

DIRECTOR FIRED AFTER CRITICAL E-MAIL

James C. Kozlowski, J.D., Ph.D.
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The First Amendment protects public employees from employer retaliation for employee speech which can be "fairly characterized as constituting speech on a matter of public concern." This was the issue before the federal district court in the case of *Burton v. City of Ormond Beach, Florida* (M.D. Fla. 8/23/2007). In this particular case, plaintiff H. Alan Burton was fired from his position as Leisure Services Director for the City of Ormond Beach after sending an e-mail critical of city administrators. SEE also: March 2001 Law Review: "Unconstitutional Retaliation Against Employee's Free Speech?" *Parks & Recreation*. Vol. 36, Iss. 3
<http://classweb.gmu.edu/jkozlow/lawarts/03MAR01.pdf>

FACTS

Burton was hired by Defendant City of Ormond Beach as the City's Leisure Services Director in May of 1996. As Leisure Services director, Burton's supervisors were the City Manager and Assistant City Manager. In June of 2005, the City Manager asked Burton to provide him with a planning recommendation for creating a 40-acre park in the Ormond Crossings area of the City. In Burton's professional opinion, this request was inappropriate because such a development would exceed the City's parks and recreation "master plan." As a result, Burton never provided a separate planning recommendation as requested because Burton accepted the parks and recreation master plan "as is."

In July 2005, an Ormond Beach resident wrote an e-mail to Burton asking the City to construct a net to prevent baseballs from flying into underbrush near the City's Number 5 field. Burton responded that he would be glad to include the request in the next year's fiscal budget and forward the request to the Public Works department for a work order. (The City's athletic ball fields were overseen by Leisure Services while the City's parks were controlled by Public Works.)

Shortly thereafter, a member of the Recreation Advisory Board sent an e-mail to Burton and others criticizing the City for underfunding recreation projects and neglecting its sports facilities. The City Manager was concerned about this e-mail, particularly the assumption that the City's sport facilities "weren't what they should be." The City Manager, therefore, scheduled a meeting with Burton and others to discuss the maintenance of the ball fields. At this meeting, the City Manager also expressed his anger with Burton for his failure to complete the requested recommendation on Ormond Crossings.

With the permission of the City Manager, the City Commissioner subsequently sent an e-mail to all parties who had received the critical e-mail from the member of the Recreation Advisory Board. In his e-mail response, the City Commissioner suggested that "Burton was responsible for the funding and maintenance issues" cited in the critical e-mail. Moreover, in the opinion of the City Commissioner, Burton had the authority to address the concerns raised by the Recreation Advisory Board member, but failed to do so. Instead, the City Commissioner claimed Burton's response had given this citizen "the run-a-round from staff." As a result, the

City Commissioner claimed this incident had caused him to "lose faith in the abilities of the current leadership in leisure services." Accordingly, in the opinion of the City Commissioner, "a strong re-organization is in order."

Later that same day, after receiving the City Commissioner's e-mail, Burton sent a five page e-mail response to the City Commissioner, the City Manager, the citizen member of the Recreation Advisory Board, and others who had received the City Commissioner's e-mail. In his response, Burton was critical of the City's organizational structure and management. Throughout the e-mail, Burton explained why he felt he could not handle the request to improve Field Number 5 by himself.

Burton described the City's Field Number 5 as "disgraceful and unsafe and nearly unplayable." Burton continued that he shared his concerns with the City Manager but "planning for a safe and playable field did not make it on the funded list." Burton went on to state that the past three memos to the Commission on parks and recreation were not reviewed by the appropriate park and recreation professional and that "this exclusionary practice is systematic and unfortunate." Burton also mentioned how he was passed over for several promotions. Burton concluded the e-mail by stating that the requested work on Field Number 5 was being performed that day, and that he agreed that a structural re-organization of the entire park and recreation system was needed.

In his e-mail response, Burton was also critical of the City Manager's job performance. Burton claimed the City Manager failed to "utilize staff around him" and support Burton as a team player and as Leisure Services Director. Burton stated further that the City Manager "violated the Florida State Sunshine Laws by sending e-mail messages back and forth during a public meeting." In addition, Burton stated that the City Manager's request to him to provide a separate recommendation on Ormond Crossings apart from the master plan eliminated public participation, betrayed other professionals, and made Burton feel dishonest. In the e-mail, Burton expressed his view that this might be his only chance to speak on the subject as "opinion has been muzzled and intimidated by the current City Manager."

Upon receipt, the City Manager and the Assistant City Manager discussed Burton's e-mail. In so doing, the City Manager reiterated his concern "about Burton's ongoing refusal to provide the City with information requested," i.e., the requested planning recommendation for creating a 40-acre park in the Ormond Crossings area. In addition, the City Manager and the Assistant City Manager both expressed their concern "about Burton's ability to manage his department and do the planning that was needed for the park system in the future."

After unsuccessfully attempting to contact Burton, the City Manager instructed the Assistant City Manager to e-mail Burton that afternoon and notify him that he would be placed on paid administrative leave. On August 1, 2005, the City terminated Burton's employment. Burton's termination letter stated only that Burton was an "at-will" employee who could be terminated at any time.

Burton filed suit against the City, arguing that he was "terminated unlawfully for engaging in his constitutional right to exercise his freedom of speech on matters of public concern." In response, the City claimed Burton's e-mail "was not speech by a citizen on a matter of public concern." In the alternative, the City argued that it had an "interest in regulating insubordinate speech" which "outweighs Burton's marginal interest in speaking."

The issue before the federal district court was, therefore, whether Burton had alleged sufficient facts to support the claim that “his termination was based on his exercise of constitutionally-protected speech.”

PICKERING TEST

As described by the federal district court, “[t]he First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.” Accordingly, the court noted, “as a general matter, a government entity may not discipline a public employee in retaliation for protected speech.” In so doing, however, the court acknowledged that “[a]n employee's exercise of his right to freedom of speech is not absolute.” Rather, the employee’s free speech right to comment as a citizen upon matters of public concern must be balanced against “the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” In light of this governmental interest, the court found that “a governmental employer may impose certain restraints on the speech of its employees, restraints that would be unconstitutional if applied to the general public.”

In determining whether “a public employee's First Amendment rights were violated for work-related speech,” the federal district court applied the “four-step *Pickering* test” enunciated by the United States Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). As described by the federal district court, the test would address the following questions:

- (1) whether the employee's speech is fairly characterized as constituting speech as a citizen on a matter of public concern;
- (2) whether the employee's interest in speaking outweighs the government's legitimate interest in efficient public service;
- (3) whether the speech played a substantial part in the government's challenged employment decision; and
- (4) whether the employer has shown by a preponderance of evidence that it would have made the same employment decision in the absence of the protected conduct.

The first two elements of this test are “questions of law designed to determine whether the employee's speech is protected by the First Amendment. The final two elements are questions of fact “designed to determine whether a retaliatory motive was the legal cause of the challenged employment decision.”

If the employee can establish the first three elements, his claim will still fail if the employer proves by a preponderance of the evidence that it would have fired him regardless of his speech.

The specific issue before the federal district court was, therefore, whether Burton’s e-mail was protected by the First Amendment. To resolve this issue, the court would first determine whether Burton was speaking as a citizen. The court would then determine whether Burton’s e-mail involved a matter of public concern. If so, then the court would consider whether Burton's e-mail, which the City characterized as “unprofessional and insubordinate speech,” was protected by the First Amendment.

SPEAKING AS A CITIZEN

The City contended that Burton's speech failed the *Pickering* test because Burton was "speaking as an employee and not a citizen when he sent the e-mail to City Commissioner." The federal district court acknowledged that Burton must "demonstrate that he spoke as a citizen on a matter of public concern" in order to have speech protected by the First Amendment.

If the employee made the statement at issue pursuant to his official duties, the First Amendment does not insulate his communication from discipline by the employer based upon the employer's reaction to the speech. Whether the employee's speech concerned the subject matter of his employment is not controlling; the controlling factor is whether the expressions were made pursuant to the speaker's job duties.

In this particular instance, the City contended that there was no doubt that "Burton was speaking in his official capacity when he sent the communication in question." The federal district court disagreed with the City's characterization of Burton's e-mail.

The e-mail in question was not sent to Commissioner Partington and City Manager Turner because they asked Burton to respond. The message was created by Burton on his own volition in response to an e-mail from Mr. Partington to Mr. Turner in which Burton was merely copied. The e-mail was sent to members of the public as well as government officials. In fact, Mr. Turner testified that there was no requirement that Burton send the July 29 e-mail, although he also testified that there was also no prohibition against him sending such e-mail.

In addition, the federal district court found "the content of the e-mail creates additional issues of fact as to whether Burton spoke as a citizen or as an employee." In particular, the court noted that there was "no evidence in the record that Burton's job duties included notifying his superiors regarding their Sunshine law compliance." Yet, in his e-mail, Burton criticized the City Manager for violating "the Florida State Sunshine Laws by sending e-mail messages back and forth during a public meeting." As a result, the court found sufficient evidence on the record to allow this case to proceed to trial to determine "whether Burton's e-mail was sent in his capacity as an employee or as a citizen."

The concerns addressed in Burton's e-mail appear to have gone beyond the core functions of Burton's employment. As the Court must resolve any doubt in favor of Burton for purposes of summary judgment [which would effectively dismiss the claim and deny Burton his "day in court"], the Court is unable to conclude that Burton's complaints were made simply as an employee rather than as a citizen.

The federal district court, therefore, denied the City's motion for "summary judgment on the question of whether Burton acted pursuant to his official duties in sending the e-mail in question."

MATTER OF PUBLIC CONCERN

Under the circumstances of this particular case, the City also contended that Burton's speech failed the *Pickering* test because Burton's comments "were not on a matter of public concern." To sustain a claim of retaliation for protected speech under the First Amendment, the federal district court noted that a public employee must show by a preponderance of the evidence (i.e.,

more likely than not) that he/she was speaking on a matter of public concern. In determining whether an employee's speech addressed a matter of public concern, the court would examine "the content, form, and context of a given statement, as revealed by the whole record." Under applicable precedent and reasoning from the U.S. Supreme Court, the federal district court acknowledged further that a document need only touch upon matters of public concern "in only a most limited sense" to be considered constitutionally protected speech.

Applying these principles to the facts of the case, the court found Burton had alleged sufficient facts to support his claim that the speech content of his e-mail "addressed a matter of public concern."

In the instant case, Burton's e-mail criticized Ormond Beach government officials, the mismanagement of ball fields by the City, and suggested that the City Manager had "muzzled" staff opinion and violated the state Sunshine laws. All of these types of statements have previously been held by courts to address matters of public concern.

Moreover, the court found the nature of the speech and the matters of public concern expressed therein were not destroyed by "the fact that Burton's e-mail contains personal matters, such as his complaints about being passed over for promotions and increased responsibilities." According to the court, Burton's "First Amendment rights do not depend on his job satisfaction."

Furthermore, the court found it to be "immaterial whether the employee experienced some personal gratification from writing the memo." As noted by the court, "even speech which contains personal attacks on someone or private matters can address a matter of public concern if there is sufficient content touching a matter of public concern mixed in with the attack."

Applying this principle to the facts of the case, the federal district court found the "whistleblowing" context of Burton's critical e-mail "weighs in favor of characterizing such speech as involving a matter of public concern."

Having found that Burton's speech addressed a matter of public concern, the federal district court determined that that summary judgment in favor of the City was not warranted on this "public concern" element of the *Pickering* test.

BALANCING TEST

The City further contended that Burton's Free Speech claim should be dismissed under the *Pickering* test because "the City's interest in regulating Burton's unprofessional and insubordinate speech outweighs Burton's marginal interest in speaking."

As described by the federal district court, "the First Amendment protects the rights of public employees 'as citizens to comment on matters of public interest' in connection with the operation of the government agencies for which they work." On the other hand, the court noted that "the government has legitimate interests in regulating the speech of its employees that differ significantly from its interests in regulating the speech of people generally."

[T]he Supreme Court has held that the scope of public employees' First Amendment rights must be determined by balancing "the interests of the employee, as a citizen, in commenting upon matters of public concern and the

interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”

As cited by the federal district court, the following three factors would be considered in striking a balance between employee free speech rights and the State’s interest in governmental efficiency in the workplace: 1) whether the speech at issue impedes the government’s ability to perform its duties efficiently; 2) the manner, time, and place of the speech; and 3) the context within which the speech was made.

While clearly acknowledging that “a public employee does not relinquish his First Amendment rights to comment on matters of public interest merely by virtue of government employment,” the federal district court noted that hostile speech and personal attacks were not protected by the First Amendment:

[T]he First Amendment does not require a public employer to tolerate an embarrassing, vulgar, vituperative, *ad hominem* [i.e. personal] attack, even if such an attack touches on a matter of public concern. If the manner and content of an employee’s speech is disrespectful, demeaning, rude, and insulting, and is perceived that way in the workplace, the government employer is within its discretion to take disciplinary action.

In this particular instance, however, the federal district court found the “whistleblowing” aspects of Burton’s speech were entitled to significant weight in Burton’s favor in applying “the *Pickering* balance” test.

CONCLUSION

As a result, the federal district court found that Burton had alleged sufficient facts to support his claim that he had been “terminated unlawfully for engaging in his constitutional right to exercise his freedom of speech on matters of public concern.” The federal district, therefore, denied the City’s motion for summary judgment which would have dismissed Burton’s claim. In so doing, the court would allow Burton’s case to proceed to trial to fully consider the merits of his claim against the City.

UPDATE: After Burton presented his case at trial, the federal district court granted judgment in favor of the City. On November 25, 2008, the federal appeals court affirmed the judgment in favor of the City:

BURTON v. CITY OF ORMOND BEACH, FLORIDA

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
November 25, 2008

H. Alan Burton ("Burton") appeals the district court's grant of the City of Ormond Beach, Florida's ("the City") Federal Rule of Civil Procedure 50(a) motion for judgment as a matter of law following Burton's case-in-chief at trial. Having thoroughly reviewed the record, we affirm.

BACKGROUND

From May 28, 1996 to August 1, 2005, the City employed Burton as its Director of Leisure Services to generally manage the City's recreation programs and athletic field maintenance. Burton's more specific duties included supervising the City's Recreation Manager, Recreation Supervisors, and several other employees; planning for parks and facilities; preparing the department's budget; addressing citizen groups' (such as the youth baseball and soccer leagues that utilized the City's recreation facilities) concerns about the ballfields; and serving as the liaison to the Recreation Advisory Board ("RAB"), a group of citizens appointed by the City Commission to advise the City on issues related to recreation and the athletic fields. Burton reported to the Assistant City Manager, and Burton's interaction with the City Commission was essentially limited to responding to a Commissioner's request for information.

The City's organizational structure assigned the maintenance of the recreation and athletic facilities to both Leisure Services and another department, Public Works. Leisure Services oversaw the City's athletic fields "inside the fences," but Public Works controlled the parks and maintenance "outside the fences." Generally, if a citizen expressed to Burton a maintenance concern within Public Works's purview, Burton was to submit a work order to Public Works.

In 2005, the City had undertaken review of the entire parks and recreation system. For years, Burton had internally advocated for an integrated system that unified the functions of Leisure Services and Public Works (as opposed to the "hybrid" system in place). But he never advocated a unified system in his official capacity because his duties obligated him to "adhere to the [City's] official position" to retain the hybrid system. In June 2005, the City Manager requested that Burton provide him with a planning recommendation for a forty-acre park in the newly developing Ormond Crossings area. Because Burton believed that the request was improper and exceeded a parks and recreation "master plan" already prepared by outside consultants, Burton did not comply with the request.

On July 24, 2005, Stan Stockhammer ("Stockhammer"), an Ormond Beach resident and director of a baseball league, emailed Burton (and another City employee) and requested that the City do something to prevent foul baseballs from flying into overgrown underbrush near the City's "Nova Field 5" ballfield. Stockhammer suggested the installation of netting to cure the problem. Burton responded by email on July 25 that he would be glad to include the request for netting in the next year's fiscal budget and forward the underbrush issue to Public Works for a work order. Another constituent copied on the emails, Doug Wigley ("Wigley"), responded to Burton's email and stated that the underbrush was a maintenance issue that should be addressed. Burton responded that he would work order the task to Public Works and grounds maintenance.

Later on July 25, John "Rick" Boehm ("Boehm"), a member of the RAB whom Burton copied on his email to Wigley, added his thoughts to the discussion. In an email to Burton, Stockhammer, Wigley, the City Commission, the City Manager and Assistant Manager, and numerous other citizens, Boehm referred to the prior emails between Burton and Stockhammer, criticized the City for under-funding recreation projects and neglecting its sports facilities, and specifically stated that the City's "facilities [we]ren't what they should be." Boehm directly expanded on Burton's original response to Stockhammer that no funding was available to refurbish Nova Field 5 within the next five years.

Concerned about Boehm's email, City Manager Isaac Turner ("Turner"), Assistant City Manager Ted MacLeod ("MacLeod"), and Burton met on July 26 to discuss maintenance of the athletic fields. At the meeting, Turner also expressed anger about Burton's failure to complete the requested recommendation on the Ormond Crossings park. That same day, City Commissioner Bill Partington ("Partington") emailed Turner, suggested that Turner fire Burton, and requested Turner's permission to respond to Boehm's email, to which Turner agreed. On July 27, Partington emailed everyone who had received Boehm's email and suggested that Burton was responsible for the City's mishandling of the funding and maintenance issues that Boehm had raised. Partington also felt that Burton had the authority to address Stockhammer's concerns and failed to do so, instead giving a citizen "the run-around from staff." Burton's response to Stockhammer caused Partington to "lose faith in the abilities of the current leadership in leisure services." Lastly, Partington concluded that "a strong re-organization is in order."

On July 29, Burton sent a lengthy responsive email to Partington, the other City Commissioners, Turner, Boehm, Stockhammer, and the other individuals copied on Partington's email. Burton sent the email because "he believed he needed to explain the Leisure Services organization and how it worked; how the City government worked; and how the City actually operated; . . . and to explain how [he] was attempting to improve the system." The email criticized the City's organizational structure and management and, according to Burton, covered many topics both pertaining to and outside his job function.

The email pointedly noted a "qualitative managerial difference" between Leisure Services and Public Works. Burton mentioned that he was passed over for several promotions, criticized City Manager Turner's performance, and raised the notion that Turner had violated the Florida Sunshine Laws. Burton added that Turner failed to support him as Leisure Services Director and this might be Burton's only chance to speak on the subject as his "opinion ha[d] been muzzled and intimidated by the current City Manager." Burton also stated that Turner's request of Burton to provide the Ormond Crossings recommendation eliminated public participation, betrayed other professionals, and made Burton feel dishonest. Describing Nova Field 5 as "disgraceful and unsafe and nearly unplayable," Burton advised that he had shared his concerns with the City Manager but that "planning for a safe and playable field did not make it on the funded list." Burton concluded the email by stating that the requested work on Nova Field 5 was being performed that day, and that he agreed with a structural re-organization of the entire park and recreation system.

After discussing Burton's email, Turner and MacLeod placed Burton on paid administrative leave. The City terminated him on August 1, 2005, and the termination letter stated only that Burton was an "at-will" employee who could be terminated at any time. Alleging that he was fired for exercising his First Amendment right to freedom of speech on matters of public concern in the July 29, 2005 email, Burton sued the City under 42 U.S.C. § 1983 for retaliation. In denying the City's summary judgment motion, the district court found that Burton's speech addressed a matter of public concern but that a genuine factual issue remained as to whether Burton spoke as a "citizen" or as a "public employee" in the email to Partington.

At trial, Burton testified that the email was a "personal email" expressing his belief in a unified park system regardless of who was in charge, that he was trying to improve the

system, and that he mentioned Turner's possible Sunshine Law violation because it disturbed him. Concluding that Burton failed to present sufficient evidence that he spoke as a citizen and not as a public employee, the district court granted the City's mid-trial motion for a directed verdict, from which Burton appeals.

DISCUSSION

"[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." Garcetti v. Ceballos, 547 U.S. 410, 421, 126 S. Ct. 1951, 1960, 164 L.Ed.2d 689 (2006). Following Garcetti, we "modified the analysis of the first step . . . for analyzing alleged government employer retaliation to determine if an employee's speech has constitutional protection by deciding at the outset (1) if the government employee spoke as an employee or citizen and (2) if the speech addressed an issue relating to the mission of the government employer or a matter of public concern." Whether an employee spoke as a citizen is a question of law for the court.

A court must discern the purpose of the employee's speech. Whether the employee spoke as a citizen on a matter of public concern is a threshold legal question.

Garcetti instructs that the inquiry into whether an employee spoke as a citizen "is a practical one." We consider whether the public employee was acting as a government agent at the time of the speech, and whether the speech "owes its existence to a public employee's professional responsibilities." Essential is whether Burton made his statements to the Commissioner in the capacity of a citizen who did not work for the government.

Although Burton invites us to provide a framework for defining the scope of an employee's professional duties, no "serious debate" exists here about the genesis of Burton's email. The form and context in which Burton responded shows that he sent the email for only one reason: to defend what he perceived as Commissioner Partington's attack on Burton's job performance as Leisure Services Director. Partington's email neither required nor prohibited a response from Burton. Both shocked and hurt by Partington's criticism, and wanting to inform Partington about how he had been trying to improve the system, Burton chose to defend himself against an expression of displeasure with Burton's handling of an issue directly within his job responsibilities. The thrust of Burton's email was that Burton had been unfairly criticized for the work he had done in his job.

Indeed, the first paragraph of Burton's email to Partington addresses head-on Stockhammer's inquiry about Nova Field 5 and the work order Burton issued to Public Works. Burton also discusses the work being completed on several fields "as I write" and his personal observation of such work--all responses to allegations of his deficient job performance. Throughout, Burton refers to himself as "your park and recreation professional" and closes the email by signing "H. Alan Burton, Certified Park and Recreation Professional." (Pl.'s Ex. 4). Burton also mentions Ormond Crossings and the "professional opinion" that was asked of him regarding this project. It is clear that Burton intended to defend his performance directly to Commissioner Partington and the people with whom Burton worked, including the RAB members.

Burton's email also systematically explains how Leisure Services operates within the City's internal structure and system of how athletic fields are maintained. He disagrees with the budgeting process, the organization of the City's departments, and his perceived unfair treatment by the City Manager. And most of these issues Burton had raised internally for many years in his official capacity. We also agree with the district court that Burton's copying of people outside City employment is unpersuasive, as they were not included on his original email chain and his response was clearly directed toward City leadership.

Lastly, it is clear that Turner's possible Sunshine Law violation was not the impetus for Burton's email. Admittedly, Burton responded to Stockhammer, Wigley, and Boehm in his capacity as Leisure Services Director, and the subjects of those emails were part of Burton's official duties. Those emails triggered Partington's attack on Burton's job performance, which Burton defended.

We therefore agree with the district court that Burton failed to produce sufficient evidence that he spoke as a "citizen" and not a "public employee."

AFFIRMED.