IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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SCOTT G. KREILKAMP,
TIMOTHY M. GORDON, and
LOCAL 877 OF THE INTERNATIONAL
ASSOCIATION OF FIREFIGHTERS,
AFL-CIO,

OPINION AND
ORDER

Plaintiffs,

99-C-0586-C

v.

CITY OF WATERTOWN,
WISCONSIN and RICHARD
L. OLSON,

Defendants.

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Plaintiffs Scott G. Kreilkamp, Timothy M. Gordon and Local 877 of the International Association of Firefighters, AFL-CIO, have brought this civil action for injunctive relief and money damages against defendants City of Watertown, Wisconsin and the city's fire chief, Richard L. Olson (who is now retired), alleging that defendants took adverse actions against them to punish them for voicing their opinion on a matter of public concern and to prevent them from continuing to speak out on the matter, in violation of the United States Constitution

and Wisconsin law. See Wis. Stat. § 111.70(3)(a)(1) and (3). Jurisdiction is present. See 28 U.S.C. § 1331. Presently before the court is defendants' motion for summary judgment. I conclude that (1) the individual plaintiffs' speech was constitutionally protected and that plaintiffs have raised a triable issue whether plaintiffs' speech motivated defendant Olson to take adverse employment action against them; and (2) plaintiff union has presented sufficient evidence to require a jury to determine whether defendants violated the First Amendment rights of its members by chilling their speech. In addition, I conclude that defendant Olson is not entitled to qualified immunity but that plaintiff has failed to adduce evidence sufficient to hold defendant City of Watertown liable for defendant Olson's actions.

For purposes of summary judgment, I find the following facts submitted by the parties and from the record to be material and undisputed.

## UNDISPUTED FACTS

### A. Parties

Plaintiff Scott G. Kreilkamp is employed as a full-time firefighter for defendant City of Watertown and is the recording secretary for plaintiff Local 877 of the International Association of Firefighters, AFL-CIO. Plaintiff Timothy M. Gordon is employed as a full-time firefighter for defendant City of Watertown and is the president of Local 877. Plaintiff Local

877 of the International Association of Firefighters, AFL-CIO, is a labor organization that serves as the exclusive bargaining agent for all full-time employees of the fire department, other than supervisors and managers. Defendant City of Watertown is a municipality of the state of Wisconsin and is responsible for operating the City of Watertown Fire Department. Defendant Richard L. Olson was the fire chief for defendant City of Watertown Fire Department until he retired in March 2000.

B. Training Program

Beginning in September 1998 and continuing into the spring of 1999, defendant Olson and other fire chiefs in Jefferson County began to plan a training program for firefighters in the area. It was defendant Olson's intention was to put together an educational program that would be beneficial to full-time firefighters and auxiliary firefighters, both within the City of Watertown and the surrounding areas. On or about May 1, 1999, it was announced that there would be a motor pump operator training course. The Moraine Park Technical College was to conduct the training course.

1. Motor pump operators

Motor pump operators operate the heavy equipment for the fire department and drive

the equipment to and from emergency scenes. Specifically, they are responsible for the operation of the fire engine, which includes: getting to the fire scene in the safest and most timely manner; securing a water supply; turning on the pump; getting the engine into pump gear; and operating the pump controls. On the scene, motor pump operators are responsible for laying out the hose lines and obtaining the proper pressures for the hoses. During fire suppression, motor pump operators must readjust the pumps and valves according to the changing conditions. Because of the complicated and crucial functions performed by motor pump operators, operators must be experienced and confident in their abilities.

2. Scheduling the program

Captain Butts instructed Battalion Chief Gerald Kudek to schedule the training course at night to accommodate the schedules of auxiliary firefighters. Defendant Olson modified the schedules of the auxiliary firefighters so that they would be paid to attend the course. Defendant Olson did not adjust the schedules of the full-time firefighters so that they could attend the training classes while on duty, but he did not have the authority to do so because of their union contract. The full-time firefighters would not be compensated for attending the course.

3. Other training programs

At the time defendant was planning the training course, motor pump operator training was available for firefighters in the Jefferson County area at the Madison Area Technical College and the regional fire center at Waukesha County Technical College. Defendant Olson was aware that these facilities offered training programs.

4. Mutual aid and assistance

The ability to rely upon adequately trained neighboring fire departments for assistance in emergencies is crucial to the functioning of a fire department. Without such mutual aid and assistance, the City of Watertown fire department would not be able to provide sufficient staffing and resources to handle emergencies.

In addition to his desire to train firefighters in his department, defendant Olson thought that the training program was important to insure that firefighters in neighboring departments had training on the "mutual aid and assistance" creed. None of the fire chiefs in the surrounding communities wrote to defendant Olson to express concerns regarding the City of Watertown's role in the mutual aid and assistance of neighboring departments.

5. Auxiliary firefighters

Auxiliary firefighters are called when full-time firefighters need assistance or when more staff is needed. Usually, an auxiliary firefighter holds a separate full-time job. Auxiliary firefighters are not obligated to respond to fires or emergencies when they are notified that assistance is needed.

Auxiliary firefighters are required to participate in five hours of training each month and are allowed to miss up to ten hours of training each year. In plaintiff Gordon's experience, an auxiliary firefighter has never been assigned to operate an engine or a ladder for a 24-hour shift.

There has been a certain level of animosity in the department between full-time firefighters and auxiliary firefighters.

### C. Cancellation of the Training Program

#### 1. Phone call from West Bend

On or about June 10, 1999, Alan Hefter, president of the West Bend Fire Fighters Local Union, contacted plaintiff Kreilkamp and asked him about the union's position on the upcoming training session. Plaintiff Kreilkamp responded that he was concerned that if the auxiliary firefighters were trained as motor pump operators, they would take full-time jobs away and there would be a safety issue for the citizens of Watertown and the firefighters because auxiliary firefighters are not around the equipment enough to become proficient in the duties

of motor pump operators.

2. Cancellation of class

On or about June 10, 1999, John Phillips from the Moraine Park Technical College left a voice mail for Captain Butts, indicating that the class would have to be cancelled because the instructors, who were firefighters in the City of West Bend, had withdrawn from the program. Defendant Olson was aware that Phillips had left this voice message and, at this point, became aware of the union's safety concerns relating to the use of auxiliary firefighters as motor pump operators. Having worked over a year on the project, defendant Olson was angry and disappointed by the cancellation of the course.

3. Investigation

On June 18, 1999, defendant Olson met with the union's executive board. At that meeting, defendant Olson announced that he would be conducting an investigation into the program's cancellation if he thought it was necessary to do so and that anyone who was found guilty would be dealt with severely. At that meeting, defendant Olson said that someone should call the West Bend instructors to ask them to change their positions about teaching the class and that things would be a little less difficult if the union agreed to do that. At that meeting,

union members acknowledged that they were not supportive of defendant Olson's training auxiliary firefighters to be motor pump operators. The union did not raise their concerns about safety at the June 18 meeting.

In a letter dated June 28, 2000 to plaintiff Gordon, defendant Olson wrote

> I am also requesting that you **officially** contact those members of the West Bend Fire Department previously contacted, and request that they reconsider their refusal to assist in the instruction of the intended class. Your official contact and their reconsideration of their position *could* help bring this problem to a timely, painless conclusion.

In almost identical letters dated June 28, 1999, defendant Olson ordered plaintiffs Kreilkamp and Gordon to appear in his office on July 2, 1999, to answer questions about the contact that was made between union firefighters from Watertown and union firefighters from West Bend. In the letters, defendant Olson wrote,

> 1. You will be required to answer all questions related to your activity as it relates to this matter truthfully. Failure to answer, or to be truthful, is grounds for serious disciplinary action, up to and including termination.
>
> 2. Nothing you say, nor the fruits thereof, will be used against you in any future criminal proceedings, but may be used in future disciplinary proceedings.

In a letter to a lawyer for the City of Watertown dated July 1, 1999, a lawyer for the union asked that the disciplinary interviews be cancelled. In addition, he stated,

> Also, please be advised that the Union and its members enjoy the constitutionally protected right to express their opinion on matters of public

> concern such as safety. Pickering v. Board of Education, 391 U.S. 563 (1968): Connick v. Myers, 461 U.S. 138 (1983). Efforts to silence such expression are in violation of the United States Constitution. . . .
>
> The Department's threats of discipline, through the Chief's June 28, 1999 correspondence, interfere with the right of free expression of Local 877 members. Those threats also interfere with the right of Local 877 members to engage in concerted activities for the purpose of their mutual aid and protection. Absent the immediate withdrawal of the threats of discipline, an appropriate complaint will be filed with the Wisconsin Employment Relations Commission.
>
> The decision to interrogate Tim Gordon and Scott K[r]eilkamp on July 2, 1999, regarding their protected concerted activities, again constitutes a prohibited practice in violation of Chapter 111 of the Wisconsin Statutes.
>
> The union will not tolerate further threats of discipline regarding employees' protected right to engage in speech aimed at protecting bargaining unit working conditions and public safety. Similarly, any illegal interrogations will be met with all necessary legal action.

On July 2, 1999, defendant Olson questioned plaintiffs Gordon and Kreilkamp about the cancellation of the training program. At the meeting, plaintiff Gordon told defendant Olson that Hefter had initiated the contact with Watertown's union.

In a letter dated June 30, 1999, to Chris Cass, the treasurer of plaintiff union, defendant Olson wrote,

> I have a recorded phone message, received by Capt. Butts' answering machine, indicating that the lead instructor was unable/unwilling to teach a [motor pump operator] class because of political turmoil. He also indicated that he had first hand knowledge of union contacts between Watertown and West Bend. . . . I have a letter indicating that the lead instructor asked their union president to contact our fire department to determine our fire fighter's feelings on this level

of education for our auxiliary fire fighters.

In a letter to plaintiff Gordon dated July 30, 1999, defendant Olson ordered plaintiff Gordon to appear for questioning on August 2, stating "You will be required to answer all questions truthfully. Failure to answer, or to be truthful, is grounds for serious discipline, up to and including termination." On August 6, 1999, defendant Olson questioned plaintiff Gordon about plaintiff Kreilkamp's actions. At some point, plaintiff Gordon was offered a five-day suspension if he would write a letter of apology and later, he was offered the option of having a written reprimand in his file. Gordon refused both options but no disciplinary charges were ever filed against him.

On August 6, 1999, defendant Olson questioned plaintiff Kreilkamp. At the August 6, 1999 meeting among defendant Olson, lawyer Mark Sweet (the union's representative) and plaintiff Kreilkamp, Sweet told defendant Olson, "we think that this is now, not only inappropriate because of [Kreilkamp's] previous protected activity, but also because of our raising our rights under State law and now you're coming forward with these events. We believe this is a pattern of harassment and retaliation."

The results of defendant Olson's investigation indicated that (1) Hefter was the originator of the call to Watertown's fire department; (2) plaintiff Kreilkamp had spoken to Hefter; and (3) plaintiff Gordon had knowledge of the phone call. Defendant Olson did not

ever instruct his lawyers to tell plaintiffs that the investigation into the cancellation of the training program was over.

## D. Disciplinary Charges

### 1. Mop incident

In February 1999, plaintiff Kreilkamp borrowed a mop and bucket from the fire department to clean his basement floor. Sometime before July 30, 1999, defendant Olson learned that plaintiff Kreilkamp had taken department property home for personal use.

#### a. Edwards's investigation

Captain Joel Edwards told defendant Olson that there was a foul smell coming from his office that might have been caused by a department mop. Defendant Olson asked Edwards to investigate the odor but he did not ask Edwards to bring in the mop or make any other efforts to identify the mop in question.

Edwards did not interview plaintiff Kreilkamp. Firefighter Ralph Wandersee was the only person who had told Edwards that he had seen plaintiff Kreilkamp take home a mop and bucket at any time. Wandersee had seen the mop and bucket removed but he did not know whether the mop and bucket had been used to clean up fecal matter. Before August 6, 1999,

the only evidence Edwards had that plaintiff Kreilkamp had borrowed a mop and bucket to clean up dog feces and urine was a rumor conveyed by Wandersee. After August 6, 1999, Edwards had no evidence that Kreilkamp had ever used a mop and bucket to clean up dog feces and urine.

b. Olson's investigation

Defendant Olson questioned plaintiff Kreilkamp, plaintiff Gordon, Wandersee and Edwards about the incident. Kreilkamp admitted that he had borrowed a mop and bucket earlier in the year and said that he had had permission to borrow the items (although the parties disagree whether Kreilkamp could remember who gave him permission). Defendant Olson did not ask Edwards whether he had seen Kreilkamp clean up dog feces and urine with the department mop and bucket, whether he had seen dog feces on the mop that Wandersee had used to clean up the alarm room, whether he had seen dog feces in his office, whether he could identify the mop that had been used to clean up the alarm room or whether there were any other possible sources of odor in his office. Defendant Olson did not have firsthand knowledge that plaintiff Kreilkamp had borrowed a mop and bucket from the fire department to clean up dog feces and urine and neither Wandersee nor Edwards told defendant Olson that he had such firsthand knowledge. The only evidence defendant Olson had against Kreilkamp

was the rumor that Wandersee had told Edwards and that Edwards had told Olson. Wandersee did not tell defendant Olson where he had heard the rumor about plaintiff Kreilkamp's borrowing the mop and bucket to clean up after a dog. At a meeting on August 6, 1999 at which Olson, Wandersee and Sweet were present, defendant Olson began the meeting by discussing allegations of sexual harassment against Wandersee and then switched to Wandersee's knowledge of Kreilkamp's mop use. Defendant Olson charged plaintiff Kreilkamp with using fire department property for personal use without authorization.

c. Borrowing department property

It is common practice for fire department employees to borrow equipment from the fire station for personal use. Plaintiff Gordon is not aware of anyone who has been disciplined for borrowing department property without permission. Although there is a form to fill out before fire department property is borrowed, this procedure is not widely followed in the department.

2. Truck incident

On or about August 5, 1999, plaintiff Kreilkamp served as a "spotter" on the ground while firefighter Kristine Snow backed up a rescue squad vehicle. Lieutenant Bill Schwenkner

and Captain Henry Butts, who were both on duty, told defendant Olson that contact had been made between the vehicle that Snow was driving and a fire engine. Defendant Olson was not present when Snow was backing up the vehicle. Lieutenant Schwenkner or Captain Butts told defendant Olson that mechanic Michael Meyer had heard a noise relating to the accident even though that was not true. On August 5, 1999, defendant Olson asked Meyer whether he had heard anything relating to the incident and Meyer told Olson that he had not.

Plaintiff Kreilkamp and Snow gave similar reports about the incident, except that Snow said that *she did not believe* that she had backed the squad vehicle into the engine and Kreilkamp said that Snow *had not* backed into the engine. On the City of Watertown's form for reporting insurance claims, plaintiff Kreilkamp stated that the estimated amount of loss was zero. There was no dollar value to the damage to the fire engine. Defendant Olson charged Kreilkamp with lying on an accident report and did not charge Snow with anything.

On August 6, 1999, when Olson questioned Kreilkamp about the incident on August 6, 1999, Olson told Kreilkamp that Olson had a statement from Meyer in which Meyer said that he had heard a noise even though Meyer had told Olson the day before that he had *not* heard anything related to the incident. When defendant Olson met with Snow and Kreilkamp and asked them whether they wanted to stand by their statements about the incident, Snow and Kreilkamp said that they stood by their versions of the incident. Olson then read

Lieutenant Schwenkner's and Captain Butts's account of the incident and asked them again if they wanted to stand by their statements.

Minor accidents have never resulted in discipline in the City of Watertown's fire department. In July 1999, Richard Wienke served as the spotter for Snow when she backed "tanker 8" into the building wall, causing some damage. Despite the damage, Wienke was not asked to fill out any kind of report following the accident or ordered to have an interview with any commanding officer besides Captain Edwards. The extent of the investigation was Edwards's questions to Snow and Wienke about what had happened and whether they had been operating according to policy when Snow was backing up the vehicle. Around May 1997, Wienke was involved in another minor accident when he was operating an engine. After Wienke reported the accident, he was not ordered to fill out an accident report or an insurance claim form.

3. Watertown Police and Fire Commission

On or about August 30, 1999, defendant Olson filed charges against plaintiff Kreilkamp with the City of Watertown Police and Fire Commission, seeking plaintiff's termination. On September 9, 1999, the charges were amended and re-filed. Plaintiff Kreilkamp was suspended with full pay pending the resolution of the charges against him. The City of Watertown Police

and Fire Commission conducted full hearings on September 28, 1999; October 14, 1999; October 19, 1999; and October 25, 1999. On October 25, 1999, the commission dismissed all the charges brought against plaintiff Kreilkamp.

E. Union Opposition to Training Program

1. Plaintiff union

Because of the minimal amount of training that auxiliary firefighters receive, the union concluded that even with the additional training course, auxiliary firefighters would not be unable to function at the appropriate safety levels for union firefighters or the Watertown community. The union believed that five hours of training each month was insufficient to allow auxiliary firefighters to remain proficient in the skills necessary to be motor pump operators. In addition, the training program for auxiliary firefighters made the union concerned about job security. The union did not want less experienced, part-time workers replacing full-time, professional firefighters.

At the union meetings in March, April and May, union members discussed the use of auxiliary firefighters as pump operators. The June union meeting was cancelled. In a letter dated July 1, 1999, the union's lawyer stated, “the union is not opposed to but rather applauds efforts to provide additional training to paid on call personnel. The Union, however, is opposed

to any effort to utilize paid on call personnel to operate apparatus in tandem with Local 877 members at emergency scenes." At a union meeting in July 1999, the union "went on record" that it was opposed to auxiliary firefighters operating the engine or aerial apparatus because of its safety concerns.

Kreilkamp's suspension interfered with the ability of members of the union to speak publicly about its opposition to the plan to use auxiliary firefighters as motor pump operators. Plaintiff Gordon instructed union members not to comment on the training program issue, stating, "Don't say anything more. Don't want anybody getting in any trouble." Because members of the department were aware that plaintiff Gordon had been questioned by defendant Olson, they were careful with whom they discussed the training issue.

Firefighter Scott Umland drafted a letter to be submitted to the newspaper regarding the training of motor pump operators in which he responded to some of the comments that had been made by defendant Olson and Mayor Fred Smith. Umland did not send the letter because he feared that he would have been subjected to department investigation. Other members of the union expressed concerns about job security to plaintiff Gordon.

2. Plaintiff Gordon

In March or April 1999, plaintiff Gordon told Captain Weber that the union was

opposed to training the auxiliary firefighters. Before June 1999, plaintiff Gordon told Captain Butts of the union's opposition to the use of auxiliary firefighters.

During the summer of 1999, defendant Olson was aware that plaintiff Gordon had made comments to the press regarding the training of auxiliary firefighters. Plaintiff Gordon responded to questions from the press but did not contact the press to express any opinions because he had been threatened with discipline.

According to plaintiff Gordon's signed statement, on July 22, 1999, defendant Olson said to Gordon, "Mr. Union Man, I need to speak with you. I hear you have been asking about a newspaper article taken off your bulletin board." After Gordon responded in the affirmative, Olson said, "I ripped it down, it was disruptive to the working efficiency of the department, and you should read your contract; you need permission to post things on that bulletin board."

3. Plaintiff Kreilkamp

As recording secretary of the union, plaintiff Kreilkamp maintains the union's records and serves as a spokesperson for members of the bargaining unit in collective bargaining, contract administration, grievance proceedings and other matters related to wages, hours and conditions of employment of members of the bargaining unit, including matters of safety and job security. Plaintiff Kreilkamp did not speak to anyone about the training program issue

other than Hefter, local union members and his wife; he was not the principal union spokesperson. Defendant Olson's monitoring, questioning and suspension of plaintiff Kreilkamp interfered with plaintiff Kreilkamp's ability to speak publicly about opposition to the plan to use auxiliary firefighters as motor pump operators.

F. Press Coverage

Mayor Smith and defendant Olson made statements to the newspaper and talked on radio shows.

An article in the Watertown Daily Times on June 28, 1999 stated:

> Watertown Mayor Fred Smith and Fire Chief Richard Olson are investigating whether the instructor reconsidered his decision to teach the class at the request of some unionized Watertown firefighters. If so, the local firefighters involved would be considered in violation of their contracts and would face disciplinary action, they said.
>
> . . .
>
> 'If we find what happened is members of the department or the union have intentionally undermined our ability to carry forth a training program, I can assure you disciplinary action will be taken,' Smith continued. 'This was a needless interruption of an aggressive training program we had put in place. It was totally inappropriate.'

An article in the Wisconsin State Journal on July 19, 1999 stated:

> Olson claims Watertown union members contacted Gerald Kudek, a West Bend Fire Department battalion chief who was lead instructor for the team-taught

course, prior to class cancellation. Olson said that triggered the investigation.

In his deposition testimony, defendant Olson stated, "There was a significant amount of media coverage of the events surrounding the class. . . . It was not long before there was a tremendous amount of conversation in the community and among other fire departments as to some things that were being identified or discussed or written about in the newspaper."

G. Aftermath of Cancellation of Program

The temporary cancellation of the training program undercut defendant Olson's authority and jeopardized his effort to provide a greater level of service to his community. Defendant Olson was concerned that the opposition to the training program could result in other fire departments believing that City of Watertown firefighters were not willing to work in conjunction with auxiliary firefighters from other departments and that as a result, they would not send their firefighters to aid and assist the City of Watertown in emergencies.

Watertown full-time firefighters did not ever refuse to work with volunteers from surrounding communities when responding in a mutual aid capacity. None of the fire chiefs in the surrounding communities approached defendant Olson to cancel, modify or rewrite the mutual aid pacts because of the cancellation of the training program. When defendant Olson asked plaintiff Gordon whether he was on board as a lieutenant about the use of auxiliary

firefighters, Gordon said he was regardless of the union's position.

Following the cancellation of the training program, a second set of instructors opted out. Subsequently, the training program was rescheduled and conducted.

## OPINION

### A. Summary Judgment Standard

Summary judgment is appropriate if there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); Weicherding v. Riegel, 160 F.3d 1139, 1142 (7th Cir. 1998). All evidence and inferences must be viewed in the light most favorable to the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). However, the non-moving party must set forth specific facts sufficient to raise a genuine issue for trial. See Celotex v. Catrett, 477 U.S. 317, 324 (1986).

### B. First Amendment

It is well established that government as employer has "a freer hand in regulating speech" than government as sovereign. Wright v. Illinois Dept. of Children & Family Services, 40 F.3d 1492, 1500 (7th Cir. 1994). The First Amendment "does not require a public office to be run as a roundtable for employee complaints over internal office affairs." Connick v.

Myers, 461 U.S. 138, 149 (1983). At the same time, public employees do not relinquish their First Amendment rights when they accept employment in the public sector. See Biggs v. Dupo, 892 F.2d 1298, 1303 (7th Cir. 1990) ("[F]reedom of speech is not traded for an officer's badge."). First Amendment claims asserted by public employees are evaluated utilizing a three-step inquiry: (1) was the employee's speech protected by the First Amendment; and (2) if so, was the employment decision motivated by the speech; and (3) if so, would the employer have taken the same action but for the speech. See Mt. Healthy City School District Board of Educ. v. Doyle, 429 U.S. 274, 284-87 (1977); Kuchenreuther v. City of Milwaukee, 221 F.3d 967, 973 (7th Cir. 2000).

1. Was plaintiffs' speech protected by the First Amendment?

Determining whether plaintiffs' speech is constitutionally protected is a question of law to be decided by the court. See Kokkinis v. Ivkovich, 185 F.3d 840, 843 (7th Cir. 1999). To determine whether a government employee's speech is protected by the First Amendment, courts employ the Connick-Pickering test. See Connick, 461 U.S. 138; Pickering v. Board of Education, 391 U.S. 563 (1968). First, the court determines whether the employee's speech addresses a matter of public concern. See Connick, 461 U.S. at 146. If it does, then the court balances 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." Pickering, 391 U.S. at 568. "The failure to satisfy either prong of the Connick-Pickering test renders [plaintiffs'] section 1983 claim meritless." Kuchenreuther, 221 F.3d at 973.

a. Public concern

"To involve a matter of public concern, [plaintiff's] speech must 'relat[e] to any matter of political, social, or other concern to the community.'" Id. (quoting Connick, 461 U.S. at 146). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole

record." Connick, 461 U.S. at 147-48. The Seventh Circuit has held that content is the most important factor, see Kuchenreuther, 221 F.3d at 974, "though '[t]he speaker's motivation and choice of forum are [also] important because, absent those factors, every employment dispute involving a public agency could be considered a matter of public concern.'" Wright, 40 F.3d at 1501. In Hulbert v. Wilhelm, 120 F.3d 648, 653 (7th Cir. 1997), the Seventh Circuit held that under this part of the Connick-Pickering inquiry, courts should determine (1) whether the speech "would be protected if uttered by a private citizen"; and (2) whether the speech was more than an unprotected "personal employee grievance." Defendants argue that plaintiff Kreilkamp's speech was not a matter of public concern because of the context of the conversation within which he made his comments and because his comments were motivated by a concern about job security of union firefighters rather than concerns about public safety. Defendants also argue that plaintiffs Gordon and the union cannot bring a viable First Amendment claim because their complaint fails to include allegations that they engaged in any protected speech. Plaintiffs Kreilkamp and Gordon contend that they spoke out on matters of public concern when they acted as advocates for the union in voicing opposition to the training program because of concerns for job security as well as the safety of firefighters and the public. They argue that although plaintiff Kreilkamp's conversation with Hefter was not in a public forum, the *issue* they discussed was a matter of public concern.

Defendants' contention that the claims of plaintiffs Gordon and the union must be dismissed because they failed to state a claim upon which relief can be granted is not a proper argument on a motion for summary judgment pursuant to Fed. R. Civ. P. 56. This argument is appropriate on a motion to dismiss pursuant to Rule 12(b)(6); however, on a motion for summary judgment, the court considers matters outside the pleadings. Because defendants have not argued that plaintiffs' complaint failed to put them on sufficient notice of plaintiffs' First Amendment claims, their argument that the complaint failed to include specific allegations describing plaintiffs' speech is not persuasive at this point in the litigation.

Plaintiff Gordon spoke to the press and to at least one captain about the union's opposition to the training and plaintiff Kreilkamp told the West Bend union president about the union's opposition to the training program in a phone conversation. Plaintiffs Gordon and Kreilkamp opposed the training program because they believed that the use of auxiliary firefighters as motor pump operators presented a public safety hazard in addition to their concerns about job security. It is well established that public safety is a matter of public concern. See Kuchenreuther, 221 F.3d at 974; Glass v. Dachel, 2 F.3d 733, 741 (7th Cir. 1993) ("Obviously, speech that focused on police departments (and ultimately police protection and public safety) involve[s] matters of great public concern."); Auriemma v. Rice, 910 F.2d 1449, 1460 (7th Cir. 1990) (en banc) (noting that issues relating to public safety are

generally matters of public concern). That plaintiffs were concerned about job security in addition to public safety does not negate the conclusion that their speech was a matter of public concern. As recognized by the Seventh Circuit, "Speech has multiple objectives. One statement can address issues of both public and private concern." Wales v. Board of Education of Community Unit School District 300, 120 F.3d 82, 84-85 (7th Cir. 1997) . "The fact than an employee has a personal stake in the subject matter of the speech does not necessarily remove the speech from the scope of public concern." Button v. Kibby-Brown, 146 F.3d 526, 529 (7th Cir. 1998).

The comments made by plaintiff Gordon and plaintiff Kreilkamp in opposition to the training program would be protected if they had been uttered by private citizens. They cannot be characterized as "personal employee grievances." Neither plaintiff Kreilkamp nor plaintiff Gordon had an interest or stake in opposing the training program that was greater than any other union member and there is no evidence that either plaintiff had a personal dispute with defendant Olson. See contra Marshall v. Porter County Plan Commission, 32 F.3d 1215, 1219 (7th Cir. 1994) ("If the speech concerns a subject of public interest but the expression addressed only the personal effect upon the employee, then as a matter of law the speech is not of public concern."). As members of the union's executive board, both individual plaintiffs questioned publicly whether it was safe to train auxiliary firefighters to serve as motor pump

operators. Plaintiffs' concern that the duties of motor pump operators are too complicated and the importance of those duties too crucial to entrust the task to part-time firefighters raises an issue of public concern. See, e.g., Gilbrook v. City of Westminster, 177 F.3d 839, 866 (9th Cir. 1999) ("an opinion about the preparedness of a vital public-safety institution, such as a fire department, goes to the core of what constitutes speech on matters of public concern") (holding that a fire marshal's comments regarding fire safety regulations touched on a matter of public concern).

"The private nature" of plaintiff Kreilkamp's phone conversation with West Bend's union president does not "vitiate the status of the statement as addressing a matter of public concern." Rankin v. McPherson, 483 U.S. 378, 387 n.11 (1987). Plaintiff Kreilkamp was asked about the Watertown *union's* position on the upcoming training session, not *his own* position on the issue. In Yoggerst v. Stewart, 623 F.2d 35, 36-37 (7th Cir. 1980), the plaintiff said to a co-worker over the phone, "Did you hear the good news?," referring to unconfirmed reports that the director of the public agency for whom she worked had been discharged by the governor. The Court of Appeals for the Seventh Circuit held that plaintiff's comment warranted First Amendment protection "absent countervailing negative impacts on the employment relationship." Id. at 40. Although the comment was made in a private phone conversation and "did not necessarily involve a matter where 'free and open debate is vital to

informed decision-making by the electorate,'" the court held that "her comment did involve a matter of some public importance and concern (as evidenced by continuing media speculation concerning the Director's tenure.)" Id. Plaintiff Kreilkamp's conversation with Hefter and plaintiff Gordon's comments to Captain Weber and the press addressed matters of public concern.

b. Balancing test

Because plaintiffs' speech addressed a matter of public concern, defendant must show a convincing reason for forbidding the speech. Hulbert, 120 F.3d at 653. In balancing 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,'" Pickering, 391 U.S. at 568, the Seventh Circuit has set forth the following factors to be considered:

> "(1) whether the statement would create problems in maintaining discipline by immediate supervisors 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 daily 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."

Kokkinis, 185 F.3d at 845 (quoting Caruso v. DeLuca, 81 F.3d 666 (7th Cir. 1996)). The Seventh Circuit noted, "[w]ith respect to the first two factors . . . a government employer is allowed to consider 'the potential disruptiveness' of the employee's speech." Kokkinis, 185 F.3d at 845. The weight accorded to the Pickering factors depends upon both the nature of the employee's work and the mission of the agency for which he or she works. See Egger v. Phillips, 710 F.2d 292 (7th Cir. 1983).

Before discussing the merits of the parties' positions under the factors set forth above, a comment is warranted about the difficulties faced by district courts in performing the Pickering balancing test. Although the determination whether speech is protected by the First Amendment is a legal question to be decided by the court using the balancing test, the test presents challenges to district court judges for several reasons. (1) It is unclear which factors are entitled to greater weight; (2) issues of credibility are inherent in the application of some of the factors; and (3) precedent is highly fact-specific, see Martin J. McHahon, Annotation, *First Amendment Protection for Publicly Employed Firefighters,* 106 A.L.R. Fed. 369 (1992 & Supp. 2000). As noted by a legal commentator, "When the Supreme Court commands that these first amendment cases be resolved by balancing competing interest, it is scarcely surprising that reasonable persons will disagree with the ultimate balance struck in specific cases. " Rodric B. Schoen, *Pickering Plus Thirty Years: Public Employees and Free Speech*, 30 Tex. Tech. L. Rev. 5, 30-

31 (1999); see also Lawrence Rosenthal, *Permissible Content Discrimination Under The First Amendment: The Strange Case of the Public Employee*, 25 Hastings Const. L. Q. 529, 567 (Summer 1998) ("The unpredictability of this balancing should concern public employers and employees.") The Seventh Circuit has also been

critical of the Connick-Pickering test, stating

> Pickering expresses optimism that courts can separate one kind of speech (and one kind of response) from the other at low cost, and then permit the public employer to react when speech goes 'too far' (or becomes 'too disruptive') while protecting speech that has net public benefits. How this is to be done Pickering does not say. When both speaker and employer have (or appear to have) mixed motives, the task is intractable. And the cost can be substantial--by which we mean not the monetary costs litigants bear themselves, or the time the judicial system must divert from serving the needs of other litigants, or the risk of error, but the opportunity costs that will be borne by the public when public servants seek to avoid litigation.

Wales, 120 F.3d at 84-85. Despite the difficulties the balancing test presents, it is the governing test at present and must be applied to the facts of this case.

Defendants contend that the Pickering scale tips in its favor because of (1) the importance of responsiveness, loyalty and duty to superiors in the hierarchical structure of a fire department; (2) the importance of working with neighboring fire departments for assistance in case of emergencies; (3) plaintiff Kreilkamp's failure to voice his opposition through formal internal channels; and (4) the detrimental effect plaintiff Kreilkamp's statement had on defendant Olson's authority when it resulted in the cancellation of the training program. Plaintiffs disagree with defendants' reasoning, arguing that (1) plaintiffs' speech did not result in any disruption to defendant city's mutual aid agreements with neighboring communities; (2) the training program was driven by economic, not public safety concerns; (3) cancellation of the training program had no adverse impact on training for motor pump operators; and (4)

plaintiff Gordon had discussed the training program issue with management before plaintiff Kreilkamp's conversation with Hefter.

Courts have recognized that the government has a particularly acute interest in the orderly and effective performance of public services when the mission of the agency is to protect public safety. See, e.g., Kokkinis, 185 F.3d at 845 (patrol officer); Weicherding, 160 F.3d 1139 (prison guard). As defendants point out, responsiveness, loyalty and duty to superiors are essential to the hierarchical structure of a fire department. To a certain extent, this is true. However, the effective performance of public safety organizations such as police and fire departments cannot always tip the scales in favor of government suppression of employee speech. In order to strike a true balance between the interest of a public employee and that of the government, it is necessary to examine closely the importance of employees' interests in addressing an issue of public concern.

Plaintiffs Kreilkamp and Gordon had serious concerns about the wisdom of using part-time firefighters to perform complicated, crucial functions in emergency situations. They believed that even with the training course, safety issues would arise were auxiliary firefighters to act as motor pump operators in light of their lack of experience in the field and their minimal training each month. As full-time professional firefighters, plaintiffs Kreilkamp and Gordon "are members of the community who are most likely to be informed and have definite opinions

about the sufficiency of firefighting services." Gilbrook, 177 F.3d at 867. "[Plaintiffs'] interest in speaking out about what [they] and the union perceived to be a serious deficiency in fire protective services, and the public's interest in receiving such information, weigh heavily in favor of according protection to [plaintiffs'] speech." Id. The "'more tightly the First Amendment embraces the speech,' the stronger the showing of workplace disruption must be." Id. Because plaintiffs' expression "lies at the core of speech on matters of public concern," "defendants' showing of disruption, real or potential, must be correspondingly great." Id.

In Gilbrook, after a fire that resulted in the death of a child, the plaintiff, who was the union's information officer, issued a press release in which he stated, "This tragedy is the direct result of the Mayor and [City] Council placing politics above the safety of the people." Id. at 850. The city discharged the union officer several months later in part because of his press release. Id. After carefully weighing eight factors in performing "a fact-sensitive inquiry involving the totality of the circumstances," the court concluded that the balancing test strongly favored the plaintiff's interest in speaking about the lack of readiness of the fire department and the citizens' interest in hearing about the issue of public concern. Id. at 869. See also Moore v. City of Kilgore, Texas, 877 F.2d 364, 376 (5th Cir. 1989) (following fire in which one firefighter died and one was injured, firefighter made comments to the press about staffing problems at the fire department and was disciplined; court held that city's interests

in controlling insubordination and prosecuting arson case were outweighed by interests of plaintiff and public).

In balancing the competing interests in this case, most of the factors favor the interests of plaintiffs in voicing their opposition to the training program. There is no evidence that plaintiffs' speech caused discord among their fellow firefighters, interfered with the performance of their daily duties and responsibilities or obstructed routine office operations. Furthermore, when defendant Olson asked plaintiff Gordon whether he would cooperate with the use of auxiliary firefighters, Gordon said that he would cooperate despite the union's position.

Although "an employer need not establish actual disruption before disciplining an employee when the threat of future disruption is obvious," Greer v. Amesqua, 212 F.3d 358, 372 (7th Cir. 2000), defendant Olson's concern that there may be disruption in the cooperation between Watertown's fire department and neighboring fire departments does not justify suppressing plaintiffs' speech. Defendant Olson contends that he wanted to organize a training program for firefighters and auxiliary firefighters within the City of Watertown *and in the surrounding areas*, although plaintiffs contend that defendant Olson's purpose was to provide training for Watertown's auxiliary firefighters. Even if defendant Olson was trying to organize a regional training program, motor pump operator training was available at two locations in Jefferson County. Furthermore, it was well-known that the union's safety concerns

centered on its fear of relying on Watertown's auxiliary firefighters as motor pump operators and was not related to any concerns about working with neighboring departments in "mutual aid and assistance" situations. To the extent that there was disruption within the department, it was caused by the actions of defendant Olson in investigating the cancellation of the training program. Plaintiffs' speech did not interfere with the preparedness to deliver or the delivery of firefighting services by the department.

There is no evidence that "the time, place or manner of the employee's speech disrupted the government's provision of services." Myers v. Hasara, 226 F.3d 821, 828 (7th Cir. 2000). Two to three months before the cancellation of the training program, plaintiff Gordon followed the internal chain of command by informing at least one captain that the union was opposed to the program. In contrast, in Greer, 212 F.3d 358, the plaintiff, who was a firefighter for the City of Madison, sued the fire chief, fire department and city, claiming that his First Amendment rights had been violated when he was terminated after he prepared a news release in which he accused the fire chief of favoring homosexuals and imposing lenient disciplinary action on a female firefighter. In performing the Pickering balancing test, the Seventh Circuit noted that the plaintiff had not approached the fire chief or pursued internal avenues about his concerns and that he was "unwilling to let the firefighters' union address the matter." Id. at 371. This led the court to conclude that plaintiff's "posture under Pickering would be

stronger if he 'had followed authorized procedures.'" Id. at 372 (quoting Wright, 40 F.3d at 1504). Although plaintiff Kreilkamp answered Hefter's question about the union's position on the training program, plaintiff Gordon first raised the union's opposition to his superiors, not to the public or West Bend's union.

It was Mayor Smith and defendant Olson who made this a public relations battle, speaking to newspapers and radio shows. Plaintiff Kreilkamp did not speak to the press and plaintiff Gordon responded to questions from the press after the issue had been brought to light but he did not contact anyone from the press. There is no strong indication that plaintiffs "could have aired [their] concerns at a better time or in a better way" or that they "created unnecessary confusion or turmoil by expressing [themselves] in the way [they] did." Myers, 226 F.3d at 828.

Defendant Olson points out that plaintiffs' speech and the subsequent cancellation of the training program undermined his authority. Although this may be true, on the whole, the government's interest in suppressing speech about the training program does not outweigh the heavy interests of plaintiffs in speaking about their concerns relating to the use of part-time firefighters as motor pump operators and the citizens in receiving such information. "There is a significant First Amendment interest in encouraging public employees, who are positioned uniquely to contribute to the debate on matters of public concern, to speak out about what

they think and know without fear of retribution, so that citizens may be informed about the instruments of self- governance." Garrison, 177 F.3d at 869. As the Supreme Court has noted, "[v]igilance is necessary to ensure that public employers do not use authority over employees to silence discourse not because it hampers public functions but simply because superiors disagree with the content of employees' speech." Rankin, 483 U.S. at 384. Because I conclude that plaintiffs' speech about the training program was constitutionally protected, I must determine whether plaintiffs suffered adverse actions as a result of their speech.

2. Did plaintiffs suffer an adverse employment action?

Defendants contend that plaintiff Kreilkamp did not suffer a materially adverse employment action because after his suspension, the police and fire commission reinstated him to his former position without any loss of seniority, pay or benefits and that plaintiff Gordon did not suffer *any* adverse employment action. Plaintiffs contend that plaintiffs Gordon and Kreilkamp suffered adverse employment actions because they were investigated and interrogated by defendant Olson and threatened with severe punishment and because plaintiff Kreilkamp was suspended.

"'The test [of unconstitutional retaliation] is whether the adverse action taken by the defendants is likely to chill the exercise of constitutionally protected speech." Yoggerst, 623

F.2d at 39. "[A]dverse acts need not be 'monstrous' to be actionable; the acts need only 'create the potential for chilling employee speech on matters of public concern.' However, '[t]o be considered materially adverse a change in the circumstances of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities.' And it certainly must be adverse in the sense that the employee is made worse off by it." Thomsen v. Romeis, 198 F.3d 1022, 1027 (7th Cir. 2000) (citing DeGuiseppe v. Village of Bellwood, 68 F.3d 187, 192 (7th Cir. 1995)). The Seventh Circuit has noted that "[l]esser retaliation such as demotions, diminished responsibilities, or false accusations all may suffice." DeGuiseppe, 68 F.3d at 192. "A campaign of petty harassment may achieve the same effect as an explicit punishment." Walsh v. Ward, 991 F.2d 1344, 1345 (7th Cir. 1993); Smith v. Fruin, 28 F.3d 646 (7th Cir. 1994) ("even minor forms of retaliation can support a First Amendment claim, for they may have just as much of a chilling effect as more drastic measures"). Defendant Olson was explicit in his threats of discipline by stating at a meeting in June 1999, that any union members found to be involved with the cancellation of the program would be disciplined and by writing to plaintiff Gordon to say that if Gordon contacted West Bend firefighters it *"could* help bring this problem to a timely, painless conclusion." Defendant Olson questioned both plaintiffs on two occasions. Although defendant Olson did not file charges against plaintiff Gordon, disciplinary action was discussed because at some point Gordon was offered a five-day

suspension and a written letter of apology and later the offer was reduced to a written reprimand. Although the police and fire commission dismissed the charges against plaintiff Kreilkamp, the interrogations of both plaintiffs and the charges against Kreilkamp were sufficient adverse employment action to prevent them from opposing the training program out of fear of future retaliatory treatment

3. Was the adverse action related to plaintiffs' speech?

In order to succeed on their First Amendment claims, plaintiffs must show that their conduct was a "'substantial factor' or 'motivating factor' in the defendants' challenged actions." Thomsen, 198 F.3d at 1027 (citing Mt. Healthy, 429 U.S. at 287). The parties do not discuss whether the interrogations and threats were related to plaintiffs' speech. Defendants contend that the decision to suspend plaintiff Kreilkamp was motivated by defendant Olson's belief that Kreilkamp had violated work rules, not plaintiff's speech in opposition to the training program. Plaintiffs contend that defendant trumped up the charges relating to the mop and bucket and the accident report in order to retaliate against plaintiff for his speech. In support of plaintiffs' contention, they point out that (1) defendant Olson had weak evidence against Kreilkamp on both charges; (2) it is common practice for fire department employees to borrow equipment from the fire station for personal use and firefighters do not fill out any forms before borrowing

the equipment; (3) Kristine Snow was not charged with anything following the accident; (4) defendant Olson lied to plaintiff Kreilkamp about having a statement from mechanic Meyer about the accident; and (5) minor accidents have never resulted in discipline in the department. Reading these facts in the light most favorable to plaintiffs, I conclude that plaintiffs have adduced sufficient evidence to raise a jury question on this issue.

C. Plaintiff Union's Claims

In plaintiffs' complaint, they allege that defendants' action "systematically and illegally stifled public debate on matters of public safety and union job security and have thereby damaged the Union's members' ability to express their beliefs and opinions about matters of public concern." Defendants contend that the union did not engage in any protected speech and, as a result, cannot bring a claim that its First Amendment rights were violated. Despite defendants' contention, the union's First Amendment claim does not fit neatly into the traditional Connick-Pickering framework. Unlike plaintiffs Gordon and Kreilkamp, the union is not claiming that it suffered an adverse employment action because of its speech. Rather, it seems to be arguing that its members were unable to oppose the training of auxiliary firefighters because of the threat of retaliation by defendant Olson.

This claim raises several issues that were not addressed by the parties. For starters,

plaintiff union has failed to identify on what basis it has standing as an association. Rather than seeking to recover for an injury to itself, it seems that the union is seeking to represent the interests of its members. An association may have standing as the representative of its members if it alleges "that its members, or any one of them, are suffering immediate or threatened injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought the suit." Warth v. Seldin, 422 U.S. 490, 511 (1975); Am. Jur. 2d *Constitutional Law* § 149, at 563 ("A group can [] have standing as the representative of its members, provided that it has alleged facts sufficient to make out a case or controversy had the members themselves brought suit.")

The union's First Amendment claim also raises issues such as whether the union members' chilled speech is a sufficient injury to confer standing, whether the union can bring a viable First Amendment claim because its members as a whole felt silenced because of defendant Olson's treatment of Kreilkamp and Gordon and whether there was a "specific present objective harm or a threat of specific future harm." Laird v. Tatum, 408 U.S. 1, 13-14 (1972) (recognizing that the Supreme Court had "found in a number of cases that constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights.")

In Providence Firefighters v. City of Providence, 26 F. Supp. 2d 350 (D.R.I. 1998), firefighters and a union challenged fire department rules restricting a firefighter's ability to speak to the public on matters concerning the fire department. In Providence, the plaintiffs "identified issues–including fire department policies and their effect on safety, tax money and fire safety in public buildings and schools–that . . . would be restricted by the Fire Department rules." Id. at 356. In striking down the rules, the court held that "defendants have no substantial interest that requires such sweeping censorship." Id.; see also United States v. National Treasury Employees Union, 513 U.S. 454, 477 (1995) (striking down statute that prohibited certain government employees from accepting honoraria for making appearances or speeches or writing articles, holding "[t]he speculative benefits the honoraria ban may provide the Government are not sufficient to justify this crudely crafted burden on respondents' freedom to engage in expressive activities"). In contrast, defendant City of Watertown did not have regulations that prohibited speech on certain topics; instead, union members are alleging they felt chilled by defendant Olson's threats of discipline to individual firefighters.

The union is not claiming that actions taken in response to its speech chilled its ability to speak in the future, like the plaintiff in Levin v. Harleston, 966 F.2d 85 (2d Cir. 1992). In Levin, 966 F.2d at 87, a tenured professor at a state college filed a § 1983 action, arguing that college officials punished him in retaliation for his published writings which "contained a

number of denigrating comments concerning the intelligence and social characteristics of blacks." In response, college officials created both an alternative section for his students who wanted to transfer out of his class and an ad hoc committee on academic rights and responsibilities to determine whether the professor's views affected his teaching ability. In finding that college officials had infringed the professor's First Amendment rights, the Court of Appeals for the Second Circuit held that "[i]t is the chilling effect on free speech that violates the First Amendment, and it is plain that an implicit threat can chill as forcibly as an explicit threat." Id. at 89-90. At this point, plaintiff union has presented sufficient evidence to raise a triable issue as to whether defendants violated its rights protected by the First Amendment. However, it has an uphill battle in providing both legal and factual support to succeed on this claim.

D. Defendant City and Defendant Olson (Official Capacity)

A local government unit, such as the City of Watertown, cannot be held liable under § 1983 under a theory of respondeat superior. See Board of County Commissioners of Bryan County v. Brown, 520 U.S. 397, 403 (1997). Rather, the municipality is responsible for its employee's actions only if those actions were taken pursuant to an unconstitutional policy or custom of the municipality itself. See id.; see also Garrison v. Burke, 165 F.3d 565, 571 (7th

Cir. 1999). The Court of Appeals for the Seventh Circuit has identified three instances in which such a "policy" or "custom" exists:

> (1) an express policy that, when enforced, causes a constitutional deprivation (citing Monell v. Dep't of Social Services of City of New York, 436 U.S. 658, 690 (1978));
>
> (2) a widespread practice that, although not authorized by written law or express municipal policy, is "so permanent and well settled as to constitute a 'custom or usage' with the force of law" (citing City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988) (plurality opinion) (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 167-68 (1970); or
>
> (3) an allegation that the constitutional injury was caused by a person with 'final policymaking authority' (citing Praprotnik, 485 U.S. at 123; Pembaur v. City of Cincinnati, 475 U.S. 469, 483 (1986) (plurality opinion)).

See Baxter v. Vigo County School Corp., 26 F.3d 728, 735 (7th Cir. 1994). "[I]t is not enough for a § 1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its *deliberate* conduct, the municipality was the 'moving force' behind the injury alleged." Board of County Commissioners of Bryan County, 520 U.S. at 404. The court noted that "proof that a municipality's legislative body or authorized decision maker has intentionally deprived a plaintiff of a federally protected right necessarily establishes that the municipality acted culpably." Id. at 405. Plaintiffs contend that defendant Olson and Mayor Smith have policymaking authority and made it the city's practice to suppress plaintiffs' speech. Mayor Smith is not a defendant in this case and

plaintiffs have failed to establish that he had any involvement in the alleged First Amendment violations other than to make comments to the press about the cancellation of the training program. Although defendant Olson was involved in the alleged constitutional violations, it is unclear whether he has final policymaking authority.

In DeGuiseppe, 68 F.3d at 190, the Seventh Circuit held that the plaintiff could not sue a village because municipalities cannot be liable for an official's conduct unless the official is the final decisionmaker. Looking to Illinois state law, the court noted that "final authority for issuing disciplinary measures against an officer is vested exclusively in the Board of Police and Fire Commissioners, not the police chief." Id. The court held that the police chief's conduct could not serve "as the predicate to municipal liability" because he "was not the final decision-maker with respect to [plaintiff's] suspension." Id. As defendants point out, the ultimate authority for issuing disciplinary measures against a firefighter rests with the board of police and fire commission under Wisconsin law. See § Wis. Stat. § 62.13(5). Although defendant Olson as chief has the authority to file charges under § 62.13(5)(b), the board has the ultimate decision making authority in disciplinary matters. See § 62.13(5)(e) ("If the board determines that the charges are not sustained, the accused, if suspended, shall be immediately reinstated and all lost pay restored. If the board determines that the charges are sustained, the accused, by order of the board, may be suspended or reduced in rank, or suspended and reduced in rank,

or removed, as the good of the service may require."). Following DeGuiseppe, 68 F.3d at 190, defendant Olson's conduct cannot serve as the predicate to municipal liability against the City of Watertown. In addition, the official policy of the City of Watertown encourages the free expression of opinions. Because defendant Olson is not the ultimate decisionmaker and his actions were not taken pursuant to an unconstitutional policy or custom of the municipality, defendant City of Watertown cannot be held liable for the alleged infringement of the individual plaintiffs' First Amendment rights. Because I am unsure of the contours of plaintiff union's claim, I cannot dismiss defendant City of Watertown as to that claim.

E. Qualified Immunity: Defendant Olson (Individual Capacity)

"A government official is entitled to immunity from suit when performing discretionary functions unless the court determines that (1) the plaintiff alleged a constitutional injury, and (2) the legal standards applicable to the injury were clearly established at the time." Myers, 226 F.3d 821 at 828 (citing Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982)). The second part of this test is objective and asks whether the constitutional right in question was sufficiently clear that a reasonable official would understand that what he was doing violates the law. See Gustafson v. Jones, 117 F.3d 1015, 1021 (7th Cir. 1997). Defendant Olson does not dispute that plaintiff alleged a constitutional injury; instead he argues that he is entitled to qualified

immunity because this case presents a close question whether plaintiffs' speech was a matter of public concern and whether plaintiffs' interests outweighed defendants' under the Pickering balancing test.

In a case decided in 1997, the Seventh Circuit stated, "It has been well established in this Circuit that a public employer may not retaliate against an employee who exercises his First Amendment speech rights . . . . It has also been clear for years that the speech about . . . public safety raises matters of public concern." Id. See also Gorman v. Robinson, 977 F.2d 350, 355 (7th Cir. 1992) ("we view their arguments [of qualified immunity] with some skepticism because courts have long recognized that an employer may not retaliate against an employee for expressing his views about matters of public concern.")

"Although the protection afforded the government official is indeed substantial, it is not necessary that the plaintiff produce a case that is on 'all fours' with the situation at issue." Gregorich v. Lund, 54 F.3d 410, 415 (7th Cir. 1995). Because of the fact-specific nature of the balancing test, it would nullify First Amendment rights of public employees if it was essential to point to a case on "all fours" with the situation at issue to demonstrate that the law was clearly established. Defendant Olson is not entitled to qualified immunity because a public employee's right not to be disciplined in retaliation for speaking out on a public safety issue was well established in 1999.

F. State Law Claims

Plaintiffs contend that defendants violated Wis. Stat. §§ 111.70(3)(a)(1) and 111.70(3)(a)(3). Section 111.70(3)(a) states in relevant part that "It is a prohibited practice for a municipal employer individually or in concert with others (1) To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2)" and "(3) To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment . . . ." Defendants have not moved for summary judgment on these claims.

G. Other Allegations in Plaintiffs' Complaint

Plaintiffs' amended complaint includes an allegation that union officer Todd Cole wrote to defendant Olson and other fire department managers with concerns about Watertown's emergency medical service response crews. Plaintiffs contend that defendant failed to raise a material dispute on this issue, but neither party has submitted proposed findings relating to Cole's letter. Although Cole is a union member and he voiced criticism of the fire department, it is unclear how this allegation fits into this case. Cole's speech was unrelated to the training program debate and Cole is not a plaintiff in this case. This allegation has not been considered at this stage of the proceedings.

Plaintiffs' amended complaint also includes an allegation that "Olson boasted to other fire department chiefs that his attempt to terminate Kreilkamp had succeeded in restoring discipline in the Watertown fire department suggesting that he had controlled the opposition of the Watertown full time professional fire fighters to the training program." Plaintiffs point out that defendant failed to put into dispute any facts relating to defendant Olson's comments at a Fire Chief's Association meeting in October 1999. Although there is no dispute as to defendant Olson's comments, plaintiffs fail to explain the significance of this. Perhaps plaintiffs believe that the court must deny defendants' motion for summary judgment because of defendant Olson's comments. Or, perhaps plaintiffs believe this allegation supports a claim against defendant Olson for slander. Either way, plaintiffs are wrong. Defendant Olson's remarks to the association are not relevant to the present motion and plaintiffs have not pled a slander claim. In deciding defendants' motion for summary judgment, I have not considered plaintiffs' proposed findings relating to defendant Olson's comments at an association meeting.

ORDER

IT IS ORDERED that the motion of defendant City of Watertown for summary judgment is GRANTED as to the First Amendment claim of plaintiffs Scott G. Kreilkamp and Timothy M. Gordon and DENIED as to the First Amendment claim of Local 877 of the

International Association of Firefighters, AFL-CIO. FURTHER, IT IS ORDERED that the motion of defendant Olson for summary judgment is DENIED. A hearing will be held on

Wednesday, December 6, 2000, at 1:00 p.m. to discuss further proceedings in this case.

Entered this 27th day of November, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge