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IN THE SUPREME COURT OF DELAWARE

SHAWN BRITTINGHAM and CHRISTOPHER STORY Plaintiffs Below/ Appellants, v. TOWN OF GEORGETOWN, A Municipal Corporation, WILLIAM TOPPING, Chief of Police, RALPH HOLM, Captain of Police, Defendants Below/Appellees.	No.: 477, 2014 Court Below: Superior Court of Delaware, In and For Sussex County C.A. No.: S11C-01-004 RFS

AMENDED OPENING BRIEF OF THE PLAINTIFFS BELOW/ APPELLANTS, SHAWN BRITTINGHAM & CHRISTOPHER STORY

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NATURE & STAGE OF PROCEEDINGS

Litigation involving these parties commenced initially in January 2011, arising from actions on the part of the Defendants Below/Appellees which Plaintiffs Below/Appellants claimed were improper and violated of their individual rights. The matters proceeded in the regular course and Defendants Below/Appellees moved for Summary Judgment of the litigation. Briefing occurred, without argument. On July 31, 2014, the trial court entered its order in this matter; granting Defendants Below/Appellees motion for summary judgment. A timely appeal ensued.

SUMMARY OF ARGUMENT

ARGUMENT ONE

The trial court erred in granting summary judgment as to Plaintiffs' Third Amended Complaint, where it found there was no "free speech" claim under the First Amendment. Further, in striking the speech claim, the trial court erred in holding none of the other counts of the Third Amended Complaint could survive summary judgment.

STATEMENT OF FACTS

Plaintiffs' Below/Appellants commenced litigation against these Defendants Below/Appellees following a claim for retaliation for attending a meeting, as citizens, with an elected official, to discuss serious deviations from policies and standards within the police department. These claimed deviations were alleged to be dangerous to the officers' safety and the safety of those the police department protects. Defendants Below answered that the participation in the meeting by the officers violated an order issued by the chief prohibiting officers – whether on duty or off – from bringing any issues whatsoever relating to the Georgetown Police Department to attention of the Mayor, Manager or Town Council and presumably to the public.

The parties disagree over the intent and effect of the "silence order" issued by the chief. The Silence Order was first implemented when the chief was the subject of criticism from officers within the department for promoting a friend – a promotion placing Defendant – captain, in charge of the functions of the department. These and other officers verbalized concerns over the captain's ability to properly perform the duties assigned to him, (which included meting out discipline and supervising the officers) given captain's overall lack of experience.

Concerns over captain's abilities came to the fore in December 2007, when the chief requested the officers send a "no confidence" letter on the captain to town

officials. The town manager responded by interviewing the officers, creating a survey to be conducted, and scheduling a departmental meeting involving the manager and mayor. Chief then advised everyone that if any officer brought up anything about this meeting to anyone, anywhere, anytime, the officer would be disciplined. The manager placed the captain on "top secret probation". Thereafter, the chief issued a written version of his silence order that any issues pertaining to the police department were to go directly and exclusively through him.

A new mayor advanced a campaign promise to remove the chief from his position. In response the chief reiterated his silence order to prevent the new mayor from receiving any information detrimental to the chief. The officers found themselves in the untenable position of being in the line of fire between the chief and then-mayor. The silence order was acting as a complete and total gag order to the department members. (A-17)

During this period of time, a Georgetown police officer was shot and killed in the line of duty, and Plaintiff below Brittingham was injured in the same shooting. (A-17) These shootings caused the officers to take their protection into their hands, given the lack of support by the chief and captain. Plaintiff Brittingham telephoned Town Council person (Barlow) to request a meeting at her home so the concerns about the chief and captain might be noticed rather than buried. (A-18) The meeting occurred on December 23, 2009, while the officers

were off duty acting in their capacity as citizens (and not as officers). A total of seven individuals met with the council person, reporting to her in her capacity as a government official. Among the issues raised included: police cars not being repaired in a timely manner; differential treatment among officers; expending personal time for Emergency Response Team training; discrimination in awarding overtime; officer layoffs; surveys not being kept confidential; retaliation; surreptitious recording of officers by captain; expired ballistic vests and poor morale. To the officers, these issues needed to be addressed for an efficient and safe police department to exist.

In March, 2010, chief and captain initiated a retaliatory Internal Affairs/Professional Standards Investigation against Plaintiffs, Officer Cordrey, Cooper, Grose and Locklear. (A-19) The officers were given the choice of either accepting the findings and receiving punishment (a letter of reprimand) or requesting a hearing with a hearing officer selected by Criminal Justice Council. They chose to appeal. The CJC opined the officers' constitutional rights may have been infringed; however, they refused to address such issues in their decision. (A-20)

In further retaliation, chief and captain increased the penalties assessed against the officers – which included suspensions, probation, loss of pay, reduction in rank and inability to apply for promotion. An appeal of the enhanced penalties

occurred to the Mayor, the Manager and the Council. The appeals board upheld the enhanced penalties.

The chief and captain used their policies and discretionary authority to orchestrate the constructive discharge of Plaintiff Brittingham. There is absolutely nothing in the record to indicate Brittingham left of his own accord.

As litigation proceeded, on August 24, 2012 the trial court granted in part and denied in part Defendants' motion to dismiss Plaintiff's first amended complaint. (A-22) The court saved Plaintiffs' First Amendment Claims, permitting the record to be more fully developed concerning the chain of command policy and chief's directives leading up to the meeting with council person Barlow. The court below dismissed Plaintiffs' claim under the Delaware Whistleblowers Protection Act because it ruled the council person was not a "supervisor" for purposes of the statute. The trial court saved Plaintiffs claim as to Defendants' alleged breach of the implied covenant of good faith and fair dealing. The trial court stated that the covenant required a violation of a recognized public interest which was better measured following opportunity for discovery. On September 14, 2012, the trial court denied Plaintiffs' motion to reargue the dismissal of its claim under the DWPA and granted Plaintiffs request for leave to amend its first amended complaint. (A-23) In Plaintiffs third amended complaint, they allege the chain of command policy is unconstitutional and void ab initio; that there was

retaliation against Plaintiffs for exercising their free speech rights under the First Amendment, in violation of 42 U.S.C. 1983; another 1983 action against defendants for violating the First Amendment and Article I of the Delaware Constitution; a violation of the DWPA; and a violation of the implied covenant of good faith and fair dealing. On July 31, 2014, the trial court granted Defendants Motion for Summary Judgment. This is Plaintiffs' Opening Brief on Appeal.

ARGUMENT ONE

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AS TO PLAINTIFFS' THIRD AMENDED COMPLAINT, WHERE IT FOUND THERE WAS NO "FREE SPEECH" CLAIM UNDER THE FIRST AMENDMENT. FURTHER, IN STRIKING THE SPEECH CLAIM, THE TRIAL COURT ERRRED IN HOLDING NONE OF THE OTHER COUNTS OF THE THIRD AMENDED COMPLAINT COULD SURVIVE SUMMARY JUDGMENT.

QUESTION PRESENTED

Was it an error of law or abuse of discretion for the trial court to grant Defendants' Motion for Summary Judgment as to Plaintiffs' Third Amended Complaint?

No specific reference or preservation of this question was preserved at trial or hearing as there was no trial or hearing on the issues set forth in the Third Amended Complaint. The trial court's ruling was based entirely upon the brief and what sparse written record before it. All of the questions raised on appeal were fairly presented to the trial court in the briefing by the Plaintiff below/ Appellant. No further record was developed other than these written submissions.

SCOPE OF REVIEW

On summary judgment, the Court's role is to ascertain whether genuine issues of material fact exist and to determine whether the moving party is entitled to judgment as a matter of law. If the court finds material facts are in dispute or that judgment as a matter of law is not appropriate, summary judgment will be

denied. Eaton v. Raven Transport, 2010 WL 4703397, at 1 Del Super Nov. 15, 2010. The moving party bears the initial burden of proof. The burden then shifts to the non-moving party to show a material issue of fact exists. Vaughn v. Jackson, 2013 WL 6667752 at 2 Del. Super Ct. Dec. 18, 2013. In reviewing the facts at the motion for summary judgment phase, the Court must view the facts in the light most favorable to the non-moving party. Id. Summary judgment may not be granted if the record indicates that a material fact is in dispute or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the case at bar. Ebersole v. Lowengrub, 180 A.2d 467 (1962).

MERITS OF ARGUMENT

Plaintiffs below assert the "silence order" or "chain of command" as the trial court captions it operates to prohibit officers from speaking about any matter involving the police department to any person other than the chief or captain. This order violates the Free Speech Clause, the rights of the people to petition the government for redress of grievances and the rights of Delawareans to meet together to apply for redress of grievances. It is well-settled law that a public employee may not be retaliated against for exercising First Amendment rights – even in a paramilitary organization. Balas v. Taylor, 567 F. Supp 2d 654 (D. Del. 2008). Even in paramilitary organizations (such as a police department) room

must be provided to bypass a chain of command when heads of the departments are the subject of the speech in question. See Ober v. Evanko 80 F. Supp App'x 196 201, 3rd Cir. 2003.

Plaintiffs below cited Czurlanis v. Albanese (721 F. 2d 98 3rd Cir., 1983), for the proposition reflecting a case where there was nothing contained in a policy similar to this one, which indicated if any would ever be regarded as appropriate for public speech. The Third Circuit held "such a policy cannot be used to justify the retaliatory action against public employees under the rubric of the government's interest in promoting the efficiency of public service. It is simply incompatible with the principles that underlie the First Amendment to countenance a policy that would severely circumscribe in this manner speech on public issues, which occupies the highest rung of the hierarchy of First Amendment values. Oladeinde v. City of Birmingham, 230 F. 3rd 1275 (11th Cir. 2000). Such a policy would act to chill speech when the employee is required to route the complaints through the very persons complained of. It would deter whistle blowing by public employees on matters of public concern and deprive the public in general and its elected officials. The trial court dismissed the holding of the Third Circuit in Czurlanis, seizing on a footnote to distinguish the cases. (App. A-25).

Plaintiffs below also noted the Defendants were not entitled to qualified immunity for the actions in quashing free speech and retaliating for the exercise

thereof. To adopt the position of the Defendants – as echoed by the trial court – the chief and captain would be immunized from individual liability for failing to act in good faith, promulgating silence orders and enhancing punishments.

The record below, as developed, shows the Plaintiffs engaged in an activity protected under the First amendment and suffered adverse employment action as a result. See Justice v. Danberg, 571 F. Supp. 2d 602 (D. Del. 2008). These plaintiffs engaged in protected activity because they acted as citizens expressing matters of public concern where the interests of the government in the efficiency of its public service operations do not outweigh their "substantial" First Amendment protections. Id, p. 608-611.

Officer Plaintiffs engaged in protected speech by joining the group to meet with the council person in the wake of the death of one officer and the serious injury of another to express concerns about the department being dysfunctional, unsafe and compromising of public safety.

The trial court relies extensively on the holding in Baldassare v. New Jersey, 250 F. Supp. 188 (3rd Cir. 2001), in setting forth a three part test where a public employee brings a First Amendment retaliation action against his governmental employer. While relying upon this opinion in announcing its own holding, the trial court errs in the conclusions reached as to the three prongs in issue.

The first prong requires the speech involve a matter of public concern. "Public concern is something that is a subject of legitimate new interest; that is, a subject of the general interest and of value and of concern to the public at the time of publication. But the speech need not address a topic of great societal importance or even pique the interest of a large segment of the public, in order to be safeguarded by the First Amendment. Rather, an employee who participates in a public dialogue on matters of interest to the public will place his speech, prima facie, within the protection of the First Amendment. That the public was not large, that the issues were not of global significance does not place speech outside the orbit of protection. Moreover, the inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern". Craig v. Rich Tp. High School Dist. 277, 736 F.3rd 110, 116 (7th Cir. 2013). Further, "The test is that a public employee's speech involves a matter of public concern if it can be fairly considered as relating to any matter of political, social or other concern to the community" (citing Connick v. Myers, 461 U.S. 138 146 (1983), with the "public concern" legal inquiry determined by the content, form and context of the public employee's speech as revealed by the whole record (citing Watters v. City of Philadelphia 55 F3d 886, 893 3rd. Cir. 1995). Despite this, the trial court summarily dismissed all but one of the officers' concerns, to wit, the issue with equipment. (App. A-56). The trial court dismissed every other

issue raised by the officers with nothing more than summary comments. (App. A-51 – A-56). The trial court cited, as if in agreement, the analysis and conclusions advanced by Plaintiffs below but then – inexplicably and without any facts and support it – rules the other way. (App. A-26 – A-30). The trial court proceeded to evaluate the one remaining issue in light of the balancing test set forth in Pickering v. Board of Education of Township High School District 205, Will County, Illinois, 391 U.S. 568. The trial court held the balancing involves several elements and finds the Pickering test favors the Defendants. (App. A-57) However, there are no facts or reasonable conclusions to be drawn from the record to support this finding by the trial court.

In Patton v. Pasqualini, 2011 WL 3595130 (ED Pa Aug. 25, 2011) the court stated "matters of interest to all residents of the township include hiring of a new police chief and the effective functioning of the police department." Police department issues are particularly likely to relate to matters of concern to the public given "the vital role…police play in promoting public safety and enforcing and upholding the laws" (citing Ober v. Evanko, 8 F. App'x 196, 200 – 3rd Cir. 2003). Given the clearly dysfunctional nature of everything going on within the Georgetown Police Department, it is a matter of public concern just like in the Patton case – and moreso, because of the safety theme of the discussions.

In relying upon the Pickering test as a basis for rejecting the Plaintiffs arguments, the trial court erred in ignoring the case of *Czulranis*, infra. in reaching its decision. There, the Third Circuit held "we do not read the 'efficiency of public services factor' referred to in Pickering to extend to a chain of command policy as interpreted and applied by the Defendants. *Czurlanis* at p. 105-106. Here – as in *Czurlanis* – not even "factors which may appropriately be considered under Pickering as relevant to the government interest support the position of these defendants. Defendants here argued the impairment of discipline, disruption of harmony, detrimental impact and impediment of operations, no evidence shows that any such thing occurred in this case (no evidence that operations of the police department were disrupted or that plaintiffs speech in any way impeded the performance of their daily duties, or that there was even a risk of such occurring.) By going to the home of an elected representative of the people of the town of Georgetown, plaintiffs balanced perfectly their constitutional rights to speak as citizens on matters of public concern and to petition the government while maintaining respect for chief and captain and not disrupting police department business. In fact, here (as in *Czurlanis*) undermining and disruption occurred in this case because of the chief and captain were attempting to suppress speech so as to make an example out of anyone who went to the council person's home and who would not cave under their pressure. The trial court summarily held the plaintiffs

First Amendment rights fall under the interest of the defendants in authority, good working order and close working relationships. (App. A-60). In fact, there were no "close working relationships" with the chief and captain left with these plaintiffs!

The First Amendment does not authorize "officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office... The point is simply that the balancing test articulated in Pickering is truly a balancing test, with office disruption or breached confidences being only weights on the scales." *Czurlanis* at 773-774.

The trial court further ignored the holding in Watters v. City of Philadelphia 55 F 3rd 886, 893 3rd Cir. 1995. In that case, the Third Circuit found in favor of the employee-speaker, confirming that disruptions caused by actions independent of the speech at issue cannot be equated with disruption caused by the speech itself. In that case, as here, any disruption was as likely caused by the very issues complained about in the speech as caused by the speech itself – and thus not supporting of the trial court's holding. The Third Circuit also said "merely saying that the relationship will be undermined does not make it so." Id. 897. Freedom of speech is not traded for an officer's badge. Id, p. 899. Rather than rely upon the balancing test of Pickering (as the trial court did) a proper analysis would find the breaking of the chain of command is exactly the type of break which would be justified in the interest-balancing test.

The trial court also erred in entering judgment in favor of defendants on summary judgment related to the adverse employment action portion of their complaint. (App. A-60- A-65) The standard for adverse employment actions has been more than met in the case at bar. The United States Supreme Court has held that adverse employment action exists where the government "withholds the grant of a penny." Elrod v. Burns, 427 U.S. 347, 359 (1976). Here the officers suffered unpaid suspensions and disqualification from promotion among other penalties. As a matter of law, adverse employment action exists. To be actionable, retaliatory conduct need only be sufficient to deter a person of ordinary firmness from exercising their free speech rights, which is a low deterrence threshold. See Balas v. Taylor, 567 F. Supp. 2ed 654, 664-665 (D. Del. 2008). The Third Circuit has held that it is a question of fact whether a retaliatory campaign of harassment has reached the threshold of actionability. Thomas v. Independence Tp., 463 F. 3rd 285, 296 (3rd Circuit 2006). And even where the effect on freedom of speech may be small since there is no justification for harassing people for exercising their constitutional right it need not be great to be actionable. Suppan v. Dadonna, 203 F.3d 228, 235 (3rd Cir. 2000). A reasonable person or jury, given the opportunity to hear the evidence, might determine the Defendants quest to make examples out of these officers, backing off only for officers who abandon their efforts to resolve to stand against the chief and captain, reached this required threshold.

In reaching its decision, the trial court bootstrapped its entire rationale on an erroneous view of the First Amendment rights of the Plaintiffs, as set forth hereinabove. The trial court held:

> "Because Defendants' employment decisions did not violate the First Amendment, Plaintiffs do not have a free speech claim under the First Amendment. Therefore, they also do not have claims under the assemble and petition clauses of the First Amendment and Delaware Constitution. ...Because the Court concludes that Plaintiffs' speech at the Barlow meeting was not constitutionally protected, the chain of command policy is not void ab initio. ... The Court also enters judgment upon Court IV of Plaintiffs' third amended complaint, alleging an action against Georgetown for violation of the DWPA." (App. A-60).

And finally, the trial court entered summary judgment in favor of defendants on the individual claims against them by holding "because defendants committed no constitutional violation against him, and no constructive discharge occurred, Defendants did not breach this covenant." (App. A-64). This is in error.

First, it must be noted the defendants did NOT address Counts I and III of the amended complaint regarding the silence order being void pursuant to the Delaware Meeting/Application clause and that speech activity is protected thereunder, thus that issue is conceded, as they did not raise same in their opening

brief. See Murphy v. State, 632 A. 2d 1150 (Del. 1993). When the right of free speech emerged in the constitutional history of Delaware, it was not coupled with the Delaware Meeting/Application clause. See Del. Constn., Art. 1 Sec. 5. Delaware adopted broader language in 1793 which embraces an expansive guarantee for citizens. Under basic statutory construction principles, this interpretation must be given effect. State Dept. of Labor v. Minner, 448 A. 2d. 227, 227 (Del. 1982). Because Delaware law affords citizens greater protection than afforded federally, intrusions on liberty that have been held proper in the public employment context under the Petition Clause should be found inapplicable to the Delaware Meeting/Application clause. See generally, Jones v. State 745 A.2d 856 (Del. 1999) and cases noted therein. See also Borough of Dureya, 131 S. Ct. at 2500.

The trial court erred in its analysis in ignoring the WPA portion of the claim. An employee's conduct is protected under the WPA, for example, when he makes a good faith report based upon a reasonable belief that he is disclosing a violation of a law, rule or regulation. The law does not require that the officer plaintiffs here know the law or articulate the nuances of the law or the violation for their conduct to be protected. See 19 Del. C. 1703, Aman v. Cort Furniture Rental Corp. 85 F. 3rd 1074 (3rd Cir. 1996), Mongelli v. Red Clay Consolidated School District, 491 F.

Supp 2d 467 (D. Del. 2007). The trial court fails to address this entire argument instead deflecting the concerns with the "no First Amendment" violation finding.

Here, the undisputed facts demonstrate a conversation took place between a council person and the officers. The substance of that conversation is in dispute. Officers contend general issues of safety (including the dysfunctional state of the police force) to the council person as well as specific examples, which threatened the safety of both the officers and the citizens of Georgetown. Every issue raised was consistent with the concerns that the police force was not fulfilling its purpose to protect citizens due to actions/inactions on the part of chief and captain. Because the defendants take issue with the content of that meeting and the issues which were raised therein, a jury is best able to sort out what was said, what the theme was, and whether, as a result of that meeting, the officer plaintiffs' employment was adversely effected.

Viewing the evidence in a light most favorable to the officers and considering what evidence shows was discussed at the meeting, issues regarding police safety standards were raised and summary judgment is not warranted. Moreover, one of those issues (the functioning of the police force) inherently implicates a safety standard issue. Georgetown Charter at 2.4(b)(2).

The trial court also erred in summarily dismissing (without addressing) the claims for violation of the implied covenant of good faith and fair dealing have no

merit. There is an implied covenant of good faith and fair dealing in employment at will contracts, (Jordan v. Town of Milton, 2013 WL 105319, D. Del. Ja. 3, 2013; Vann v. Town of Cheswold 9 A.3rd 467 (Del. 2010) and this court has specifically held that a claim may exists where the employee's termination violates public policy. The Constitution may be a sufficient public policy, according to Shaffer v. Topping, 2012 WL 4148979 (Del. Super. Aug. 24, 2012). The Delaware Meeting/Application Clause also provides the basis for a qualifying public interest, as does the WPA. See Smith v. Delaware State Univ., 47 A. 3rd 472 (Del. 2012); McMartin v. Quinn, 2004 WL 249576 Del. Super Ct. Feb. 3, 2004. Pursuant to the standards set forth by the court in Lipson v. Anesthesia Services, P.A., 790 A2d 1261 (Del. Super Ct., 2001) this claim should proceed to trial on the merits rather than fall before a summary judgment standard.

CONCLUSION

The trial court erred in granting summary judgment on Plaintiffs Third Amended Complaint in numerous ways set forth hereinabove. The overall error committed by the trial court is straightforward. By forcing the entire controversy into a narrow view of the First Amendment claims of the Plaintiffs the trial court committed error. In essence, the trial court set up the "straw person" of the First Amendment and used a line of reasoning which is distinguishable from the true facts of this case and the law applicable to the inquiries, to ignore all but the First Amendment inquiry. Given the error of the trial court in using the analysis and finding related to the First Amendment to ignore the balance of Plaintiffs Third Amended Complaint, summary judgment was inappropriate as a matter of law. For the foregoing reasons, it is respectfully submitted the opinion and order of the trial court must be reversed, vacated and remanded for trial.

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IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR SUSSEX COUNTY

SHAWN BRITTINGHAM, and CHRISTOPHER STORY,	)
Plaintiffs,	)
v.	)
WILLIAM TOPPING, in his capacity as Chief of Police of the Town of Georgetown and individually, RALPH W. HOLM, in his Capacity as Captain of the Georgetown Police Department and individually, and the TOWN OF GEORGETOWN, a municipal Corporation,	) C.A. No.) S11C-01-004 RFS
Defendants.	)

MEMORANDUM OPINION

Upon Defendants' Motion for Summary Judgment. Granted.

Date Submitted: April 1, 2014
Date Decided: July 31, 2014

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STOKES, J.

Before the Court is the Motion for Summary Judgment of Defendants William Topping ("Topping"), Ralph W. Holm ("Holm"), and the Town of Georgetown ("Georgetown") (collectively "Defendants") on the claims of Plaintiffs Shawn Brittingham ("Brittingham") and Christopher Story ("Story") (collectively "Plaintiffs"). Because Plaintiffs have failed to establish that their meeting with a local councilwoman constituted protected activity under the First Amendment to the United States Constitution, this Motion is **GRANTED**.

FACTS & PROCEDURAL BACKGROUND

During the relevant time period, Brittingham and Story were police officers with the Georgetown Police Department (the "GPD") in Georgetown, DE. Topping was the GPD's Chief of Police, and Holm was the GPD's Captain of Police.

At some point in time, Topping promoted Holm to Captain. It is clear that tension existed between Holm and the GPD officers. In December 2007, Topping authorized thirteen members of the GPD to send a letter of "no confidence" (the "no confidence letter") to town officials. This caused individual interviews with the GPD officers to be scheduled and surveys assessing Holm to be disseminated. Also, a meeting was scheduled between members of the GPD, the Mayor of Georgetown, Eddie Lamden ("Lamden") and the Town Manager, Eugene Dvornick ("Dvornick"). Before the meeting in 2007, Topping told all GPD officers that they would be

disciplined if they brought up anything going on within the department. Ultimately, Holm was placed on probation. Topping's comments reflected a policy that all issues pertaining to the internal operations of the GPD needed to go directly to Topping (the "chain of command policy"). This policy was created in a formal directive by Topping,[1] was authorized by the Town Charter,[2] and was elaborated upon through a series of correspondence by Topping.[3]

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[1] A directive entitled "Organizational Structure," reads that "[t]he Chief of Police shall exercise operational control over the policy force. The authority of the Chief of Poice shall be subordinate to the Mayor and the Town Council." App. to Defs.' Reply Br. at A-447. Under a section of that directive entitled "Chain of Command Policy," it reads that "[e]mployees shall at all times operate within the chain of command, keep supervisors informed of their activities, and comply with directive #41, Part VII, B.4." *Id.* at A-448.

[2] Section 23(b) of the Town Charter describes the function of the Chief of Police:

> The Chief of Police shall be solely responsible for the day to day operational control of the police department. The Chief of Police shall make rules and regulations governing the operational control of the police department. The Chief of Police will be responsible for the good order and discipline of the department.

Id at A-463.

[3] A series of correspondence was promulgated regarding the GPD's chain of command policy. *See* App. to Defs.' Opening Br. at A-371 (Email from William S. Topping, June 11, 2007) ("All officers and civilian employees are hereby reminded that discussion of operational issues involving this department without FIRST notifying the Chief of Police is a direct violation of departmental rules and regulations. This includes contract issues and (sic) well as day to day operations of this department. If you have any questions about this policy, contact the (sic) me and I will explain it to you."); *id.* at A-372 (Email from William S. Topping, Jan. 14, 2008) ("Any and all correspondence dealing with matters within the police department will go through the office of the Chief of Police. There are no exceptions to this policy."); *id.* at A-373 (Letter from Edwin A. Lamden ("The [Town] Council has directed the senior leadership of the Georgetown Police Department to address any/all concerns raised by members of the organization. It is imperative that the proper chain of command, already established, be followed. I can assure you that we take all concerns raised by employees seriously. If they are

Apparently, tension also existed between Topping and Lamden as well, so much so that one of Lamden's platforms when he ran for Mayor was to remove Topping. As Mayor, Lamden tried to keep tabs on the GPD, reiterating his campaign promise. Lamden would often approach GPD officers in an effort to probe them for information. In September 2008, several GPD officers, who merely wished to remove themselves from the feud between their superior and an elected official, wrote a letter in which they pledged their support to Topping.

On September 1, 2009, the GPD tragically lost one of its members. During the course of performing their duties, Brittingham and Chad Spicer ("Spicer"), another officer with the GPD, were both shot. Spicer was fatally shot in the face. Brittingham suffered a neck wound from the shooting. This terrible occurrence caused morale at the GPD to plummet to an all-time low. Topping appointed Holm to be the department's liason to the Spicer family. Officers would have to go through Holm in order to communicate with the family. This upset many of the GPD officers, who had been close to Spicer and felt that neither Topping nor Holm appreciated Spicer during his lifetime. A police psychologist who counseled the GPD after

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not addressed after exhausting the direct chain of command, they can be elevated as outlined in our personnel policy manual. Since the Mayor and Council serve in the capacity of a Final Appeals Board, any direct communication, with Town Council members, in respect to ongoing issues will not be tolerated.").

Spicer's death identified a group of disgruntled officers and warned Topping and Holm that, as an effect of the shooting, there would be dissension within the department.

GPD officers are required to wear body armor as part of their official equipment. This includes use of ballistic vests, which carry a manufacturer's warranty for a period of five years after the date of sale. After Spicer's death, Topping and Holm set out to replace any vests which had expired warranties.[4] They tasked Lester Shaffer ("Shaffer"), a GPD lieutenant and quartermaster, with checking each officer's vest and ordering new vests if those vests' warranties were expired. By November 2009, eight new vests were ordered, including one for Brittingham. Prior to the meeting with a local councilwoman described below, no officer had advised Topping of using a vest with an expired warranty.

On December 23, 2009, a group of GPD officers went to the home of Sue Barlow ("Barlow"), a member of the Georgetown Town Council and mother of two GPD officers. Brittingham had contacted Barlow and asked to stop by her house. Brittingham was joined by Story, Shaffer, Bradley Cordrey ("Cordrey"), Lawrence Grose ("Grose"), and Christopher Cooper ("Cooper"). Another officer, Jamie

[4] There is no contention that a ballistic vest, with or without an expired warranty, contributed to Spicer's death. It appears the department focused on the vests for precautionary purposes.

Locklear ("Locklear"), arrived later.[5] All were GPD officers. What was discussed at this meeting (the "Barlow meeting"), is the subject of this Motion and examined thoroughly below. Suffice it to say, a range of topic were brought up by the officers to Barlow, including the issue of the vests with the expired warranties. Subsequently, Barlow met with Dvornick regarding her meeting with the officers. After contacting Brittingham for his feedback, Dvornick composed a survey of the officers' concerns.

In March 2010, Topping and Holm initiated an internal affairs investigation against the officers who attended the meeting. After the investigation, Holm determined that one of four potential charges for violations of various items, including departmental policies, was substantiated.[6] This charge was for insubordination for violation of the department's chain of command policy. Also during this time, Lamden issued an official memorandum reminding all GPD officers of their obligation to follow the department's chain of command policy. Lamden later sent a Facebook message to at least one officer, stating that his reminder "was just a smokescreen."

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[5] Prior to Locklear's arrival at the meeting, Shaffer was communicating with him somehow, either through text messaging or conversations on the telephone. Also, an additional officer named Kirk Marino called Brittingham during the meeting. Brittingham put Marino on speaker phone in order for Marino to listen to the other officers speak to Barlow and to voice his concerns as well.

[6] Cooper and Locklear were exonerated altogether.

For their insubordination charge, Topping offered the officers a sanction in the form of a letter of reprimand.[7] Brittingham, Story, and Cordrey requested a hearing before the Criminal Justice Council (the "CJC").[8] The CJC determined that substantial evidence showed insubordination by Plaintiffs' failure to follow the chain of command policy. It noted, however, that any First Amendment contentions were not within its purview.

Following the CJC ruling against Plaintiffs, Topping, after legal consultation, imposed enhanced sanctions, which were still within the department's disciplinary matrix in relation to the offense. Brittingham was suspended for four weeks without pay. His rank was reduced for fourteen days. Additionally, he was placed on probation for a year, thereby barring his ability to seek a promotion during that time. Story was suspended for two weeks without pay. His rank was reduced for seven days. He was also placed on probation for a year, thereby barring his ability to seek a promotion during that time.

Plaintiffs then appealed to Georgetown's Disciplinary Action Appeals Board (the "Board"), which consisted of the Mayor, the Manager, and the Town Council.

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[7] Topping was told to offer this sanction by the Town Council, who wanted a light sanction for each officer.

[8] *See* 11 *Del. C.* §§ 9203–07 (describing the procedural rights police officers have under the Law-Enforcement Officers' Bill of Rights ("LEOBOR") regarding disciplinary actions against them).

The Board affirmed the enhanced sanctions imposed on Plaintiffs on October 18, 2010.

In the spring of 2011, Brittingham quit his employment with the GPD, accepting a position with the Milford Police Department in Milford, Delaware. Upon learning that Brittingham sought employment elsewhere, Topping asked Brittingham to stay if Brittingham so chose. Nevertheless, Brittingham left the GPD, and, being a K-9 officer, took police his dog, Dino, his partner, with Topping's permission. Story quit his employment with the GPD in January 2014, accepting a position with the Laurel Police Department in Laurel, Delaware.

On January 4, 2011, Brittingham, Story, Cordrey, and Shaffer sued Defendants.[9] On June 28, 2011, this Court granted summary judgment as to a petition for a writ of mandamus filed by Brittingham, Cordrey, and Story,[10] and dismissed the petition for the writ, finding that the petitioning parties had not met their burden for mandamus.[11] On July 6, 2011, the Court ruled on Defendants' motion to dismiss,

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[9] Beforehand, on December 6, 2010, Shaffer and his wife filed a complaint against Defendants, among other parties. This Court dismissed that complaint on March 31, 2011 for Plaintiffs' failure to timely file their answer to a motion to dismiss. On June 21, 2012, the Court denied Plaintiff's motion for relief from that judgment.

[10] Shaffer did not take part in petitioning the Court for a writ of mandamus.

[11] *Brittingham v. Town of Georgetown*, C.A. No. S10-M-09-023 RFS (Del. Super. June 28, 2011).

saving only Plaintiffs' claim that their discussions with Barlow were protected speech under the First Amendment and that the subsequent sanctions imposed on them were retaliatory conduct.[12] The Court could not preliminarily conclude that no reasonable set of circumstances susceptible to proof did not exist on that claim.

On September 8, 2011, the Court granted Cordrey's notice of dismissal from this case. On October 21, 2011, the Court granted Plaintiffs' motion to amend their complaint.

On August 24, 2012, the Court granted in part and denied in part Defendants' motion to dismiss on Plaintiffs' first amended complaint.[13] In that decision, the Court first dismissed Shaffer from the case under the doctrine of *res judicata*. Next, it saved Plaintiffs' First Amendment claims, permitting the record to be more fully developed concerning the chain of command policy and Topping's directives leading up to the Barlow meeting. The Court then dismissed Plaintiffs' claim under the Delaware Whistleblowers Protection Act (the "DWPA") because it ruled that Barlow was not a "supervisor" for purposes of that statute. Lastly, the Court saved Plaintiffs' claim as to Defendants' alleged breach of the implied covenant of good faith and fair dealing. The Court stated that the covenant required a violation of a recognized

[12] *Shaffer v. Topping*, 2011 WL 2671237 (Del. Super. July 6, 2011).

[13] *Shaffer v. Topping*, 2012 WL 4148979 (Del. Super. Aug. 24, 2012).

public interest, which was better measured following an opportunity for discovery.

On September 14, 2012, the Court denied Plaintiffs' motion to reargue the Court's dismissal of its claim under the DWPA, and granted Plaintiffs' request for leave to amend its first amended complaint.[14]

STANDARD OF REVIEW

Summary judgment will be granted only if the moving party, who bears the initial burden, can establish that no genuine issues of material fact exist and the moving party is entitled to judgment as a matter of law.[15] The Court examines all of the evidence, and the reasonable inferences therefrom, in the light most favorable to the non-moving party.[16] Using this lens, only if the moving party establishes that no factual questions indeed exist, the burden shifts to the non-moving party to establish the existence of such factual questions which must "go beyond the bare allegations of the complaint."[17]

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[14] *Shaffer v. Topping*, 2012 WL 4148692 (Del. Super. Sept. 14, 2012).

[15] *See, e.g., Direct Capital Corp. v. Ultrafine Techs., Inc.*, 2012 WL 1409392, at *1 (Del. Super. Jan. 3, 2012) (citations omitted) (iterating the exacting standard of summary judgment).

[16] *Id.*

[17] *Id.*

ANALYSIS

In their third amended complaint, which is the subject of this Motion, Plaintiffs allege five counts against Defendants. Count I charges that the GPD's chain of command policy is unconstitutional and *void ab initio*. Count II is an action under 42 U.S.C. § 1983 against Defendants for unconstitutional retaliation against Plaintiffs for exercising their free speech rights under the First Amendment. Count III is another Section 1983 action against Defendants for unconstitutional violation of Plaintiffs' petition rights under the First Amendment and Article I, § of the Delaware Constitution. Count IV is an action against Georgetown for violation of the DWPA. Count V is an action against Georgetown for violation of the implied covenant of good faith and fair dealing. Defendants have moved for summary judgment on each of these counts.

Preliminarily, the Court examines Count I of Plaintiffs' complaint, alleging that the chain of command policy was unconstitutional and *void ab initio*. The policy, as embodied in official documents and as explained by Topping and others through correspondence,[18] does not completely forbid communication, but rather requires that communication be directed to Topping's office. On the other hand, in *Czurlanis v. Albanese*, the United States Court of Appeals for the Third Circuit stated that "[a]

[18] *See supra* note 1.

policy which would compel public employees to route complaints about poor departmental practices to the very officials responsible for those practices would impermissibly chill such speech."[19] However, in a footnote, the Third Circuit also stated that because it had determined that the speech at issue in that case "did not concern private matters relating to [the plaintiff's] employment, [the court] need not consider whether a public body may properly require channeling all such complaints through an existing grievance procedure."[20]

In the recent case of *Volkman v. Ryker*, the United States Court of Appeals for the Fourth Circuit noted the relevance "of the employer-employee relationship in the paramilitary context of a correctional center," and expounded its established precedent "that because police departments function as paramilitary organizations charged with maintaining public safety and order, they are given more latitude in their decisions regarding discipline and personnel regulations than an ordinary government employer."[21] The Fourth Circuit then stated "[w]hen a supervisor . . . criticizes a disciplinary decision . . . it undermines other employees' respect for the chain-of-

[19] *Czurlanis v. Albanese*, 721 F.2d 98, 106 (3d. Cir. 1983) (citation omitted).

[20] *Id.* at 106 n.6 (citation omitted).

[21] *Volkman v. Ryker*, 736 F.3d 1084, 1092 (4th Cir. 2013) (citation omitted) (quoting another source) (internal quotation marks omitted) (internal brackets omitted).

command, and for the rules which were violated in the first place."[22] It decided that "[t]here is value in maintaining order and respect for their own sake in a paramilitary context . . . and [the court] w[ould] not second-guess [the employer's] decision that the example [that the plaintiff] set through his conduct was a detrimental one."[23] The court added that its holding was not "meant to suggest that [the plaintiff's] right to express his opinion on a matter of public concern [wa]s not also an important one."[24] However, "in the paramilitary context . . . [it] agreed with the district court that the [employer's] . . . interests in maintaining order and security in the workplace outweighed [the employee's] interests on a *work-related* prosecution."[25] Thus, the constitutional legitimacy of a chain of command policy can turn on the Court's determination of whether the speech at issue is protected by the First Amendment. With that in mind, the Court proceeds to its First Amendment analysis.[26]

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[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.* (emphasis added).

[26] This conclusion holds despite Plaintiffs' assertion that a major discrepancy existed between the chain of command policy as written and as applied. According to Plaintiffs, regardless of the policy as written, the policy as applied constituted an autocratic gag order which forbade GPD officers from speaking to local politicians at all. If Plaintiffs cannot establish that their speech was constitutionally protected, the application of the chain of command policy is irrelevant. Nothing would be unconstitutionally "silenced."

"[A] public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment."[27] "A public employee has a constitutional right to speak on matters of public concern without fear of retaliation. Public employers cannot silence their employees simply because they disapprove of the content of their speech."[28] Although the government as employer, not sovereign, may more freely regulate the speech of its employees, this power is not unlimited.[29] When a public employee brings a First Amendment retaliation action against his government employer, the Court employs a three-step process:

> First, plaintiff must establish the activity in question was protected. For this purpose, the speech must involve a matter of public concern. Once this threshold is met, plaintiff must demonstrate his interest in the speech outweighs the state's countervailing interest as an employer in promoting the efficiency of the public services it provides through its employees. These determinations are questions of law for the Court. [Second, i]f these criteria are established, plaintiff must then show the protected activity was a substantial or motivating factor in the alleged retaliatory action. [Third], the public employer can rebut the claim by demonstrating it would have reached the same decision even in the absence of the protected conduct. The second and third stages of this analysis present questions for the fact finder . . . .[30]

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[27] *Connick v. Myers*, 461 U.S.138, 140 (1983) (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968)).

[28] *Baldassare v. New Jersey*, 250 F.3d 188, 194 (3d. Cir. 2001) (citations omitted).

[29] *Id.* at 195 (citations omitted).

[30] *Id.* (citations omitted) (internal quotation marks omitted) (internal brackets omitted).

Regarding the first stage, "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[31] "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."[32]

If the Court finds that the speech at issue touches on a matter of public concern, it balances the interests of the parties by employing a test often referred to as the *Pickering* balancing test from the United States Supreme Court's flagship decision in this area, *Pickering v. Board of Education of Township Highschool District 205, Will County, Illinois*:

> [T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State as an employer, in promoting the efficiency of the public services it performs through its employees.[33]

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[31] *Connick*, 461 U.S. at 146.

[32] *Id.* at 147-48.

[33] *Pickering*, 391 U.S. at 568

During this balancing, it is the employer's burden to establish the legitimacy of its employment decision.[34] However, "[t]he [employer's] burden in justifying a particular discharge varies upon the nature of the employee's expression. Although such particularized balancing is difficult, the courts must reach the most appropriate possible balance of the competing interests."[35]

Further, "the [speech] will not be considered in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose."[36] Factors to consider are "whether the [speech] impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise."[37] "[T]he state interest element of the [balancing] test focuses on the effective functioning of the public employer's enterprise. Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong state interest."[38] The

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[34] *Rankin v. McPherson*, 483 U.S. 378, 388 (1987) (citation omitted).

[35] *Connick*, 461 U.S. at 150 (citation omitted).

[36] *Rankin*, 483 U.S. at 388 (citations omitted).

[37] *Id.* (citation omitted).

[38] *Id.*

government need not demonstrate actual disruption in the workplace, "although such evidence would be highly relevant."[39]

With these principles in mind, the Court turns to the case at hand. This case concerns seven GPD officers who participated in a meeting with a local councilwoman. Plaintiffs have brought a retaliation action against Defendants, arguing that their punishment was violative of the freedom of speech clause and the assemble and petition clauses of the First Amendment to the federal constitution[40] and Article I, § 16 of the Delaware Constitution.[41] The Court decides the First Amendment freedom of speech issue using the analysis outlined above, which in turn decides Plaintiffs' other constitutional claims, as well as the other counts of Plaintiffs' third amended complaint.

As a threshold matter, the Court determines, as a matter of law, whether

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[39] *See, e.g.*, *Watters v. City of Philadelphia*, 55 F. 3d 886, 896 (3d Cir. 1995) (citing, *inter alia*, *Waters v. Churchill*, 511 U.S. 661 (1994)).

[40] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

[41] Del. Const. art. I, § 16 ("Although disobedience to laws by a part of the people, upon suggestions of impolicy or injustice in them, tends by immediate effect and the influence of example not only to endanger the public welfare and safety, but also in governments of a republican form contravenes the social principles of such governments, founded on common consent for common good; yet the citizens have a right in an orderly manner to meet together, and to apply to persons intrusted with the powers of government, for redress of grievances or other proper purposes, by petition, remonstrance or address.").

Plaintiffs' speech touched on a matter of public concern. Therefore, it is important to have a clear understanding of what was discussed at the Barlow meeting.[42] Below, the Court reviews excerpts from depositions of some of the key participants in the Barlow meeting, in an effort to delineate the content of the speech at issue. These excerpts are categorized by speaker and topic.[43]

BRITTINGHAM

In general

Q: What kind of things did you talk about?

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[42] The Court focuses solely on the speech that occurred at the Barlow meeting, as that was the cause of Defendants' adverse actions against Plaintiffs. The Court does not focus on the 2007 no confidence letter. Not only is it historical, but also the letter was shared with Town Council after compliance with the protocol. By Plaintiffs own words, "Chief and Captain initiated a retaliatory Internal Affairs/Professional Standards Investigation against [Plaintiffs] . . . for participating in the meeting with Councilwoman Barlow." Pls.' Answering Br. at 9–10.

[43] There is not a genuine factual dispute about the topics discussed at the meeting. Thus, summary adjudication is appropriate. *See Simon v. City of Clute, Tex.*, 825 F.2d 940 (5th Cir. 1987) ("If the resolution of . . . factual issues is necessary to determine the protected status of speech, summary dismissal of the case before it gets to the jury is improper. If, on the other hand, there is no genuine issue of material fact, the district court may decide the case by summary judgment, for the issues are then solely legal." (citations omitted)).

Although the parties dispute the level of concern the speakers had for these topics at the meeting, this does not preclude summary judgment. The determination as to whether something constitutes public concern is a legal question, even though that determination involves examining, *inter alia*, the context of the speech, which in turn involves factual determinations. *Cf.* 77 AM. JUR. *Trials* 1, §21 (2000) ("The context of the speech must . . . be analyzed in determining the public concern question. The time, place, and manner of the speech are relevant, and sometimes critically important. Tone, accuracy, and purpose of the speech are relevant. Was the officer's speech professional, factually accurate (or at least not clearly false), and low key? Was the speech threatening, vulgar, defamatory, rude, or otherwise disruptive? All of these considerations are often indirectly factored in the inquiry.").

A: Vests, obviously expired vests.

Q: But they weren't expired at that[44] point, right?

A: No, not at that point. After the shooting they bought us new ones.

I brought up court time. I think [Shaffer] was going to bring up issues he had with some – them transferring his time when he went as an hourly employee from a 12-hour employee.

Q: Overtime issues?

A: Possibly. I can't remember all of them at this point.[45]

Low morale

Q: And you mentioned public safety concerns. What were the public safety[46] concerns that you had?

A: Well, the vest[s], with that, morale, we talked about morale a lot, especially after the shooting, a lot of that, you know, a lot of issues kind of came to the surface. They had always been there, a lot of issues were already there. But, you know, the shooting brought it up kind of more. Magnified it.[47]

Q: Would you say at the time of the Barlow meeting or since [Spicer's] shooting that morale was especially low?[48]

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[44] App. to Defs.' Opening Br. at A-6 (Tr. of Dep. of Shawn Brittingham at 20: 21 24).

[45] *Id.* at A-7 (Tr. of Dep. of Shawn Brittingham at 21: 1–11). The court time issue, Brittingham later explains, involved officers being required to write tickets during the time they were required to serve in court.

[46] *Id.* at A-8 (Tr. of Dep. of Shawn Brittingham at 25: 23–24).

[47] *Id.* (Tr. of Dep. of Shawn Brittingham at 26: 1–8).

[48] *Id.* (Tr. of Dep. of Shawn Brittingham at 26: 22–24).

A: It was probably the lowest I've seen it since I've been there maybe.

Q: Do you think that was due to any actions by Captain or inaction?

A: Yes.

Q: In what way?

A: With him, he was the Spicer, I guess the liason to them. I know some guys felt slighted that they didn't get an opportunity to do that. You know, some guys brought that up.

Everything had to go through [Captain], which I didn't necessarily agree with. I thought, you know, if we needed to do something, if we needed to talk whoever, like that, or if we want to stop by, I thought we should kind of do that more on a whim or if we wanted to or if we were working or something like that. That's about it.[49]

STORY

In general

Q: [Y]ou said you had two particular issues. What were they?

A: Two particular issues I brought up, one was training.

Q: Okay. Elaborate on that, please?

A: Well, at the time when I came down to Georgetown Police Department, I was certified on the motorcycle. Okay? Got certificates, got the training, everything.[50]

I was told that there's only certain people that were going

[49] *Id.* (Tr. of Dep. of Shawn Brittingham at 27: 1–24).

[50] App. to Defs.' Opening Br. at A-61 (Tr. of Dep. of Christopher Story at 24: 16–24).

to be on the motor unit and I wasn't one of them.[51] All that time you wasted doing the training and everything else is out the window.[52]

Q: What was the other main issue you had?

A: The other issue was the, because of the way that the officers were being managed and the – I want to say the – trying to think of the right here – the mismanagement . . . .

Q: Micromanagment?

A: No, no, I'm not going to say micromanagement, because what I'm talking about here is the chief, I'm not talking about the captain.

Q: Okay.[53]

A: But what he did after Chad's shooting.

Q: Can you be specific, give me some examples?

A: Okay. Well, anything that we had to do with the Spicers, we couldn't just go, we had to go through the captain because he was the liason. Several of us felt very out of that way because we were closer to the family than they were, and it's actually put a barrier between us and the family now, you know, with us going to the chief, telling him the problems that were in the department, and him not doing anything about it.

Q: Was that primarily problems with the captain's management?

A: That was everything. You know, everything that we – that was

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[51] *Id.* at A-62 (Tr. of Dep. of Christopher Story at 26: 1–3).

[52] *Id.* at A-62 (Tr. of Dep. of Christopher Story at 27: 20–22).

[53] *Id.* (Tr. of Dep. of Christopher Story at 28: 12–24).

happening, you know, Chief just, he blew you off to the side.

Q: Give me some specific examples of things that you went to him with that he blew off?

A: Well, the bit about the Spicers.[54]

Vests

Q: Did you personally mention ballistic vests at Sue Barlow's house? I know other personnel may have.

A: Me personally, no. But as a group, yes.

Q: Do you remember any other specific[55] individual talking about vests at Sue Barlow's?

A: I think we all chimed in when that came because again if it was an issue with one officer, it was an issue with all the officers.

Q: Except as to you, at least, you knew yours was current at the time –

A: Oh, I knew mine was current but it was still an issue.[56]

Mass exodus, vests, & morale

A: [W]e were collectively – me personally, you know, I went and I said that, you know, if – I was the one that brought up about the mass exodus. You're going to have[57] officers – you've got

[54] *Id.* at A-63 (Tr. of Dep. of Christopher Story at 29: 1–23).

[55] *Id.* at A-60 (Tr. of Dep. of Christopher Story at 13: 16–24).

[56] App. to Defs.' Opening Br. at A-60 (Tr. of Dep. of Christopher Story at 14: 1–10).

[57] *Id.* at A-64 (Tr. of Christopher Story at 36: 21–24).

officers looking to leave because of the actions or inactions of Chief Topping. You know, I was the one . . . that brought that up. And I said, if you don't have the officers out of on the road, you're not going to be able to protect the public the way it should be done.[58]

Q: Any other particular items that you or anybody else mentioned that you recall?[59]

A: I know the vests were a big issue. The vests were a issue. I know – well, you know the issue about the mass exodus and that, that came back to the morale, which I brought up.[60]

Q: Who else besides you discussed[61] morale?

A: We all did. I mean, we thought it was an all-time low at that time.[62]

BARLOW

In general

A: The discussion was mostly complaints[63] about the chief and captain.

Q: Was there any discussion about the department as well?

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[58] *Id.* at A-65 (Tr. of Christopher Story at 37: 1–7).

[59] *Id.* (Tr. of Christopher Story at 39: 4–5).

[60] *Id.* (Tr. of Christopher Story at 39: 15–20)

[61] *Id.* (Tr. of Christopher Story at 39: 24).

[62] App. to Defs.' Opening Br. at A-65 (Tr. of Christopher Story at 40: 1–3).

[63] *Id.* A-89 (Tr. of Sue Barlow at 42: 24).

A: The only thing that I can think of is that someone brought up the subject that one of the – that some of the vests were outdated.[64]

Q: Do you believe that it's reasonable for [the officers] to be concerned about their own safety after someone else is killed in the department?

A: I think it's perfectly reasonable for them to be concerned about their own safety. But I still think it had nothing to do with the outdated vests.

Q: And do you believe that the safety of the officers translates to safety to the citizens?

A: No.[65]

Vests

A: I cannot believe that the expired vest was in any way a safety concern.

Q: And I'm not saying the chief has done anything wrong, whether it be budgetary or whatever why the vests were not replaced in a timely manner. But can we at least agree that the police officers' concern about a vest[66] is about safety at a very – at bottom?

A: I don't believe that this group of officers that talked to me that night were concerned about the vests.[67]

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[64] *Id.* (Tr. of Sue Barlow at 43: 1–7).

[65] *Id.* (Tr. of Sue Barlow at 44: 13–24) At another point in her deposition, Barlow agreed that during one interview, she stated that "some of things [discussed] seem[ed] petty[, while] other things seemed a little more serious." *Id.* at A-92 (Tr. of Sue Barlow at 58: 1 3 (internal quotation marks omitted)).

[66] *Id.* at A-90 (Tr. of Sue Barlow at 45: 18–24).

[67] App. to Defs.' Opening Br. at A-90 (Tr. of Sue Barlow at 46: 1–4).

The one thing we learn about safety equipment like the safety vests is that while there is an expiration date stamped on them, that doesn't mean they're going to fall apart that day.[68]

Police vehicles

A: Well, they brought up one thing about the cars were not being maintained on a regular basis. That was, and they did – the entry team had to train on their time off and they weren't getting paid for that. I wasn't aware of that at all. And so I thought, you know, that was something that probably should be discussed.[69]

Vests & police vehicles

Q: You admitted that there were some serious concerns about the department they addressed with you at your house; correct?

A: More – well, the two problems that I thought were serious was the vests and the cars. Again, those are things that were almost immediately taken care of or at least satisfied my concern for those things.[70]

Q: And you mentioned the cars and the vests. Were they the main focus of the meeting or was it more the captain –

A: No.

Q: – and chief?

A: I think that was – the focus of the meeting was the complaints against the captain and the chief that had nothing to do with the cars or the vests.

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[68] *Id.* at A-91 (Tr. of Sue Barlow at 50: 8–12).

[69] *Id.* at A-92 (Tr. of Sue Barlow at 59: 5–12).

[70] *Id.* at A-99 (Tr. of Sue Barlow at 108: 15–22).

Q: Okay. What about [Spicer] and the aftermath of his death, was that a focus of the meeting?

A: They focused on that quite a bit.

Q: What did they say?

A: They talked about how the captain and the chief was not kind to [Spicer] while he[71] was alive, that they found all sorts of reasons to complain about his work, about everything that he did. And yet after his death he became sort of sainted, and there – again I took that as venting.[72]

Morale

Q: If we were not talking about the meeting, would you be concerned just as [a] member of the public about the morale within the police department?

A: No.

Q: Do you believe morale is important for a strong police force?

A: Yes.

Q: Do you believe it's important for[73] people to watch each other's back and morale is a part of that?

A: Yes.

Q: Do you believe if morale is poor that that could lead to safety issues?

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[71] *Id.* at A-100 (Tr. of Sue Barlow at 112: 9–24).

[72] *Id.* at A-101 (Tr. of Sue Barlow at 113: 1–5).

[73] App. to Defs.' Opening Br. at A-90 (Tr. of Sue Barlow at 48: 16 -24).

A: Yes.[74]

Q: So you do believe that morale is important; correct?

A: Yes.[75]

Q: And can we agree that morale is a danger to public safety?

A: No.

Q: Why is it not a danger to public[76] safety –

A: Because these –

Q: – why do you feel that way?

A: – are well trained men. They do their job. Their morale might be bad when they are sitting around inside the police department, but once they're out there on the street, their training will kick in no matter how low their morale is.

Q: But you are still worried about it being low. Why do you think it's still a bad thing when it's low?

A: Because it just is, causes friction between the members of the department.

Q: Can we agree that it's important for morale to be good in a police department for it to properly function?

A: Yes.

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[74] *Id.* at A-91 (Tr. of Sue Barlow at 49: 1–6).

[75] *Id.* A-98 (Tr. of Sue Barlow at 89: 13–15).

[76] *Id.* (Tr. of Sue Barlow at 89: 21–24).

Q: Can we agree that morale helps officers watch each other's backs better?

A: I don't think that morale has anything to do with watching their backs better. Again, that is training, it has[77] nothing to do with morale. Morale is, do I want to go to work? Well, maybe not, but I'm going to go anyway.[78]

Q: Did you consider morale or poor morale to be a workplace issue – I mean something that affected the workplace?

A: I guess I thought it probably affected the workplace but I never thought[79] that it had any effect on the officers' ability to do their job.

Q: And would you agree that morale can fluctuate from time to time in any given place?

A: Absolutely, from, you know – and at this point morale had to be low because one of their own had died just months previously.[80]

Q: Councilwoman Barlow, whose job is it to manage morale on the police department? Who do you consider that responsibility falls upon?

A: I would suppose it would be the chief's ultimate responsibility.[81]

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[77] *Id.* at A-98 (Tr. of Sue Barlow at 90: 1–24).

[78] *Id.* (Tr. of Sue Barlow at 91: 1–3).

[79] App. to Defs.' Opening Br. at A-102 (Tr. of Sue Barlow at 119: 20–24).

[80] *Id.* (Tr. of Sue Barlow at 120: 1–8).

[81] *Id.* at A-106 (Tr. of Sue Barlow at 140: 8–13).

ERT Training

Q: The ERT . . . the . . . emergency response . . . team. Are you aware that that is something that certain officers volunteer to be on?

A: Yes.

Q: And that the training they were talking about, was that specific to the ERT –

A: Yes.

Q: – when they said, I think you said they weren't getting paid?

A: Yes, they had to train on their own time and they weren't getting paid.

Q: They weren't talking about basic day-to-day –

A: No.[82]

Q: – police training?

A: Just the ERT training.[83]

Mass exodus

A: I wanted, the other threat that I kept hearing that night was 'We are going to leave the department, we are going to leave the department if things don't get better, you know, we are going to leave the department."

I did not want any of those men to leave the department.

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[82] *Id.* at A-103 (Tr. of Sue Barlow at 122: 8–24).

[83] *Id.* at A-103 (Tr. of Sue Barlow at 123: 1–2).

I thought we had a good police department. That was what I was,[84] again, one of the reasons that I wanted to talk to Mr. Dvornick, is because I did not want a mass exodus from our police department.[85]

Q: Can we at least agree that a mass exodus would affect the police department in a negative way?

A: Well, yes, it would have.

Q: And that could also affect the citizens in a negative way; correct?

A: Probably not.

Q: Why if the department cut in half, it wouldn't affect the citizens?

A: Because there was other officers that could be hired. I just didn't want these particular ones to leave.[86]

CORDREY

In general

Q: All right. What was the general focus of that meeting, what kind of things were discussed?

A: It was in a sense – it was honestly, it was like a bitch session. There was discussion – there was discussion about issues with the captain, the chief not in a sense taking care of the captain, i.e., disciplining him. There was an issue that I brought up and it was the vest issue.

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[84] *Id.* at A-97 (Tr. of Sue Barlow at 85: 17–24).

[85] App. to Defs.' Opening Br. At A-97 (Tr. of Sue Barlow at 86: 1–3).

[86] *Id.* (Tr. of Sue Barlow at 86: 13–24).

Q: What did you about the vests?

A: I was told by Lester Shaffer not too long after [Spicer] was killed, there was a list that went around for the vests, as far as the expiration. And mine hadn't expired at that point, but it was due to expire in a couple months. And Lester Shaffer put together a list of vests, or of people that were supposed to get new vests. And I was told by him that[87] Captain had taken my name off the list.

Q: Did you talk to Captain about that allegation?

A: No.

Q: Did you later find out whether that was true or not?

A: Yes, I did.

Q: What did you find out?

A: I found out that Lester Shaffer had lied to me.[88]

Q: [D]o you know if anybody else complained about vests at the meeting that you[89] recall?

A: No. I would have been the one.

Q: What other things were discussed?[90]

A: Issues on disciplinary, getting called into the captain's office, him

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[87] *Id.* at A-181 (Tr. of Bradley A. Cordrey at 11: 6–24).

[88] *Id.* (Tr. of Bradley A. Cordrey at 12: 1–10).

[89] *Id.* at A-182 (Tr. of Bradley A. Cordrey at 13: 23–24).

[90] *Id.* (Tr. of Bradley A. Cordrey at 14: 1–3).

calling you and micromanagement. And pretty much it was brought up that these issues had been brought to the chief of police and there was no response or he hadn't rectified the situation and how everybody felt it should have been handled.[91]

Q: Do you recall if you ever had a gripe session with the chief about the captain?

A: Not per se the captain. It might have been more, say, the agency as a whole as far as morale and just other, you know, concerns.[92]

Q: The type of things you were complaining about about Captain at Sue Barlow's house, did they go back a couple of years?

A: Yes.[93]

Holm as a topic

Q: Would you agree with the statement that a purpose of the meeting was to get the captain fired?

A: Yes, I would agree with that.[94]

Safety of citizens

Q: Okay. Do you recall anyone discussing any issues that in your mind impacted the safety of Georgetown citizens?

A: No.[95]

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[91] App. to Defs.' Opening Br. at A-181 (Tr. of Bradley A. Cordrey at 14: 6–13).

[92] *Id.* (Tr. of Bradley A. Cordrey at 14: 18–24).

[93] *Id.* at A-183 (Tr. of Bradley A. Cordrey at 18: 1–5).

[94] *Id.* at A-182 (Tr. of Bradley A. Cordrey at 15: 9–12).

[95] *Id.* (Tr. of Bradley A. Cordrey at 16: 19–22).

Vests

Q: Do you have an understanding about the functionality of vests after the manufacturer's warranty expires?

A: At the time of the – at the time of Chad's death, no. At this point now, yes.

Q: What's your understanding?

A: The understanding now is as long as it's well maintained, the expiration date is just that the manufacturer, that's what the manufacturer's warranty is. It would be just like buying a new car. There's a warranty and that's where the dealership, you know, will cover certain things.

It's the same thing with the vest. It's not saying once it expires that it's no good. It's just saying that the manufacturer is not, the warranty is expired in the[96] manufacturer.[97]

Q: Going back for a moment to the questions about your vest. Did you get a new vest as soon as you advised someone your vest was out of warranty?

A: Yes.[98]

Q: [Y]ou don't view your vest as a community public safety issue?

A: Has nothing to do with them. That[99] would be my safety.[100]

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[96] *Id.* at A-183 (Tr. of Bradley A. Cordrey at 19: 8–24).

[97] App. to Defs.' Opening Br. at A-183 (Tr. of Bradley A. Cordrey at 20: 1).

[98] *Id.* at A-191 (Tr. of Bradley A. Cordrey at 51: 7- 11).

[99] *Id.* at A-194 (Tr. of Bradley A. Cordrey at 81: 22–24).

[100] *Id.* (Tr. of Bradley A. Cordrey at 82: 1).

Spicer's death

Q: Was there discussion of Chad Spicer's shooting or its aftermath?

A: I don't recall, no.

Q: Was there any discussion about the captain being a point person to deal with [Spicer's] family?

A: Yes.[101]

Q: What do you recall about that?

A: People were pissed off that he was appointed in that position.

Q: Did they express why or what kind of comments did they make?

A: They just felt that he shouldn't have been a point of contact person. He wasn't that close with [Spicer].

Q: Do you recall that being a major point of discussion or not?

A: No, I wouldn't say.

Q: Would you agree at the time of the Barlow meeting you all were still emotionally upset about [Spicer's] killing?

A: Yes.

Q: Do you think any of you were kind of venting to Sue Barlow about that, about your feelings?

A: I don't recall us bringing anything up about that.

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[101] *Id.* at A-184 (Tr. of Bradley A. Cordrey at 22: 18-24).

Q: Okay.

A: If anything, it was being brought up about the vest issue as far as after he was killed.[102]

Q: From your observation was there anything like counseling that officers needed but weren't provided after [Spicer's] death?

A: No.[103]

Q: This Barlow meeting aside, do you think [Spicer's] death fractured the cohesiveness of the department?

A: Yes. I feel it – it changed a lot of us, a lot of our I guess feelings.[104]

ERT Training

Q: Do you recall anybody discussing ERT training or people not getting paid for ERT training?[105]

A: At the Barlow [meeting], I don't recall, no –[106]

Police Vehicles

Q: Do you recall any discussion of[107] departmental vehicles not being repaired in a timely manner?

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[102] *Id.* (Tr. of Bradley A. Cordrey at 23: 1–24).

[103] App. To Defs.' Opening Br. at A-184 (Tr. of Bradley A. Cordrey at 24: 1–4).

[104] *Id.* (Tr. of Bradley A. Cordrey at 24: 13–17).

[105] *Id.* at A-185 (Tr. of Bradley A. Cordrey at 25: 16–18).

[106] *Id.* (Tr. of Bradley A. Cordrey at 25: 21).

[107] *Id.* (Tr. of Bradley A. Cordrey at 25: 24).

A: No.

Q: Or being defective in any way?

A: No.[108]

What constitutes public concern for First Amendment purposes is a difficult concept. While private remarks may constitute matters of which the public should be aware, "public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication."[109] Regarding speech made by police officers, it is true that "[t]he delivery of police services . . . is unavoidably of interest to [the] citizenry."[110] Further, "[c]onditions within police departments are of such great public concern because those conditions affect the level of public safety, and matters relating to any alleged wrongdoing, inefficiency, or any type of mismanagement or malfeasance on the part of public officials are the essence of public concern."[111] However, this cannot mean that *any* speech made by police officers regarding their employment touches on matters of public concern, even if that speech is couched under the inchoate heading

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[108] *Id.* (Tr. of Bradley A. Cordrey at 26: 1–5).

[109] *City of San Diego v. Roe*, 543 U.S. 77, 83–84 (2004).

[110] 77 AM. JUR. *Trials* 1 (2000) (quoting *Broderick v. Roache*, 767 F. Supp. 20, 24 (D. Mass. 1991)).

[111] *Id.* (citations omitted).

of "public safety." "To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark-and certainly every criticism directed at a public official-would plant the seed of a constitutional case."[112]

Looking first at the content of the what was discussed at the Barlow meeting, the topics can be divided into three general categories: (1) police department equipment concerns, specifically the expiration of the warranties on police ballistic vests, and, to a lesser extent, the maintenance of police vehicles; (2) low officer morale; and (3) personnel issues. Concerning the first category, it seems obvious that police department equipment concerns constitute matters of public concern. The general public has an interest in knowing whether a police force charged with its protection is equipped with the proper tools, especially in the wake of a fellow officer's death in the line of duty.

Guidance regarding the second category regarding morale can be gleaned from the United States Supreme Court's decision in *Connick v. Myers*, another seminal case in this area. In that case, Myers, a New Orleans assistant district attorney, distributed a questionnaire to other attorneys within the office "soliciting the[ir] views . . . concerning office transfer policy, office morale, the need for a grievance

[112] *Connick v. Myers*, 461 U.S. 138, 149 (1983).

committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns."[113] She did this after being informed that she would be transferred to a different section of the criminal court and expressing her reluctance over such a transfer. Myers was subsequently terminated by Connick, the District Attorney of Orleans Parish. The Court ruled that only one question on Myers' questionnaire, which asked about political campaigns, touched on matters of public concern. As for the rest, the Court "view[ed] the questions pertaining to the confidence and trust that Myers' coworkers possess[ed] in various supervisors, the level of office morale, and the need for a grievance committee as mere extensions of Myers' dispute over her transfer to another section of the criminal court."[114] The questionnaire did not attempt to illuminate any negligence or wrongdoing on the part of Connick or his office. Rather, "the questionnaire, if released to the public, would [have] convey[ed] no information at all other than the fact that a single employee [was] upset with the status quo."[115]

Likewise in this case, with the exception of the issue regarding Plaintiffs' police department equipment, if the rest of the content of the Barlow meeting was

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[113] *Id.* at 141.

[114] *Id.* at 148.

[115] *Id.*

released to the public, nothing would be revealed except that a group of GDP officers were unhappy with the status quo. As to the issue of low officer morale specifically, police officers cannot transform grievances which, standing alone, would not constitute matters of public concern, into matters of public concern by referring to them as "morale problems." Otherwise, the rule that not all employment decisions occurring within a government office qualify as matters of public concern would be meaningless.[116]

This does not mean that low morale within a government office can never be a matter of public concern *per se*. The *Connick* Court itself acknowledged this when it stated that "[w]hile discipline and morale in the workplace are related to an agency's efficient performance of its duties, the focus of Myers' questions [wa]s not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors."[117]

Dahl v. Rice County, Minnesota involved, *inter alia*, a former deputy sheriff's free speech retaliation claim.[118] The county sheriff emailed the deputy to reprimand him for purchasing badges and charging them to the department without

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[116] *See id.*

[117] *Id.*

[118] *Dahl v. Rice Cnty., Minn.*, 621 F.3d 740 (8th Cir. 2010).

authorization. The deputy wrote back to the sheriff that he had a "hostile and condescending tone" and that "the tone of some messages [the] deputies have been receiving ha[d] brought the morale of th[e] department to its proverbial knees."[119] The United States Court of Appeals for the Eight Circuit found that this comment did not touch on a matter of public concern:

> The focus [of First Amendment public concern analysis] is on the role the employee has assumed in advancing the particular expressions: that of a concerned public citizen, informing the public that the state institution is not properly discharging its duties, or engaged in some way in misfeasance, malfeasance or nonfeasance; or merely as an employee, concerned only with internal policies or practices which are of relevance only to the employees of that institution.[120]

The Eight Circuit noted that the deputy "was not 'informing the public' that the department was engaged in 'misfeasance, malfeasance or nonfeasance,' but rather he focused on [the sheriff's] unpleasant demeanor."[121] Further, "not only d[id] the record indicate that the [s]heriff did not have previous notice of low morale, but it also show[ed] that [the deputy's] statements were closely tied to a personal employment dispute that he had with [the sheriff] . . . ."[122] The court stated that "[s]uch a comment

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[119] *Id.* at 742 (internal quotation marks omitted).

[120] *Id.* at 744 (quoting *Cox v. Dardanelle Pub. Sch. Dist.*, 790 F.2d 668, 672 (8th Cir. 1986).

[121] *Id.* (quoting *Cox*, 790 F.2d at 672).

[122] *Id.*

d[id] not attain the status of public concern simply because 'its subject matter could, in different circumstances, have been the topic of a communication to the public that might be of general interest.'"[123]

In this case, the officers' low morale was significantly caused by Spicer's death, a tragedy that is unquestionably a matter of public concern. Topping's choice of Holm as the liason to the Spicer family is tangentially related to that event; but by itself is no more than an unpopular internal decision. Like in *Dahl*, the discussion about low morale at the Barlow meeting was closely tied to personal employment disputes the officers were having with Defendants:

> Question to Brittingham: The morale issues, did that go back to the problems you had been having with the captain since maybe at least 2007?
>
> Brittingham: Not really, I mean, *I'm sure it stemmed from that.* I mean, we had issues before and then we'd be fine, because we were on the ERT together, we'd be fine. We wouldn't hang out off duty or anything, but we could talk and communicate.
> And then stuff would start again and, you know, we'd have issues again and everything would be fine again for awhile. It was kind of just like a roller coaster.[124]

The focus of the comments made during the Barlow meeting regarding the low

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[123] *Id.* (quoting *Connick*, 461 U.S. at 148 n.8).

[124] App. to Defs.' Opening Br. at A-8 (Tr. of Shawn Brittingham at 26: 9 - 21) (emphasis added).

morale attributable to Spicer's death was "not to evaluate the performance of the office,"[125] but rather to vent feelings of discontent:

> (Barlow): I heard absolutely nothing that should have been acted on except, like I said, the vests and cars. My concern was that all of these men were reacting to Chad Spicer's death and that they needed to vent.
>
> Q: So other than the vests and the cars, you didn't see anything that was more serious enough to bring to Gene [Dvornick]?
>
> A: No.
>
> Q: You viewed the rest of it as sort of –
>
> A: As just venting.[126]

Even if the content of low officer morale due to Spicer's death which was discussed at the meeting could be considered a matter of public concern, its context and form establish otherwise. "[S]peech that takes place at a public meeting where police officers are discussing and debating issues will enhance the likelihood of [First Amendment] protection."[127] The Barlow meeting was a private operation involving off-duty police officers voicing issues to a local politician in her private home. Its parochial nature supports the conclusion that the morale issue was not a matter of

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[125] *Connick*, 461 U.S. at 148.

[126] App. to Defs.' Opening Br. at A-94.

[127] 77 AM. JUR. *Trials* 1, §25 (2000) (citation omitted).

public concern.

The third category of issues discussed at the Barlow meeting was personnel issues which "most accurately [can be] characterized as . . . employee grievance[s] concerning internal office policy."[128] The public cannot be said to have any legitimate interest in issues such as officers' court hours, not being permitted to serve on the GPD motorcycle unit, and not being paid for training, occurring during officers' own time, for voluntary service on an emergency response team.

With one category of topics discussed at the Barlow meeting constituting a matter of public concern (*i.e.*, equipment),[129] the Court proceeds to the *Pickering* balancing test. "The weight afforded each side of the *Pickering* balance . . . varies with the content of the speech. The more the employee's speech touches on matters

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[128] *Connick*, 461 U.S. at 154.

[129] The Court notes that the vest issue is a nonstarter. Brittingham himself agreed in his deposition that the issue "had been resolved after the [Spicer] shooting," and before the Barlow meeting. App. to Defs.' Opening Br. at A-5 (Tr. of Shawn Brittingham at 14: 4–5). The record indicates that only Cordrey believed the warranty of his vest was expired at the time of the meeting. Nor are the passing references about police vehicles detailed. Rather, they reflect a pattern of conclusory complaints. Furthermore, as gleaned from all of the relevant parties' depositions, the level of importance placed on the vest and vehicle issues during the meeting is attenuated, a factor which the Court may consider in determining whether Plaintiffs' speech constituted a matter of public concern. 77 AM. JUR. *Trials* 1, §21 (2000) ("The context of the speech must . . . be analyzed in determining the public concern question. The time, place, and manner of the speech are relevant, and sometimes critically important. Tone, accuracy, and purpose of the speech are relevant. Was the officer's speech profession, factually accurate (or at least not clearly false), and low key? Was the speech threatening, vulgar, defamatory, rude, or otherwise disruptive? All of these considerations are often indirectly factored in the inquiry.").

of significant public concern, the greater the level of disruption to the government that must be shown."[130] "The efficient functioning of government offices is a paramount public interest. Police are the most restrictive in this regard as they are paramilitary–discipline is demanded, and freedom must be correspondingly denied."[131] This balancing involves several elements:

> Factors relevant to this inquiry include whether a public employee's speech (1) impaired the maintenance of discipline by supervisors; (2) impaired harmony among coworkers; (3) damaged close personal relationships; (4) impeded the performance of the public employee's duties; (5) interfered with the operation of the institution; (6) undermined the mission of the institution; (7) was communicated to the public or to coworkers in private; (8) conflicted with the responsibilities of the employee within the institution; and (9) abused the authority and public accountability that the employee's role entailed.[132]

The *Pickering* balancing favors Defendants for several reasons. First, the Court must consider all of the circumstances surrounding the speech. As already

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[130] *Lewis v. Cohen*, 165 F.3d 154, 162 (2d Cir. 1999) (citing, *inter alia*, *Connick*, 461 U.S. at 152).

[131] *Durham v. Jones*, 737 F.3d 291, 301 (4th Cir. 2013) (citations omitted) (internal quotation marks omitted)

[132] *Id.* at 301–02 (citation omitted) (quoting another source); *see also Rankin v. McPherson*, 483 U.S. 378, 388 ("We have previously recognized as pertinent considerations whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties with the regular operation of the enterprise.") (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 570–73 (1968)).

stated, this was a closed meeting of off-duty police officers, speaking as citizens,[133] to a local politician, who, although not their supervisor, was considered someone who could intervene on their behalf. The meeting took place in the politician's private home. The meeting was impromptu. Indeed, Barlow was surprised to find officers other than Brittingham at her door.[134] It is true that there can be "case[es] where an employee arranges to speak out in a private manner on a matter of public concern, one not tied to a personal employment dispute."[135] But there is a difference between secret informing and secret griping. This case presents the latter scenario.

Second, threats of a "mass exodus" from a majority of the GPD's officers, based on matters not of public concern, clearly harms Defendants' need for efficiency in their agency, which is a paramount interest. Such a maneuver by the officers would certainly interfere with the department's operation and undermine its mission.

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[133] The Court considers Plaintiffs to have been speaking as citizens, due to the fact that the Barlow meeting took place while all of officers were off duty. The fact that one police vehicle may have been brought over to Barlow's house is not dispositive. Their comments were not part of their employment duties. *See Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) ("[W]hen 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."). If Plaintiffs had spoken as "employees" as understood in First Amendment jurisprudence, then summary judgment would be entered on Defendants' behalf on that ground alone. *See id.*

[134] App. to Defs' Opening Br. at A-88 (Tr. of Sue Barlow at 40: 12–13 ("A: I thought Shawn was coming. I didn't expect to see the rest of them.").

[135] *Dahl v. Rice Cnty., Minn.*, 621 F.3d 740 (8th Cir. 2010) (citing *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415–16 (1979)).

Third, Plaintiffs' speech interfered with the work relationships between the officers who participated in the Barlow meeting and their superiors (Holm and Topping), as well as relationships between those officers and the officers who did not participate in the meeting.[136] At the meeting, Plaintiffs' comments were directly focused on Defendants, as opposed to general complaints. Because these comments did not constitute matters of public concern, the danger of an "us versus them" mentality was palpable, which would be detrimental to a small-town police department. Fourth, Plaintiffs did abuse their authority and public accountability that their role entailed by going behind their superiors' backs, violating a chain of command policy, in an effort to vent employment problems to a hopefully-sympathetic ear.

Lastly, the factor that weighs most heavily against Plaintiffs in the *Pickering* balancing is that Plaintiffs' speech minimally touched on matters of public concern, which in turn lightens Defendants' burden in establishing that the balance weighs in their favor. The Court considers Plaintiffs' speech to be similar to Myers' questionnaire in *Connick*, "touch[ing] upon matters of public concern in only a most

[136] Indeed, certain officers with GPD did not participate in the meeting. *See* App. to Opening Br. at A-84 (Tr. of Christopher Story at 265: 23-24); *id.* (Tr. of Christopher Story at 266: 1-5) (Q: "The so-called golden boys I think you mentioned, Diza and Bean, they weren't a part of the Barlow meeting; correct? A: They were not. Q: They wouldn't have light to shed on the Barlow meeting or anything like that? A: No, not at all.").

limited sense[.]"[137] Rather, Plaintiffs' speech "is most accurately characterized as . . . employee grievance[s] concerning internal office policy."[138] Therefore, "[t]he limited First Amendment interest involved here does not require that [Defendants] tolerate action which [they] reasonably believed would disrupt the office, undermine [their] authority, and destroy close working relationships."[139]

Because Defendants' employment decisions did not violate the First Amendment, Plaintiffs do not have a free speech claim under the First Amendment. Therefore, they also do not have claims under the assemble and petition clauses of the First Amendment and the Delaware Constitution.[140] The Court hereby enters

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[137] *Connick v. Myers*, 461 U.S. 138, 154 (U.S.).

[138] *Id.*

[139] *Id.*

[140] The Court recognizes that the First Amendment and Article 1, § 16 of the Delaware Constitution are not identical in application. *See, e.g.*, *State v. Elliott*, 548 A.2d 28, 32 (Del. Super. 1988) ("The right of petition and assembly, as provided by the Delaware Constitution, does not mean that those who elect to enjoy this right also have the privilege to be the sole decision makers as to the way to exercise their rights under Art. I, Sec. 16. The right of assembly is not an unlimited right, but a right subject to certain qualifications as imposed by the state's police power. While the First Amendment of the United States Constitution guarantees the right of free speech, this does not mean that the state does not have the authority to regulate conduct which adversely affects the public interest, and indirectly affects the right of free speech." (citations omitted)).

The Court also recognizes that in order "[t]o determine whether a state constitutional provision is substantively identical to an analogous provision of [the] United States Constitution, th[e] Court considers [a] list of nonexclusive factors . . . ."). *Doe v. Wilmington Hous. Auth.*, 88 A.3d 654, 662 (Del. 2014). However, the record is not developed enough for the Court to employ this analysis because Plaintiffs, who have no claim under the First Amendment, have not sufficiently argued that they have an independent claim under the Delaware Constitution.

judgment upon Counts II and III of Plaintiffs' third amended complaint. The Court also enters judgment as to Count I of the complaint. Because the Court concludes that Plaintiffs' speech at the Barlow meeting was not constitutionally protected, the chain of command policy is not *void ab initio*. The policy allowed Topping and Holm to maintain order, the interest of which outweighed Plaintiffs' interests in expressing their non-constitutionally protected speech.

The Court also enters judgment upon Count IV of Plaintiffs' third amended complaint, alleging an action against Georgetown for violation of the DWPA. In pertinent part, that statute provides that "[a]n employer may not discharge . . . an employee . . . [b]ecause the employee . . . reports . . . to a public body . . . a violation which the employee knows or reasonably believes occurred . . . ."[141] Based on the Court's ruling regarding Plaintiffs' constitutional claims, no "violation" occurred. Further, contrary to argument, Brittingham was not "constructively discharged." "To establish a constructive discharge, the plaintiff [i]s required to show working conditions so intolerable that a reasonable person would have felt compelled to resign. Something more than a hostile work environment is required."[142] The record in the present case establishes that no such conditions existed. Brittingham and Story

[141] *See* 19 *Del. C.* § 1703(1).

[142] *Rizzitiello v. McDonald's Corp.*, 868 A.2d 825, 832 (Del. 2005) (citations omitted) (internal quotation marks omitted).

both described what they considered "retaliation:"

(Brittingham): As you know, the Internal Affairs started in March, the interview was in April. Shortly after that I was taken away from being a shift supervisor. Back then that's when Tommy Tyndall, Sergeant Tyndall, was put above me.
I enjoyed being a shift supervisor, I had a good time, ...[143]

Q: [F]or right now could you kind of just tick off a list of what you contend was the retaliation . . . ?

A: Okay. When I went out on FMLA, I had gone up to Town Hall and . . . filled out paperwork up there about using sick time while I was out.[144]
That's when they went back and they took the vacation and the sick time before they – or the vacation and personal days before the sick time.
And then the discipline after – prior to this IA, I got written up for running into our secretary's car and I lost 12 hours. And the result of the discipline from this is obviously a month and two weeks loss of rank and year probation.

Q: Anything else?[145]

A: That's about it.[146]

Question to Story: You're saying [Topping] retaliated against you, so I'd like to know what's happened to you from him.

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[143] App. to Defs.' Opening Br. at A-29 (Tr. of Shawn Brittingham at 110:14–24).

[144] *Id.* (Tr. of Shawn Brittingham at 111: 3–10).

[145] *Id.* (Tr. of Shawn Brittingham at 111: 14–24).

[146] *Id.* (Tr. of Shawn Brittingham at 112: 1).

(Story): Well, let's see. We'll keep it just with the case. The punishment, the suspension, not using the vacation time in lieu of suspension time. You know, making the comments, let's go after them where it really hurts them, in their pocket. Not allowing –

Q: That's something you heard Chief Topping say?[147]

A: Yes.

Q: To you?

A: Yes. It wasn't to me. It was around.

Q: Who was he talking to?

A: I can't remember.

Q: Okay.[148] [Y]ou personally heard him say that?

A: I've heard him say that, yes. I've also heard him say that if you want to go after somebody, you better cut off their head, go after, you know, cut the head off the snake is what he did with Lester [Shaffer].[149]

These conditions cannot be considered be so intolerable that any reasonable person standing in Plaintiffs' shoes would have resigned.

Finally, summary judgment is entered against Brittingham's individual count,

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[147] App. to Defs.' Opening Br. at A-69 (Tr. of Christopher Story at 84: 14–24).

[148] *Id.* at A-70 (Tr. of Christopher Story at 85:1–7).

[149] *Id.* (Tr. of Christopher Story at 85:9–15).

Count V, against the Town of Georgetown for breach of the implied covenant of good faith and fair dealing. Because Defendants committed no constitutional violation against him, and no constructive discharge occurred, Defendants did not breach this covenant.

CONCLUSION

The Court concludes that Plaintiffs' speech at the Barlow meeting barely touched on a matter of public concern. Applying the *Pickering* balance test, and noting that Defendants' burden lightens due to a weak showing that Plaintiffs' speech touched on matters of public concern, the Court determines that the balancing favors Defendants. This ruling vitiates each of Plaintiffs' five counts in its complaint. Therefore, Defendants' Motion for Summary Judgment is **GRANTED**.

IT IS SO ORDERED.

Richard F. Stokes, Judge

cc: Prothonotary
Judicial Case Manager