IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TAMMY DOUGLAS,

Plaintiff,

v.

PALMYRA-EAGLE AREA SCHOOL DISTRICT, JERRY ROSSO and ELMER KILIAN, In Their Individual Capacities,

Defendant.

OPINION
AND ORDER

99-C-744-X

Plaintiff Tammy Douglas is suing the Palmyra-Eagle Area School District, the district administrator and the school board president, claiming that they failed to hire her in retaliation for plaintiff having exercised her First Amendment right to free speech. Before the court is defendants' motion for summary judgment. For the reasons stated below, I am denying defendants' motion.

Defendants assert that plaintiff has no First Amendment interest here because she cannot establish that the speech at issue—two letters she wrote to the editor of the local newspaper—addressed matters of public concern as required by *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983). Alternatively, defendants contend that their interest in promoting workplace harmony and efficiency outweigh any First Amendment interests that plaintiff might have.

Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In determining whether a genuine issue of material fact exists, the court construes all facts in the light most favorable to the non-moving party and draws all reasonable and justifiable inferences in favor of that party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Defendants have not met their burden on any point. Plaintiff's letters to the editor addressed matters of public concern, and the record does not adequately support defendants' assertions regarding why they refused to hire plaintiff, or that their justification for refusing to hire plaintiff was reasonable.

Indeed, because it is clear from the present record that plaintiff's letters *did* comment on topics of public concern, I am prepared to enter summary judgment *in favor* of plaintiff on this point. *See Vaughn v. King*, 167 F.3d 347, 354 (7th Cir. 1999) (court has power to enter summary judgment sua sponte "when the outcome is clear, so long as the opposing party has had an adequate opportunity to respond.") (quoting *Sawyer v. United States*, 831 F.2d 755, 759 (7th Cir. 1987)). I do not foresee defendants discovering any additional evidence relevant to this issue before trial: they have had already deposed plaintiff regarding her motivation for

writing the letters, and the letters speak for themselves. However, before entering summary judgment in favor of plaintiff on this issue, I will provide defendants one last opportunity to convince me otherwise.

From the proposed findings submitted by the parties, I find the following facts solely for the purpose of deciding the motion for summary judgment:

Undisputed Facts

Palmyra is a village in Southeastern Wisconsin with a population of about 1500. At all relevant times, Tammy Douglas was a member of the Palmyra Police Commission (the "PPC"). On April 22, 1999, the *Palmyra Enterprise* published a letter to the editor written by Douglas in which she complained about the newspaper's coverage of a meeting of the village board of trustees. In the letter, Douglas also criticized the police chief for his comments during the meeting that the PPC did not handle complaints about the police department; Douglas labeled this a "false statement" and cited to the PPC's policies and procedures as support for her contrary view. Douglas signed her letter as a member of the PPC. The text of this letter is set forth in full in Exhibit A, attached to this opinion.

Around this same time, Douglas sought appointment by the village president to a vacant seat on the village board of trustees. The village president, Jim Garity, told Douglas to submit a letter to the village board listing her qualifications. Douglas did as she was told, but went a

step further and on May 4, 1999 sent a letter to the editor of the *Palmyra Enterprise* in which she outlined her qualifications and asked the community to support her in her bid. The newspaper published Douglas's letter. Douglas wrote the letter because she wanted to furnish the Village Board of Trustees with her qualifications quickly. Also, because there were only a few days before the appointment, she wanted to let constituents quickly learn her qualifications so they could contact the trustees to inform them whom they wished to have represent them. The text of this letter is set forth in full in Exhibit B, attached to this opinion.

Slightly before this, in April 1999, Douglas had applied for a job as Secretary to the Director of Pupil Services in the Palmyra-Eagle Area School District. As secretary, Douglas would have been responsible for managing and organizing the entire special education program, including processing paperwork for students with exceptional educational needs and corresponding with parents and teachers. Much of the work involved handling confidential student records.

Douglas interviewed for the position on June 16, 1999 with Jerry Rosso, District Administrator, and Ruth Hammiller, Director of Special Education. From Douglas's written application, interview, and references, Rosso believed that she was the most qualified of the approximately 25 applicants. On June 17, 1999, Rosso called Douglas to offer her the position pending approval by the school board. Rosso characterized the approval as a "technicality,"

explaining that during his five years as administrator, the board had never rejected any of his approximately 40 hiring recommendations.

Rosso brought his recommendation to hire Douglas for the secretary position before the board during its June 24, 1999, meeting. During the meeting, the board went into closed session to discuss Douglas's credentials. During the closed session, Rosso withdrew his recommendation of Douglas for the secretary position after it became apparent to Rosso that the board did not support his recommendation. Rosso was under the impression that the board was concerned about Douglas's ability to maintain confidentiality.

The board did not discuss plaintiff's letters to the editor during the closed session but the topic came up among some board members after the meeting. According to the school board president, Elmer Kilian, he thought the school did not need "somebody that is writing a letter to the editor already about whatever." Kilian has testified (at his deposition) that it was "sort of inferred that if she's complaining in a letter to the editor and the police and fire commission and the village board is there any possibility—and these are my words—that she would be discussing similar things if she had the position in the school." According to Kilian, two or three other board members agreed with this sentiment.[1]

After the meeting, Rosso called Douglas to inform her of the board's adverse decision. When Douglas asked Rosso why the board would have an opinion or any knowledge of who she

[1] Kilian's report of the "sentiments" of the other school board members is hearsay, but since defendants did not oppose plaintiff's proposed fact on this point, I will accept it.

was, he replied that the position involved discreetness and confidentiality, and that she was a "high profile" resident of the community. Douglas asked whether it would make a difference if she quit her position with the PPC. Douglas's offer surprised Rosso because, to his knowledge, the board's decision had not been based on plaintiff's PPC membership.

Following her conversation with Rosso, Douglas met with Kilian to inquire further about why she was rejected. Kilian told her that the position required the utmost confidentiality and discreetness, that she would be dealing with parents and children and sometimes would have to handle "very delicate" situations. Kilian explained that he and the other board members doubted Douglas's ability to be discreet as a result of her political standing in the community.

Kilian subsequently denied that the board was afraid that Douglas would fail to respect confidentiality and asserted that such a concern had nothing to do with the board's refusal to hire Douglas. Kilian explained that the reason he discussed confidentiality with Douglas was because a secretary who had worked for the school 25 years ago had failed to respect school confidences.

Analysis

A claim under § 1983 for retaliation in violation of the First Amendment requires a three-step analysis:

> First, the court must determine whether the plaintiff's speech was constitutionally protected. If so, then the plaintiff must prove that the

> defendant's actions were motivated by the plaintiff's constitutionally protected speech. Finally, if the plaintiff can demonstrate that his constitutionally protected speech was a substantial or motivating factor in the defendant's actions, the defendant is given the opportunity to demonstrate that it would have taken the same action in the absence of the plaintiff's exercise of his rights under the First Amendment.

Kokkinis v. Ivkovich, 185 F.3d 840, 843 (7th Cir. 1999).

Defendants contend they are entitled to summary judgment because plaintiff's speech was not constitutionally protected. This is a question of law for the court that requires application of the two-part test derived from the Supreme Court's decisions in *Pickering v. Board of Education*, 391 U.S. 563 (1968) and *Connick v. Myers*, 461 U.S. 138 (1983). Under the *Pickering-Connick* test, a government employee must satisfy two criteria to prove unlawful discharge under the First Amendment: 1) the speech addressed a matter of public concern; and 2) the employee's First Amendment interest is not outweighed by the government's interest in promoting the efficiency of its public services. *See Pickering*, 391 U.S. at 568; *Connick*, 461 U.S. at 149-151.

Only if the employee's speech addresses a matter of public concern does the court perform the balancing of interests required by the second part of the test. *Connick*, 461 U.S. at 146. Circuit courts, including the Court of Appeals for the Seventh Circuit, have applied the *Pickering* balancing to hiring decisions. *See Worrell v. Henry*, 219 F.3d 1197, 2000 WL 1028214 (10th Cir. 2000) (applying *Pickering* balancing to government employer's rescission of a job offer); *Bonds v. Milwaukee County*, 207 F.3d 969 (7th Cir. 2000) (same); *Shahar v. Bowers*, 114

F.3d 1097, 1102-03 (11th Cir. 1997) (en banc) (same); *Hubbard v. EPA*, 949 F.2d 453, 460 (D.C. Cir. 1992) (applying *Pickering* balancing to hiring decision and observing that "[m]erely because an employer is hiring rather than firing, however, does not justify unconstitutional action").

I. Public Concern

Evaluating whether an employee's speech dealt with a matter of public concern requires an examination of the "content, form, and context" of her statements "as revealed by the whole record." *Connick*, 461 U.S. at 147-148. Although content is the most important of these considerations, *see Campbell v. Towse*, 99 F.3d 820, 827 (7th Cir. 1996), the employee's motive or "point" in making the statements is also relevant. *See Linhart v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985). "The underlying substantive question is whether the particular speech at issue constitutes the employee's own personal expression, intended as public comment on a matter of public interest, rather than a mere articulation of an employer's position or speech directed by a private grievance." *Bonds v. Milwaukee County*, 207 F.3d 969, 980 (7th Cir. 2000); *see also Dishnow v. School Dist. of Rib Lake*, 77 F.3d 194, 197 (7th Cir. 1996) (describing matters of public concern as "matters in which the public might be interested" as distinct from wholly personal grievances and casual chit-chat).

A. The April 22, 1999 Letter

Starting with plaintiff's April 22, 1999 letter to the editor, defendants contend that there are only three ways in which the letter can be interpreted, none of which supports a finding that the letter implicated matters of public concern. Specifically, defendants contend that plaintiff's letter was: 1) an attempt to correct the newspaper's inaccurate reporting; 2) an open letter informing the public of the powers and duties of the police commission, written on behalf of the Palmyra Police Commission, not by plaintiff as a private citizen; or 3) a purely personal grievance between plaintiff and Chief Neubauer.

Defendants' single-threaded characterizations are uncompelling. Although plaintiff's letter interweaves strands of all three interpretations offered by defendants, when read as a whole, it inarguably touches upon matters of public concern within the meaning of *Connick* and *Pickering*. The thrust of plaintiff's letter is her concern that the public may have been misled about the powers of the Palmyra Police Commission as a result of statements made by the police chief and inaccurate reporting by the newspaper. As the Seventh Circuit has recognized, speech that addresses questions of public safety and police protection generally involves matters of vital public concern. *See, e.g., Campbell*, 99 F.3d at 828; *Glass v. Dachel*, 2 F.3d 733, 741 (7th Cir. 1993). *See also New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.").

Of course, simply because a topic might be of some interest to the public does not automatically mean that an employee's statements on that topic address a matter of public concern as that term is employed in *Connick*. *Kokkinis*, 185 F.3d at 844. The court must consider whether the speaker's point was to bring wrongdoing to light or to raise other issues of public concern, because they are of public concern, or to further a purely private interest. *Vukadinovich v. Bartels*, 853 F.2d 1387, 1390-1391 (7th Cir. 1988). In *Kokkinis*, the court found that a police officer's statements on a news program covering sex discrimination in the police department were not a matter of public concern in light of the officer's admission that he had little personal knowledge of the discrimination incident and that his comments expressed his personal opinion about the police chief's vindictiveness. 185 F.3d at 844. *See also Vukadinovich*, 853 F.2d at 1391 (high school basketball coach's comments questioning why school asked him to resign were not matter of public concern where coach did not comment about any possible improper motives or procedures regarding defendants' actions); *Hesse v. Board of Education*, 848 F.2d 748, 752 (7th Cir. 1988) (memoranda from teacher to school board indicated that he was not attempting to speak on matter of public concern, but was expressing his private disagreement with policies and procedures that he had either failed to apply or refused to follow); *Yoggerst v. Hedges*, 739 F.2d 293, 296 (7th Cir. 1984) (employee's in-office remark to coworker expressing happiness that supervisor had been discharged was not matter of public concern where employee's statement did not suggest that supervisor was ineffective

administrator, that he failed to discharge his duties, or that he had committed some wrongdoing or breach of public trust).

At the same time, "[a] personal aspect contained within the motive of the speaker does not necessarily remove the speech from the scope of public concern." *Greer v. Amesqua*, 212 F.3d 358, 371 (7th Cir. 2000). Instructive in this respect is the Supreme Court's decision in *Connick*, a case that involved a questionnaire distributed by respondent Sheila Myers to her colleagues in the New Orleans District Attorney's Office. Even after finding that Myers's motivation in distributing the questionnaire was not to bring public wrongdoing to light but to "gather ammunition for another round of controversy with her superiors" regarding her dissatisfaction with a job transfer, *see Connick*, 461 U.S. at 148, the Court nonetheless found that a question asking if assistant district attorneys ever felt pressured to work in political campaigns for office-supported candidates was a matter of public concern. *Id.* at 149.

In this case, although plaintiff used first person singular construction in her letter and may have had personal reasons for writing it, these factors do not remove her letter from the realm of public concern. As plaintiff puts it, "very few people speak out on issues in which they are totally disinterested." Plaintiff's Brief, dkt. #9, at 5. Plaintiff's letter indicates that she was motivated by her concern that the public misconceived the PPC's powers and its ability to address complaints of police misconduct. Specifically, after attempting to set the record

straight in response to alleged misstatements made by the police chief and the newspaper, plaintiff wrote:

> I have heard several comments about the Palmyra Police Commission and how powerless and spineless this Committee truly is. So it is of the utmost urgency that when something hits the paper that is not so true about this Committee, I feel it must be corrected or at least addressed as soon as possible.
>
> I have been a member of the Palmyra Police Commission for the last seven months now, and I have heard from several citizens within the Village of Palmyra, and if they have a problem, I am going to listen to them and do anything within my powers to help the people of Palmyra.

These statements show that plaintiff was not merely airing a personal grievance with the police chief, but was seeking to inform the public about the PPC's powers. Unlike the plaintiff in *Kokkinis*, plaintiff's PPC membership and the PPC's public role gave her an interest in making her views public beyond her mere disagreement with the police chief. *See Bonds*, 207 F.3d at 981 (noting that opinions of employee who has access to "inside information" about government performance "have particular First Amendment value for the public").

Moreover, defendants have adduced no evidence to support their claim that plaintiff had solely personal motivations for writing to the newspaper. The only evidence submitted by defendants is that after plaintiff's letter was published, the police chief's lawyer accused Douglas of soliciting complaints against the chief. But this establishes that the police chief had a personal grievance *against plaintiff* as a result of her letter; it does *not* establish that the plaintiff wrote her letter because of any personal grievance against the chief.

Defendants also point to plaintiff's statements at her deposition that she wrote the letter to opine that the paper's reporter did a "junky" job and to say "look, I'm a Police Commissioner, and this is what we do." Even if these motives may be somewhat "personal" in nature, they are closely tied to plaintiff's interest as a member of a public political body in making sure the public had the proper information about that entity's authority.

This segues into the alternate interpretation offered by defendants, namely, that plaintiff, who signed her letter as "Palmyra Police Commissioner" was merely articulating the position of the PPC and was not expressing her personally-held views. Defendants' characterization is incorrect. Nowhere in her letter does plaintiff state or suggest that her views are shared by the other PPC members or that she was writing on behalf of the entire PPC, and defendants have adduced no evidence suggesting that plaintiff was acting as a surrogate for the PPC.

Finally, plaintiff's choice of a public forum in which to express her views supports her claim that her letter was a matter of public concern. Although the fact that an employee's views may have been disseminated in a public forum is not dispositive, *see, e.g., Vukadinovich*, 853 F.2d at 1391, it does weigh in favor of plaintiff where, as here, there are other indices that plaintiff's speech concerned matters of public interest. *Cf. Barkoo v. Melby*, 901 F.2d 613, 619 (7th Cir. 1990) (absent evidence that plaintiff shared information with newspaper, her private discussions with other employees in village dispatcher's office about employer's taping of

employee conversations indicated that plaintiff's concern was purely personal); *Vukadinovich*, 853 F.2d at 1391 (coach's comments expressing private dissatisfaction with being asked to resign did not become matter of public concern when newspaper contacted him and published comments).

In sum, I conclude that plaintiff's April 22, 1999 letter to the *Palmyra Enterprise* addressed a matter of public concern.

B. The May 4, 1999 Letter

Plaintiff submitted her second letter to the editor to advance her bid for the vacant seat on the village board of trustees. In her letter, plaintiff stated that the board had asked each nominee to submit a letter of qualifications, "so I am at this time giving my qualifications to the entire Village of Palmyra." Plaintiff outlined her qualifications.

In the letter, plaintiff also criticized the other nominee for the seat, Hilma Thompson, stating:

> One of my biggest reasons for this letter is that the voters of the Village of Palmyra have already made their decision, back on April 6, 1999, they voted Hilma Thompson out of office. The residents of Palmyra do not want Hilma on the Village Board any more, they have made this clear as of the last election. Granted Hilma has served 18 years as a Village Trustee, but times and situations change. So I, Tammy Douglas represent change, with an open mind and open ears for the residents of the Village of Palmyra . . ..

See Plaintiff's Letter of May 4, 1999, attached as exhibit B.

Plaintiff urged the public to support her for the position by calling current village board members and attending the board's May 10, 1999 meeting:

> Please show your support. This is still your Village and you should have a say in who you would like to represent the residents of Palmyra. So please call your current Village Board members and express your feeling, but most of all this matter will be brought forth once again at the May 10 meeting of the Village Board at 7 p.m. Please show up to this meeting and show your support.

Id.

This plea for political support and exhortation to participate in local governance is quintessential First Amendment political expression that would bring a lump to the throat of any Founding Father. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court explained that "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'" *Id*. at 14 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

Undaunted by these fundamental principles of American democracy, defendants contend that plaintiff's second letter to the editor did not implicate matters of public concern. Defendants argue that plaintiff was motivated solely by her self interest in being appointed to fill the vacant seat on the board; therefore her letter does not involve a matter of public concern.

Defendants are incorrect. Plaintiff was seeking a public position as a member of the village's governing body. On one level, plaintiff obviously had a personal stake in whether she was appointed or not, but on a more fundamental level, her ultimate goal, like that of all political candidates, was to serve the public. While small-town politics undoubtedly foster their share of inflated egos and personal agendas, surely the defendants are not so cynical as to suggest that candidates for public office at the village level are motivated solely by an all-consuming self interest untempered by any small sense of civic duty.

Moreover, as noted previously, some personal motivation on the part of the speaker does not necessarily remove the speech from the scope of public concern. *See, e.g., Breuer*, 909 F.2d at 1039 ("Wrongdoing may often be revealed to the proper authorities only by those who have some personal stake in exposing wrongdoing"). Had plaintiff written her letter in support of someone else or simply had questioned the appropriateness of appointing Thompson, there would be no question that her letter would have addressed matters of public concern. That being so, plaintiff's political statements are not less protected simply because plaintiff publicly supported herself.

Defendants argue that plaintiff could not have been advocating for her own candidacy because the decision of whom to appoint to the vacant seat rested with the village president and not with Palmyra voters. Also, defendants contend that plaintiff's deposition testimony indicates that her motives were purely personal, arguing that plaintiff has conceded that her

letter was directed to the village board and not the public. As such, argue defendants, plaintiff's letter is nothing more than a job application that happened to be submitted in a public forum.

Defendants have oversimplified the issue and misconstrued the record. Plaintiff acknowledges that "part" of her intent in writing the letter was quickly to furnish the village board of trustees with her qualifications; she also acknowledges that she did not write her letter to raise public pressure in an effort to force her appointment. But plaintiff maintains that her letter was directed to the public. Plaintiff's Response to Def.'s Proposed Findings of Fact, dkt. #31, ¶ 16. In fact, plaintiff has testified that she submitted her qualifications publicly because there was only a very short period of time before the appointment, and she wanted to let constituents know her qualifications quickly so that they could contact the trustees to let them know whom they wished to have represent them. Douglas Dep. 60: 2-11, dkt. #28, ex. C. That plaintiff was not limiting her audience to the board of trustees is borne out by the content of plaintiff's letter and her choice of a public forum. Clearly, plaintiff sought to make her views known publicly.

Second, although defendants assert in their brief that "the decision of who to appoint as Village Trustee rested solely in the hands of Mr. Garity," this assertion is neither the subject of any proposed finding of fact nor supported with any citation to the record. Therefore, this

court may not consider it as a fact.[2] Indeed, plaintiff's letter to the editor suggests that defendants' assertion is incorrect, for the letter indicates that the entire board of trustees would be voting on whom to appoint to the vacant seat. Specifically, plaintiff wrote:

> I was in attendance at the May 3, 1999 meeting of the Palmyra Village Board, and at this meeting was supposed to be the nomination of a new Village Trustee to replace Jim Garity's unexpired one year term on the Board. Jim Garity brought forth the nomination of Hilma Thompson, then Mike Fischer brought forth the nomination for Village Trustee of me—Tammy Douglas. The Board of Trustees then cast their votes 3 ayes, 3 nays. The Board was deadlocked after two votes. At this time Jim Garity tabled this nomination, and Mike Fischer asked for a letter of qualifications from each prospective trustee nominee.

Plaintiff's Letter of May 4, 1999, second paragraph.

That said, the court need not resolve this factual dispute because it doesn't matter to the outcome. Even if defendants are correct and the village president was to handpick the winning candidate, that fact alone would not remove the selection process from the public realm. Simply because an empty seat on the village board is to be filled by appointment does not mean that the appointer chooses in a vacuum, insulated completely from the influence of politics and public opinion. (Just ask former Supreme Court nominees Robert Bork and Clarence Thomas.) The citizens of Palmyra had a legitimate interest in learning something

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[2] According to a May 13, 1999 article in the *Palmyra Enterprise* (a copy of which is attached to the Affidavit of Andrew T. Phillips, dkt #28), the Village Board took five ballots at a special public meeting before electing Hilma Thomas to the vacant seat; after the first ballot, the board allowed the public to comment in support of particular candidates for the position. This report contradicts defendants' assertions that public input was irrelevant and that the board president alone made the decision. However, neither side offered any proposed findings of fact on these points, so I have taken no note of them in ruling on defendants' motion.

about the candidates from among whom the village president would pick their newest representative on the village board. This seems particularly true where the citizens had rejected one of the nominees in the previous election. So, even if plaintiff's fate actually rested solely in the hands of the village president, plaintiff would not have been wrong to think that a public demonstration of support in her favor might have persuaded him to appoint her over Hilma Thompson.

In sum, plaintiff's campaign letter addressed matters of public concern, even though it also may have advanced her personal interest in obtaining appointment. Plaintiff was not airing a private grievance or engaging in casual chit-chat. She was attempting to educate the public about the qualifications of the individuals seeking to represent it, and she was alerting the public that its previous decision at the ballot box to oust Thompson was on the verge of being nullified via appointment. This was paradigmatic political expression, and plaintiff's letter was not less protected simply because plaintiff was also stumping for herself.

II. ***Pickering*** **Balancing**

The second prong of the *Pickering* test requires the court to balance "the interest of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *See Pickering*, 39 U.S. at 567-68. Factors to consider in applying *Pickering* balancing

include (1) whether the speech would create problems in maintaining discipline or harmony among co-workers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee's ability to perform her responsibilities; (4) the time, place and manner of the speech; (5) the context in which the underlying dispute arose; (6) whether the matter was one on which debate was vital to informed decisionmaking; and (7) whether the speaker should be regarded as a member of the general public. *Greer*, 212 F.3d at 371; *Bonds*, 207 F.3d at 981. The government bears the burden of demonstrating that its interests as an employer outweigh the employee's First Amendment rights. *See Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

Defendants appear to concede for summary judgment purposes that their refusal to hire plaintiff was motivated by her protected speech. They assert that plaintiff's "propensity" to write letters to the editor expressing disagreement indicated that she was an axe grinder who was sure to cause problems at some point if she were hired. Specifically, defendants argue that their refusal to hire plaintiff was based on their fear that she would "go public" with highly confidential matters if she happened to disagree with a supervisor regarding official policy.

It is not clear from the record whether the defendants actually held this view at the time they rejected plaintiff's employment application. Rosso could only say that it was his "impression" that the board was concerned about confidentiality; Kilian flat out denied that the board's decision had anything to do with confidentiality. Kilian got close when he said that

it was "sort of inferred" in discussions among board members after the meeting "that if she's complaining in a letter to the editor and the police and fire commission and the village board is there any possibility—and these are my words—that she would be discussing similar things if she had the position in the school," but in light of his clear-cut denial that the decision arose from confidentiality concerns, it is hard to know what Kilian meant by this statement. It would have been helpful to hear what the other board members had to say about why they opposed Rosso's recommendation to hire plaintiff, but defendants did not offer such evidence. Moreover, defendants have not attempted to reconcile Kilian's apparently contradictory statements. Thus, the court is left with a muddled record that precludes granting summary judgment for defendants.

That said, even if I accept at face value defendants' claim that the failure to hire plaintiff was based on concerns about her ability to maintain confidentiality as a result of her letters to the editor, I conclude that the defendants' predictions about the effects of plaintiff's speech on the workplace were simply too speculative and lacked any reasonable basis in fact that would outweigh plaintiff's First Amendment interests.

First, as discussed in the previous section, plaintiff's First Amendment interest in both of her letters was very strong. As a PPC member, plaintiff was in a unique position to offer informed opinions about the powers of the commission and the role it could play in the community. *Cf. Bonds*, 207 F.3d at 981 (finding an employee's First Amendment rights

significant where employee expressed opinions about a city program that he had studied and researched); *see also Waters v. Churchill*, 511 U.S. 661, 674 (1994) ("Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions"). Plaintiff had a significant First Amendment interest in promoting herself as the most qualified individual nominated to fill the vacant seat on the village board.

In light of plaintiff's strong First Amendment interests, defendants bear a greater burden to justify their failure to hire plaintiff. *See Waters*, 511 U.S. at 674 (where government employee has strong First Amendment interest, government may have to make substantial showing that speech is, in fact, likely to be disruptive before it may be punished); *Connick*, 461 U.S. at 150 (noting that "*Pickering* unmistakably states . . . that the State's burden in justifying a particular discharge varies depending upon the nature of the employee's expression"). The employer's decision may be speculative based on the potential disruptiveness of the employee's speech so long as the employer's belief regarding the effects of the employee's speech was reasonable. *Bonds*, 207 F.3d at 982-83; *see also 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.").

On this record, defendants' prediction that plaintiff would cause problems on the job is conjecture. Defendants have adduced no evidence beyond plaintiff's letters to justify their

claimed fear that if they hired plaintiff she would publicly air any employment-related disagreements, or would cause dissension at work in some other way. The letters themselves do not adequately justify this fear. For instance, defendants have adduced no evidence to show that the police chief was plaintiff's supervisor; that there was some "proper channel" through which plaintiff should have gone but didn't; or that plaintiff's disagreement with the police chief involved "official policy" or a "purely internal" matter.

Moreover, plaintiff's second letter was not job-related at all; plaintiff wrote as a citizen seeking appointment to public office. The fact that plaintiff went beyond simply submitting her qualifications to the board by opposing another candidate's selection and by seeking public involvement in a matter of public concern does not constitute "making a purely internal problem public." *See* Def.'s Brief, dkt. #26 at 15.

In sum, neither of plaintiff's letters had anything to do with her employment. Both addressed issues arising from her service on the PPC and her bid for the village board. This distinguishes this case from *Bonds v. Milwaukee County*, 207 F.3d 969, a case cited by defendants on this point. In *Bonds*, a research analyst for the City of Milwaukee made comments at a public forum that were extremely critical of a program implemented by the city and on which he had worked. As a result of his comments, which were reported in the *Milwaukee Journal Sentinel* and which sparked a "firestorm" of political controversy, the County of Milwaukee

rescinded its pending offer to hire Bonds; Bonds then brought a § 1983 action contending that the county had violated his rights under the First Amendment.

In support of its claim that the *Pickering* balancing weighed in its favor, the county presented testimony from three county supervisors who testified that, after learning about Bonds's comments at the public forum, they phoned the county board chairperson and left messages to the effect that they would have found it very difficult to work with Bonds and would be concerned that he would publicly criticize the county if he disagreed with one of its policies. The county board chairperson also testified that she thought Bonds's open criticism and inflammatory comments regarding a policy-making body for which he worked reflected "extremely poor judgment" and suggested that he might do the same thing again if he worked for the county. Also, she testified that she was concerned about dissension in the workplace if Bonds were hired, noting that it was a small staff and that several supervisors had already expressed skepticism that they could work with Bonds.

On the basis of this evidence, the court found that the county reasonably concluded that Bonds's speech would cause dissension and inefficiency in the workplace if Bonds was hired. *Id.*, 207 F. 3d at 982-83. The court also noted that there was sufficient evidence from which the chairperson reasonably could have concluded that Bonds had conducted himself inappropriately at the forum; this evidence included the newspaper report, a telephone conversation between Bonds and the county chief of staff in which Bonds acknowledged that

the "main thrust" of the newspaper article was correct, and Bonds's written apologies to the mayor and the city council. *Id.* at 982. In ruling against Bonds, the court of appeals emphasized Bonds's status as a policymaking employee, noting that the "special loyalty and confidentiality" needed from such employees "exacerbates the damage to the employment relationship and government effectiveness caused by their insubordinate, disloyal or inappropriate speech." *Id.* at 981.

None of the circumstances present in *Bonds* are present here, at least on the current record before this court. Although plaintiff's first letter criticized the newspaper's coverage of the board meeting and criticized some of the police chief's comments at that meeting, her criticisms cannot reasonably be characterized as fierce or inflammatory. There is no evidence that plaintiff was being hired for a policymaking position with the school or that this job was similar in any manner to plaintiff's positions as a public officer and nominee for public office. There is no evidence that plaintiff betrayed any confidences or criticized her own employer in either of her letters to the editor. There is no evidence that plaintiff had an employment relationship with either the police chief, the village board or Hilma Thompson that demanded any special loyalty or confidence. There is no evidence that plaintiff's letters violated any official rule or policy of her employment or her public service. There is no evidence that anyone employed at the school contacted the board to express reluctance to work with plaintiff as a result of her letters. Finally, it is not even clear that any of the board members had actually

read plaintiff's letters. *See Waters*, 511 U.S. at 677 ("[I]t may be unreasonable for an employer to act based on extremely weak evidence when strong evidence is clearly available—if, for instance, an employee is accused of writing an improper letter to the editor, and instead of just reading the letter, the employer decides what it said based on unreliable hearsay.").

All that defendants offer is the fact that plaintiff wrote two letters to the editor voicing disagreement with others regarding two unrelated public issues; from this defendants ask this court to conclude that plaintiff's letters reasonably supported an inference that plaintiff would betray the loyalty and confidences of her employer if she was hired. This is too long a stretch for summary judgment.

Defendants assert that it is irrelevant whether plaintiff's speech related to her then-current employer. One could hypothesize situations in which an employee's protected speech on matters not related to her employment could lead a government employer reasonably to believe that the speech was likely to disrupt the workplace. In *this* case, however, without anything to suggest that plaintiff's speech would disrupt the workplace except for the letters themselves, the fact that plaintiff's letters had nothing to do with her employment weakens significantly the connection defendants attempt to draw between plaintiff's speech and their asserted fears about how she would behave in the workplace. Criticizing a public official for misstating facts of concern to the public is one thing; going public with information that one's employer has warned must be kept confidential is quite another. *Compare Biggs v. Village of*

Dupo, 892 F.2d 1298, 1303-04 (7th Cir. 1990) (police department violated First Amendment when it fired officer for critical statements made about mayor and village board; officer did not criticize anyone with whom he had working relationship calling for loyalty and confidence and speech caused no significant disruption of police department's operation), *with Breuer*, 909 F.2d at 1041 (police department's termination of police officer for his complaints alleging that sheriff was engaged in favoritism and had stolen county property was justified in light of fact that officer's speech created "serious schism" in police department and interfered with officer's ability to perform his work).

Having noted all this, I don't want to sell defendants short. Obviously, everyone benefits if a village's police chief is on amicable terms with the members of the village's police commission, and public friction between the two could make observers uncomfortable. On the other hand, one could also reasonably conclude that a police commission member has a duty publicly to correct any misimpressions the public might have drawn from the chief's misleading comments at a public meeting, even if this might create public friction. In such an event, perhaps the public friction could be so severe or involve such questionable tactics that reasonable observers would conclude that they didn't want anything to do with the combatants.

Accepting these premises as true, would a public disagreement between a police chief and a police board member of the sort that occurred here be so alarming to other villagers that

it would justify the school board declining to hire the board member to work in the school district's special education program? I think not. Maybe if other factors were present the school board would have a convincing argument, but absent anything else, the school board's squeamishness is unjustified. Perhaps reasonable minds could differ on this conclusion, but at the summary judgment stage, this is fatal to defendants' motion.

As noted previously, the question when evaluating the government's reasoning for termination (or failure to hire) based on an employee's speech is whether the employer's belief was reasonable. *Bonds*, 207 F.3d at 983. Courts should give *substantial* deference to government predictions of harm from an employee's speech, but they should not give *complete* deference. *See Waters*, 511 U.S. at 677 ("Even in situations where courts have recognized the special expertise and special needs of certain decisionmakers, the deference to their conclusions has never been complete."). To accept the defendants' position would be to defer completely (and unreasonably, based on the facts currently in the record).

In sum, material disputes of fact remain as to defendants' reasons for refusing to hire plaintiff. Moreover, even if defendants' asserted concerns about confidentiality were adequately supported by the record, defendants have presented insufficient evidence to support their claim that these concerns outweighed plaintiff's First Amendment interests under the balancing test of *Pickering*.

Conclusion

An examination of the content, form and context of plaintiff's letters in light of the existing record reveals that in each case, plaintiff's letters addressed matters of public concern. Therefore, defendants' motion for summary judgment on this ground must be denied. Because it appears that further discovery would not produce any additional evidence that could change my conclusion at trial, I am inclined to grant summary judgment in favor of plaintiff as to the public concern issue, and I am taking the matter under advisal. Defendants shall have until September 25, 2000 in which to present any objections they may have to me proceeding in this fashion. Plaintiff shall have until October 5, 2000 in which to file a response to defendants' objections.

As for the second step of the analysis, material facts remain disputed regarding defendants' actual reasons for refusing to hire plaintiff; specifically, it is unclear whether defendants were concerned about plaintiff's ability to keep workplace issues confidential at the time they decided not to hire her. Moreover, even if defendants' asserted concerns about confidentiality were supported by the record, defendants have presented insufficient evidence on summary judgment to support their claim that these concerns outweighed plaintiff's First Amendment interests under the balancing test of *Pickering*.

For all of these reasons, I am denying defendants' motion for summary judgment.

ORDER

IT IS ORDERED the motion of defendants Palmyra-Eagle area School District, Jerry Rosso and Elmer Kilian for summary judgment is DENIED.

It is FURTHER ORDERED that defendants shall have until September 25, 2000 to show cause why summary judgment should not be entered in favor of plaintiff on the issue whether plaintiff's speech addressed matters of public concern. Plaintiff shall have until October 5, 2000 in which to file a response to any such objections.

Entered this 11th day of September, 2000.

BY THE COURT:

STEPHEN L. CROCKER
Magistrate Judge

EXHIBIT A

April 16, 1999

In regards to your article dated April 6, 1999 labeled “Residents complain about Neighbor,” I felt that there were some discrepancies in this article that I would like to address. I am currently on the Palmyra Police Commission and was personally at the Palmyra Village Board Meeting on April 5, 1999. The first concern I have with this article is the statement, “Brien and Powell also said they talked to the Palmyra Police Commission and were told to address their complaint to the town trustees.” In fact I was the first one to receive this complaint from the Village President, Jeffrey Martens and upon me bringing this complaint letter in front of the Palmyra Police Commission on March 17, 1999, Chief Neubauer is the person that stated, “You cannot hand a complaint to a Police Commissioner; it must be given to the Village Board,” and not the Palmyra Police Commission. My next issue is with the quote, "I am asking the Village Board to be proactive instead of reactive,” Brien said. The wording in this statement did not fully express the meaning of Mr. Brien. Mr. Brien would like the Village on a regular basis to check out blighted buildings, junked cars, excessive outside storage of junk and other debris, etc., so it would not have to come to the point of a citizen's complaint. Also, Chief Neubauer made the statement that "the Police Commission only has the authority to hire and fire." This is also incorrect: we have the power to hire, fire, take disciplinary action and hold hearings regarding these aforementioned matters. My last issue is with the quote saying that Chief Neubauer told the board that residents should file complaints with the Police Department and not the Police Commission. This is a false statement. In fact under section 1.03(a) of the Palmyra Police Commission Policy and Procedure it states, “The duties of the Chairperson shall be to receive written charges filed against chief officers or subordinates."

I have heard several comments about the Palmyra Police Commission and how powerless and spineless this Committee truly is. So it is of the utmost urgency that when something hits the paper that is not so true about this Committee, I feel it must be corrected or at least addressed as soon as possible.

I have been a member of the Palmyra Police Commission for the last seven months now, and I have heard from several citizens within the Village of Palmyra; and if they have a problem, I am going to listen to them and do anything within my powers to help the people of Palmyra.

Thank you,
Tammy Douglas
Palmyra Police Commissioner

EXHIBIT B

Letter to the Editor,

My name is Tammy Douglas , and I currently serve as a commissioner on the Palmyra Police commission for the last eight months.

I was in attendance at the May 3, 1999 meeting of the Palmyra Village Board, and at this meeting was supposed to be the nomination of a new Village Trustee to replace Jim Garity's unexpired one year term on the Board. Jim Garity brought forth the nomination of Hilma Thompson, then Mike Fischer brought forth the nomination for Village Trustee of me -- Tammy Douglas. The Board of Trustees then cast their votes 3 ayes, 3 nayes. The Board was deadlocked after two votes. At this time Jim Garity tabled this nomination, and Mike Fischer asked for a letter of qualifications from each prospective trustee nominee. So I am at this time giving my qualifications to the entire Village Of Palmyra. My qualifications are as follows: I currently work for the City of Jefferson. I deal on a daily basis with City ordinances, City budgets, Special assessments, Zoning, Legal descriptions, dealings with the Mayor and City Council members on a daily basis, working with the following departments: Water and Electric, Zoning, Building Inspections, Park, Recreation and Forestry, Street Department, Engineering Department, Jefferson Police Department, Wastewater Treatment Plant, Plan Commission, Historic Preservation, Jefferson Area Senior Center. I make agendas for several Committees, taking Minutes. I deal daily with Wisconsin State Statutes, Open Meetings Laws, and I have numerous hours of professional schooling enabling me to run, provide and prepare for any such type of meeting to include: closed session meetings, public hearing meetings, City Council meetings, TIF District meetings along with several other meetings. The Governmental process is my job and my career, I do this for a living, this is not a sideline, and I take my job very seriously. My knowledge is endless and if I am unsure of anything, I make it my point to become informed.

One of my biggest reasons for this letter is that the voters of the Village of Palmyra have already made their decision, back on April 6, 1999, they voted Hilma Thompson out of office. The residents of Palmyra do not want Hilma on the Village Board any more, they have made this clear as of the last election. Granted Hilma has served 18 years as a Village Trustee, but times and situations change. So I, Tammy Douglas represent change, with an open mind and open cars for the residents of the Village of Palmyra. I am more than qualified for this position and I am quite capable to perform the duties of a Village Trustee.

Please show your support. This is still your Village and you should have a say in who you would like to represent the residents of Palmyra. So please call your current Village Board members and express your feeling, but most of all this matter will be brought forth once again at the May 10 meeting of the Village Board at 7 p.m. Please show up to this meeting and show your support.

Thank you,

Tammy Douglas

May 4, 1999