

Docket No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

SCOTTIE A. BAGI, ET AL.,

Petitioner,

versus

CITY OF PARMA,

Respondent.

On Petition For Writ Of Certiorari
From The United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT, U.S.

I. QUESTIONS PRESENTED FOR REVIEW

Whether the The Sixth Circuit Court of Appeals Erred in Failing to Find That the Petitioner's Letter Concerning Hiring-Related Speech Touched On Matters of Public Concern and, Therefore, Constituted Protected Speech Under the First Amendment of the United States Constitution?

II. LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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Appendix C -	Opinion, Sixth Circuit Court of Appeals, Case No. 16-4011

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V. OPINIONS BELOW

The District Court granted summary judgment in favor of Defendant-Respondent on August 19, 2016. Appendix B: Memorandum Opinion Granting Summary Judgment, United States District Court Northern District of Ohio, Eastern Division, Case No. 1:14-CV-558. A Notice of Appeal from that final judgment was timely filed on September 1, 2016. On October 26, 2017, the Sixth Circuit Court of Appeals affirmed. Appendix C: Opinion, Sixth Circuit Court of Appeals, Case No. 16-4011

VI. STATEMENT OF THE BASIS FOR JURISDICTION

The District Court had subject matter jurisdiction by virtue of the claim brought by Plaintiff-Petitioner under 42 U.S.C. §1983 being a federal question under 28 U.S.C. §1331.

The District Court granted summary judgment in favor of Defendant-Respondent on August 19, 2016. A Notice of Appeal from that final judgment was timely filed on September 1, 2016. The Court of Appeals affirmed the District Court on October 26, 2017, and this Appeal is from a final judgment which disposed of all claims of Plaintiff-Petitioner.

VII. CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

“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.”

U.S. Const. Amend. I.

VIII. STATEMENT OF THE CASE

A. Procedural History

On appeal, Scottie Bagi (“Petitioner”) and Gary Vojtush brought their claim against their public employer the City of Parma for retaliation under the First Amendment under 42 U.S.C. §1983 in the Federal District for the Northern District of Ohio.

Respondent City of Parma moved for summary judgment under Fed. R. Civ. P. 56, which was granted by the District Court on August 19, 2016 (Memo Opinion, R. 90 Page ID #s 1641-71). Petitioner appealed this decision on September 1, 2016 (Notice of Appeal, R. 92 Page ID #1673).

On appeal in the Sixth Circuit Court of Appeals, Petitioner presented the following claims:

1. Whether a genuine issue of material fact existed that Petitioners intentionally or recklessly disregarded the truth of their speech contained in a letter written to the

City's Chief of the Parma Fire Department and delivered to the Chief and the City's Director of Human Resources.

2. Whether Petitioners' speech contained in this letter was protected under the First Amendment.

3. Whether the District Court weighed evidence in its determination that Petitioners' speech was not protected by the First Amendment because the speech was made with an intentional or reckless disregard to its truth.

4. Whether the District Court weighed or gave proper credit to the evidence before it when it determined that Petitioners' speech was not protected by the First Amendment because their speech was made with an intentional or reckless disregard to its truth.

5. Whether the District Court viewed the evidence before it in a light most favorable to Petitioners, and made all reasonable inferences from the evidence in Petitioners' favor when it determined that Petitioners' speech was not protected by the First Amendment because their speech was made with an intentional or reckless disregard to its truth.

6. Whether the District Court's Opinion in granting summary judgment in favor of Appellee based on its determination that Petitioners' speech was not protected by the First Amendment because their speech was made with an intentional or reckless

disregard to its truth reflected a clear misapprehension of summary judgment standards in light of Supreme Court precedents.

7. Whether Appellee met its burden to show that Petitioners' speech was untrue and was made with an intentional or reckless disregard for the truth.

8. Whether the District Court Memorandum Opinion granting summary judgment in favor of Appellee demonstrated bias or distinct hostility toward Petitioners.

On October 26, 2017, the Sixth Circuit Court of Appeals affirmed.

B. Statement of Facts

1. 2011 Test, Concerns of Integrity & Letter

In 2011 the City of Parma held a test for firefighters in its Department to fill spots in the The Tactical Emergency Medical Support Unit (hereinafter "TEMS Unit"). The TEMS Unit works along with and as a benefit to the City's Police SWAT Unit, and it provides firefighter/paramedics for emergency medical service in high-risk situations to the police and residents (Whelan dep tr, R. 56-1 at 38-39 Page ID #722; Ryan dep tr, R. 64-1 at 35 Page ID #1011). Petitioner Bagi perceived an issue with the integrity of the test that primarily surrounded the involvement of Captain Poznako (Bagi Declar, R. 72-3 at ¶3 Page ID #1453). Because of this concern Bagi wrote a letter that was delivered to the City's Fire Chief and Human Resource Director after the test (Id. at ¶¶ 3-7 Page ID #s 1453-54; Dep Ex 11, R. 70-2

Page ID #s 1171-72). The letter addressed the manner in which the Department was about to select new members of the Unit, and spoke about concerns based on a prior test for the Unit when bias was seen in the selection process by Captain Poznako (Dep Ex 11, R. 70-2 Page ID #1171). In this letter, Bagi believed that the 2011 test was created by the Captain, and that there was a realistic risk that the best performer on the test “. . . will not be *accepted* onto the SWAT team.”(emphasis added) (Id.). Bagi said that many in the ranks are discontented and “. . . are *under the belief* that Captain Poznako gave the answers, *or at least identified the areas to specifically study*, to his friends and close associates so they could perform well on the test.”(emphasis added) (Id.).

The letter was written before the test and predicted that Firefighter Fetter would be selected for the Unit (Id.). The letter cautioned that Fetter only had five years experience, and that his selection for the Unit in such a manner would effect his credibility (Id.). The letter further expressed concern for the Unit and interest on the part of the members of the Department if selection for the Unit was subjected to personal whims (Id.). The letter asked for the Chief's intervention to prevent such conduct, and stressed that there was a common belief that Captain Poznako considered his personal interests above the interests of the Department and community (Id. Page ID #1172).

2. Administration of the 2011 Test

The 2011 TEMS Unit test was not given by an entity external to the City. Petitioner believed Captain Poznako administered the test, and there was evidence of his involvement with the test (Poznako dep tr, R. 69-1 at 69 Page ID #1145). The Captain was certainly involved in organizing and approving the testing procedures (Id. at 107 Page ID #1154, Dep Ex 52 *TEMS Test Proc*, R. 70-8 Page ID #s1199-1201; Whelan dep tr, R. 56-1 at 62 Page ID #728). The interview portion of the test was subjective and there was the possibility of bias in the test through friendships in the Department (Poznako dep tr, R. 69-1 at 101 Page ID #1153; Ryan dep tr, R. 64-1 at 51 Page ID #1015). Concerning the interview portion of the test the extent of the Captain's input was unknown, but for some reason he was present in the room when the interviews were conducted (Poznako dep tr, R. 69-1 at 60-61 Page ID #s 1142-43; Whelan dep tr, R. 56-1 at 45 Page ID #723). Importantly the Department's Chief testified that the Captain was in charge of the TEMS Unit at the time and he was ultimately responsible for the test (French dep tr, R. 55-1 at 71 Page ID #673).¹

3. Captain Poznako

Captain Poznako was viewed by a number of firefighters to be controlling, a

¹This evidence was provided to the District Court by Petitioner in Opposition to the City's Motion for Summary Judgment R. 72-2 at Section I(B) pp 5-9 Page ID #s 1425-29.

bully, very biased, manipulative, conniving, vindictive, someone who would berate others, and who had an explosive personality (Kinney dep tr, R. 62-1 at 13, 24-26, 28-29, 89 Page ID #s 953, 955-57; Poznako dep tr, R. 69-1 at 144 Page ID #1163; Knecht dep tr, R. 59-1 at 48-49 Page ID #s 865-66; Bagi Declar, R. 72-3 at ¶3 Page ID #1453; Tibbets dep tr, R. 63-1 at 35 Page ID #989). One example of Captain Poznako's explosive and questionable behavior in the Department is an instance when he called Firefighter Gaudino a faggot because he drank a frappe –which Gaudino took as harassment and not as a joke (Kinney dep tr, R. 62-1 at 28 Page ID #956; Ryan dep tr, R. 64-1 at 54-55 Page ID #1016; Poznako dep tr, R. 69-1 at 133-34, 137 Page ID #s 1161-62; Dep Ex 57 *Invest Hearing tr*, R. 70-9 at 15-17 Page ID #s 1205-07; Gaudino dep tr, R. 61-1 at 56-58, 63 Page ID #s 918- 19, 920).²

4. Concerns About the 2004 Test

Petitioner pointed to evidence that raised a question of propriety that existed in the Fire Department with the manner in which Captain Poznako administered a prior 2004 TEMS Unit test (Kinney dep tr, R. 62-1 at 63, 65-66, 79, 87-88 Page ID #s 965, 966, 969, 971; Tibbets dep tr, R. 63-1 at 15-16 Page ID #984; Bagi Declar, R. 72-3 at ¶3 Page ID #1453). Specifically, the Captain himself told Bagi that with

²This evidence was also provided to the District Court by Petitioner in Opposition to the City's Motion for Summary Judgment R. 72-2 at Section I(B) pp 5-9 Page ID #s 1425-29.

the outcome of the 2004 test he was directed by the Parma Police that if Firefighter Mlady was not selected that there would not be a TEMS Unit from the Fire Department (Bagi Declar, R. 72-3 at ¶3 Page ID #1453).

Concerns of the manner in which Captain Poznako administered the 2004 test had previously been brought to the attention of the union president (Lovejoy dep tr, R. 57-1 at 41, 167-68, Page ID #s 766, 797).³

5. Uncertainty of the Years of Service Requirement

Added to the evidence that Petitioner and others recognized concerns of Captain Poznako's bias – there was also the belief that turned out to be inaccurate that five years of service were required to be on the TEMS unit, which drew into question Firefighter Fetter's qualification for the Unit (Bagi Declar, R. 72-3 at ¶3 Page ID #1453; Memo Opinion, R. 90 at 13, fn 9 Page ID #1653). Petitioner Bagi believed that Firefighter Fetter only had three or four years of service (Id.).

Petitioner pointed to evidence that the confusion and uncertainty of the number of years of service was widespread in the Department. The actual number of years as a paramedic required to be on the Unit was three years, which had been changed from two to three years from a prior 2004 test for the Unit. Firefighters in the department

³This evidence was also provided to the District Court by Petitioner in Opposition to the City's Motion for Summary Judgment R. 72-2 at Section I(B) pp 5-9 Page ID #s 1425-29.

were uncertain of the actual number of years required from either two, to three, to five years (Tibbets dep tr, R. 63-1 at 52-53 Page ID # 993-94; Knecht dep tr, R. 59-1 at 31-32, 90-91 Page ID #s 861, 876; Whelan dep tr, R. 56- 1at 56-57 Page ID #726). Assistant Chief Ryan also thought the requirement was five years – then it changed to two years – which turned out to be incorrect (Ryan dep tr, R. 64-1 at 40-43 Page ID #s 1012-13).⁴

6. Reliance Upon City's Ethic's Policy

Petitioner pointed to their reliance on the City of Parma's Policy, which if they believed an ethical issue with the test existed, placed "... a responsibility [upon them] to bring the matter to the attention to the [City's] HR Director or Law Director." (Lovejoy dep tr, R. 57-1 at 69 Page ID #773, Dep Ex 39 *Ethics Policy*, R. 70-6 at 3 Sec D Page ID #1179). In terms of reporting ethical concerns, the City's policy directed that the employee must be prepared to document their observations in writing and include the individual(s) involved, as well as facts such as dates, times and locations of their observations (Dep Ex 39 *Ethics Policy*, R. 70-6 at 3 Sec D(1)(a) Page ID #1179). The caution in the Policy to the City's employees is based their ability to provide facts based on their observations – it does not require that they have

⁴This evidence was also provided to the District Court by Petitioner in Opposition to the City's Motion for Summary Judgment R. 72-2 at Section I(B) pp 5-9 Page ID #s 1425-29. *See, also*, Memorandum in Support of Summary Judgment, R. 54-1 at 9 Page ID #241.

proof to support their observations (Id.). The policy also provides that the employment status of an employee who in good faith reports the misconduct "... will not be adversely affected solely as a result of their actions." (Id. at Sec D(1)(b) Page ID #1179).⁵

7. Good Faith Reason for the Speech

Evidence was presented in the Court below that because of these concerns – particularly with Captain Poznako – the Firefighters signed the letter because they wanted the 2011 TEMS Unit test to be administered in a fair manner (Bagi Declar, R. 72-3 at ¶7 Page ID #1454; Kinney dep tr, R. 62-1 at 13-14, 23, 32, 43, 52, 62- 63, 68, 70, 73, 81, 88, 96 Page ID #s 953, 955, 957, 960, 962, 965, 967-68, 970- 71, 973; Tibbets dep tr, R. 63-1 at 33, 46, 47, 49, 57 Page ID #s 989, 992-93, 995; Knecht dep tr, R. 59-1 at 52, 54, 67, 70 Page ID #s 866-67, 870-71; Gaudino dep tr, R. 61-1 at 90- 91, 114, 129, 130-31 Page ID # 927, 933, 937). The Union’s President testified that it was understandable that some of the firefighters would have had concerns about the Captain’s integrity, and he did not believe that Bagi intentionally made a false statement (Lovejoy dep tr, R. 57-1 at 101, 115-16 Page ID #s 781, 784). Chief French acknowledged in his testimony that he could not dispute whether a common belief

⁵This evidence was provided to the District Court by Petitioner in Opposition to the City’s Motion for Summary Judgment R. 72-2 at Section I(D) pp 10-11 Page ID #s 1430-31.

existed in the Department related to Captain Poznako's fairness in his involvement with the 2011 test (French dep tr, R. 55-1 at 156-57 Page ID #s 694-95). Firefighter Whelan even testified that the Captain expressed concerns to him about fairness of the test based on discussion in the Fire Department (Whelan dep tr, R. 56-1 at 123-24 Page ID #743).

Evidence presented to the Trial Court showed that, while the information in the letter turned out not to be true, the concerns expressed in the writing by Petitioner and the other Firefighters who signed it were brought forward based on good faith and their true interest in maintaining integrity of the test and the Unit (Kinney dep tr, R. 62-1 at 14-15, 30-31, 32-33, 41-42, 52, 87-88, 93-94, 96 Page ID #s 953, 957, 960, 962, 971, 973; Tibbets dep tr, R. 63-1 at 20-21, 27-28, 33, 45, 49 Page ID #s 985-87, 989, 992-93; Knecht dep tr, R. 59-1 at 28, 30, 41, 52, 53, 67, 70 Page ID #s 860, 864, 866-67, 870-71; Gaudino dep tr, R. 61-1 at 16, 17, 30, 47-48, 49, 88, 90, 129-31 Page ID #s 908-09, 912, 916, 926-27, 937; Dep Ex 61 *Gaudino Pre-discip Hearing*, R. 70-12 at 11-16, 22-22 Page ID #s 1272-77; 1281-83; Lovejoy dep tr, R. 57-1 at 101, 146 Page ID #s 781, 792). Even the Department's Chief French and Assistant Chief Ryan recognized that the letter was signed because the Firefighters cared about fairness of the test (French dep tr, R. 55-1 at 134 Page ID #689; Ryan dep tr, R. 64-1 at 121 Page

ID #1033).⁶

Petitioners signed the letter because they were concerned that if the integrity of the test was compromised – the effectiveness of the Unit and overall safety to the City’s Police and community would also be affected (Bagi Declar, R. 72-3 at ¶¶ 2, 3 Page ID #s 1452-53; Tibbets dep tr, R. 63-1 at 20-21 Page ID #986; Knecht dep tr, R. 59-1 at 30, 43 Page ID #s 861, 864; Gaudino dep tr, R. 61-1 at 30 Page ID #912; Kolar dep tr, R. 60-1 at 12 Page ID #884; French dep tr, R. 55-1 at 32, 34-35, 138 Page ID #s 663-64, 690; Ryan dep tr, R. 64-1 at 34-36 Page ID #1011; Whelan dep tr, R. 56-1 at 39, 115-16 Page ID #s 722, 741).⁷

IX. ARGUMENT ADDRESSING REASONS FOR ALLOWING THE WRIT

Summary

Petitioner Scottie A. Bagi and Gary C. Vojtush were Plaintiffs in the Court as public employees of the City of Parma’s Fire Department, and they brought a First Amendment retaliation claim under 42 U.S.C. § 1983 against their public employer (Complaint, R. 1 at 1-6, Count I Page ID #s 1-6). Their case was based on retaliation

⁶In terms of the motivations 6 of Petitioners and the others who signed the letter see argument and citations to evidence in Petitioners’ Memorandum in Opposition to Summary Judgment R. 72-2 at Section I(C) pp 9-10 Page ID #s 1429-30.

⁷ This evidence was provided to the District Court by Petitioners in Opposition to the City’s Motion for Summary Judgment R. 72-2 at Sections I(B) pp 5-9 Page ID #s 1425-29 & I(F) pp 12-15 Page ID #s 1433-35.

they received directly as a result of a letter prepared by Petitioner Bagi and delivered to the Department's Chief and City's Human Resource Director that questioned the integrity of the a test that was given by the City's Fire Department and was believed to be administered by Captain Poznako (Bagi Declar R. 72-2 at ¶¶ 3-7 Page ID #s 1453-54). This letter was signed by Petitioner Vojtush and five other members of the Parma Fire Department (Id. at ¶4 Page ID #1453). Petitioner were subjected to extensive discipline by the City of Parma after providing this letter to the Fire Chief and Human Resource Director (Id. at ¶8 Page ID #1454).⁸

The City of Parma moved the Trial Court for Summary Judgment and argued that Petitioner's speech was not protected by the First Amendment because:

- (1) Petitioners' made false accusations in their letter;
- (2) Petitioners' speech was made in their official capacities as firefighters;
- (3) Petitioners' speech was not a matter of public concern; and
- (4) the City's interest in discipline and managing the Fire Department outweighed Petitioners' interest under the First Amendment.

(Memorandum Support of SJ, R. 54-1 at 5 Page ID #233).

The Trial Court's Memorandum Opinion that granted Respondent's Motion for

⁸See facts and evidence cited by Petitioners in Opposition to the City's Motion for Summary Judgment R. 72-2 at Section I(G) pp 15-17 Page ID #s 1435-37.

Summary Judgment addressed only Respondent's first argument, and concluded that because Petitioners had no evidence to support their speech, their speech was inaccurate, and the allegations in their speech were false. The District Court decided Petitioners' speech was made with reckless indifference to its truth and, as such, fell outside of protection under the First Amendment (Memorandum Opinion R. 90 at 28-31 Page ID #s 1668-71).

Issues 2 through 4 above – raised by Respondent City of Parma in its dispositive motion were not decided by the lower court (Id.). On Petition for a Writ of Certiorari the question is whether the District Court and Court of Appeals erred in determining that Petitioner's speech was made with an intentional or reckless disregard for its truth. Specifically, Petitioner submit that the District Court's decision is the result of an improper weighing of the evidence, the failure to apply the appropriate inferences in Petitioner's favor, and reflects a clear misapprehension of summary judgment standards under Fed. R. Civ. P. 56.

The issue brought by Petitioner in his lawsuit was not whether the concerns they raised in their speech were correct – rather the issue was whether they were retaliated against because they spoke. Here there is no dispute that Petitioner was disciplined because of his speech. Petitioner maintains that the Trial Court turned these issues on their head. It improperly weighed the evidence before it. When credit

is given contrary to evidence presented in the City's dispositive motion, and reasonable inferences are made in Petitioner's favor, it clearly demonstrates that Petitioner had a basis for raising his concerns – even though such turned out to be incorrect. There were at least genuine issues of material fact that existed to demonstrate that Petitioner's speech was not made with an intentional or reckless disregard for its truth, which should have precluded summary judgment in the City's favor.

A. The Sixth Circuit Court of Appeals Erred in Failing to Find That the Petitioner's Letter Concerning Hiring-Related Speech Touched On Matters of Public Concern and, Therefore, Constituted Protected Speech Under the First Amendment of the United States Constitution.

Petitioner's speech was protected by the First Amendment, and in Opposition To Respondent's Motion for Summary Judgment, Petitioner presented evidence to the District Court that showed that they did not knowingly nor were they recklessly indifferent to the truth of their speech. In its decision otherwise, the District Court erred in weighing the evidence before it and otherwise did not apply the appropriate standard under Fed. R. Civ. P. 56.

In order to make out a *prima facie* case for a First Amendment retaliation claim, a public employee who claims that an employment decision was made in retaliation for engaging in protected speech, must show that: (1) "the plaintiff was

engaged in constitutionally protected speech; (2) the plaintiff was subjected to an adverse action or was deprived of some benefit; and (3) the protected speech was a 'substantial' or a 'motivating factor' in the adverse action." Banks v. Wolfe Co. Bd. of Educ., 330 F.3d 888, 892 (6th Cir. 2003), *citing*, Brandenburg v. Housing Auth. of Irvine, 253 F.3d 891, 897 (6th Cir. 2001) *and* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977).

Public employees must show that their speech touched on a matter of public concern, and that their "interest in making such statements outweighs the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Banks, at 892, *citing*, Pickering v. Board of Educ. of Township High School, Dist., 205, 391 U.S. 563, 568 (1968), Mt. Healthy City School Dist. Bd. of Educ., *supra*, at 284, *and* Bailey v. Floyd County Bd. of Educ., 106 F.3d 135, 144 (6th Cir. 1997). *See, also*, Westmoreland v. Sutherland, 662 F.3d 714, 718-19 (6th Cir. 2011), *citing*, Garcetti v. Ceballos, 547 U.S. 410, 417 (2006) *and* Pickering, *supra*, at 568. The nature of the adverse employment action is the concern that action by the public employer would chill an employee to engage in such speech. *See*, Ellison v. Knox Co. Bd. of Educ., No. 3:15-CV-126 (E.D. Tenn., Jan. 15, 2016) (unreported Memorandum Opinion & Order at 2, attached as R. 72-4 Page ID #1455). *See, also*, Dye v. Office of Racing Comm'n, 702 F.3d 286, 303 (6th Cir. 2012), *citing*,

Center for Bio-Ethical Reform, Inc. v. City of Springboro, 477 F.3d 807, 822 (6th Cir. 2007).

The, at times, troubling issues presented in the second and third factors of the retaliation claim were not in dispute in this case as the issues of causation and whether the City acted under its policy in its discipline of Petitioner was not drawn into question by Respondents' dispositive motion. In its opinion, the District Court stopped at the City's first premise when it decided that Petitioner's speech was not protected under the First Amendment because they were recklessly indifferent and that no evidence supported the allegations in the speech (Memo Opinion, R.. 90 at 32, Page ID #1671). In an unusually harshly worded decision, the District Court incorrectly maintained that because there was no evidence that supported the allegations in the letter, written by Petitioner Bagi and signed by Petitioner Vojtush and others, the "... speech falls outside the realm of employee speech protected under the First Amendment." (Id.).

The law of First Amendment retaliation is clear in that the lack of evidence to support what is presented in public employees' speech will not deprive that speech of Constitutional protection. Chappel v. Montg. Co. Fire Prot. Dist. No. 1, 131 F.3d 564, 576-77 (6th Cir. 1997). Like Petitioner's speech, the speech of the plaintiff in Chappel concerned allegations of unethical conduct within the county's fire

department. The public employer claimed the plaintiff's speech was not protected because it was "... nothing more than accusations of incompetent management,' and Chappel 'has presented no 'concrete evidence' that 'public corruption' occurred.'" Id. at 576 (this Court citing the defendants' argument).

Like the contention by the City of Parma, the defendants in Chappel argued that the speech regarding the unethical conduct was not protected because the employee had no actual evidence related to the accusation in the speech. Id. This Court explained that this understanding "misinterpreted the relevant case law[]" that pertains to First Amendment Retaliation. Id. "A public employee is not required to prove the truth of his speech in order to secure the protections of the First Amendment. Id., *citing*, Williams v. Commonwealth of Ky., 24 F.3d 1526, 1535-36 & n. 3 (6th Cir. 1994), *and relying on*, Pickering, *supra*, at 571-72. Thus, Petitioners claim does not depend on whether they had evidence to support their speech because the law requires that the public employer defendant "... must prove that the statements were not only false, but were made with intentional or reckless disregard for the truth," Westmoreland v. Sutherland, *supra*, at 722, *relying on*, Chappel, *supra*, at 576 *and* Farhat v. Jopke, 370 F.3d 580, 591 (6th Cir. 2004).

In Tolan, *supra*, the United States Supreme Court recently cautioned and emphasized to Courts the responsibility against the temptation to weigh evidence

when deciding motions brought under Fed. R. Civ. P. 56. The Court warned that credit must be given to evidence in the record that contradicts the moving party's position on key factual issues. Tolan, *supra*, at 1866-67, *citing*, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). Courts must remember that each party "... come to this case with their own perceptions, recollections, and even potential biases, [and] [i]t is in part for that reason that genuine disputes are generally resolved by juries in our adversarial system." *Id.* at 1868.

The law is plain and clear that in reviewing the City's Motion for Summary Judgment, the District Court was prohibited from weighing the evidence or making any credibility determinations." Biegas v. Quickway Carrier, Inc., 573 F.3d 365, 374 (6th Cir. 2009), *citing*, Anderson v. Liberty Lobby, Inc., *supra*, at 255. In the face of the City's Motion, the District Court was required to draw all reasonable inferences in light of what Petitioner pointed to as evidence to support their claim. *Id.*, *citing*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). *See, also*, Ohio Citizen Action v. City of Englewood, 671 F.3d 564, 569-70 (6th Cir. 2012) *and* Bennett v. City of Eastpoint, 410 F.3d 810, 817 (6th Cir. 2005), *both also citing*, Anderson and Matsushita Elec. Indus. Co., *supra*.

In terms of First Amendment retaliation law, given that the public employee does *not* have to prove that the speech is true to obtain Constitutional protection *and*

that the burden is on the defendant employer to show that the speech was untrue *and* made with intentional or reckless disregard for the truth – it is error for the District Court to grant summary judgment when the employees “. . . present[] evidence that [they] had reason to believe. . .” their speech. Westmoreland, *supra*, at 722. Further, when a concern related to safety is advanced, this Court specifically rejected the public employer’s argument that the employee’s speech was not protected because he did not provide any evidence to substantiate the allegations of his speech. Chappel, *supra*, at 576, *citing*, Williams, *supra*, at 1535-36 & n. 3, *and relying on*, Pickering v. Bd. of Educ., *supra*, at 571-72. *See, also*, Stinebaugh v. City of Wapakoneta, No. 14-4262 at 4 (6th Cir., Nov. 10, 2015) (not recommended for full text publication, attached as R. 72-5 Page ID #s 1459-67), *citing*, Westmoreland, *supra*, at 719-20 *and* Mattox v. City of Forest Park, 183 F.3d 515, 521 (6th Cir. 1999) (observing that speech concerning “the workings of the [city’s] Fire Department and public safety” fell easily within matters of public concern).⁹

The Opinion of the District Court set forth an understanding of this proposition

⁹Petitioner pointed to a great deal of evidence in the Court below that their speech related to public safety (Bagi Declar R. 72-3 at ¶2 Page ID #1452; Whelan dep tr, R. 56-1 at 39, 115-116 Page ID #s 722, 741; Tibbets dep tr, R. 63-1 at 20- 21 Page ID #s 985-86; Knecht dep tr, R. 59-1 at 30, 43 Page ID # 861, 864; Gaudino dep tr, R. 61-1 at 30 Page ID #912; Kolar dep tr, R. 60-1 at 12 Page ID # 884; French dep tr, R. 55-1 at 32, 34-35, 138 Page ID #s 663, 664, 690; Ryan dep tr, R. 64-1 at 34-36 Page ID #1011). *See*, primarily information provided in Petitioner’s Memorandum in Support of their Opposition to Summary Judgment, R. 72-1 at Sec I(C) pp 9-10 Page ID #s 1430-31.

(Memo Opinion R. 90 at 28 Page ID #1668),¹⁰ but its decision focused on the lack of evidence to support the speech (Id. at 31 Page ID #1671). The Court then proceeded to weigh the evidence and/or not credit evidence that contradicted Respondent's position in deciding summary judgment in the City's favor.

In Opposition to the City of Parma's dispositive Motion, Petitioner produced and pointed to evidence that:

(1) Captain Poznako was at least involved in the administration and was ultimately responsible for the test. *See, Section IV(B)(2), supra.*

(2) Captain Poznako was viewed by a number of firefighters to be controlling, a bully, very biased, manipulative, conniving, vindictive, would berate others, and that he had an explosive personality. *See, Section IV(B)(3), supra.*

(3) Raised a question of propriety in the manner in which Captain Poznako administered the prior, 2004 TEMS Unit test. *See, Section IV(B)(4), supra.*

(4) Pointed to widespread confusion and uncertainty in the Department of the number of years of service required the TEMS Unit. *See, Section IV(B)(5), supra.*

(5) Presented evidence that the reason for the speech by the Petitioner and the others who signed the letter was to ensure that the 2011 TEMS Unit test was administered

¹⁰ The District Court actually cited Westmoreland, *supra*, at 721 and Chappel, *supra*, at 576 for this proposition of law.

in a fair manner, and that there was a specific concern of bias on the part of Captain Poznako. *See, Sections (IV)(B)(3) & (7), supra.*

(6) The Chief could not dispute whether there was a common belief of the lack of fairness on the part of the Captain.¹¹

(7) Evidence that Petitioner Bagi who wrote the letter did not intentionally make false statements in the letter.¹²

(8) While the statements expressed in the letter turned out not to be true, those who signed the letter brought forward the concerns based on good faith and their true interest in maintaining the integrity of the test and the Unit. *See, Section IV(B)(7), supra.*

(9) Even when Petitioners were subjected to discipline for the speech, the arbitrators determined that Petitioners did not make statements that were knowingly false with malice.¹³

¹¹Importantly, Chief French acknowledged in his testimony that he could not dispute whether a common belief existed in the Department related to Captain Pozanko's fairness in his involvement with the test – as was suggested in the speech at issue in this case (French dep tr, R. 55-1 at 156-57 Page ID #s 694-95).

¹²The Union's President testified that it was understandable that some of the firefighters would have had concerns about the Captain's integrity, and he did not believe that Bagi intentionally made a false statement (Lovejoy dep tr, R. 57-1 at 101, 115-16 Page ID #s 781, 784).

¹³ Ex GG, *Bagi's Arbitration Decision*, R. 54-35 at 47-48 Page ID #s 512-13; Dep Ex HH, *Vojtush's Arbitration Decision*, R. 54-36 at 20 Page ID #541. This evidence was put before the Court by the City – attached to its dispositive Motion R. 54-35, R. 54-36, and the point was

Despite the District Court's recognition that it was not to weigh the evidence and draw all inferences in Petitioner's favor (Memo Opinion, R. 90 at 26-27 Page ID #s 1666-67), like the lower courts in *Tolan*, *supra*, here the District Court did not credit contradictory evidence, did not construe the evidence in Petitioner's favor, and did not draw all inferences in their favor. *Tolan*, at 1867.

The District Court "... "credited the evidence of the party seeking summary judgment and failed properly to acknowledge key evidence offered by the party opposing that motion." *Id.*, at 1867-68. Because of this, the District Court's "... opinion below reflects a clear misapprehension of summary judgment standards in light of [the Supreme Court's] precedents." *Id.* at 1868.

The letter in question was critical of Captain Poznako's action related to a prior, 2004 TEMS Unit Test (Dep Ex 11 *letter*, R. 70-2 Page ID #1171). The District Court stated that Petitioner wrote and signed the letter with no evidence of any wrongdoing with the 2004 or 2011 test, no evidence of bias and no Dep evidence of the qualification of Fetter, or whether this was connected with the tests (Memo Opinion, R. 90 at 28-29, 30 Page ID # 1668-71). This statement clearly did not credit evidence, and/or drew inferences and weighed evidence that raised a question of

argued to the Court at least in Petitioner's Response in Opposition to Summary Judgment, R. 84 at 4 Page ID #1588.

propriety as to the manner in which Captain Poznako administered the 2004 TEMS Unit test. This included evidence that the Captain himself told Bagi that test he was directed by the Parma Police that Firefighter Mlady needed to be put on the Unit after the 2004 test – which pointed to a clear connection in the outcome of the test (Bagi Dec 72-3 at ¶3 Page ID #1453).¹⁴

Further, the lower Court clearly did not credit, nor did it draw inferences, and/or it weighed evidence that the Captain was viewed by a number of firefighters to be very biased – as well as controlling, manipulative, conniving, vindictive, that he would berate others, and exhibited an explosive personality.¹⁵

The District Court further stated that there was no evidence that the Captain administered the test or otherwise influenced the test (Memo Opinion, R. 90 at 29 Page ID #1669). This statement clearly did not credit evidence and/or drew inferences and weighed evidence that the Captain was involved in parts of the administration of the test, and that he was ultimately responsible for the test.

¹⁴In this regard, the language in the letter must be noted that presented a concern that the best performer on the test would “. . . not be *accepted* onto the SWAT team.”(emphasis added) (Dep Ex 11 R. 70-2 Page ID #1171). Further, the lower Court failed to give credit in this regard of the evidence of questions of bias raised by Petitioner Bagi with the Captain regarding the 2004 test, and that Bagi presented these concerns to the Fire Department about the 2004 test (See, Memo Opinion, R. 90 at 3-4, 5-6 Page ID #s 1643-46).

¹⁵The District Court did not credit Petitioner Bagi’s communication directly to Captain Poznako of his concern of bias with the test before the test took place (See, Memo Opinion, R. 90 at 9 Page ID #1649).

The District Court stated in its Opinion that the letter in question portrayed that the Captain "... gave answers or identified specific areas to study to his friends. . ." (Id.), and that the speech accused Captain Poznako and Firefighter Fetter of cheating (Id. at 30 Page ID #1670). This statement clearly ignored the full language of the letter, weighed the language or gave an inference of the language in favor of the City because the letter stated that many in the department "... are *under the belief* that Captain Poznako gave the answers, *or at least identified the areas to specifically study...*" (emphasis added) (Dep Ex 11 R. 70- 2 Page ID #1171).

In this regard, the District Court clearly gave an improper inference in favor of the moving party – as the word "cheating" appeared nowhere in the letter. The Court cites the view of City's Chief that the speech said that the Captain cheated (Memo. Opinion R. 90 at 20 Page ID #1660).¹⁶ While the Chief that may have believed this – the speech in question does not actually say that he cheated and, as such, points to an improper weighing of the speech or inferences of the speech in question.

The District Court's Opinion stated the letter contained inaccurate information of the years of service requirement to be on the TEMS Unit (Id. at 29 Page ID #1669). This statement clearly did not credit evidence and/or drew inferences and weighed

¹⁶Firefighter Tibbits testified that the speech did not say that Captain Poznako actually cheated or gave answers to the test (Tibbets dep tr, R. 63-1 at 69- 70 Page ID #998).

evidence of widespread confusion and uncertainty in the Department of the number of years of service required the TEMS Unit – which included uncertainty on the part of the Department’s Assistant Chief (Ryan dep tr, R. 64-1 at 40-43 Page ID #s 1012-13). The District Court purely and openly weighed this evidence in the City’s favor when it wrote this off by stating that “. . . any uncertainty was the result of general work gossip.” (Memo Opinion, R. 90 at 8 Page ID #1648).

The District Court stated in its Opinion that Petitioner Bagi failed to investigate further his concerns before communicating them in the letter (Id. at 14 Page ID #1654), but this negated and failed to give credit to the fact that he was a firefighter and that he used the only resource available to him to make known his concerns about the potential ethical issues with the test – as set forth under the City’s policy.

While not determinative, as the District Court did not engage in a balancing test under Pickering, *supra*, its Opinion further drew inferences into the speech and stated that it caused disruption in the Fire Department – despite contradictory evidence on this point (Id. at 30 Page ID #1670).¹⁷ Without reference to actual facts the lower

¹⁷A number of firefighters testified that the letter written by Petitioner did not disrupt the Department, it ran fine, and they were able to perform their jobs after the letter (Kinney dep tr, R. 62-1 at 94-95 Page ID #973; Kolar dep tr, R. 60- 1 at 16 Page ID #885; Tibbets dep tr, R. 63-1 at 57 Page ID #995; Gaudino dep tr, R. 61-1 at 13, 19, 28 Page ID #s 908, 909, 911). Even the Department’s Assistant Chief explained that the Fire Department continued to run as it did before and that any turmoil created did not affect its ability to run (Ryan dep tr, R. 64-1 at 115-16 Page ID #1031). While Firefighter Michael Whelan testified that he was offended and angered by the letter, and that there was a great divide in the Department caused by the letter (Whelan dep tr, R.

Court then inferred that this caused the expense of significant resources and unknown taxpayers dollars (Id.).¹⁸

The District Court's Opinion further drew inferences to conclude that Petitioner's speech had the intent of affecting the careers and reputations of Captain Poznako and Firefighter Fetter (Id.). This inference negated and/or weighed evidence by discounting testimony to the contrary regarding the speech:

Specifically, testimony was presented by Petitioner that Firefighter Fetter was not bad mouthed and did not have his credibility affected by the letter (Kinney dep tr, R. 62-1 at 106, 108 Page ID #969; Lovejoy dep tr, R. 57-1 at 195-96 Page ID #804), and that the speech was not made to bring discredit to anyone in the Department (Kolar dep tr, R. 601 at 35 Page ID #890; Bagi Declar, R. 72-3 at ¶7 Page

56-1 at 75-77, 82-84 Page ID #s 731, 733), he could not be specific as to what he meant by such a *divide*, and he testified that the letter did **not** interfere with his ability to perform his job and he does **not** know of any fireman who was so affected by the letter that they were unable to perform their job (Id. at 98, 100 Page ID #737). Firefighter Frantz also said that there was an unspecified "little division in the ranks," but that the speech did **not** interfere with the firefighters' ability to perform their jobs in the Department (Frantz dep tr R. 68-1 at 113-14 Page ID #1119). Before the speech, the union president testified that there was already a reluctance in the Department for firefighters to come forward and make statements on the record about concerns or issues, and they did not want to take a risk of negative treatment from the administration by making complaints (Lovejoy dep tr, R. 57-1 at 101-03, 104-06 Page ID #s 781-82). This evidence was put before the District Court in Petitioner's Opposition to Summary Judgment, R.72-2 at Sec I(F) pp 12-15 & Sec III(D) pp 27-30 Page ID #s 1432-35, 1447-50

¹⁸This inference also negates that any evidence of time expended on the issue was the discipline directed toward Petitioner. It was the retaliatory multihearing investigation that caused any dysfunction – not Petitioner's speech.

ID #1454). Even Chief French testified that he did not view that Bagi harbored any ill will toward the Fire Department (French dep tr, R. 55-1 at 101 Page ID #681), and he said concerning the contents of the letter that, “I believe [Scott Bagi] felt that there was some truth to the basis of it.” (Id. at 163 Page ID #696).¹⁹

The District Court also proclaimed that the Chief and City of Parma acted “honestly” or “professionally” in light of Petitioner’s speech (Memo Opinion, R. 90 at 30 Page ID #1670), and it did not give credit to evidence that – despite the City’s policy to the contrary – the Chief did not want the letter sent the City’s Human Resource Director (French dep tr, 55-1 at 50, 80, 123-24, 127, 140, 141, 166-68 Page ID #668, 675, 686, 687, 690, 691, 697; Dep Ex 39 *Ethics Policy*, R. 70-6 at 3 Sec D Page ID #1179; Lovejoy dep tr, R. 57-1 at 108, 110 112, 115 Page ID #s 782, 783, 784). No credit was given by the District Court to Bagi’s reliance on the City’s *Ethics Policy*, which provides that if someone brings a violation to the human resource department in good faith – that individual would not be adversely affected (Bagi Declar, R. 72-3 at ¶6 Page ID #1454; Kinney dep tr, R. 62-1 at 50-52 Page ID #962; Dep Ex *Ethics Policy*, R. 76-3 at 3 Sec D Page ID #1179).²⁰

¹⁹Assistant Chief Ryan said he was shocked when saw the letter – but the letter did not offend or anger him, and he does not recall an indication from Chief French that the letter offended or angered him (Ryan dep tr, R. 64-1 at 67-68; 93-94 page ID #s 1019, 1026).

²⁰At the time of Plaintiffs’ speech, Assistant Chief Ryan was not even aware of this policy that directed the City’s employees to report to the Human Resource Department (Ryan dep tr, R.

Given the evidence before the District Court, a view of its Memorandum Opinion, and particularly the manner in which the lower Court accepted beliefs of the City and the Chief of its Fire Department over the beliefs (wrong or right) by Petitioners in deciding that their speech was unprotected because it was made with an intentional or reckless disregard for the truth was presented with a slanted and biased perspective favoring the City. Also, given the law related to First Amendment retaliation and the protection intended for public employees, the evidence before the District Court and its focus and Petitioner's lack of evidence *to support their speech* reveals an overall tone in the Opinion that is harsh and reflects a distinct hostility toward Petitioner. *See, Lavin v. Husted*, 764 F.3d 646 (6 Cir. 2014). Thus, Petitioner questions whether this case would be appropriate for reassignment upon remand based on the tone of the Memorandum Opinion by the District Court in this instance. *Id.* at 652.

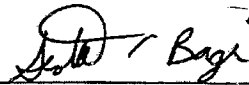
As the Court of Appeals erred in failing to find that Petitioner's letter concerning hiring-related speech touched on matters of public concern, thus constituting protected speech under the First Amendment, Petitioner requests that the decisions of the lower courts regarding this issue be vacated and that this issue be granted review by this court.

X. CONCLUSION

For the foregoing reasons, Petitioner, Scottie A. Bagi, ask this Court to Reverse the District's Court's and Court of Appeals, and to reassign this case upon remand due to the overly harsh tone and the one-sided weight, credit, and inferences provided to Respondent related to the evidence before the lower Courts.

Respectfully submitted,

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