as employer, lacked adequate justification for treating police officers differently from other members of public speaking on matter of public concern, and thus officers' statements to FBI regarding wrongdoing by police chief were protected against retaliation under First Amendment; officers alleged official misconduct and public corruption by chief in ordering that evidence of methamphetamine manufacture be removed from mayor's property where it was found, and officers' statements were not false and did not disclose sensitive, confidential, or privileged information. U.S. Const. Amend. 1; 42 U.S.C.A. § 1983.

1 Case that cites this headnote

[8] **Federal Courts** Issues or questions not passed on below

District court did not consider correct legal theory in support of police officers' *Monell* claim against city, based on claim of First Amendment retaliation for officers' cooperation with FBI investigation into police chief misconduct, and thus decision to grant city summary judgment needed to be vacated and remanded for reconsideration under correct legal standard; district court seemed to have judged officers' claim on theory of whether the individual defendants were implementing or executing unconstitutional policy, whereas pleadings indicated that officers alleged *Monell* claim under theory that individual defendants were endowed by city with final authority to make retaliatory disciplinary decisions. U.S. Const. Amend. 1; 42 U.S.C.A. § 1983.

***803** ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY

Attorneys and Law Firms

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Mark A. Osbourn, Bush & Osbourn, Louisville, KY, for Defendants-Appellees

BEFORE: COLE, Chief Judge, WHITE and NALBANDIAN, Circuit Judges.

Opinion

HELENE N. WHITE, Circuit Judge.

[1] Plaintiff-Appellant James Barrow and Intervening Plaintiff-Appellant Leo Daniel Cook appeal the district court's grant of summary judgment to Defendants-Appellees City of Hillview, former Hillview Chief of Police Glenn Caple, and Major Kenneth Straughn. Asserting that they were retaliated against for their involvement in a federal investigation into wrongdoing by Caple, Plaintiffs alleged a civil conspiracy under 42 U.S.C. § 1985(2), a claim of First Amendment retaliation under 42 U.S.C. § 1983, and a state-law claim of tortious employment reprisal.[1] The district court granted summary judgment to Defendants on all claims. We AFFIRM as to Plaintiffs' civil-conspiracy claim and state-law tort claim, REVERSE as to their First Amendment retaliation claim against Caple and Straughn, VACATE as to their *Monell* claim against the City, and REMAND for further proceedings consistent with this opinion.

I.

A. Factual History

On January 4, 2012, four members of the Hillview Police Department—the two Plaintiffs and the two Defendants—went to the home of Mayor James Eadens after Eadens reported suspicious activity on his property. Eadens was not home when the officers arrived, but his son Allen was there. While looking around the yard, Straughn found a backpack tucked inside a tire behind the detached garage. The officers identified the contents of the backpack—a jar of liquid, tubing, and a curling iron—as materials used in the manufacture of methamphetamine. When Caple asked Allen about the backpack, Allen denied any knowledge of the backpack or its contents. Allen was handcuffed, and Barrow stayed with him while the other officers continued their search of the yard.

***804** Cook and Straughn found two white plastic garbage bags behind a wire fence at the rear boundary of Eadens's property. The bags exuded a smell associated with methamphetamine production; Cook testified the bags gave off "a real strong chemical smell to the point that even the major stated that he was getting a headache." (R. 54-10, PID 1146.) Caple then ordered the officers to place the backpack behind the wire fence where the white garbage bags had been found. According to Cook, Caple stated, "the mayor didn't need that kind of heat." (R. 54-10 PID 1149.) Cook, who had experience handling drug-processing materials from working with the local county drug task force, volunteered to relocate the backpack. Cook knew at the time that moving

the backpack was a violation of standard operating procedure, but did it "[b]ecause the chief said, this is what we're going to do." (R. 54-10, PID 1153.)

While Caple and Cook were discussing moving the backpack, Barrow remained on the porch of the residence with Allen. As Cook walked to his car to get safety gloves, Barrow asked, "What are we going to do with the backpack in the back yard?" (R. 54-9, PID 1248.) According to Barrow, Cook responded, "there was no backpack in the yard; it was in the woods outside the fence." (*Id*.) Barrow, suspecting that the officers' conduct was either illegal or contrary to department policy, told Cook, "I'm done with this. You-all don't need me anymore." (*Id*. at PID 1248–49.) Cook then released Barrow from the scene. Barrow testified that as he walked to his car, Straughn ordered him not to discuss the incident with anyone, and Barrow gave him "a sarcastic salute." (*Id*. at PID 1249.)

The remaining officers called Mayor Eadens to report the discovery of the backpack. They explained that Allen had denied any involvement with the backpack or its contents, and Eadens instructed the officers to escort Allen off the property. Straughn took Allen to a nearby restaurant, and Caple called the county drug task force to clean up the items behind the fence.

Unsettled by Caple's decision to move the backpack off Eadens's property, Barrow reported the incident to the Bullitt County Sheriff's Office, which referred the matter to the Federal Bureau of Investigation (FBI). Barrow then met with FBI Agent Brett Johnson and gave his account of what happened. The FBI later contacted Cook, who confirmed Barrow's account. Barrow and Cook continued to cooperate with the FBI investigation. Barrow met with Agent Johnson "numerous times," and secretly recorded conversations with Caple and Straughn at the FBI's direction. (R. 54-9, PID 1232.) Cook spoke with the FBI at least one more time.

In May 2013, after the FBI investigation became a matter of common knowledge within the Hillview Police Department, Barrow admitted to Straughn and Caple that he had spoken with the FBI. Beginning around this time, he and Cook were subjected to disciplinary actions by Caple and Straughn.

On May 9, 2013, Caple reprimanded Barrow for speeding on the access road leading to the Hillview Police Department parking lot. The warning was Barrow's first reprimand in his four years with the police department.

On May 31, 2013, Cook received a written reprimand for mishandling a case. The disciplinary report states that Cook failed to investigate the matter within a year of the initial citizen complaint because he "forgot about the case." (R. 54-5, PID 423.)

On January 15, 2014, Barrow was reprimanded for violations of the Hillview Police Department's pursuit policy and the personal video-camera policy. These ***805** charges resulted in a suspension of two days and a written reprimand. Barrow appealed the suspension, but the Civil Service Board of Hillview upheld the punishment. Barrow requested that these two days of unpaid suspension be scheduled in separate pay periods in order to limit the financial effect. Straughn denied the request.

On May 7, 2014, Cook received a reprimand regarding his failure to properly fill out his daily log sheets.

On June 10, 2014, Eadens sent a letter to Straughn addressing Cook's "excessive absenteeism." (R. 54-5, PID 411.) According to the memo, Cook missed a total of 21 days due to illness between June 11, 2013, and June 10, 2014.

On July 7, 2014, Cook received notice from the Hillview Police Department Internal Affairs Unit that it intended to interview him with regard to complaints from two citizens who alleged that he failed to investigate crimes they had reported.

On August 19, 2014, Straughn sent a memo to Eadens regarding allegations that Cook deposited $ 2.50 each into the accounts of two inmates housed in the Bullitt County Detention Center. The memo recommended Cook's termination. Cook ultimately reached a settlement with the Hillview Police Department pursuant to which he accepted a demotion from detective to patrolman in exchange for the dismissal of all disciplinary charges against him.

Barrow and Cook allege these disciplinary actions were taken in retaliation for their communication with the FBI. They argue that some of the disciplinary actions are factually unfounded. For example, Barrow disputes that he was driving in the department parking lot at an excessive speed, and regarding Cook's alleged absenteeism, Cook argues, and Eadens concedes, that there is no evidence that Cook was not in fact sick on the days he was absent. Barrow and Cook also point to similar violations of the pursuit and personal-video

policies by other Hillview police officers that did not result in official reprimands.

A grand jury indicted Caple on October 1, 2013, for lying to the FBI in violation of 18 U.S.C. § 1001(a). Barrow and Cook both testified against Caple in the subsequent criminal trial. Cook testified that he received no discipline after Caple's trial.

B. Procedural History

Barrow filed a complaint in Bullitt County Circuit Court against the City of Hillview and Caple and Straughn in their individual capacities. Count I of Barrow's complaint alleged a violation of the Kentucky Whistleblower Act by the City of Hillview. Count II alleged that Caple and Straughn conspired "to deter the Plaintiff from testifying freely, fully, and truthfully ... and to punish him for doing so," in violation of 42 U.S.C. §§ 1985(2) and 1986. (R. 1-4, PID 13.)

Defendants removed the case to federal court. Defendants then moved to dismiss, arguing that the City of Hillview is not an employer for the purposes of the Kentucky Whistleblower Act, and that Barrow is unable to state a claim under 42 U.S.C. § 1985(2) because the individual defendants are protected by the intracorporate-conspiracy doctrine. Barrow filed an amended complaint, adding: (1) a state-law tort claim of "tortious employment reprisal," (2) a First Amendment retaliation claim, and (3) a claim that the disciplinary actions "constitute[d] the exercise of arbitrary governmental authority," in violation of section 2 of the Kentucky Constitution. (R. 6, PID 94–96.) Barrow abandoned his claim under the Kentucky Whistleblower ***806** Act. The district court denied Defendants' motion to dismiss, and discovery proceeded. Cook filed an intervening complaint on October 16, 2014. Cook's claims mirror those in Barrow's Amended Complaint.

Defendants moved for summary judgment, and the district court granted Defendants' motion as to all claims.[2] Regarding the section 1985(2) and 1986 claims, the district court held that Plaintiffs' claims are barred by the intracorporate-conspiracy doctrine because Defendants were acting as agents of the same entity—the City of Hillview—and therefore Plaintiffs had not alleged that at least two separate "persons" existed to form a conspiracy. With regard to Plaintiffs' state-law claim for "tortious employment reprisal," the district court held that Plaintiffs had not stated a claim because the cause of action requires that the employee actually be discharged, and neither Plaintiff's employment was terminated. Regarding the First Amendment retaliation claim, the district court found that Plaintiffs failed to show that they were engaged in protected First Amendment activity. Finally, the district court dismissed Plaintiffs' claim under section 2 of the Kentucky Constitution on the ground that the Kentucky Supreme Court has specifically declined to create a private right of action for money damages for violations of the Kentucky Constitution, and therefore Plaintiffs' claim for damages for the exercise of arbitrary governmental authority was not legally cognizable.

Plaintiffs now appeal.

II.

We review de novo a district court's grant of summary judgment. *Mayhew v. Town of Smyrna*, 856 F.3d 456, 461 (6th Cir. 2017) (citation omitted). Summary judgment is proper only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). We construe the facts in the light most favorable to the non-moving party. *Gillis v. Miller*, 845 F.3d 677, 683 (6th Cir. 2017) (citation omitted).

A. Civil Conspiracy

[2] Plaintiffs assert two primary arguments regarding their civil-conspiracy claim. First, they argue that Caple's and Straughn's disciplinary decisions were outside the scope of their employment, and so the intracorporate-conspiracy doctrine does not defeat Plaintiffs' § 1985(2) claim. Second, Plaintiffs ask us to recognize a new exception to the intracorporate-conspiracy doctrine that would apply when an employee defendant is acting in his or her "personal interests," whether or not the employee is acting within the scope of his or her employment.

1. Scope of Employment

Section 1985(2) establishes a cause of action for conspiracy to, among other things, obstruct justice or to intimidate a party, witness, or juror. 42 U.S.C. § 1985(2). To state a cause of action under § 1985, a plaintiff must prove the existence of a conspiracy among two or more persons. *See Hull v. Cuyahoga Valley Joint Vocational Sch. Dist. Bd. of Educ.*, 926 F.2d 505, 509 (6th Cir. 1991). However, if "all of the defendants are members of the same collective entity, there

are not two separate 'people' to form a conspiracy." *Id*. at 510. In other words, "an agreement between or among agents of the same legal entity, when the agents act in their ***807** official capacities, is not an unlawful conspiracy." *Ziglar v. Abbasi*, —— U.S. ——, 137 S. Ct. 1843, 1867, 198 L.Ed.2d 290 (2017). This is the "intracorporate-conspiracy doctrine." *Id*. We have held that the doctrine applies in § 1985(2) suits. *Doherty v. Am. Motors Corp.*, 728 F.2d 334, 339 (6th Cir. 1984).

We recognize an exception to the intracorporate-conspiracy doctrine "when employees act outside the course of their employment." *Johnson v. Hills & Dales Gen. Hosp.*, 40 F.3d 837, 841 (6th Cir. 1994). This exception acknowledges "a distinction between collaborative acts done in pursuit of an employer's business and private acts done by persons who happen to work at the same place." *Id*. at 840. As a result, "when employees act outside the course of their employment, they and the corporation may form a conspiracy." *Id*. at 841. *See also Jackson v. City of Columbus*, 194 F.3d 737, 753 (6th Cir. 1999), *abrogated on other grounds by Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) ("members of the same legal entity cannot conspire with one another as long as their alleged acts were within the scope of their employment").

Here, Plaintiffs have not produced sufficient evidence to create a genuine dispute of material fact with regard to whether Defendants were acting outside the scope of their employment. As the district court observed:

> The disciplinary charges against Plaintiffs were made during the course of their working hours, all the charges were connected to the Hillview police department and its policies, and the disciplinary charges were subject to review by the Hillview Civil Service Board. Further, it is not relevant whether Plaintiffs actually committed the Hillview violations they were charged with; it is enough that the alleged retaliatory actions were connected to the "legitimate business" of the Hillview Police Department. *See Johnson*, 40 F.3d at 841 ("[I]t is not necessary that the complaints were based on fact.")

(R. 62, PID 1104.) Although Plaintiffs assert that "Caple and Straughn were acting outside the scope of their employment in committing intentional retaliatory acts," (Appellant Br. at 26), this conclusion is not supported by the summary judgment record. Our precedent makes clear that "managers of a corporation jointly pursuing its lawful business do not become 'conspirators' when acts within the scope of their employment are said to be discriminatory or retaliatory." *Johnson*, 40 F.3d at 840 (quoting *Travis v. Gary Cmty. Mental Health Ctr., Inc*., 921 F.2d 108, 110 (7th Cir. 1990)). In *Johnson*, the plaintiff alleged that her co-workers' critiques of her performance were motivated by racial bias, and therefore outside of the scope of their employment as hospital staff. We found that, even accepting the plaintiff's allegations of bias as true, the "plaintiff ha[d] failed to overcome the facts that the employees' complaints were made during the course of their working hours, the remarks were connected to the business of the hospital, and they were forwarded to the proper managerial authorities." *Id*. at 841. The *Johnson* court distinguished the individual defendants' actions in that case from situations "where the aim of the conspiracy exceeds the reach of legitimate corporate activity." *Id*. at 840. "For example, a manufacturing corporation's employees might not be within the intracorporate conspiracy exception if, for racially discriminatory reasons, they attempted to prevent a person from renting an apartment owned by another company." *Id*. at 840–41. In the instant case, Defendants were responsible for enforcing police discipline, ***808** [3] and the decisions at issue were made during work hours, on City property, by the police department's management team. In short, "the aim of the conspiracy [did not] exceed[ ] the reach of legitimate corporate activity." *Id.* at 841.

Plaintiffs further contend that Caple's authority as Chief of Police was restricted to administrative duties during the period he was under federal indictment, and therefore any actions he took to discipline Plaintiffs were beyond the scope of his employment.[4] In his deposition, Caple conceded that he was in the meeting when Straughn and two other officers decided that Barrow should receive a two-day suspension and a written reprimand, and that rather than leave the meeting, Caple "basically announced that [he] would be abstaining ... from anything from that point on with Officer Barrow." (R. 54-4, PID 297.) However, it is not clear that, even if Caple did in fact participate in the disciplinary actions against Barrow, his participation would not have been "administrative," and therefore within the proper scope of his employment while he was under indictment.

2. Personal Interests

Plaintiffs also urge us to recognize a distinct exception to the intracorporate-conspiracy doctrine "when individual actors are motivated by personal interests rather than the interests of their corporate employer." (Appellant Br. at 23.) Plaintiffs rely in large part on *Brever v. Rockwell International*

Corp., an out-of-circuit case in which two plutonium workers alleged a conspiracy to deter them from cooperating with the FBI in an investigation into environmental crimes at their workplace. 40 F.3d 1119 (10th Cir. 1994). The Tenth Circuit found that although the individual defendants were all employees of the same corporation, the intracorporate-conspiracy doctrine did not apply because the defendants had "an independent personal stake in achieving the corporation's illegal objective." *Id*. at 1127 (quoting *Buschi v. Kirven*, 775 F.2d 1240, 1252 (4th Cir. 1985)). The court concluded that in seeking to deter the plaintiffs' cooperation with the FBI, the defendants were "acting for their own personal purposes and not blindly executing corporate policy," and therefore "they became independent actors who can conspire with the corporation." *Id*. (citation and internal quotation marks omitted).

[3] But *Brever* does not bear the weight Plaintiffs put on it. Although the specific phrasing of the "independent personal stake" rule supports Plaintiffs' proposed exception, the facts of that case demonstrate that the conspirators were also acting outside the scope of their employment. *Id*. Specifically, the *Brever* defendants' alleged acts of intimidation included harassing phone calls and mail, wiretapping the plaintiffs' home telephones, and vandalizing plaintiffs' vehicles, none of which could plausibly be considered within the scope of the defendants' employment at the plutonium facility. *Id*. at 1123–24. Thus, *Brever* does not actually stand for the proposition that acts motivated ***809** by personal interests that are within the scope of the defendant's employment are subject to § 1985 liability. We therefore affirm the district court's grant of summary judgment to Defendants on Count I.

We also affirm the grant of summary judgment on the § 1986 claim. Section 1986 provides a cause of action against persons who aid and abet violations of § 1985. 42 U.S.C. § 1986. Without a predicate violation of § 1985, there can be no violation of § 1986. *See Haverstick Enters., Inc. v. Fin. Fed. Credit, Inc*., 32 F.3d 989, 994 (6th Cir. 1994). Accordingly, because Defendants are entitled to summary judgment on the § 1985(2) claim, they are also entitled to judgment on the § 1986 claim.

B. Tortious Employment Reprisal

[4] Count II of Plaintiffs' complaint alleges a claim of "tortious employment reprisal" under Kentucky state law. Plaintiffs assert that failing to report Caple would have violated Kentucky law, and therefore the adverse employment actions taken by Defendants against them constituted unlawful retaliation. *See Firestone Textile Co. Div., Firestone Tire & Rubber Co. v. Meadows*, 666 S.W.2d 730, 731 (Ky. 1983) ("[A]n employee has a cause of action for wrongful discharge when the discharge is contrary to a fundamental and well-defined public policy as evidenced by existing law.") (citation omitted).

The district court granted summary judgment to Defendants on this claim. Noting that the case law offered by Plaintiffs refers exclusively to the Kentucky tort of "public policy wrongful discharge," the district court construed Plaintiffs' claim as such. (R. 62, PID 1105–08.) *See Hill v. Kentucky Lottery Corp*., 327 S.W.3d 412, 422 (Ky. 2010); *Grzyb v. Evans*, 700 S.W.2d 399, 401 (Ky. 1985). And, because Plaintiffs were not in fact discharged, the district court determined that Plaintiffs are unable to state a claim under this cause of action.

On appeal, Plaintiffs assert that this court should recognize a tort claim in favor of employees who suffer adverse employment actions in violation of public policy, but whose employment is not terminated. Plaintiffs argue that limiting an employee's ability to seek redress to instances of actual termination is contrary to public policy because an employer would be free to take any adverse employment actions short of termination without recourse. In support, Plaintiffs point to the various Kentucky statutes penalizing retaliation against employees who pursue workers-compensation claims, occupational-safety claims, and wage-and-hour claims, none of which limit the right to sue to instances of full termination. Plaintiffs also note that Kentucky courts have not expressly held that the public-policy tort applies only to instances of wrongful termination.

The district court did not err in finding that Plaintiffs failed to state a claim for tortious employment reprisal. In establishing a cause of action for public-policy wrongful discharge, the Supreme Court of Kentucky defined specific limitations on any judicial exception to the state's employment-at-will doctrine. *Grzyb*, 700 S.W.2d at 401. These limitations are:

> 1. The discharge must be contrary to a fundamental and well-defined public policy as evidenced by existing law.
>
> 2. That policy must be evidenced by a constitutional or statutory provision.
>
> 3. The decision ... whether the public policy asserted meets these criteria is a question of law for the court to decide, not a question of fact.

Hill, 327 S.W.3d at 421 (quoting *Firestone*, 666 S.W.2d at 731). Implicit in the first element is that a "discharge" occurred. ***810** *See, e.g.*, *Follett v. Gateway Reg'l Health Sys., Inc.*, 229 S.W.3d 925, 929 (Ky. Ct. App. 2007) ("a plaintiff must show at a minimum that he was engaged in a statutorily protected activity, that he was discharged, and that there was a connection between the protected activity and the discharge") (citation and internal quotation marks omitted). The Kentucky Supreme Court has discussed this tort exclusively in the context of actual employment termination. *See, e.g.*, *Wymer v. JH Props., Inc.*, 50 S.W.3d 195, 198–99 (Ky. 2001) (Kentucky law "recognizes a cause of action when an employee is terminated in contravention of statutory or constitutional provisions"); *Boykins v. Hous. Auth. of Louisville*, 842 S.W.2d 527, 530 (Ky. 1992) ("there exist two situations where the discharge of an employee violates fundamental public policy") (discussing *Grzyb*, 700 S.W.2d at 402). Although Plaintiffs' argument is not without logical force, we are bound to apply the substantive law of Kentucky as interpreted by the Supreme Court of Kentucky, *see Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 82 L.Ed. 1188 (1938); *Bailey v. V & O Press Co., Inc.*770 F.2d 601, 605 (6th Cir. 1985) ("we are not commissioned to take a position regarding the advisability or fairness of the state rule to be applied, but are to determine the issue as would the highest court of the state"), and the Supreme Court of Kentucky has given no indication that wrongful discharge really means wrongful discipline.

C. First Amendment Retaliation

Count III alleges that Defendants violated Plaintiffs' First Amendment rights by retaliating against them for cooperating with the FBI investigation. We employ a burden-shifting framework to determine whether an employee has established a claim of First Amendment retaliation. *Benison v. Ross*, 765 F.3d 649, 658 (6th Cir. 2014) (citations omitted). To establish a prima facie case, the employee must demonstrate that: (1) the employee was engaged in constitutionally protected speech or conduct; (2) the employee was subjected to an adverse employment action that would deter a person of ordinary firmness from continuing to engage in that speech or conduct; and (3) the protected speech was a substantial or motivating factor for the adverse employment action. *Id.* (citations omitted). If the employee establishes a prima facie case of retaliation:

> [T]he burden then shifts to the employer to demonstrate by a preponderance of the evidence that the employment decision would have been the same absent the protected conduct. Once this shift has occurred, summary judgment is warranted if, in light of the evidence viewed in the light most favorable to the plaintiff[s], no reasonable juror could fail to return a verdict for the defendant.

Boulton v. Swanson, 795 F.3d 526, 531 (6th Cir. 2015) (quoting *Benison*, 765 F.3d at 658).

The district court's analysis here did not extend past the threshold question: whether Plaintiffs' speech is protected by the First Amendment. The district court granted summary judgment to Defendants, concluding that Plaintiffs "failed to set forth any facts tending to support their argument that Cook and Barrow were acting outside the scope of their employment duties when they participated in the FBI investigation" and "do not offer any law or precedent supporting an argument that reporting misconduct or participating in an FBI investigation is protected speech." (R. 62, PID 1111.)

We recognize that Plaintiffs gave the district court little to support their First Amendment claim and seemed to concede the scope-of-employment issue in favor of an alternative theory of the case. Plaintiffs ***811** approached the First Amendment claim as an alternative to their tort claim, and Defendants and the district court understood it as such. The district court noted that although alternative claims are permissible, Plaintiffs must still meet the summary judgment standard on each claim. Addressing the merits of the first prong of the First Amendment inquiry—whether the speech is protected—the district court determined that because Plaintiffs believed it was their professional duty to report Caple's suspicious conduct to outside law-enforcement, and their cooperation with the FBI was pursuant to that duty, Plaintiffs' communication with the FBI was not protected speech under the First Amendment. But Plaintiffs' perception of the legal status of their speech is not controlling; rather, the district court was presented with a question of law, and our review of its decision is de novo. *Mayhew*, 856 F.3d at 461–64. Considering the record before the district court, Plaintiffs have adequately established that their cooperation with the FBI is protected speech under the First Amendment.

We engage in a three-step inquiry to determine whether speech by a public employee is protected. *Id.* at 462. First, we ascertain whether the relevant speech addressed a matter of public concern. *Id.* (citing *Connick v. Myers*, 461 U.S. 138, 143, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983)). Second, we determine whether the employee spoke as a private citizen or as an employee pursuant to the employee's official duties.

Id. (citing *Garcetti v. Ceballos*, 547 U.S. 410, 421, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006)). Third, we balance the interests of the parties and determine if the employee's speech interest outweighs "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id*. (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968)).

1. Matter of Public Concern

In determining whether an employee's speech addresses a matter of public concern, we examine "the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147–48, 103 S.Ct. 1684. An employee's speech "involves matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Mayhew*, 856 F.3d at 467 (quoting *Lane v. Franks*, 573 U.S. 228, 241, 134 S.Ct. 2369, 189 L.Ed.2d 312 (2014)).

[5] Barrow's and Cook's statements to the FBI pertain to matters of public concern. Barrow contacted the FBI because he suspected that Caple had committed a crime by moving the backpack off Eadens's property. Cook "was informed [by the FBI] in the beginning that they were investigating ... political corruption." (R. 54-10, PID 1161.) We have previously held on similar facts that reporting police corruption to the FBI is a matter of public concern. *See v. City of Elyria*, 502 F.3d 484, 493 (6th Cir. 2007). This is not a case in which a public employee claims First Amendment protection for speech made in an employment grievance, personnel dispute, or complaint regarding internal management. *See, e.g.*, *Bagi v. City of Parma*, 714 F. App'x 480, 486 (6th Cir. 2017) (allegations of mismanagement in fire department were internal personnel issues, not matters of public concern); *Haynes v. City of Circleville*, 474 F.3d 357, 365 (6th Cir. 2007) (police dog handler's criticisms of department funding reflected "nothing more than the quintessential employee ***812** beef: management has acted incompetently"). Rather, this case falls within the Supreme Court's guidance that "[e]xposing governmental ... misconduct is a matter of considerable significance." *Garcetti*, 547 U.S. at 425, 126 S.Ct. 1951.

2. Private Citizen or Public Employee

The second element of the inquiry asks whether the employee spoke as a private citizen or as a public employee. In *Garcetti v. Ceballos*, the Supreme Court held that "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 their communications from employer discipline." 547 U.S. at 421, 126 S.Ct. 1951. The Court reasoned that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id*. at 421–22, 126 S.Ct. 1951 (citation omitted). In *Lane*, the Supreme Court clarified that the director of a state program spoke as a citizen rather than as a public employee when he testified in the criminal prosecution of a former employee. 573 U.S. at 241–42, 134 S.Ct. 2369. The Court distinguished Lane's testimony from speech made pursuant to ordinary work responsibilities:

> *Garcetti* said nothing about speech that simply relates to public employment or concerns information learned in the course of public employment. The *Garcetti* Court made explicit that its holding did not turn on the fact that the memo at issue "concerned the subject matter of [the prosecutor's] employment," because "[t]he First Amendment protects some expressions related to the speaker's job." *Garcetti*, 547 U.S. at 421, 126 S. Ct. 1951. In other words, the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech. The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties.

Id. at 239–40 (alterations in original). In drawing this line, the Court specifically emphasized the significance of speech by public servants that relates to the administration of government agencies:

> There is considerable value, moreover, in encouraging, rather than inhibiting, speech by public employees. For government employees are often in the best position to know what ails the agencies for which they work. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it.

Id. at 236 (internal citations, alterations, and quotation marks omitted).

[6] Barrow's and Cook's speech was not within their "ordinary job responsibilities." In making this determination, we consider several factors, including the speech's impetus, its setting, and its general subject matter. *Mayhew*, 856 F.3d at 464 (citing *Handy-Clay v. City of Memphis*, 695 F.3d 531, 540 (6th Cir. 2012)). Relevant considerations also include "whether the statements were made to individuals up the chain of command," whether the speech occurred at the workplace, and whether it concerned the subject matter of the speaker's employment. *Handy-Clay*, 695 F.3d at 540 (citations omitted).

Several of our recent cases are instructive. In *Mayhew v. Town of Smyrna*, the laboratory supervisor at a water-treatment ***813** plant alleged retaliation by his supervisors for reporting that a colleague was improperly recording water-testing data. 856 F.3d at 461. We found that Mayhew's complaints fell within his ordinary job responsibilities because "his job was to oversee all water-sample testing required by state and federal regulations ... and to report any [in]appropriate situations and accidents immediately to management." *Id*. at 464–65. We saw no meaningful distinction between the reporting of water-quality issues and the reporting of illegal activity by other employees, and rejected the argument that Mayhew's complaints "were borne out of his civic and 'moral responsibility,' not his job functions." *Id*. at 465. Because "Mayhew's entire function at the plant was to ensure water-testing standards were in compliance with federal and state regulatory mandates," his reports were not entitled to First Amendment protection. *Id*.

In contrast, we held in *Stinebaugh v. City of Wapakoneta* that a fire captain's discussions with city council members regarding the financial maladministration of the fire department constituted speech as a citizen. 630 F. App'x 522, 528 (6th Cir. 2015). We noted that (1) the plaintiff expressly stated he was contacting the city council members in his role as a concerned taxpayer, (2) the impetus for the speech was to voice his opinion about city resources, rather than internal fire department goals, and (3) the plaintiff was off-duty and out-of-uniform when he addressed the council members. *Id*. at 528. We concluded that although the plaintiff's speech concerned a matter related to his employment, it was not made "pursuant to his official duties." *Id*. at 527.

The present case is similar to *Mayhew* in that Barrow and Cook, as police officers, have a general responsibility to uphold the law and report unlawful conduct. Just as reporting inappropriate water sampling was within Mayhew's ordinary responsibilities, reporting possible criminal conduct is within Barrow's and Cook's ordinary job responsibilities. *See Mayhew*, 856 F.3d at 465 (discussing "*Lane*'s instruction that we focus on his 'ordinary job responsibilities' and *Garcetti*'s mandate that we look at job duties practically").

What differentiates this case from *Mayhew*, however, is that although Barrow's and Cook's cooperation with the FBI concerned information they learned as police officers, their ordinary job responsibilities did not include reporting allegations of public corruption to outside authorities. Neither Barrow nor Cook was employed by the FBI, and their participation in the FBI investigation was distinct from their obligations as Hillview police officers. Indeed, Barrow secretly recorded conversations with Caple and Straughn at the FBI's direction; this was not within the ordinary responsibilities of a patrolman, which include "taking reports, traffic stops, investigating minor crimes and so forth ... just normal patrol duties." (R. 54-9, PID 1218.) Further, Plaintiffs' speech was made without the knowledge or consent of their superior officers. Straughn actively discouraged Barrow from taking action by ordering him not to discuss the incident with anyone. And Barrow and Cook deliberately communicated outside the chain of command to ensure a neutral audience. Barrow testified:

> [T]he way I understood it, the Sheriff's office didn't want to investigate this, because if there was no crime, they didn't want to make it look like they were trying to cover something up. If there was a crime, they didn't want to have to enforce criminally on another agency or a member of the other agency or whatever.

***814** (R. 54-9, PID 1228–29.) Finally, Barrow's first in-person meeting with the FBI took place in Louisville, Kentucky, rather than in Hillview. *See Stinebaugh*, 630 F. App'x at 527 ("Other relevant, but not dispositive, factors include where the speech occurred—inside or outside of the workplace."). These facts all suggest that Plaintiffs' speech was outside the ordinary responsibilities of their employment. It is therefore "speech as a citizen for First Amendment purposes."[5] *Lane*, 573 U.S. at 238, 134 S.Ct. 2369.

3. *Pickering* Balancing

The third step of the inquiry asks whether the government had "an adequate justification for treating the employee differently from any other member of the public" based on the government's needs as an employer. *Garcetti*, 547 U.S. at 418, 126 S.Ct. 1951 (discussing *Pickering*, 391 U.S. at 568, 88 S.Ct. 1731).

[7] In cases involving allegations of official misconduct and public corruption, "the employer's side of the *Pickering* scale is entirely empty." *Lane*, 573 U.S. at 242, 134 S.Ct. 2369. If there was evidence that Barrow's or Cook's statements were false, or that they "disclosed any sensitive, confidential, or privileged information," then the government interest in regulating that speech may tip the scale in the employer's favor. *Id*. Defendants have not, however, presented any such evidence.

4. Conclusion on First Amendment Claim

Based on the summary judgment record, Plaintiffs have demonstrated that their cooperation with the FBI was protected speech under the First Amendment. We therefore reverse the district court's grant of summary judgment to Defendants.

5. *Monell* Claim

[8] We also reverse the grant of summary judgment to Defendants on Plaintiffs' claim against Hillview. As with their § 1983 claims against Caple and Straughn, Plaintiffs did not articulate a clear theory for their *Monell* claim on summary judgment, and the opposition to Defendants' motion does not point to specific facts in the record to support their claim.[6] The district court granted summary judgment to Defendants on the basis that "there is nothing in the record to indicate that Caple and Straughn were implementing or executing any unconstitutional policy, ordinance, regulation, decision, or custom of Hillview or its Ordinances." (R. 62, PID 1112.)

This is correct; however, a plaintiff need not show that an individual defendant was implementing an unconstitutional policy, ordinance, or custom to succeed on a *Monell* claim. To establish municipal liability under *Monell v. Department of Social Services*, a plaintiff has four ways to show that a municipality had a "policy or custom" ***815** that caused the violation of his rights. The plaintiff can prove: "(1) the existence of an illegal official policy or legislative enactment; (2) that an official with final decision making authority ratified illegal actions; (3) the existence of a policy of inadequate training or supervision; or (4) the existence of a custom of tolerance or acquiescence of federal rights violations." *Burgess v. Fischer*, 735 F.3d 462, 478 (6th Cir. 2013). The district court seems to have judged Plaintiffs' claim against only the first theory of liability—whether the individual Defendants were "implementing or executing [an] unconstitutional policy." (R. 62, PID 1112.) But the pleadings indicate that Plaintiffs alleged a *Monell* claim under the second theory—that Caple and Straughn were "endowed by Hillview with final authority to make [retaliatory disciplinary decisions]." (R. 6, PID 95.) We therefore vacate and remand to the district court for reconsideration of the *Monell* claim under the correct legal standard.

IV.

For the reasons stated above, we AFFIRM the district court's grant of summary judgment to Defendants on the civil-conspiracy claim and the tortious-employment-reprisal claim; REVERSE with regard to Plaintiffs' claim of First Amendment retaliation; VACATE with regard to the *Monell* claim; and REMAND to the district court for further proceedings consistent with this opinion.

All Citations

775 Fed.Appx. 801, 2019 IER Cases 200,230

Footnotes

1 Plaintiffs also alleged a violation of section 2 of the Kentucky Constitution on the basis that the Defendants' actions "constitute the exercise of arbitrary governmental authority." (R. 6, PID 96.) The district court dismissed this claim, and Plaintiffs do not contest this decision on appeal. We therefore consider the claim abandoned. *United States v. Johnson*, 440 F.3d 832, 845–46 (6th Cir. 2006).

2 The district court found that it need not determine whether Defendants were entitled to qualified immunity because Plaintiffs had failed to show that Defendants violated any statutory or constitutional rights.

3 The Hillview City Code provides that the Chief of Police shall "[m]ake and review all personnel assignments within the Department," "[m]ake recommendations to the Mayor and City Council for the appointment, promotion and dismissal of officers," and "[e]nforce disciplinary measures when necessary." Hillview, Ky., Code of Ordinances § 35.10. Straughn, as a senior officer in the department, also enforced internal discipline.

4 Hillview Police Department standard 300.11 provides that an officer who is arrested or indicted "will be suspended from police duty and shall not exercise the powers of a sworn police officer until the case is settled or disposed of." (R. 54-5, PID 430–31.)

5 Other courts have reached the same conclusion under similar facts. *See* *Howell v. Town of Ball*, 827 F.3d 515, 524 (5th Cir. 2016), *cert. denied sub nom* *Town of Ball v. Howell*, —— U.S. ——, 137 S. Ct. 815, 196 L.Ed.2d 600 (2017) (town police officer's speech while assisting the FBI investigate his coworkers and superiors for disaster-assistance fraud was not within the ordinary scope of his duties); *Seifert v. Unified Gov't of Wyandotte Cty./Kansas City*, 779 F.3d 1141, 1152 (10th Cir. 2015) (testimony of police officer against fellow officers in a civil-rights lawsuit was protected because it "concerned his work but was not part of it").

6 Plaintiffs cited only Ky. Rev. Stat. § 65.2005 for the proposition that Hillview is required "to defend employees such as Caple and Barrow to the extent they have acted in the scope of their employment." (R. 55, PID 801.)

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Appendix B

2021 WL 5040293
Only the Westlaw citation is currently available.
United States District Court, E.D. Michigan, Southern Division.

Alexander HAGGART, Plaintiff,

v.

CITY OF DETROIT, et al., Defendants.

Case No. 2:19-cv-13394
|
Signed 10/27/2021

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OPINION AND ORDER GRANTING MOTION FOR SUMMARY JUDGMENT [33]

STEPHEN J. MURPHY, III, United States District Judge

***1** Plaintiff Alexander Haggart sued the City of Detroit, Detroit Police Officer Theopolis Williams, and two Detroit firefighters (Chief Patrick McNulty and Deputy Chief Robert Shinske) and filed a complaint that alleged constitutional claims for First Amendment retaliation under 42 U.S.C. § 1983. ECF 1, PgID 4–5, 10; *see also* ECF 34, PgID 475 (explaining that the crux of the complaint was First Amendment retaliation). Plaintiff also asserted a claim under 42 U.S.C. § 1985 for conspiracy to interfere with Plaintiff's civil rights and a malicious prosecution claim against Deputy Chief Shinske. ECF 1, PgID 10–12.

Defendants moved for summary judgment on all claims and asserted qualified immunity defenses. *See* ECF 33, PgID 345 (noting the standard for granting qualified immunity to state actors); *see also* ECF 3, PgID 24 (affirmative defenses).[1] Plaintiff responded to the motion but responded only to the summary judgment arguments about the § 1983 claims against Deputy Chief Shinske and Chief McNulty. *See* ECF 34, PgID 469–74 ("The evidence raises a question of fact as to Shinske and McNulty's motivations...."). The Court will therefore consider the *Monell* claim, § 1983 claim against Officer Williams, the § 1985 claims, and malicious prosecution claim abandoned. *See Brown v. VHS of Mich., Inc.*, 545 F. App'x 368, 372 (6th Cir. 2013) ("[A] plaintiff is deemed to have abandoned a claim when a plaintiff fails to address it in response to a motion for summary judgment."); *see also* ECF 34, PgID 475. Thus, the only remaining claims are the § 1983 claims for First Amendment retaliation against Deputy Chief Shinske and Chief McNulty.

The Court will not hold a hearing on the motion. *See* E.D. Mich. L.R. 7.1(f). For the following reasons, the Court will grant summary judgment to Defendants.

BACKGROUND

Plaintiff moonlights as a freelance photographer. ECF 34-2, PgID 499. Plaintiff photographs the aftermaths of accidents, crimes, and fires and then sells the photos to news agencies. *Id.* at 499–500. Plaintiff also posts the photos on a social media account called Southeast Michigan Fire and Weather. *Id.* at 500–01.

On the night of October 13 and the early morning of October 14, 2017, Plaintiff livestreamed a video on social media. ECF 33-1, PgID 353 (video filed in traditional manner); ECF 34-1, PgID 480. The video shows Plaintiff, a white man, and another white man, driving a vehicle slowly behind a black woman, who is walking on a sidewalk. ECF 33-1 at 0:00–3:30. Plaintiff and the other man in the vehicle claimed that the woman lit a mattress on fire in a building. *Id.* at 3:20–3:30; ECF 34-2, PgID 501. The two men allegedly could not report the woman for arson because the police and fire department were not answering calls. ECF 33-1 at 3:50–4:10. The two men ultimately followed the woman for a mile until she ran into a house. *Id.* at 3:35–3:54. The two men claimed that they "held her at gun point for ten minutes" sometime during the pursuit. *Id.* at 4:35–4:38; 7:30–7:36. At one point, while driving down a street, Plaintiff stated that he had his pistol, even though he should not have been carrying it. *Id.* at 5:38–6:18. Plaintiff even asserted that he "wished he could" shoot the woman. *Id.* at 6:09–6:13. Towards the end of the video, one man asked the other, "You don't have any of the bad shit

I just did on there, do you?" *Id.* at 9:50–9:58. The other man confirmed that he did not. *Id.* at 9:57–10:01. The men then talked about how Plaintiff held the woman at gun point. *Id.* at 9:58–10:16.

***2** The next day, Patrick McNulty, Chief of the Fire Investigation Division, was notified of Plaintiff's video and began to investigate Plaintiff's conduct. ECF 34-3, PgID 536. Chief McNulty was concerned that the video showed vigilantism and so he forwarded the video to a sergeant in his office for review. *Id.* at 539–40. Chief McNulty was specifically concerned with Plaintiff's "admissions made in the video about holding [the woman] at gunpoint" and Plaintiff's lack of a concealed carry license. *Id.* at 540. "[T]he investigation encompassed the whole act, the arson, the person who committed the arson, and the subsequent detainment or following of th[e] suspect." *Id.* at 542. Later that same day, Detroit Police took over the investigation, and Chief McNulty was no longer involved in the investigation. *Id.* at 549.

A few days later, Plaintiff posted photos of a Detroit Fire Department vehicle outside a bar in Dearborn, Michigan. ECF 34-2, PgID 500; *see also* ECF 34-1, PgID 480–82. The vehicle belonged to Deputy Chief Robert Shinske. ECF 34-2, PgID 500. The photo went viral, and the local news featured it in a story. *Id.* at 500–01; ECF 34-6; *see also* ECF 34-1, PgID 481.[2] Deputy Chief Shinske received a five-day suspension because of the photo. ECF 34-5, PgID 604.

Two months later, Plaintiff posted another photo of Deputy Chief Shinske's department vehicle; the vehicle was smashed into Shinske's house. ECF 34-2, PgID 513.

Eighteen months later, in June 2019, Deputy Chief Shinske learned that Plaintiff—who was not a Detroit Firefighter—was drinking beer and riding equipment in a firehouse. ECF 34-5, PgID 614–15; ECF 34-9, PgID 674. Under department policy, civilians are only allowed in a firehouse if they are invited but are not allowed after a certain time. ECF 34-4, PgID 580. Drinking is also forbidden inside firehouses. *Id.* at 581; ECF 34-5, PgID 622. Deputy Chief Shinske then banned Plaintiff from entering Detroit firehouses in two June 2019 orders.[3] ECF 34-9, PgID 674. Plaintiff later sued Defendants in August 2019. ECF 1, PgID 2.

LEGAL STANDARD

The Court must grant a motion for summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A moving party must identify specific portions of the record that "it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the non-moving party may not simply rest on the pleadings but must present "specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)) (emphasis omitted).

A fact is material if proof of that fact would establish or refute an essential element of the cause of action or defense. *Kendall v. Hoover Co.*, 751 F.2d 171, 174 (6th Cir. 1984). A dispute over material facts is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When considering a motion for summary judgment, the Court must view the facts and draw all reasonable inferences "in the light most favorable to the non-moving party." *60 Ivy St. Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987) (citations omitted).

DISCUSSION

***3** Qualified immunity is "an immunity from suit rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis omitted). A qualified immunity analysis requires a two-pronged inquiry. First, the Court must consider whether the facts, "when taken in the light most favorable to the party asserting the injury, show the [defendant's] conduct violated a constitutional right." *Mullins v. Cyranek*, 805 F.3d 760, 765 (6th Cir. 2015) (citing *Saucier v. Katz*, 533 U.S. 194, 201–02 (2001)). Second, the Court must determine whether the right was "clearly established such 'that a reasonable official would understand that what he is doing violates that right.' " *Id.* (quoting *Saucier*, 533 U.S. at 201–02).

The Court may use its discretion to determine which prong to analyze first. *Id.* (citing *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)). Ultimately, "[p]laintiff bears the burden of showing that defendants are not entitled to qualified immunity." *Maben v. Thelen*, 887 F.3d 252, 269 (6th Cir. 2018) (citing *Chappell v. City of Cleveland*, 585 F.3d 901, 907 (6th Cir. 2009)). But "courts 'should not grant summary

judgment on the issue of qualified immunity if there exists a genuine issue of material fact, involving an issue on which the question of immunity turns, such that it cannot be determined before trial whether the defendant did acts that violate clearly established rights.' " *Jones v. Clark Cnty.*, 959 F.3d 748, 765 (6th Cir. 2020) (quoting *Flint ex rel. Flint v. Ky. Dept. of Corr.*, 270 F.3d 340, 346 (6th Cir. 2011)).

To establish a First Amendment retaliation claim, a plaintiff must prove three elements. First, a plaintiff must "engage[ ] in protected conduct." *Hill v. Lappin*, 630 F.3d 468, 472 (6th Cir. 2010). Second, the defendant must take "an adverse action that is capable of deterring a person of 'ordinary firmness from continuing to engage in that conduct.' " *Id.* (citing *Thaddeus–X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc)). And third, "the adverse action" must be "motivated at least in part by the [plaintiff's] protected conduct." *Id.* (quoting *Thaddeus–X*, 175 F.3d at 394).

For the third prong, "[i]f the defendant can show that he would have taken the same action in the absence of the protected activity, he is entitled to prevail on summary judgment." *Maben v. Thelen*, 887 F.3d 252, 262 (6th Cir. 2018) (quoting *Thaddeus-X*, 175 F.3d at 399). In other words, a plaintiff must show "but-for causation." *Hartman v. Moore*, 547 U.S. 250, 260 (2006). But "[c]ircumstantial evidence like the timing of certain actions" may preclude summary judgment on the third prong. *LaPine v. Corizon Inc.*, No. 2:18-cv-10750, 2019 WL 2502735, at *9 (E.D. Mich. June 17, 2019) (Murphy, J.) (citing *Thaddeus-X*, 175 F.3d at 399); *see also Holzemer v. City of Memphis*, 621 F.3d 512, 526 (6th Cir. 2010). The Court will separately address the First Amendment retaliation claims against Chief McNulty and Deputy Chief Shinske.

I. Chief McNulty

Plaintiff has satisfied the first two prongs of a First Amendment retaliation claim against Chief McNulty. First, Plaintiff's speech was protected. "The First Amendment protects speech that may be 'fairly characterized as constituting speech on a matter of public concern.' " *Lucas v. Monroe Cnty.*, 203 F.3d 964, 973 (6th Cir. 2000) (quoting *Chappel v. Montgomery Cnty. Fire Prot. Dist. No. 1*, 131 F.3d 564, 573 (6th Cir. 1997)). "Speech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest." *Snyder v. Phelps*, 562 U.S. 443, 453 (2011) (Roberts, C.J.) (cleaned up). When a Detroit Fire Department vehicle is parked outside a bar, it is a matter of public concern. *See Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006) ("Exposing governmental inefficiency and misconduct is a matter of considerable significance.").[4]

***4** Second, enduring a criminal investigation is an adverse consequence that would deter an ordinary person from engaging in protected conduct.[5] *See Wurzelbacher v. Jones-Kelley*, 675 F.3d 580, 584 (6th Cir. 2012) (noting that a threated governmental investigation would deter an ordinary person from engaging in protected conduct) (citing *Ctr. for Bio-Ethical Reform, Inc. v. Napolitano*, 648 F.3d 365, 375 (6th Cir. 2011)). Chief McNulty confirmed that he "initiated" "the Haggart investigation." ECF 34-3, PgID 536–37.

Yet, despite showing the first two prongs against Chief McNulty, Plaintiff cannot prove the third prong. Put simply, Chief McNulty ordered the vigilante investigation *before* Plaintiff ever posted the photos of Deputy Chief Shinske's work vehicle. Plaintiff thus cannot show a causal link between posting the photos on social media and ordering the investigation. *See Maben*, 887 F.3d at 262. What is more, Chief McNulty had no meaningful role in the investigation after the police department took over, which was also before Plaintiff posted the photos on social media. ECF 34-3, PgID 549. Without evidence that can support a finding on the third prong, no constitutional violation occurred, and thus Chief McNulty is entitled to qualified immunity. The Court will therefore grant Chief McNulty summary judgment.

II. Deputy Chief Shinske

As the Court explained above, Plaintiff has satisfied the first prong of a First Amendment retaliation claim. Under the second prong, Plaintiff must show, at the present stage, that the ban from the fire department property surpasses the threshold of an "inconsequential action[ ]." *Thaddeus-X*, 175 F.3d at 398 (emphasis omitted).[6] The inquiry "is an objective inquiry, capable of being tailored to the different circumstances in which retaliation claims arise, and capable of screening the most trivial of actions from constitutional cognizance." *Id.*

At the present stage, Plaintiff has presented a genuine issue of material fact about the second prong. The Court cannot find, and the parties did not brief, whether the Sixth Circuit has held that a ban from a municipal building, such as a firehouse, would deter an ordinary person from exercising their First Amendment rights. Some federal courts have found that bans from certain public spaces are adverse actions that would

deter an ordinary person from engaging in protected conduct. *See*Seum v. Osborne, 348 F. Supp. 3d 616, 623, 632 (E.D. Ky. 2018) (finding that a ban "from the third floor of the Capitol Annex" would chill the First Amendment expression of an ordinary person, including the plaintiff who was a "citizen advocate"); *Stark v. City of Memphis*, No. 19-2396, 2020 WL 8770177, at *16 (W.D. Tenn. Feb. 18, 2020) ("[A] ban from police property is a serious sanction for a prosecutor —especially a prosecutor who, like [the plaintiff], had an office in a police building."). Here, Plaintiff is not a firefighter but a freelancer who presumably accesses Detroit firehouses to maintain relationships with firefighters. *See* ECF 34-2, PgID 515; ECF 34-5, PgID 579. At minimum, it is for a jury to determine whether banning Plaintiff from entering firehouses meets the second prong of a First Amendment retaliation claim. *See*Bell v. Johnson, 308 F.3d 594, 603 (6th Cir. 2002) ("Thus, unless the claimed retaliatory action is truly 'inconsequential,' the plaintiff's claim should go to the jury.") (quoting *Thaddeus-X*, 175 F.3d at 398).

***5** Yet, for the third prong, Plaintiff has again shown no evidence of but-for causation. First, Plaintiff cannot even show a bare temporal proximity link between the two events because the events occurred more than eighteen months apart. *See*Coleman v. Bowerman, 474 F. App'x 435, 437 (6th Cir. 2012) (per curiam) ("In theory, temporal proximity between the protected conduct and the adverse action, standing alone, may be significant enough to create an inference of retaliatory motive.") (citing *Muhammad v. Close*, 379 F.3d 413, 417–18 (6th Cir. 2004)). Indeed, the timeline shows that Plaintiff's firehouse bans were unconnected to the social media photos. ECF 34-4, PgID 580 (Deputy Chief Shinske banned Plaintiff because of inappropriate behavior at firehouses); ECF 34-5, PgID 614–15 (same); ECF 34-9, PgID 674 (same). Based on testimony before a Michigan state court, Deputy Chief Shinske explained that he issued the orders in June 2019. ECF 34-9, PgID 674; *see also* ECF 34-10, PgID 707–08. The orders therefore occurred more than eighteen months after Plaintiff's photos went viral and after Deputy Chief Shinske's five-day suspension.

Beyond lacking temporal proximity, Plaintiff offered no evidence—other than his belief—that Deputy Chief Shinske was motivated to ban Plaintiff because of the photos. *See* ECF 34-2, PgID 510–13 (hearsay statements of persons who will not testify or are unnamed); Fed. R. Evid. 801(c) (definition of hearsay); *Smith v. Campbell*, 250 F.3d 1032, 1038 (6th Cir. 2001) (A plaintiff "offer[ed] no evidence to demonstrate that his [protected activities] played any role in [the adverse consequence], let alone a substantial role."). And the evidence shows that Deputy Chief Shinske had a legitimate reason to ban Plaintiff from firehouses based on Plaintiff's drinking and horsing around on department equipment. ECF 34-5, PgID 614–15; ECF 34-9, PgID 674; *see*Adderley v. Florida, 385 U.S. 39, 47 (1966) ("The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.").

In all, Plaintiff has failed to show that Deputy Chief Shinske would not have banned him but for posting the photos on social media. Because no evidence shows a but-for causation, Deputy Chief Shinske did not violate Plaintiff's constitutional rights and is therefore entitled to qualified immunity.

Even if the Court were to find that Deputy Chief Shinske violated Plaintiff's constitutional rights, the Court would still grant qualified immunity to Deputy Chief Shinske under the second qualified immunity prong. For the second prong, the Court must determine whether Plaintiff's right against First Amendment retaliation "was clearly established such 'that a reasonable official would understand that what [s]he is doing violate[d] that right.' " *Mullins*, 805 F.3d at 765 (citing *Saucier*, 533 U.S. at 201–02). "A plaintiff can meet his burden under this prong by presenting caselaw 'with a fact pattern similar enough to have given fair and clear warning to officers about what the law requires.' " *Vanderhoef v. Dixon*, 938 F.3d 271, 278 (6th Cir. 2019) (quoting *Hopper v. Plummer*, 887 F.3d 744, 755 (6th Cir. 2018)). Although the case that a plaintiff cites " 'need not be on all fours' with the instant fact pattern" the question at issue "must be so settled that 'every reasonable official would have understood that what he [was] doing violate[d] [the] right' at issue." *Id.* (quotations omitted).

Plaintiff has cited no case law that holds retaliating against someone by banning the person from firehouses (or even municipal buildings where the public must be invited to enter) is clearly established as a First Amendment violation. *See* ECF 34, PgID 474. As the Court explained earlier, two district courts within the Sixth Circuit found that banning a person from a State Capitol building and a prosecutor from their office building would deter an ordinary person from exercising their First Amendment rights. *Seum,* 348 F. Supp. 3d at 632; *Stark*, 2020 WL 8770177, at *16. But Plaintiff does not work at the firehouses and department policy prohibits citizens from entering firehouses unless they are invited. ECF 34-2, PgID 510; ECF 34-4, PgID 580. Plaintiff's bans differ greatly from the bans in *Seum* and *Stark*. Plus, based on the Court's research, there is no binding Sixth Circuit precedent

that holds a municipal building ban, in which a plaintiff lacks an unfettered right to enter, is an adverse action that would qualify under the second prong of a First Amendment retaliation claim. As a result, Deputy Chief Shinske is also entitled to qualified immunity because the constitutional violation that Plaintiff asserted is not clearly established. The Court will therefore grant summary judgment to Deputy Chief Shinske.

ORDER

***6 WHEREFORE**, it is hereby **ORDERED** that the motion for summary judgment [33] is **GRANTED**.

IT IS FURTHER ORDERED that the claims against Defendants are **DISMISSED WITH PREJUDICE**.

This is a final order that closes the case.

SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2021 WL 5040293

Footnotes

1 Because "qualified immunity is an affirmative defense," defense counsel should in the future explicitly assert that each defendant is asserting qualified immunity as a defense. *English v. Dyke*, 23 F.3d 1086, 1089 (6th Cir. 1994) (citations omitted).

2 The parties failed to attach the news article as an exhibit, but it is publicly available. *See* Randy Wimbley, *Detroit fire chief investigated for taking department car to bar*, Fox 2 Detroit (Oct. 18, 2017) https://bit.ly/3aF5I5n [https://perma.cc/9ZZV-BBLZ].

3 Oddly, no party offered Deputy Chief Shinske's orders into evidence. Thus, the duration and extent of the ban is unclear. *See* ECF 34-4, PgID 589.

4 Consider also Shawn Ley and Dane Kelly, *Detroit Fire Department report finds 40% of firefighters have witnessed drinking on the job*, Click on Detroit (May 14, 2021) https://bit.ly/3***o***KrqwK [https://perma.cc/QGE7-XRQW]; Shawn Ley and Dane Kelly, *Changes put in place in wake of Detroit Fire Department drunk driving incidents*, Click On Detroit (May 7, 2021) https://bit.ly/2YEtonJ [https://perma.cc/68SE-YTSV]; Robin Murdoch and Jack Nissen*, Detroit fire chief crashed department vehicle while under influence of alcohol, sources confirm*, Fox 2 Detroit (Mar. 1, 2021) https://bit.ly/2WXHcsT [https://perma.cc/93QH-8K4M].

5 Because Chief McNulty had no role in Plaintiff's ban from fire stations, the Court need not analyze the conduct under a First Amendment retaliation claim related to Chief McNulty. ECF 34-4, PgID 581; ECF 34-5, PgID 610.

6 No evidence shows that Deputy Chief Shinske was involved in the investigation into Plaintiff. Instead, the evidence showed only that Chief McNulty was the only Fire Department head who directed the investigation before the Detroit Police Department took over. ECF 34-5, PgID 618 ("That's the only time I've ever talked about [Plaintiff] with [Chief] McNulty, was when he mentioned that *after* [Plaintiff's] arrest....") (emphasis added); *see also* ECF 34-3, PgID 536–37 (Chief McNulty explaining that he began the investigation into Plaintiff).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

SANDRA HERNDEN,

an individual,

Plaintiff,

v.

CHIPPEWA VALLEY SCHOOLS BOARD OF EDUCATION, a government body, FRANK BEDNARD, in his official capacity as President of Chippewa Valley Schools and in his individual capacity, and ELIZABETH PYDEN, in her official capacity of Secretary of Chippewa Valley Schools and in her individual capacity.

Defendants.

Case No.: 2:22-cv-12313-MAG-DRG

Judge Mark A. Goldsmith

PROOF OF SERVICE

CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that on April 14, 2023, I served a copy of Plaintiff's Response to Defendant's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(c) on Defendants through the United States District Court electronic transmission.

Dated: April 14, 2023

/s/ Stephen A. Delie
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