

I. PROCEDURAL HISTORY

This is a civil rights lawsuit, brought pursuant to 42 U.S.C. Section 1983, alleging retaliatory discharge in violation of the first and fourteenth Amendments.

Plaintiff Judy Shoudy is the former captain of the rescue squad for Volunteer Fire Company No. 1 of Roxbury Township. Defendants are the fire company and several of its members, the local firemen's association, and Roxbury Township, for which the company serves as the municipal fire department.

Shoudy claims the fire company dismissed her from membership as punishment for appearing at a township council meeting and speaking about the squad during the meeting's "public comment" portion. She says the dismissal deprived her of her right to free speech, as well as her substantive and procedural due process rights, under both the federal and the state constitutions.

The township, the fire company and the individual defendants have moved for summary judgment.¹ Shoudy now cross-moves for partial summary judgment on her first amendment claim.

Shoudy submits this brief in opposition to defendants' motion and in support of her cross-motion, which seeks a

¹ The fireman's association has filed a separate motion for summary judgment on the ground that it is not a "state actor" subject to suit under Section 1983. See Lugar v. Edmunson Oil Co., 475 U.S. 922 (1982). Shoudy will respond separately to that motion.

judgment of liability against defendants on her first amendment claim.

For several reasons, the Court should deny defendants' motion and grant Shoudy's:

First, Shoudy's remarks to council concerned an issue of paramount local public importance -- effective provision of first aid and rescue services. Defendants' attempts to turn Shoudy's legitimate concern with this issue into a vendetta against the fire chief are both factually unpersuasive and legally insufficient.

Second, Shoudy's first amendment interest in speaking out on this issue outweighs any "disruption" her remarks may have caused. Closely examined, defendants' claim of "disruption" amounts to little more than a desire to keep discussion of squad and fire department issues private, away from pesky public review.

Third, there is no dispute here that Shoudy's "public issue" speech was the exclusive cause of her dismissal; and not a whit of evidence suggests the fire department would have fired her anyway. Shoudy is thus entitled, as a matter of law, to a judgment of liability on her First amendment claim.

Fourth, Shoudy possesses protected interests sufficient to support both procedural and substantive due process claims. She

has a state-created interest in maintaining fire company membership, with its attendant monetary benefits, and a right to be substantively free of arbitrary interference with her free speech rights.

II. STATEMENT OF FACTS

Shoudy incorporates her Statement of Material Facts, submitted herewith pursuant to L.Cv.R. 65.1.

III. ARGUMENT

Summary judgment is governed by Fed. R. Civ. P. 56(c). A party seeking summary judgment must "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Id. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Brooks v. Kyler, 204 F.3d 102, 105 n.5 (3d Cir. 2000).

An issue is "genuine" if a reasonable jury could hold in the non-movant's favor on that issue. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-8 (1986). In deciding whether there is a genuine issue of material fact, the court must review the underlying facts and draw all reasonable inferences in favor of the non-moving party. Pennsylvania Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995).

If the movant makes a properly supported showing of no triable issue of fact and entitlement to judgment as a matter of law, "its opponent must do more than simply show that there is some metaphysical doubt as to material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The non-moving party must "go beyond the pleadings and by [its] own affidavits, or by the depositions, answers to interrogatories or admissions on file, designate specific facts showing that there is a genuine issue for trial." Celotex Corp., 477 U.S. at 324 (quotations omitted); see also Big Apple BMW, Inc. v. BMW of North Amer., Inc., 974 F.2d 1358, 1363 (3d Cir. 1992).

Even if a non-moving party has failed to establish a triable factual issue, a court should only grant summary judgment where "appropriate." Fed. R. Civ. P. 56(e). Accordingly, the case must be evaluated on its merits, and summary judgment may be granted only if the movant is entitled to judgment as a matter of law. Anchorage Associates v. Virgin Islands Bd. of Tax Rev., 922 F.2d 168, 175 (3d Cir. 1989).

Judged by that standard, defendants' motion must fail, and Shoudy's cross-motion must be granted.

- A. Shoudy's Appearance Before Township Council, And The Statements She Made There, Are Entitled To Full First Amendment Protection.

Public employers may not condition public employment on the surrender of the right to free expression. Perry v. Sindermann, 408 U.S. 593, 597 (1972). A public employee has a constitutional right to speak on matters of public concern without fear of retaliation. Rankin v. McPherson, 483 U.S. 378, 383-4 (1987); Feldman v. Phila. Hous. Auth., 43 F.3d 823, 829 (3d Cir. 1994).

Public employers may not silence employees merely because they disapprove of the content of their speech. Watters v. City of Philadelphia, 55 F.3d 886, 891 (3d Cir. 1995). Although "the government's role as employer ... gives it a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large," this hand cannot act with impunity. Waters v. Churchill, 511 U.S. 661, 671 (1994) (plurality opinion). See Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).

Deciding whether an employee has been punished for uttering protected speech requires a three-step process. Baldassarre v. New Jersey, 250 F.3d 188, 194-5 (3d Cir. 2001); Watters v. City of Philadelphia, 55 F.3d at 892.2

2 Defendants cite Versage v. Tp. of Clinton, 984 F.2d 1359, 1364 (3d Cir. 1993) to imply that Shoudy's interest in her fire company membership might not be sufficient to warrant First amendment scrutiny, but they do not press the point. In any event, it is undisputed here that the volunteer fire company is, by ordinance, the township fire company, and subject to township control. See (ordinance and resolution). That relationship makes Shoudy a "public employee" by any definition of the term, and warrants application of the First amendment. See Eggert v. Tuckerton Vol. Fire Co., 938 F. Supp. 1230 (D. N.J. 1996).

First, the employee must establish he has engaged in protected activity. Czurlanis v. Albanese, 721 F.2d 98, 103 (3d Cir. 1983). Once this threshold is met, the employee must demonstrate that his interest in the speech outweighs the state's countervailing interest in protecting the efficiency of the services it provides. Connick v. Myers, 461 U.S. 138, 147-8 (1983).

These determinations are questions of law for the court. Waters v. Churchill, 511 U.S. at 668; Green v. Phila. Hous. Auth., 105 F.3d 882, 885 (3d Cir. 1995).

Second, the employee must show that the activity was a substantial motivating factor in his punishment. Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 287 (1977). Finally, the employer may show it would have imposed the discipline absent the protected conduct. Id.; Swineford v. Snyder Cty., Pa., 15 F.3d 1258, 1270 (3d Cir. 1994).

Perhaps because they cannot dispute the second and third steps, defendants focus solely on the first prong of this analysis. They argue both that Shoudy's speech did not implicate a public issue and that the township's interest in efficiency outweighed Shoudy's speech interests.

Neither argument has merit.

1. Shoudy's speech, directed to the township's governing body, and concerned with effective provision of fire and rescue services, involved a public issue.

"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.'" Green, 105 F.3d at 885-6, citing Connick, 461 U.S. at 146. A court must focus on the "content, form and context" of the activity in question. Baldassare, 250 F.3d at 195.

An examination of those factors establishes that Shoudy's speech involved a "public concern."

The content of Shoudy's speech involved a significant public issue: the effective provision of first aid and rescue services to the township. Her remarks to the council pointed out problems with the squad that hampered its effectiveness.

She spoke about staffing problems and the relationship between the squad and the fire company; and the circumstances -- institutional and professional -- that justified making them separate entities, or defining their relationship more precisely. She asked for public, official action -- the enactment of an ordinance -- to restructure an aspect of provision of public safety services in Roxbury Township.

It is hard to imagine a topic of greater public importance

to a small, semi-rural municipality than the subject that brought Shoudy before the council.

Conversely, and despite defendants' efforts to tease a vendetta out of it, Shoudy's speech was not about her so-called "personality clash" with Chief Moore. At no place does she mention Moore by name or accuse him of anything untoward. Her only reference to Moore is by position, and deals with the institutional relationship between the squad chief and company captain, not the personal relationship between "Lou Moore" and "Judy Shoudy":

As captain, I currently have no real say in things that involve my squad. I am aware of the chain of command but ... some things asked of me should be able to be decided by the EMS captain without first being cleared through the fire chief. The majority of the decisions that I need to make are not fire-related and I am perfectly capable of making a decision on my own.

Exhibit ____, meeting transcript at 13.

The form and context of Shoudy's speech reflect its "public" nature. Shoudy appeared at a public meeting of the township's governing body, the entity ultimately responsible for the fire department and the squad. She asked council to consider doing what only it had the power to do: pass an ordinance restructuring the relationship between the squad and

the company. Cf. Zamboni v. Stamler, 847 F.2d 73, 78 (3d Cir. 1988)(that statements were made to officials with power to act is relevant to their public character); Czurlanis, 721 F.2d at 98 (employee's appearance at public meeting of board of freeholders).

The reaction of the council to Shoudy's speech confirms its public nature. The council members were both interested in and concerned by what Shoudy had to say. No one told her she shouldn't have come. The council voted unanimously to set up a committee to study the issues raised by Shoudy in her remarks -- a clear indication of their public nature.

Moreover, Shoudy came before the council at the suggestion of one of its members -- the deputy mayor, who was liaison to the fire department. The deputy mayor also suggested that Shoudy wear her squad uniform, "to make a better impression."

Shoudy's speech does not lose its public character merely because it concerns matters she knew of through her position with the squad. See Czurlanis, 721 F.2d at 104-05. To the contrary, like the teacher-plaintiff in Pickering and the mechanic-plaintiff in Czurlanis, Shoudy "was in a particularly good position to be aware of" the issues she brought to the council.

Defendants' principal argument is that Shoudy's "personal

ambition and a personality conflict with Chief Moore" -- rather than a concern for public safety -- "motivated" her speech to the council, and that this motive establishes the speech's "private" character. Db 33-36. The argument is doubly defective.

First, as the Third Circuit has held repeatedly, "the speaker's motive, while often a relevant part of the context of the speech, is not dispositive in determining whether a particular statement relates to a matter of public concern." Azzaro v. County of Allegheny, 110 F.3d 968, 978 (3d Cir. 1997). See also Swineford, 15 F.3d at 1272; Versage v. Clinton Tp., 984 F.2d 1359, 1365 (3d Cir. 1993); Zamboni, 847 F. 2d at 78 (3d Cir. 1988); Rode v. Dellarciprete, 845 F.2d 1195, 1201 (3d Cir. 1988). "Indeed, it is unlikely that any employee who lacks a personal interest in the subject that gives rise to the speech in question would file a lawsuit to vindicate his or her First amendment rights." Zamboni, 847 F.2d at 78.

Second, consideration of "the whole record" in this case, see Connick, 461 U.S. at 148, makes clear that Shoudy's overriding concern throughout her tenure on the squad was the provision of safe, speedy and effective first aid services to injured persons. Whatever her "personality problems" with Moore, they arose not because of some "personal grudge," see

Versage, 984 F.2d at 1365, but from a desire to provide effective rescue services.

A review of her correspondence with Moore and other fire company and township officials bears that out. These letters are concerned not with personal matters, but with what Shoudy believes were problems that affected the squad's ability to perform efficiently, effectively and accountably.

Even Shoudy's list of "Squad Problems Throughout 2000" (which defendants reproduce verbatim in their brief, Db 10-15, as if it somehow "proves" their point) partakes of that character. Most of the listed items reflect safety and efficiency concerns. That these problems may have resulted from Moore's inattention, or even from what Shoudy may have considered Moore's refusal to deal with her, does not lessen their "public" character.

In any event, these incidents have little to do with the character of Shoudy's speech at the township council meeting. Defendants' struggle to transmute her deferential, non-personal request for the council's attention into a personal power grab, but neither the tone nor the content of Shoudy's remarks can bear the weight of that misreading.

Defendants suggest Shoudy's speech was not of "public concern" because her statements about a manpower shortage were

not "true." Db at 32. See Swineford, 15 F.3d at 1274. The argument misstates the gist of Shoudy's remarks. The "manpower shortage" she described was not a shortfall in overall membership, but a shortage in members who responded to calls. See meeting transcript at 10. That shortage, of responding volunteers, indisputably did exist.

Similarly, defendants suggest Shoudy's mention of resigning undercuts the public character of the issue she is addressing. To the contrary, read in context, it affirms that character, since its predicate is the need for the governing body to address the issues she raises.

Finally, defendants' attempt to make this case a reprise of Versage v. Clinton Tp. is misplaced. In fact, in many ways Shoudy's case presents the antithesis of the Versage situation.

In Versage, a personal dispute over a road-closing, unrelated to fire company business, impelled the plaintiff to criticize the fire chief for alleged building permit violations during the renovation of the fire hall. Because plaintiff's speech was so clearly engendered by his unrelated personal dispute with the chief, and because the issue raised was only tangentially related to the fire company business, the court found the speech of only "limited public concern." 984 F.2d at 1365-66.

Here the situation is reversed. Shoudy's remarks concerned the core functions of the rescue squad, and whatever tension existed between her and the fire chief was a product of her concern for those functions, not its progenitor.

Shoudy's speech involves a matter of public concern in a direct and substantial way. As a matter of law, this Court should so hold.

2. Defendants have not shown that Shoudy's speech caused so much "disruption" that she could be punished for it.

A public employer may punish an employee's speech on a public issue only if its interests in "efficiency" outweigh the employee's free speech interests. Rankin v. McPherson, 483 U.S. at 388; Azzaro v. County of Allegheny, 110 F.3d at 980. The public employer bears the burden of proving that this balance tips in its favor. Baldassare, 250 F.3d at 198.

The public's interest in the expression is a significant factor in this balance. O'Donnell v. Yanchulis, 875 F.2d 1059, 1061 (3d Cir. 1989). The more substantially an employee's speech implicates public interests, the stronger the necessary showing of disruption. Connick, 461 U.S. at 152.

Moreover, in cases involving "public speech," the employer must demonstrate the employee caused "an actual disruption" to

outweigh the employee's interest in free expression. Swineford, 15 F.3d at 1272; Zamboni, 847 F.2d at 78. And even that showing does not necessarily permit the employer to suppress speech.

"The presumption in favor of free speech is great, and a mere showing of disruption is not, by itself, sufficient for a determination that an employee's speech is not protected."

Swineford, 15 F.3d at 1272, citing O'Donnell, 875 F.2d at 1062.

In determining an employer's interests, a court should examine such factors as whether the speech impaired 1) discipline or 2) workplace harmony, 3) interfered with working relationships, 4) impeded the employee's performance or 5) interfered with the regular operation of the enterprise. "These interests are referred to collectively as 'disruption.'"

Swineford, 15 F.3d at 1272, citing Versage, 984 F.2d at 1366.

Judged by these criteria, defendants' claim of "disruption" fails.

Defendants stress the character of the fire company as a "paramilitary" organization with a need for discipline and a hierarchical "chain of command." They suggest this factor alone tips the balance in their favor.

It does not. Shoudy did not forfeit her right to speak when she chose a "public safety" career. The Supreme Court long ago established that "[p]olicemen, like teachers and lawyers,

are not relegated to a watered-down version of constitutional rights." Garrity v. New Jersey, 385 U.S. 493, 500 (1967). What is true for policemen is at least as true for fire and rescue personnel.

The Third Circuit has made clear that Shoudy's position as a member of the Fire Company does not require her, as matter of efficiency, to keep its secrets:

[A chain of command policy] cannot be used to justify the retaliatory action against [defendant] under the rubric of the County'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. A 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. ... It would deprive the public in general and its elected officials in particular of important information about the functioning of government departments. 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, 721 F.2d at 106 (citations omitted).

Moreover, defendants' reliance on this factor is purely

abstract. There is no evidence in this record that Shoudy's speech before the council impaired discipline, or threatened the hierarchical structure or efficient operation of the fire department.

Second, the "disruption" defendants assert was not caused by Shoudy's speech. In fact, if defendants' evidence proves anything, it is that the tension between the fire company and the first aid squad -- and the resultant issues involving possibility of squad independence and the decline in responding volunteers -- pre-existed Shoudy's visit to council. And if that is so, Shoudy's speech could not have caused it.

Nor can it be said that Shoudy's speech itself exacerbated the situation. Shoudy was not disruptive, derogatory, or disorderly. She was not personal or antagonistic in her remarks. She told the council what she thought the existing problems were and asked -- politely-- for their help.

To the extent her remarks alluded to "tension" or "antagonism" in the fire company, they reflected existing conditions and their serious consequences. Shoudy's words did not create those conditions, and Shoudy did not exacerbate them by choosing to make them public.

In other words, the unarticulated premise of defendants' "disruption" argument is that that issues involving the fire

company and the squad should have been dealt with privately, and not made public. Defendants object less to what Shoudy had to say than to where she said it.

Their real objection is that Shoudy made public her views about issues of public significance -- issues that pre-existed her appearance at council, and that (as council's committee-forming response indicates) the council itself recognized as important.

Seen for what it really is, then, defendants' asserted interest is entitled to little weight. Its premise is anathema to the first amendment, which requires that debate on public issues be public -- "uninhibited, robust and wide-open," New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) -- to assure the "free and unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484 (1957).

It is precisely for this reason that a court must take the public's interest into account when determining whether to allow the government to truncate an employee's speech rights. See O'Donnell, supra.

This principle is as true for issues involving public safety -- fire and police issues -- as it is for any other governmental topic. "It is important that the public have

access to the thoughts and expressions of the rank and file police officer, whose views as to the effectiveness of police policy may be quite valuable to the community." Gasparanetti v. Kerr, 568 F.2d 311, 317 n.18 (3d Cir. 1977).

One need only substitute "fire and rescue worker" for "police officer" in that sentence to have a precise description of the public value of Shoudy's speech.

Seen from this perspective, defendants' claims of "disruption" and "violation of the chain of command" are merely their way of saying to Shoudy: "You embarrassed us in public, and must be punished for it." This is hardly an "efficiency" interest sufficient to outweigh Shoudy's interest in speaking out on an issue of public import.

Furthermore, if certain members of the fire department were upset by Shoudy's appearance at council, that alone cannot justify her dismissal. "A finding of actual disruption ... is not sufficient to a determination that the employee's speech is not protected. The first amendment balancing test of Pickering can hardly be controlled by a finding that disruption did occur." O'Donnell v. Yanchulis, 875 F.2d 1059, 1062 (3d Cir. 1989)(emphasis in original; citation omitted).

The only true evidence defendants have of "disruption" caused by Shoudy's speech is that 31 of 45 fire company members

present at the March 16, 2001, fire company meeting voted to expel Shoudy for appearing before the council. That vote (there are approximately 80 members overall in Shoudy's fire company) is hardly overwhelming;³ and to afford what is in essence a "heckler's veto" to fire company members who disagreed with Shoudy's petition to council is to elevate the personal interests of the company's members over the first amendment. See Terminiello v. Chicago, 337 U.S. 1 (1949).

Again, Versage provides an instructive counterpoint to this case. There the court found "disruption" that went far beyond dismissal by a one-vote margin, caused by speech of "limited" public value that it characterized as "carping criticism and abrasive conduct." 984 F.2d at 1367.

None of those elements is present here. The "public" value of Shoudy's speech is high, and the alleged "disruption" minimal at best. The balance of interests in this case favors Shoudy.

Any efficiency interests defendants assert do not, and cannot, outweigh Shoudy's first amendment interests here. The Court should therefore reject defendants' contrary contention and hold, as a matter of law, that her speech was fully protected by the first amendment.

³ The procedure followed by the company that evening required a two-thirds vote for dismissal. By that standard, Shoudy was dismissed by one vote.

B. Shoudy Was Dismissed Exclusively For
Speaking In Public To The Council,
And There Is No Evidence In This
Record Of An Alternative Justification
For Terminating Her.

To establish liability for a speech retaliation claim, a public employee must also establish that his speech caused the retaliation. Baldassare, 250 F.3d at 195. The employer may then attempt to show that "it would have reached the same decision ... in the absence of the protected conduct." Doyle, 429 U.S. at 287.

Here it is indisputable that Shoudy was dismissed from the fire company because she appeared before, and spoke to, the township council, and for no other reason. The minutes of the fire company meeting at which she was dismissed; the termination letter sent her by the company; and the final decision of the township manager affirming her dismissal all make that incontrovertibly clear.

Moreover, defendants have produced no evidence, and this record reveals none, that Shoudy would have been dismissed even if she had not appeared before the council.⁴

Accordingly, because her speech was protected, and because it was the exclusive basis for her dismissal, as a matter of law

⁴ The evidence, in fact, is to the contrary: In his "final decision," the township manager affirmatively found that "none" of the "personnel issues" involving the fire company and first aid squad "rose to any level of offense for which Mrs. Shoudy should have been considered for expulsion."

she is entitled to a judgment of defendants' liability on her first amendment claim.

C. Shoudy Has Stated Viable Claims
For Substantive And Procedural
Due Process Violations.

Defendants make the purely legal argument that Shoudy's due process claim must fail because she has no liberty or property interest in volunteer squad membership. This argument, again drawn entirely from Versage, misapprehends Shoudy's due process claim in several ways.

First, Shoudy has alleged state-created property interests sufficient to sustain a procedural due process claim. See Codispoto v. Heckler, 742 F.2d 72, 80 (3d Cir. 1984). Although a volunteer, Shoudy had a protected interest in maintaining that status. "The right to hold a specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the liberty and property concepts" of the due process clause. Greene v. McElroy, 360 U.S. 474, 492 (1959)(fifth amendment due process).

Moreover, in addition to her status in the fire company, Shoudy has enumerated a list of property-type benefits that accrue to volunteer membership, including pension, college

tuition, training and a clothes allowance. None of these benefits was considered in Versage.⁵

These benefits are state-conferred. See Board of Regents v. Roth, 408 U.S. 564, 577; Robb v. City of Philadelphia, 733 F.2d 286 (3d Cir. 1984). The township has enacted the pension plan pursuant to state law. See N.J.S.A. 40A:14-183 et seq. The township has formally established the fire company as its municipal fire department and subsidizes its operations with an annual contribution. See N.J.S.A. 40A:14-33.

The township has also established, by resolution, rules and regulations for the operation of the fire company, including rules governing discipline of members. This fact, also not present in Versage, supports Shoudy's entitlement to procedural due process protection. See Richardson v. Felix, 856 F.2d 505 (3d Cir. 1988).

Second, Shoudy has asserted her substantive as well as her procedural due process violations. She asks the Court to vindicate her right to be free of arbitrary governmental action, particularly when it affects fundamental rights. Reno v. Flores, 507 U.S. 292, 301-02 (1993); Bowers v. Hardwick, 478 U.S. 186, 191 (1986).

⁵ To the contrary, Versage claimed an interest only in "training, workers' compensation and access to the firehouse as a social area." 984 F.2d at 1370. His attempt on appeal to add interests equivalent to those asserted by Shoudy was rejected as untimely and procedurally inappropriate, not on the merits. Id.

Here Shoudy has alleged arbitrary interference with her free speech rights, motivated by the fire company's impermissible desire to silence her. This is a viable basis for a substantive due process claim. See Phillips v. Borough of Keyport, 107 F.3d 164, 180 (3d Cir. 1997).

Accordingly, defendants' motion for summary judgment on Shoudy's due process claim should be denied.

IV. CONCLUSION

For the foregoing reasons, this Court should deny defendants' motion for summary judgment, and should grant Shoudy's motion for partial summary judgment for liability on her claim that defendants deprived her of her First amendment rights.

DATED:

Respectfully submitted,