IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

- -

CHRIS BORRESON,

OPINION AND ORDER

Plaintiff,

10-cv-521-bbc

v.

AL SCHUMACHER and THE CITY OF MADISON,

Defendants.

- -

SHANE MOSEL,

Plaintiff,

10-cv-523-bbc

v.

AL SCHUMACHER and THE CITY OF MADISON,

Defendants.

- -

Plaintiffs Chris Borreson and Shane Mosel are suing defendants Al Schumacher and the City of Madison for firing them from their jobs as street machine operators in violation of their rights under First Amendment and Title VII of the Civil Rights Act. Defendants have filed a motion for summary judgment in both cases and the parties have filed

consolidated briefs and proposed findings of fact.

I am denying defendants' motion in all respects save one. Defendants are entitled to summary judgment on plaintiffs' claim that defendants violated their right to "associate" under Title VII as interpreted in Thompson v. North American Stainless, 131 S. Ct. 863 (2011), because plaintiffs have failed to meet the standard articulated in that case. With respect to plaintiffs' other claims, the parties dispute two issues: (1) whether plaintiffs engaged in speech protected by Title VII and the First Amendment when they spoke out against what they perceived as sex discrimination and sexual harassment of one of their coworkers; and (2) whether a reasonable jury could find that defendants fired plaintiffs because of that speech. Because I conclude that the answer to both questions is "yes," these claims cannot be resolved on summary judgment.

From the parties' proposed findings of fact and the record, I find that the following facts are undisputed.

UNDISPUTED FACTS

Plaintiffs Chris Borreson and Shane Mosel were street machine operators for defendant City of Madison. Both of them drove recycling trucks and snow plows. Defendant Al Schumacher is the superintendent for the city's streets division. He has the final say regarding disciplined imposed on union members such as plaintiffs.

A. Michelle Heimann's Termination

Michelle Heimann was a seasonal employee for the streets division in 2007. Heimann and plaintiff Mosel were living together and "romantically involved" at the time. Mosel Dep., dkt. #21, at 5. After Heimann was fired in November 2007, Mosel spoke to Schumacher multiple times about Heimann's belief that she was fired "due to sexual harassment" by her supervisor, a subordinate of Schumacher. Id. at 22. (The parties dispute whether Schumacher called Mosel "a real piece of shit" during one of these conversations.)

On December 14, 2007, Heimann filed a complaint with the Equal Rights Division in which she alleged that she was fired because of her sex. In addition, Heimann filed "an internal City complaint" in which she alleged that her former supervisor had sexually harassed her. Schumacher investigated the internal complaint and spoke to Mosel about it.

Both Mosel and Borreson provided a statement to the Equal Rights Division on Heimann's behalf. (Neither side submitted Borreson's statement.) In Mosel's statement, he made the following observations: (1) Heimann's supervisor had engaged in "harassing behavior" toward her, such as "trying to get Ms. Heimann alone" and "calling her [at home] to see if he could come over to her apartment"; (2) Heimann was well-liked by other employees and had no disciplinary problems; and (3) similarly situated men were not terminated. He concluded by saying that Heimann "was terminated either because she is a woman, she would not engage in sexual relations with [her supervisor] or that she is my

girlfriend and management and myself do not see eye to eye since I am the union steward." Another street machine operator, Carl Sarbacker, also provided a statement for Heimann. Schumacher reviewed Mosel's and Sarbacker's statements, but he did not see Borreson's statement. Heimann's complaint was settled in September 2008.

On September 30, 2008, a radio program in Madison, Wisconsin featured Heimann's case as a topic of discussion during its entire one hour show. The host noted that Heimann had filed complaints for sexual harassment and sex discrimination, alleging that her foreman had sexually harassed her and then given her a bad performance evaluation near the end of her probationary period, which led to her termination. The host gave specific examples of some of the alleged harassing behavior. He noted that the city found that discipline of the supervisor was warranted, transferred him to another position and settled Heimann's claim for $80,000. The bulk of the program focused on two issues: (1) whether the supervisor received adequate discipline; and (2) whether Heimann received an adequate settlement. In particular, the host criticized a part of the settlement that prohibited Heimann from working for the city again. After comparing the case to other city sexual harassment scandals from past years, he called on the mayor to intervene and asked listeners to do the same.

Borreson called into the program and made the following statements on air:

> I actually worked with [Heimann] intermittently. She was a real good worker. She came here, punched in on time, didn't do drugs, did her job and then this happens.

The host asked Borreson whether Heimann's supervisor took "revenge" on Heimann by writing a bad review for her after she refused to "capitulate to his advances." Borreson said:

> Yeah, that's what it seems to be. I don't know all the specifics about what exactly happened and the time frame. All I know is that I had trained her on these new automated machines and she caught on real well. Did a real good job, real efficient, real fast. She was an excellent worker and then the next you know, boom this happens. It absolutely was sick. It made me sick.

The host then asked Borreson whether he had to work with Heimann's supervisor:

> Yeah, they ended up transferring him to the Westside and we got a whole bunch of friends that are on garbage and evidently they shipped him west. He wasn't our foreman for all that long. I didn't have to deal with him all that much.

When the host made the comment that "it sounds like the city is employing the wrong person," Borreson responded as follows:

> Another thing is when all this stuff happened when the firing happened, we had several people call down to the mayor's office and the mayor's office said they're not dealing with a personnel issue. Everybody knew about it. Everybody knew exactly what was going on and yet this is what it comes down to. She is a single mother and now she doesn't have a job.

The following day, the same radio program continued its discussion of the Heimann case. The host again challenged the supervisor's continued employment with the city and the provision of the settlement agreement that precluded Heimann from seeking

employment with the city in the future. Mosel called into the program that day and made these statements on the air:

> I worked with Michelle Heimann for a couple of years while she was on probation. . . . It was absolutely amazing. Her probation about comes up and before the office without knowing anything they fire her. So the workers a whole bunch of us stood up for her signed all kinds of depositions for her lawyer and to say she wasn't a good worker is asinine. I don't know where they can come up with that from.

When the host asked Mosel whether he called the mayor's office, Mosel said, "I called the mayor's office today and they told me to call back in 2 hours because they weren't going to talk to me right now."

In October 2008 Borreson made the following statement on a television program: "I was amazed when she was fired. I couldn't believe it. . . . It was ridiculous."

Mosel's and Borreson's "public support" of Heimann and their comments to the media bothered Schumacher because he believed it made the division look bad.

B. Plaintiffs' Termination

Beginning in 2003, Borreson was assigned to drive vehicle 4405, a recycling truck. Borreson was the first and only employee assigned to the truck.

On January 29, 2009, at approximately 12:30 p.m., Borreson took his truck to be washed at a city facility after completing his route. He pulled into one of two bays, turned

off the truck and began washing it. Other city employees came in and out of the bay while Borreson was washing his truck, including Tim Faust, Michelle Treinen, Carl Sarbacker and Chris Scott.

Mosel arrived later to wash his truck, but both bays were occupied, so he began helping Borreson with his truck. Both Borreson and Mosel used a firehouse to clean the truck. At some point, Borreson left to take a bathroom break. When he returned, he tried to start the truck. After several unsuccessful attempts, he summoned a mechanic, Scott Bodah, about the problem. Both plaintiffs left after their shift ended, around 2:00 p.m, and they did not return until the following day. Randy Schnurbush, another employee in the streets division, was in the "wash bay area" when they left.

After plaintiffs left, Bodah hooked a charger to the battery and then attempted to start the truck. When the truck "turned over slowly," he concluded that the problem was a bad battery.

The truck remained in the wash bay all night. "Numerous workers" had access to it during that time. Schumacher Dep., dkt. #22, at 81.

On the morning of January 30, Borreson could not get the truck to start. Water was discovered in the exhaust system.

When defendant Schumacher heard about the potential damage, he decided to investigate the cause of the problem. He also contacted the Madison Police Department, but

it declined to investigate. The only other instances in which Schumacher asked the police to investigate a situation involved theft.

The truck was taken to a repair company, which found water in the exhaust pipe, engine block and oil pan. Schumacher was advised that the repair company believed that someone put water into the exhaust system intentionally. The truck was repaired.

On February 2, 2009, Schumacher met with Chris Kelley (the operations supervisor of the facility where the incident occurred), Bill Vanden Brook (the fleet service supervisor), and Gary Kramer (the foreman in fleet services) about who should be interviewed for the investigation. Kramer and John Grueneberg (a streets division supervisor) were assigned to conduct the interviews and draft questions for them.

Kramer and Grueneberg conducted 23 interviews. Roger Knapp, a machine operator, was one of the employees interviewed. (The parties dispute whether Grueneberg warned Knapp about the consequences of not telling the truth during this interview.) He was asked, "Are you aware of any damage done to a vehicle on Thursday, January 29, or at any other time in the wash bay?" In response, Knapp did not say anything about seeing Borreson or Mosel putting water into a truck exhaust at any time.

After the first round of interviews Schumacher told Grueneberg, Kramer and Kelley that he suspected that plaintiffs were involved in misconduct related to the incident. He did not suspect anyone else. However, Chris Scott was also mentioned as a suspect and

Sarbacker "c[a]me up as knowing more than he was telling." Schumacher Dep., dkt. #22, at 22. (The parties do not explain why.) Tim Faust and Michelle Treinen were not considered suspects.

Schumacher told Grueneberg, Kramer and Kelley to reinterview Borreson, Mosel, Sarbacker and Scott. During the second interview, Grueneberg warned Knapp about possible discipline for lying. Knapp said that he saw Borreson with "a garden hose down the exhaust pipe of one of our refuse trucks" about one month before the January 29, 2009 incident. Knapp Dep., dkt. #31-17, at 26. Grueneberg did not ask Knapp why he did not come forward earlier and he did not try to independently verify Knapp's statement.

No city trucks failed to start or showed other damage from water being placed in the exhaust of the truck from December 1, 2008, through January 28, 2009. Vanden Brook is not aware of any trucks not starting in November 2008 because of water in the exhaust.

Neither Mosel nor Borreson admitted spraying water into the exhaust on January 29 or at any other time. No one interviewed said that they saw Mosel or Borreson put water in the exhaust pipe on January 29.

Grueneberg and Kramer advised Kelley and Schumacher of their investigative findings, which included the following:

> a. #4005 failed to start at 1:00 p.m. on [January] 29, 2009 because it was hydrolocked from water being intentionally placed in #4005's exhaust system.

> b. That Mosel and Borreson were involved in placing the water in the exhaust and/or knew how it was place[d] there and did not disclose what they knew about the incident.
>
> c. There were several reported incidents in which Borreson had been previously involved in placing water in vehicle exhausts.
>
> d. Scott was also considered a possible suspect, but there was not enough information to link him to placement of water in #4005.
>
> e. Carl Sarbacker ("Sarbacker"), a co-employee, knew more information about how water got in the exhaust but was not forthcoming about what he knew.

(Plaintiffs do not dispute that these were the investigative findings, but they dispute the accuracy of the underlying facts with respect to findings (a), (b) and (c).) Finding "c" comes from Knapp's testimony as well as a statement by employee Randi Rossi that employee Jason Schmelzer had told him that Borreson had admitted to Schmelzer that Borreson had put water in an exhaust pipe several years earlier. Although Schmelzer was interviewed after Rossi, he was not asked about the previous alleged incident.

On February 23, Schumacher met Grueneberg, Kelley, Vanden Brook and others to discuss the interviews. (The parties do not say whether Grueneberg and Kramer gave Schumacher their findings before or after the February 23 meeting.) At the February 23 meeting, Schumacher said, "I want to make sure that the decision that is made on whatever discipline is presented to Mr. Borreson was not made by me and me alone, because Mr. Borreson had been vocal, so outspoken on some previous issues we had at the time with Mr.

Mosel, Mr. Borreson and the group they sort of [hung] around with." In addition, he said that he wanted to make sure that any treatment of plaintiffs was not construed as retaliation for their involvement with the Heimann case. Before Schumacher made these statements, Grueneberg, Kelley and Vanden Brook had no information about plaintiffs' involvement in the Heimann case. Grueneberg now denies that Schumacher made these statements.

Schumacher's fear of a retaliation claim was a reason he included a large group of people in the decision making process. However, he did not consider recusing himself. The group decided to hold predisciplinary hearings of Borrelson, Mosel and Sarbacker. Schumacher was aware that each of these employees had spoken out on behalf of Heimann. Schumacher was not aware of any support that Scott may have given Heimann.

Schumacher told Kelley that he believed Borreson and Mosel were lying about their involvement in the truck incident. Schumacher said that Borreson put water in the exhaust pipe so that "it would shoot out like a geyser at Yellowstone" when he started the truck. Schumacher Dep., dkt. #22, at 67. He did not think about a motive for Mosel.

Schumacher rejected the possibility that Mosel put water in the exhaust while Borreson was in the bathroom because he believed that Borreson was the one with a history of putting water in the exhaust. He did not consider the possibility that Borreson might have filled the exhaust pipe with water before Mosel arrived. He hoped that by accusing both of them, one or both would provide incriminating information about the other.

On February 27, Schumacher met with Brad Wirtz (the human resources director), Mel Lamb (a supervisor at the facility where the incident occurred), Mike Dieters (the city's labor relations specialist), Kelley, Kramer, Grueneberg and Vanden Brook. Schumacher asked each person at the meeting for a recommendation whether plaintiffs and Sarbacker should be disciplined and, if so, to what extent. Each participant recommended that plaintiffs be terminated. "Most" of the participants advised Schumacher to give Sarbacker a five-day suspension. (The parties do not explain the reasoning for these recommendations.)

Schumacher made the final decision regarding plaintiffs' discipline. The next step on the discipline scale for Borreson was a written warning, but Schumacher concluded that termination was the appropriate discipline. Although Mosel's disciplinary record was "clean," Schumacher decided to terminate him as well. Vanden Brook is not aware of any other employee who was terminated for causing a similar amount of damage. Kevin Reilly, the union president, is not aware of any other situation in which disciplinary levels were skipped to this extent.

On March 3, 2009, Schumacher terminated plaintiffs on the grounds of vandalism and lying during the investigation and suspended Sarbacker for three days. Again, Schumacher skipped over steps in the disciplinary policy for all of these employees. Schumacher did not discipline Knapp for failing to come forward with information about

Borreson pouring water into a truck the first time he was questioned or for not reporting the incident earlier.

In April 2007, Schnurbush damaged a city vehicle with his truck while he was engaging in "horseplay." Someone was inside the other vehicle when Schnurbush hit it. He denied being involved until a witness identified him. Schumacher gave Schnurbush a three-day suspension, which was the next step for Schnurbush under the city's progressive discipline policy. Schumacher admitted that someone could have been hurt in the Schnurbush incident. Schumacher is not aware of Schnurbush's ever speaking in favor of Heimann or to the media about sexual harassment.

On November 16, 2009, an arbitrator issued an order to reinstate Borreson. Mosel was reinstated in November or December 2010.

OPINION

A. Scope of Plaintiffs' Claims

Although plaintiffs do not say so expressly, I assume that they mean to assert their Title VII claims against the city and their First Amendment claims against defendant Schumacher in his individual capacity. Under Title VII, an individual supervisor may not be sued; only the employer may be held liable under agency principles. 42 U.S.C. § 2000e(b). Both public officials and municipalities may be sued for First Amendment

violations, but only for their own wrongdoing. In other words, agency principles do not apply to constitutional claims; a plaintiff must show that a municipality had an unconstitutional policy. Monell v. Department of Social Services of City of New York, 436 U.S. 658, 694 (1978). Because neither side addresses the standard for municipal liability under the Constitution, I do not understand plaintiffs to be raising a First Amendment claim against the city.

B. Protected Conduct

An element of plaintiffs' claims under both the First Amendment and Title VII is that they engaged in conduct or speech that is protected under the relevant law. With respect to their free speech claims, plaintiffs must show that they "spoke as . . . citizen[s] on a matter of public concern." Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2493-94 (2011). With respect to their Title VII claims, plaintiffs must show that they "opposed" discriminatory conduct or "participated" in an investigation or proceeding under the statute. 42 U.S.C. § 2000e-3(a).

The first task is to identify the speech or conduct that plaintiffs contend is protected. In their opening brief, defendants discuss three acts of speech by plaintiff Mosel: (1) conversations with Schumacher about his internal investigation of Heimann's harassment complaint; (2) an affidavit filed on behalf of Heimann in the Equal Rights Division

proceeding; and (3) statements to the media regarding Heimann's settlement. With respect to Borreson, defendants say that his only relevant acts of speech are his statements to the media. Although Borreson provided his own statement to the Equal Rights Division, defendants do not include that statement because they say Schumacher did not know about it. Stephens v. Erickson, 569 F.3d 779, 788 (7th Cir. 2009) ("[A] superior cannot retaliate against an employee for a protected activity about which he has no knowledge.").

In their opposition brief, plaintiffs do not develop an argument with respect to any other speech, so I am limiting consideration to the incidents identified by defendants. In their statement of facts in their brief, plaintiffs say that "Schumacher would have known that Borreson was one of Heimann's supportive witnesses because of questions asked at a deposition during the prosecution of Heimann's claim." Plts.' Br., dkt. #24, at 3. However, they do not explain this statement further or even identify what the questions were. Their proposed findings of fact are similarly vague. Plts.' PFOF ¶ 41, dkt. #25 ("Clifcorn was asked questions about Chris Borreson that would have led Schumacher to the conclusion that Chris Borreson was a supportive witness for Heimann."). Accordingly, plaintiffs have waived any argument that Schumacher was aware that Borreson provided an affidavit in support of Heimann during the Equal Rights Division proceeding. Plaintiffs cite other speech in their proposed findings of fact, such as telephone calls to the mayor's office, Plts.' PFOF ¶ 38, and public comments Borreson made about the city's salt use, Plts.' PFOF ¶¶ 199-204, but these

are not mentioned in their brief, so I have not considered them either.

The next question is which acts of speech are protected under the First Amendment and Title VII. Plaintiffs say that all of the speech is protected by both laws. Defendants' position is a bit more complicated. They concede that Mosel's comments to Schumacher during the internal investigation qualify as "opposition" to sex discrimination and that the affidavit Mosel submitted to the Equal Rights Division is "participation" in a proceeding under Title VII. Dfts.' Br., dkt. #10, at 14. However, they argue that plaintiffs' statements to the media are not protected under Title VII because they were made after Heimann settled her claim. In addition, defendants say that none of plaintiffs' speech is a matter of public concern under the First Amendment. (Defendants do not argue that any of plaintiffs' speech falls outside the First Amendment because it was made "pursuant to their official duties," Garcetti v. Ceballos, 547 U.S. 410, 421 (2006), so I do not consider that question.)

1. First Amendment

I will consider the First Amendment first. The Supreme Court has stated consistently that speech raising issues of public concern is entitled to heightened protection under the First Amendment, but the Court has admitted that "the boundaries of the public concern test are not well defined." San Diego v. Roe, 543 U.S. 77, 83 (2004). The most recent attempt to provide guidance is in Snyder v. Phelps, 131 S. Ct. 1207, 1215-16 (2011): "Speech deals

with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." Id. at 1215-16 (citations omitted). However, "speech solely in the individual interest of the speaker" or speech that does "nothing to inform the public about any aspect of the employing agency's functioning or operation" does not qualify. Id. The content, form and context of the speech are all relevant factors. Id.

The Court of Appeals for the Seventh Circuit has recognized that sex discrimination and sexual harassment are inherently matters of public concern. Yatvin v. Madison Metropolitan School Districty, 840 F.2d 412, 419 (7th Cir. 1988) ("Sex discrimination is a matter of public concern, obviously debate over it is protected by the First Amendment."); Callaway v. Hafeman, 832 F.2d 414, 417 (7th Cir. 1987) ("[I]t is undoubtedly true that incidences of sexual harassment in a public school district are inherently matters of public concern."). Thus, it seems obvious that criticizing the city's handling of these issues on television and radio is protected speech. Marshall v. Allen, 984 F.2d 787, 795-96 (7th Cir. 1993) ("Reinforcing our conclusion that the alleged gender discrimination at issue was of public concern is the fact that both the allegations and the subsequent terminations had received coverage in the Chicago newspapers and had been the subject of a press conference held by several women's interest organizations prior to Mr. Marshall's firing."); Auriemma v.

Rice, 910 F.2d 1449, 1460 (7th Cir. 1990) (newspaper story was some evidence of public interest and concern).

In their opening brief, defendants make two arguments on this issue, neither of which is developed. First, with respect to Mosel's statements during the internal investigation and Equal Rights Division proceeding, defendants emphasize that the statements were "not made in a public forum, but rather in investigatory settings." Dfts.' Br., dkt. #10, at 10. That is not dispositive, particularly when the plaintiff is speaking out against discriminatory conduct, as in this case. Rankin v. McPherson, 483 U.S. 378, 387 n. 11 (1987) ("The private nature of the statement does not . . . vitiate the status of the statement as addressing a matter of public concern."); Givhan v. Western Line Consol. School District, 439 U.S. 410 (1979) (complaint about race discrimination made in private raised matter of public concern); Connick v. Myers, 461 U.S. 138, 148 (1983)("[a person's] right to protest racial discrimination—a matter inherently of public concern—is not forfeited by her choice of a private forum"). Further, the court of appeals has held on multiple occasions that statements made in the context of a discrimination investigation or proceeding are entitled to protection under the First Amendment. E.g., Salas v. Wisconsin Dept. of Corrections, 493 F.3d 913 (7th Cir. 2007) ("[P]articipation as a witness to [an] EEOC charge" may be protected under First Amendment; speech "was not an internal workplace grievance meant to advance his own career"); Marshall, 984 F.2d at 795 (witness's statements in sex discrimination proceedings

were protected under First Amendment) See also Catletti v. Rampe, 334 F.3d 225, 230 (2d Cir. 2003) (worker's testimony on behalf of wrongly discharged co-worker is protected speech), cited with approval in Salas, 493 F.3d at 925.

Defendants' second objection is that all of plaintiffs' statements were "personal grievances." To the extent defendants mean to say that plaintiffs likely had a personal motive to help Heimann, I agree. However, that is not enough to require dismissal of plaintiffs' free speech claims. A public employee seeking the protection of the First Amendment need not show that he is perfectly disinterested, acting solely out of a sense of Kantian moral duty. As the court of appeals has recognized, many people who speak out on matters of public concern are motivated at least in part by personal reasons. Breuer v. Hart, 909 F.2d 1035, 1039 (7th Cir. 1990) ("Wrongdoing may often be revealed to the proper authorities only by those who have some personal stake in exposing wrongdoing."). The court has concluded in a number of cases that the speaker was protected by the First Amendment despite clear indications that he had mixed motives for his speech. E.g., Chaklos v. Stevens, 560 F.3d 705, 713-14 (7th Cir. 2009) (letter objecting to award of "no bid" contract was protected even though plaintiff was soliciting that contract because letter "protests inefficient spending of public funds," which is matter of public concern); Cygan v. Wisconsin Dept. of Corrections, 388 F.3d 1092, 1100 (7th Cir. 2004) (although speech of disgruntled prison guard may have been motivated by dissatisfaction and concerns for personal safety, speech touched on issues of internal prison

security and was "undoubtedly a matter of public concern"); Gustafson v. Jones, 290 F.3d 895, 908 (7th Cir. 2002) ("[W]hile speech that is only motivated by private concerns may not be protected, a personal aspect contained within the motive of the speaker does not necessarily remove the speech from the scope of public concern.") (internal quotations and alterations omitted); Ohse v. Hughes, 816 F.2d 1144, 1146 (7th Cir.1987) (recognizing that conflict may have begun because of dispute about promotion); see also Thomas v. Ragland, 324 F. Supp. 2d 950, 970 (W.D. Wis. 2004) (concluding that plaintiff's speech was protected as matter of public concern despite possible personal motivations). In fact, in Spiegla v. Hull, 371 F.3d 928, 939 (7th Cir. 2004), the court expressly admonished the district court for "improperly elevat[ing] motivation to a litmus test and thereby undervalu[ing] the important content of [the plaintiff's] speech." In this case, I cannot conclude that plaintiffs' sole motive was to further a purely private interest.

To begin with, it is undisputed that plaintiffs had nothing personal to gain by speaking out. In most of the cases in which the court of appeals has concluded that speech about discrimination or harassment did not raise a matter of public concern, it involved the employee's personal efforts to stop her own poor treatment. Compare Phelan v. Cook County, 463 F.3d 773, 791 (7th Cir. 2006) (statements about sexual harassment not protected under First Amendment because plaintiff "has not alleged or introduced evidence supporting a conclusion that she expressed concerns about sexual harassment beyond

concerns specifically related to her treatment at Cook County"), and Gray v. Lacke, 885 F.2d 399, 411 (7th Cir. 1989)("Gray complained to her supervisors in order to have the sexual harassment stopped. Her communication related solely to the resolution of a personal problem."), with Webb v. Board of Trustees of Ball State University, 167 F.3d 1146, 1150 (7th Cir. 1999) ("complaint that another faculty member made inappropriate sexual requests of a student . . . readily could be characterized as speech on a matter of public concern) (internal quotations omitted), and Marshall, 984 F.2d at 795 ("No one in this case contends that Mr. Marshall was himself a victim of gender discrimination or that he had any personal stake in the outcome of the Cary plaintiffs' contentions. There is no allegation that Mr. Marshall's speech was tied to a personal interest; it was presumably against Mr. Marshall's interests to speak on behalf of the Cary plaintiffs.").

Two exceptions are Gross v. Town of Cicero, Illinois, 619 F.3d 697, 706 (7th Cir. 2010), and Kokkinis v. Ivkovich, 185 F.3d 840, 844 (7th Cir. 1999), but both of these cases are readily distinguishable. In Gross, 619 F.3d at 706, the court found that the First Amendment did not protect the plaintiff from retaliation by his employer for statements he made in support of his daughter because he "spoke only about his daughter, Rhonda, with the intent of obtaining some private redress for her." The same cannot be said in this case. Although plaintiffs may have wanted to provide personal assistance to Heimann, it would be overly simplistic to say that was their sole motivation. When plaintiffs spoke to the media,

Heimann already had received a settlement from the city in her case. The primary purpose of the programs was to bring awareness to the problem and to urge city government to correct it. Plaintiffs' statements must be viewed in that context.

In Kokkinis, 185 F.3d 840, the plaintiff appeared on a television program that was addressing alleged sex discrimination by the police chief. Although the speech certainly was "public," the court concluded that it was not protected because the facts showed that the plaintiff was not actually concerned about sex discrimination but was "simply . . . further[ing] his own goal of expressing his displeasure with the Chief's policies." Id. at 844. In this case, there is no suggestion that plaintiffs were criticizing the city to advance a personal vendetta. Accordingly, I conclude that defendants are not entitled to summary judgment on the ground that plaintiffs' statements fall outside the protections of the First Amendment.

Plaintiffs raise another claim under the First Amendment for a violation of their right of free association. In particular, they say that defendants fired them because plaintiffs were "part of an association of troublemakers." Plts.' Br., dkt. #24, at 27. As plaintiffs point out, defendants' motion for summary judgment did not address this claim, so it must proceed to trial. However, I note that it is unclear what this claim adds to the case. As plaintiffs admit, a retaliation claim under the right of free association includes the same "public concern" element as a free speech claim. Klug v. Chicago School Reform Board of Trustees,197 F.3d 853, 857 (7th Cir. 1999) ("[A] public employee is protected from adverse employment

consequences based on the exercise of the right to freedom of association only when the associational conduct relates to a matter of public concern."). Because plaintiffs do not discuss any "public concern" implicated by their association with other employees besides that related to the Heimann case, plaintiffs should consider whether it makes any sense to assert this claim separately at trial.

2. Title VII

As noted above, defendants concede for the purpose of summary judgment that Mosel's statement to the Equal Rights Division and Mosel's conversations with Schumacher during the internal investigation qualify as protected activity under Title VII, so I do not consider those questions. This leaves plaintiffs' statements to the media. Defendants argue that the statements are not protected because plaintiffs made them after Heimann settled her claim with the city.

Defendants rely on the following quotation from Crawford v. Metropolitan Government of Nashville and Davidson County, Tennesee, 555 U.S. 271, 276 (2009):

> The opposition clause makes it "unlawful ... for an employer to discriminate against any . . . employe[e] . . . because he has opposed any practice made ... unlawful ... by this subchapter." § 2000e–3(a). The term "oppose," being left undefined by the statute, carries its ordinary meaning, Perrin v. United States, 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979): "to resist or antagonize . . .; to contend against; to confront; resist; withstand," Webster's New International Dictionary 1710 (2d ed.1958). Although these actions

> entail varying expenditures of energy, "resist frequently implies more active striving than oppose." Ibid.; see also Random House Dictionary of the English Language 1359 (2d ed. 1987) (defining "oppose" as "to be hostile or adverse to, as in opinion").

Obviously, this passage says nothing about the question whether speech is protected if it occurs after a claim has settled. Defendants rely on the "present tense use of the terms in this quote (resist, antagonize, confront, withstand)," Dfts.' Br., dkt. #10, at 15, but that argument makes no sense. In Crawford, 555 U.S. at 276, the Court was considering whether the character of the plaintiff's speech came within the reach of the opposition clause. The Court was not considering whether the clause imposed a temporal limitation, so there is no reason to draw any inference from the verb tense used by the Court.

In any event, saying that the opposition clause requires the plaintiff to "oppose" conduct "in the present tense" does not address the question whether a plaintiff may "presently oppose" conduct that occurred in the past. The ordinary meaning of the term does not impose the narrow reading defendants suggest. For example, one of the definitions cited with approval by the Court for the term "oppose" was "to be hostile or adverse to, as in opinion." Under that sense of the word, one may "oppose" the practice of slavery even if it has long since been abandoned. Taken to its logical conclusion, defendants' argument would mean that a plaintiff could not "oppose" discriminatory conduct unless it was ongoing at the time of the plaintiff's speech. That is obviously not the law. Even defendants acknowledge

that the opposition clause extends to speech in the context of proceedings investigating completed conduct. There is simply no textual basis in the statute for distinguishing speech on the basis of whether it occurred during or after a proceeding.

To the extent the text of the statute leaves any ambiguity, defendants' interpretation must be rejected because it would contradict a primary purpose of Title VII, which is to prevent and deter discriminatory and retaliatory conduct by employers. "The statute's primary objective is a prophylactic one; it aims, chiefly, not to provide redress but to avoid harm." Kolstad v. American Dental Association, 527 U.S. 526, 545 (1999) (citations and internal quotations omitted). See also Burlington Northern and Santa Fe Railway Co. v. White, 548 U.S. 53, 64 (2006) (rejecting narrow interpretation of Title VII retaliation provision in part because it would "fail to fully achieve" purpose of statute).

Adopting defendants' view would contradict the deterrent purpose of the statute because it would discourage employers from using past instances of discrimination as a teaching tool to prevent new discriminatory acts from occurring. Employees would have to pretend as if past discrimination had never occurred or risk retribution from their employer. Under defendants' view, an employee who gave a statement to the press after winning her discrimination lawsuit would have no recourse under Title VII if the employer fired her after giving that statement. That makes no sense.

Defendants raise no other arguments for finding that plaintiffs' statements to the

media are not protected by Title VII. Accordingly, I decline to grant defendants' motion for summary judgment on this ground.

Plaintiffs include another theory under Title VII that seems to be similar to their claim under the right of free association:

> Even being associated with a person who has engaged in protected activity entitles the employee to Title VII's protections against retaliation. Thompson v. North American Stainless, 131 S. Ct. 863, 867-868 (2011). In this case, it is clear that Schumacher persecuted Mosel in an effort to harm Borreson, and visa versa. As Schumacher noted, they were leaders in a vocal group of employees who complained often. PPFOF 246. Accordingly, even if Schumacher was not aware of Borreson's conduct during the pendency of Heimann's ERD charge, Borreson still has a claim because the record shows that Schumacher retaliated against him (at least partially) because of his association with Mosel, who did file a statement with the ERD.

Plts.' Br., dkt. #24, at 13. That is plaintiffs' entire discussion on this topic in their brief.

I agree with defendants that plaintiffs are over-reading the Thompson case and that Title VII does not include a cause of action for employees who received less favorable treatment simply because they "associate" with others who engaged in protected activity under Title VII. The question in Thompson was whether an employee could sue for retaliation if he was fired in order to harm a third party (in that case the plaintiff's fiancée) who engaged in statutorily protected activity. The Court stated that Title VII could provide a remedy in that situation if the plaintiff could show that the third party would be dissuaded from exercising her rights under Title VII by the retaliation and that the plaintiff's injury falls

within Title VII's zone of interests. Thompson, 131 S. Ct. at 868, 870. In this case, plaintiffs do not develop any argument either that Mosel would be dissuaded from exercising his rights because of retaliation against Borreson or that defendants fired Borreson in order to harm Mosel. Accordingly, plaintiffs have forfeited any potential claim under the theory articulated in Thompson.

B. Causation

The next question is whether plaintiffs have adduced sufficient evidence to allow a reasonable jury to find that the city fired them because they engaged in protected speech. In the context of a retaliation claim under Title VII, plaintiffs must show that their protected activity is the "but for" cause of their termination. Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 963 (7th Cir. 2010); Speedy v. Rexnord Corp., 243 F.3d 397, 406-07 (7th Cir. 2001); McNutt v. Bd. of Trustees of University of Illinois, 141 F.3d 706, 707 (7th Cir. 1998). In the context of a First Amendment claim, plaintiffs must show that their speech was a "motivating factor" in the adverse decision. If they can do this, the burden shifts to defendants to show that they should have taken the same action even if plaintiffs had not engaged in protected speech. Greene v. Doruff, 660 F.3d 975, 977-78 (7th Cir. 2011). Under either standard, I conclude that defendants are not entitled to summary judgment.

Two decisions are disputed in this case: Schumacher's finding that plaintiffs were

involved in vandalizing the truck and Schumacher's decision to fire them. Plaintiffs' strongest evidence of discriminatory treatment relates to the discipline they received. They were fired even though doing so required Schumacher to skip steps in the city's progressive disciplinary policy. In Mosel's case, he had no blots on his disciplinary record before this incident.

The union president testified that he was not aware of any other instances in which disciplinary levels were skipped to this extent. Other than plaintiffs, the only employee disciplined was Sarbacker, who also filed a statement with the Equal Rights Division on behalf of Heimann. Schumacher provided no explanation for his relatively harsh treatment of plaintiffs or for his decision to discipline Sarbacker at all.

Further, plaintiffs pointed to another employee, Randy Schnurbush, who had damaged a city vehicle while engaging in "horseplay" and lied about it until a witness came forward. Schumacher did not fire Schnurbush, but gave him a three-day suspension, which was his next step in the discipline policy. Defendants say that "[t]he damage to vehicle 4405 was much greater than the damage done" to the other vehicle, Dfts.' Br., dkt. #5, at 13, but they cite no evidence for this proposition. More generally, the fleet service supervisor testified that he was not aware of any other employee who was terminated for causing damage similar to that caused to the truck.

One way of proving a retaliation claim is with evidence that the defendant treated the

plaintiff less favorably than other, similarly situated employees who did not engage in protected speech and that the defendant's reason for the adverse action is pretextual. Vance v. Ball State University, 646 F.3d 461, 473 (7th Cir. 2011). Plaintiffs' evidence that Schumacher treated them less favorably than Schnurbush and that Schumacher failed to follow the city's progressive discipline policy is enough to meet that standard. Davis v. Wisconsin Dept. of Corrections, 445 F.3d 971, 976-77 (7th Cir. 2006) (failure to follow progressive discipline policy is evidence of pretext); Chaney v. Plainfield Healthcare Center, 612 F.3d 908, 916 (7th Cir. 2010) (failure to terminate employee who engaged in misconduct of comparable seriousness is evidence of discrimination, even if misconduct is not identical). Also relevant is Schumacher's unexplained discipline of Sarbacker. Hasan v. Foley & Lardner LLP, 552 F.3d 520, 529 (7th Cir. 2008) ("Our precedents establish, however, that behavior toward or comments directed at other employees in the protected group is one type of circumstantial evidence that can support an inference of discrimination.") (internal quotations omitted).

Schumacher's finding that plaintiffs were involved in putting water into the truck's exhaust is less suspicious than his determination regarding the appropriate discipline. After all, plaintiffs were the ones washing the truck just before it failed to start. Plaintiffs point to a number of alleged defects in the investigation, such as Grueneberg's failure to independently confirm other employees' allegations that Borreson had been involved in similar incidents in

the past, but defendants are correct that courts generally are reluctant to infer discriminatory intent from a shoddy investigation. Kariotis v. Navistar International Transportation Corp., 131 F.3d 672, 677 (7th Cir. 1997). That reluctance should be even greater in this case because it seems to be undisputed that the investigators were not aware of plaintiffs' protected speech while they were conducting the investigation. Even if I agreed with plaintiffs that the investigation was sloppy and riddled with problems, a reasonable jury could not attribute these problems to retaliatory animus if the investigators were ignorant of the alleged reason for retaliation.

That being said, the ultimate question in a retaliation case is not whether the defendant's conclusion was a reasonable one, but whether he reached it because of the plaintiffs' protected speech. Crawford–El v. Britton, 523 U.S. 574, 577, 594 (1998) (in First Amendment retaliation case, rejecting "proposal to immunize all officials whose conduct is 'objectively valid,' regardless of improper intent"). See also Gullick v. Ott, 517 F. Supp. 2d 1063, 1069 (W.D. Wis. 2007) ("It makes no difference whether the defendant *could have* taken an adverse action against the plaintiff for a legitimate reason. If the actual reason was the plaintiff's exercise of a constitutional right, the defendant may be held liable for retaliation."). Plaintiffs have adduced sufficient evidence to allow a reasonable jury to conclude that he did.

First, Schumacher admitted that he was bothered by plaintiffs' comments to the

media, which obviously is evidence of a retaliatory motive. Magyar v. Saint Joseph Regional Medical Center, 544 F.3d 766, 773 (7th Cir. 2008); Matrisciano v. Randle, 569 F.3d 723, 730 (7th Cir. 2009). Second, plaintiffs adduced evidence that Schumacher approached the investigation with uncharacteristic zeal as soon as he learned that plaintiffs might be involved, even seeking to initiate a criminal investigation, which is something he rarely did. Akright v. Capelle, 2008 WL 3875410, *3 (W.D. Wis. 2008)(defendant's "zeal in insuring that the matter be reported right away supports the drawing of an inference that she had an axe to grind"). Third, Schumacher admitted that he had a conflict of interest because of plaintiffs' history of speaking out, but he declined to recuse himself from the case. Olson v. Moore, No. 10-cv-199-bbc (W.D. Wis. Apr. 1, 2009) (defendant's failure to recuse himself from case involving conflict of interest is evidence of retaliatory motive).

Finally, Schumacher's testimony regarding the rationale for his decision was inconsistent and not completely coherent. Simple v. Walgreen Co., 511 F.3d 668, 671 (7th Cir. 2007) (inconsistent or incoherent statements are evidence of pretext). For example, he rejected the possibility that Mosel put water in the exhaust while Borreson was in the bathroom because he believed that Borreson was the one with a history of putting water in the exhaust. However, if Schumacher believed that Borreson was the more likely culprit, it does not explain why Schumacher did not even consider the possibility that Borreson might have filled the exhaust pipe with water before Mosel arrived. (Mosel testified that Borreson

was half done with washing his truck by the time Mosel got there. Mosel Dep., dkt. #21, at 75.) In addition, Schumacher admitted that he was trying to get plaintiffs to incriminate each other, but he does not explain why it was important for him to do that.

Even if these facts would not be enough on their own to prove retaliatory intent with respect to the finding of guilt, the evidence undermining Schumacher's decision regarding the appropriate discipline for plaintiffs undermines the entire decision making process. Accordingly, I conclude that plaintiffs are entitled to a trial on both the question whether the city fired them because of their protected speech and the question whether the city found plaintiffs guilty of misconduct for the same reason.

C. Punitive Damages

Defendants seek a ruling that plaintiffs are prohibited from seeking punitive damages at trial. However, their argument is undeveloped and premature. Defendants may renew their argument after all the evidence is in at trial.

ORDER

IT IS ORDERED that defendants Al Schumacher's and the City of Madison's motions for summary judgment (dkt. #9 in case no. 10-cv-521-bbc and dkt. #8 in case no. 10-cv-523-bbc) are GRANTED with respect to plaintiffs Chris Borreson's and Shane Mosel's claim that

the city violated their "right of association" under Title VII. The motions are DENIED in all other respects.

Entered this 8th day of December, 2011.

BY THE COURT:
/s/
BARBARA B. CRABB
District Judge