UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2001

(Argued: November 16, 2001 Decided: May 13, 2002
Errata Filed: June 13, 2002)

Docket No. 00-9487

- -X

THOMAS PAPPAS

Plaintiff-Appellant,

-v.-

RUDOLPH GIULIANI, Mayor of the City of New York and HOWARD SAFIR, Commissioner of the Police Department of the City of New York,

Defendants-Appellees.

- -X

BEFORE: LEVAL, SOTOMAYOR, *Circuit Judges*, and McMAHON, *District Judge*.[*]

Plaintiff Thomas Pappas appeals from a summary judgment of the United States District Court for the Southern District of New York (Buchwald, J.), dismissing his claim that he was terminated from the New York City Police Department in violation of the First Amendment by reason of his exercise of his rights of free speech.

The Court of Appeals (*Leval, J.*) holds that the Police Department's action did not infringe Pappas's rights under the First Amendment. Judge McMahon concurs in this opinion and files a separate concurring opinion. Judge Sotomayor dissents by separate opinion.

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[*]The Honorable Colleen McMahon, United States District Court for the Southern District of New York, sitting by designation.

AFFIRMED.

CHRISTOPHER T. DUNN, Amicus Curiae New York Civil Liberties Union, New York, N.Y. (Arthur Eisenberg on the brief), *for Plaintiff-Appellant.*

ROSEMARY CARROLL, Carroll & Friess, New York, N.Y., on the brief *for Plaintiff-Appellant.*

MARGARET KING, for Michael D. Hess, Corporation Counsel of the City of New York, New York, N.Y. (Edward F.X. Hart, Bryan D. Glass, Marta Ross, of counsel), *for Defendants-Appellees*.

LEVAL, J.:

This appeal raises the question whether a municipal police department may, without violating the First Amendment's guarantee of freedom of speech, terminate a police officer by reason of the officer's anonymous dissemination of bigoted racist anti-black and anti-semitic materials. Appellant Thomas Pappas brought this suit under 42 U.S.C. § 1983 against officials of the City of New York and the New York City Police Department (NYPD) alleging that he was unconstitutionally fired from his employment by the police department by reason of his exercising rights of free speech protected by the First Amendment. The United States District Court for the Southern District of New York (Buchwald, J.) granted the defendants' motion for summary judgment. We affirm the district court.

Background

Pappas was employed by the New York City Police Department (NYPD) from January 25, 1982 until his termination on August 18, 1999. At the time of his termination, Pappas worked in the Department's Management Information Systems Division (MISD), which was responsible for maintenance of its computer systems.

On at least two occasions in 1996 and 1997, Pappas received letters from the Mineola Auxiliary Police Department (MAPD) soliciting charitable contributions and enclosing reply envelopes for use in sending contributions. Pappas stuffed the reply envelopes with offensive racially bigoted materials and returned them anonymously. The materials included printed fliers conveying anti-black and anti-semitic messages. The fliers asserted white supremacy, ridiculed black people and their culture, warned against the "Negro wolf . . . destroying American civilization with rape, robbery, and murder," and declaimed against "how the Jews control the TV networks and why they should be in the hands of the American public and not the Jews."

Upon receipt of these materials, the Nassau County Police Department then undertook an investigation in the hope of identifying the sender. It sent out a charitable solicitation mailing with coded return envelopes. Once again, a response envelope was returned, stuffed with similar racist materials. The Nassau County Police Department traced the source to P.O. Box 321 in Mineola, New York – a post office box registered under the name "Thomas Pappas/The Populist Party for the Town of North Hempstead." The Nassau County Police Department made another mailing in 1997, with the same result.

Upon ascertaining that Thomas Pappas was a New York City police officer, the Nassau County Police Department notified the New York City Police Department's Internal Affairs

Bureau (IAB), which repeated the investigative experiment, sending Pappas further charitable solicitation mailings, once again with the result that Pappas returned the reply envelopes stuffed with similarly provocative materials.

On March 24, 1998, Pappas was interrogated by a New York City police officer. Pappas at first admitted sending such materials to his friends, and, after some evasion, admitted sending the materials in response to the MAPD and other solicitations.

The NYPD charged Pappas with violation of a Departmental regulation. A disciplinary trial was held before Josefina Martinez, Assistant Deputy Commissioner of Trials. Pappas asserted at the trial that he had sent the materials because, "I was protesting, and I was tired of being shaken down for money by these so-called charitable organizations. And it was a form of protest, just put stuff back in an envelope and send stuff back as a form of protest." The NYPD and Pappas stipulated that Pappas's conduct and the subsequent investigation had been the subject of news media reports in the *New York Times*, Fox 5 news, ABC News on Channel 7, and a Long Island television station.

Commissioner Martinez issued a 20-page decision, finding Pappas guilty of violating a Departmental Regulation by disseminating defamatory materials through the mails, and recommending his dismissal from the force. Police Commissioner Howard Safir adopted the recommendation and dismissed Pappas.

Pappas then filed this action seeking monetary and injunctive relief, claiming that his termination violated his First Amendment rights. The district court granted the defendant's

motion for summary judgment and dismissed the action.[1] This appeal follows.

Discussion

Where a government employee suing for violation of the First Amendment establishes that he was terminated by reason of his speech "upon a matter of public concern," the Supreme Court has instructed that the court's task is "to arrive at a balance between the interests of the . . . citizen, in commenting on 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." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968). *See also Connick v. Myers*, 461 U.S. 138, 142 (1983). Under the balancing test, the governmental employer may defeat the claim by demonstrating that it "reasonably believed that the speech would potentially interfere with or disrupt the government's activities, and can persuade the court that the potential disruptiveness was sufficient to outweigh the First Amendment value of that speech." *Heil v. Santoro*, 147 F.3d 103, 109 (2d Cir. 1998) (internal citations omitted).

There is no dispute that Pappas was terminated because of his speech and would not have been terminated were it not for his speech. The defendants contend that Pappas's anonymous sending of the bigoted materials may not be "fairly characterized as constituting speech on a

[1]The district court decided that the NYPD's administrative proceedings did not bar Pappas's subsequent § 1983 suit under collateral estoppel, but went on to conclude that Pappas could not make out a First Amendment violation. Because we agree with the district court on the First Amendment issue, we do not discuss the questions of preclusion.

matter of public concern." *Connick*, 461 U.S. at 146. The First Amendment concerns itself less with speech relating to an individual's private concerns than with speech relating to matters of public concern; accordingly a public employee has greater latitude to discipline an employee over speech expressing private concerns. "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Id.* at 146. "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Id.* at 147-48. Because of our resolution of the *Pickering* balancing test, we assume without deciding that Pappas's mailings constituted speech on a matter of public concern.

Pickering's balancing test weighs the plaintiff's interest in freely speaking his mind on a matter of public concern against the State's interest in the performance of its functions. *Pickering,* 391 U.S. at 568. Under our Constitutional doctrines, few values are more carefully and thoroughly protected than the citizen's right to speak his mind on matters of public concern without interference by government. Nonetheless, the right is not absolute. At times, the right of free speech conflicts with other important governmental values, posing the problem which interest should prevail. The effective functioning of entities of government could be seriously undermined by its employees' unrestrained declarations of their views. For this reason, the employee's right of free speech is sometimes subordinated to the interest of the effective functioning of the governmental employer.

The effectiveness of a city's police department depends importantly on the respect and trust of the community and on the perception in the community that it enforces the law fairly, even-handedly, and without bias. *See* Tom R. Tyler, *Why People Obey the Law* 22-23, 67 (1990) (demonstrating how belief in the legitimacy of legal authority and trust in law enforcement leads to greater compliance with law). If the police department treats a segment of the population of any race, religion, gender, national origin, or sexual preference, etc., with contempt, so that the particular minority comes to regard the police as oppressor rather than protector, respect for law enforcement is eroded and the ability of the police to do its work in that community is impaired. Members of the minority will be less likely to report crimes, to offer testimony as witnesses, and to rely on the police for their protection. When the police make arrests in that community, its members are likely to assume that the arrests are a product of bias, rather than well-founded, protective law enforcement. And the department's ability to recruit and train personnel from that community will be damaged. *See* David Cole, *No Equal Justice* 169-178 (1999) (describing the costs that the perception of inequality and disparate treatment places on law enforcement; it engenders distrust and unwillingness to cooperate and encourages crime), Brandon Garrett, Note, *Standing While Black: Distinguishing Lyons in Racial Profiling Cases*, 100 Colum. L. Rev. 1815, 1833 nn.72-3 (2000) (describing social science evidence that a public perception of police bias undermines community cooperation with law enforcement and compliance with law), C.J. Chivers, *Alienation is a Partner for Black Officers*, N.Y. Times, April 3, 2001, at A1; Kevin Flynn, *Feeling Scorn on the Beat and Pressure From Above*, N.Y. Times, Dec. 26, 2000, at A1 (describing how negative public perceptions of police in New York, especially by minority

communities, has led to low morale, and difficulty in recruitment and retention, especially among minorities).

For a New York City police officer to disseminate leaflets that trumpet bigoted messages expressing hostility to Jews, ridiculing African Americans and attributing to them a criminal disposition to rape, robbery, and murder, tends to promote the view among New York's citizenry that those are the opinions of New York's police officers. The capacity of such statements to damage the effectiveness of the police department in the community is immense. Such statements also have a great capacity to cause harm within the ranks of the Police Department by promoting resentment, distrust and racial strife between fellow officers. In these circumstances, an individual police officer's right to express his personal opinions must yield to the public good. The restrictions of the First Amendment do not require the New York City Police Department to continue the employment of an officer whose dissemination of such racist messages so risks to harm the Department's performance of its mission. In the words of Justice Holmes, "A policeman may have a constitutional right to [speak his mind], but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892) (quoted in *Connick*, 461 U.S. at 143-44).

Pappas argues that the foregoing considerations should not apply to him because he tried to conceal his identity as the source of the bigoted opinions. He contends he is being punished for his opinions, rather than his actions. The argument misses the mark. Pappas was tried and found to have violated Police Department regulations. That fact is important to our upholding of the lawfulness of the Department's actions. If Pappas had written his bigoted views in a private

diary, or revealed them in confidence to his family or intimate friends, and they had become known accidentally, or through a breach of confidence, that case would present different considerations. We do not speculate how such a case would be decided. But those are not the facts we deal with. Here, Pappas deliberately sought to publicize his views. He repeatedly sent leaflets that aggressively pronounced his provocative views to organizations engaged in public solicitation. He admittedly did so with the intention of influencing public opinion. The Department appropriately took action against him not because of his private opinions but because of his conduct in violation of Departmental regulations -- conduct that risked to harm the Department in the performance of its governmental mission. Although Pappas tried to conceal his identity as speaker, he took the risk that the effort would fail.

* * *

We turn now to the arguments Judge Sotomayor advances in her dissenting opinion.

Judge Sotomayor attaches great importance to the fact that Pappas did not occupy a "high level 'supervisory,' 'confidential,' or 'policymaking' role" in the Police Department. She relies on the Supreme Court's statement in *Rankin v. McPherson*, 483 U.S. 378 (1987) that where "an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal." *Id.* at 390-91, as well as our observation in *McEvoy v. Spencer*, 124 F.3d 92, 103 (2d Cir. 1997) that "the more the employee's job requires confidentiality, policymaking, or public contact, the greater the state's interest in firing her for expression that offends her employer." (internal quotation marks omitted).

While it is undoubtedly the case that ill-considered public statements of a high policy-making executive often have a higher likelihood of harming the employer's accomplishment of its mission than similar statements made by a file clerk, laborer or a janitorial employee, it by no means follows that rank and file employees are incapable of harming the employer's effectiveness by their speech, or that governmental employers are powerless to sanction lower level employees when their statements do have the capacity to harm the employer's performance of its mission. Neither *Rankin* nor *McEvoy* implied any such thing.

In *Rankin*, a clerical employee in the Harris County, Texas, Constable's office, who had no contact with the public, was fired because, upon learning of the assassination attempt on President Reagan, she and a coworker discussed privately their mutual dislike of the President's welfare cutbacks, and she added, "If they go after him again, I hope they get him." *Id.* at 380. The lower court found that the statement was not a criminal threat, but rather a hyperbolically framed statement of a political opinion concerning the President's policies. "Although [the plaintiff's] job title was deputy constable, this was the case only because all employees of the Constable's office, regardless of job function, were deputy constables. She was not a commissioned peace officer, did not wear a uniform, was not authorized to make arrests or permitted to carry a gun." *Id.* at 380 (internal citations omitted). She was a typist and had no contact with the public. There was "no indication that she would ever . . . have any involvement with . . . the minimal law enforcement activity engaged in by the Constable's office." *Id.* at 392.

The Court identified as "pertinent considerations [in assessing the employer's legitimate interest in disciplining an employee for speech] whether the statement impairs discipline by

superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Id.* at 388. "These considerations, and indeed the very nature of the [*Pickering*] balancing test, make apparent that the state interest element of the test focuses on the effective functioning of the public employer's enterprise." *Id*.

The Court easily concluded, considering all the circumstances, that the plaintiff's hyperbolic private utterance of her political opinions did not threaten any of the employer's legitimate interests, and in particular did not "interfere[] with the efficient functioning of the [Constable's] office." *Id.* at 389.

This case is significantly different in several respects: (i) Pappas is a police officer, while the *Rankin* plaintiff was a civilian clerical employee; (ii) Pappas disseminated his diatribes publicly while the *Rankin* plaintiff was overheard speaking privately to a coworker; (iii) Pappas was venting his personal racial bias, while the *Rankin* plaintiff (albeit in foolishly hyperbolic terms) was discussing the governmental policies of the President, s*ee Connick*, 461 U.S. at 150 ("the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression."); (iv) furthermore, and most important, upon consideration of all the pertinent facts, while the *Rankin* plaintiff's statement had little or no capacity to harm the effective functioning of the employer, the making of Pappas's statements by a police officer has a very high capacity to impair the effective functioning of the Police Department in the discharge of its public mission and to provoke anger and discord among fellow police officers.

Had the facts of this case conformed to *Rankin*'s in any of these respects, we might well reach the same conclusion as the *Rankin* Court. But *Rankin* certainly did not mean that only high level, policy-making employees may be removed by reason of their speech. To be sure, the Supreme Court observed that "[t]he burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails." *Rankin*, 483 U.S. at 390. By no means does it follow that an ordinary police officer is immune from disciplinary discharge for public statements that carry a high potential to impair the police department's performance of its mission.

The main consideration in assessing the employer's interest is the capacity of the employee's public speech to harm the effective functioning of the employer's enterprise. The public perception in minority communities that risks to harm the mission of the Police Department is not that the Police Commissioner or his principal deputies are racially biased. It is rather the perception that ordinary cops are biased. An ordinary police officer's distribution of these bigoted hate-filled materials reinforces that perception and thus harms the effectiveness of the Police Department. Furthermore, for police officers of one race to express hatred and scorn for members of another race obviously fans anger, dissension and racial tensions among officers of different races and thus inflicts harm of a second kind on the Department's performance of its mission.

Judge Sotomayor's second argument is that, because Pappas was assigned to computer work in the Management Systems Information Division rather than to law enforcement contact with the public, his statements had no capacity to impair the Department's effectiveness. If

Pappas were not a police officer but rather a civilian employee hired to work on the Department's computers, his case would have greater similarity to *Rankin*, and the capacity of his racist remarks to impair the Department's performance of its mission would be diminished. But Pappas is not a civilian employee. He is a cop. The fact that he was assigned to work on computers does not make him any less a cop, either in fact or in public perception. His assignment furthermore was subject to change; at any time he could have been assigned to a beat. If the press became aware of his dissemination of racist diatribes, it would report that this was done by a police officer – not that it was done by a person employed to work on Police Department computers. Furthermore, as to the capacity of Pappas's statements to cause racial tension and strife *among fellow police officers*, it would make no difference whether he was assigned to patrol a beat or to program computers.

Judge Sotomayor's third point is that Pappas's statements were made from his home, on his own time, and anonymously, in a manner that did not reveal that he was a police officer. Judge Sotomayor cites the Supreme Court's observation in *Connick* that "[e]mployee speech which transpires entirely on the employee's own time, and in non-work areas of the office, [brings] different factors into the *Pickering* calculus, and might lead to a different conclusion." 461 U.S. at 153 n.13. That observation in *Connick* was made with reference to an employee's complaint about office policies and procedures. It is undoubtedly true that complaints about office policies made away from the office to persons having no connection with the employment would generally have little capacity to harm the employer. It is also true that Pappas's proclamations of bigotry made privately, away from work, during off-duty time, had a lesser

likelihood of undermining the Department's effectiveness than if he had passed out his leaflets in uniform to citizens in the streets of New York or to his fellow officers at the workplace.

But to say that his statements would have had greater likelihood of causing harm if made in uniform or at work does not mean that they did not have a substantial capacity to cause harm as they were made. Where and when the statements are made is certainly a factor to be considered in the overall assessment, but it is only a factor. No talismanic or determinative significance attaches to it. What we must do in such cases is assess the entire picture – especially the likelihood that the employee's speech will harm the functioning of the governmental employer. Given the nature of Pappas's statements and their very high capacity to inflict serious harm on the employer's mission if it were discovered that they came from a police officer, the fact that Pappas acted anonymously, at home, and on his own time does not alter the ultimate conclusion that the Department was entitled to dismiss him because of the harm to the Department that his statements risked to inflict.

Judge Sotomayor's final point is that the Department should not be permitted to discharge Pappas because, absent the Department's decision to bring disciplinary charges, no one would have known that these offensive materials were being distributed by a police officer. Judge Sotomayor argues in essence that, upon learning that Pappas was violating its rules by disseminating bigoted racist materials, the Department should have swept the matter under the rug hoping no one would ever learn the facts; and if it chose instead to bring charges against Pappas, it has only itself to blame for the resulting harm to its reputation, and may not discharge Pappas for his misconduct. In our view this argument is seriously misguided as a policy matter,

and is premised furthermore on a misunderstanding of the law.

First, as to the policy implications, we have little sympathy for the suggestion that the proper course for the Police Department, upon learning that one of its officers was disseminating offensive racially bigoted materials, was to hush the matter up and hope to keep it secret. Had the Department taken this course and the truth had eventually become known, the harm to the Department would have been all the greater because the Department would be perceived as tolerating Pappas's acts and being in passive complicity. While it may be true that the Department could have avoided adverse publicity had it covered up Pappas's misconduct rather than proceeding against him, that does not make it the right thing to do, and the Department did not lose the right, as Judge Sotomayor suggests, to dismiss Pappas for this misconduct merely because the bringing of the disciplinary action brought to public light the fact that it was a police officer who was responsible for the hate mailings.

Judge Sotomayor's argument is also premised on a misunderstanding of the government's burden under *Pickering*. A governmental employer's right to discharge an employee by reason of his speech in matters of public importance does not depend on the employer's having suffered *actual* harm resulting from the speech. The employee's speech must be of such nature that the government employer reasonably believes that it is likely to interfere with the performance of the employer's mission. *See Waters v. Churchill*, 511 U.S. 661, 673-74 (1994) (the government need only "make a substantial showing that the speech is . . . likely to be disruptive"); *Connick*, 461 U.S. at 152 ("[W]e do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest

before taking action."); *Heil*, 147 F.3d at109 ("the government can prevail if it can show that it reasonably believed that the speech would potentially interfere with or disrupt the government's activities"); *Jeffries v. Harleston,* 52 F.3d 9, 12-13 (2d Cir. 1995) (rejecting any actual harm requirement, and stating that the proper inquiry is into "potential disruptiveness"). The employer's interest in discharging the employee is demonstrated if the employee's statements create a significant risk of harm, regardless whether that harm actually materializes.

In conclusion, it is indeed possible to imagine changed facts that would make the case against Pappas still stronger. The Department's right to dismiss him would have been even clearer if he were a high ranking policy-maker, or if he had distributed his leaflets to the public while on duty wearing his police uniform. The fact that a stronger case can be imagined does not mean that the actual case for discharge is inadequate. Considering the facts as they are, balancing Pappas's interest in his right to pronounce his views against the interest of the Department as an employer in promoting the efficiency of the public service it performs, *see Pickering,* 391 U.S. at 568; *Connick*, 461 U.S. at 142, we conclude that the Department was entitled to terminate Pappas by reason of his public dissemination of his diatribes.

The Department's reasonable perception of serious likely impairment of its performance of its mission outweighed Pappas's interest in free speech. The district court properly held the Department's action did not violate Pappas's rights under the First Amendment.

Conclusion

The judgment of the district court is affirmed.