

1 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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3 JOSHUA ZUCKERMAN, 22-CV-3384 (CBA)
4 Plaintiff, United States Courthouse
Brooklyn, New York

5 -versus- December 15, 2022
6 2:00 p.m.

7 ERIC GONZALEZ, ET AL.,
8 Defendants.

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10 TRANSCRIPT OF CIVIL CAUSE FOR ORAL ARGUMENT
BEFORE THE HONORABLE CAROL B. AMON
11 UNITED STATES DISTRICT JUDGE

12 APPEARANCES

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1 (In open court.)

2 THE COURTROOM DEPUTY: All Rise. Zuckerman versus
3 Gonzalez et al, 22-CV-3384, on for oral argument on
4 defendant's motion to dismiss.

5 I'll ask counsel to please state your names,
6 beginning with counsel for defendants.

7 MS. SAINT-FORT: Good afternoon. Dominique
8 Saint-Fort for the New York Law Department for defendants.

9 THE COURT: Good afternoon.

10 MS. KOISTINEN: Good afternoon, your Honor. Laura
11 Koistinen. I represent the plaintiff Joshua Zuckerman. Along
12 with me is co-counsel Kevin Mintzer.

13 THE COURT: Good afternoon. Everyone can be seated.
14 You can argue seated using the microphones because that's the
15 best set up we have for being able to hear you.

16 Ms. Saint-Fort, you're moving to dismiss?

17 MS. SAINT-FORT: Yes, your Honor.

18 THE COURT: I read the motion papers here, but how
19 do you viably distinguish this case from no Munafo versus the
20 Metropolitan Transit Authority?

21 MS. SAINT-FORT: Yes, your Honor. There, and in the
22 line of cases similar to it, where an individual is
23 complaining about a safety risk in their workplace that is an
24 objective risk, that differs from the issues here with the
25 speech particularly made by plaintiff.

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1 Here plaintiff is not complaining -- excuse me,
2 plaintiff's speech that was made during the December 15, 2021
3 meeting that was called to address the COVID policies within
4 the Brooklyn DA's office. His specific speech was about the
5 level of contact tracing that the Brooklyn DA was engaging in,
6 not whether it was engaging in conduct that would protect
7 individuals from contracting COVID in and of itself.

8 The DA's office was engaging in contact tracing.
9 They were notifying individuals who had been in contact
10 with --

11 THE COURT: That I think probably is a disputed
12 issue of fact, isn't it? I don't know that -- basically what
13 he was saying is, look, all of these people have got COVID,
14 they are saying everybody is fine, they are not fine, they are
15 not tracing, they are not doing the tracing.

16 He also was concerned about other people coming into
17 the office, the fact that they had elderly people that
18 sometimes came into the office.

19 MS. SAINT-FORT: Your Honor, plaintiff acknowledges
20 that contact tracing was being done and certain individuals
21 were being informed, but not the level he believed they should
22 be.

23 So his speech sought to change the policy of the
24 DA's office, to increase the number of individuals who were
25 being informed; not that individuals weren't being informed at

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1 all.

2 In fact, he specifically references a number of
3 e-mails that were sent out by senior staff members in the
4 domestic violence bureau on a regular basis notifying them of
5 individuals who are out of the office and who are out sick.
6 He references his own experience with having contracted COVID
7 and informing the office of individuals he had been in contact
8 with.

9 I don't believe it's disputed that the DA's office
10 was engaging in contact tracing. Rather, plaintiff seems to
11 suggest that the number of individuals who are informed to
12 should be increased. In particular he's stating that the
13 individuals who had come in contact with a person potentially
14 were being notified, but everyone on the floor with an
15 individual who had a COVID positive result should be notified
16 of that positive result, whether or not the individual with
17 the positive result identified them as someone that they had
18 contact with.

19 He's trying to change the internal policy of the
20 DA's office regarding who is contacted. That differs from
21 Munafo, cited by plaintiff, where there is an objective safety
22 risk that is not being essentially addressed by the employer.
23 Here the DA's office is addressing it; plaintiff just wants
24 the policy to be changed. That's personal to his work
25 experience. A personal grievance is not protected speech

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1 under the First Amendment for public employees.

2 THE COURT: Thank you.

3 Do you want to respond to that?

4 MS. KOISTINEN: Yes, your Honor.

5 We do disagree about this issue. No where in
6 plaintiff's complaint does he concede that contact tracing was
7 being done. In fact, I would direct the Court to paragraph 36
8 of plaintiff's complaint. As alleged in that paragraph,
9 plaintiff stated to defendants Chavez and Thomas in a meeting
10 that included other co-workers, that for the past week many
11 people were out sick and that people on the 15th floor were
12 living in fear because they had not received communication
13 from the District Attorney's Office about what they should do
14 and what steps needed to be taken to protect them and their
15 health.

16 Additionally, your Honor, the fact that plaintiff --
17 we disagree that plaintiff was merely talking about policy
18 issues here. But even if he were, the mere fact that he's
19 wanting to have the policy changed does not mean that he's not
20 speaking out about a matter of public concern.

21 If you turn to, as plaintiff noted on page 13 of his
22 opposition brief, the Second Circuit has found in the Goldener
23 in case that speech can be protected when it's regarding a
24 policy. And this is a case that defendants did not address in
25 their reply brief. I believe we also cited several other

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1 district court cases that support this conclusion as well.

2 As your Honor mentioned, plaintiff also noted that
3 part of the reason why he was speaking out about this issue is
4 because he was concerned about members of the community who
5 were coming into the District Attorney's office, in particular
6 elder abuse victims who were particularly prone to getting a
7 bad case of COVID.

8 Despite defendants' attempts to say that his
9 motivation doesn't matter; in fact, the Sarratt case in the
10 Second Circuit has held that it is a relevant consideration
11 when determining whether a plaintiff's speech is a matter of
12 public concern.

13 THE COURT: Thank you. I've read your papers, both
14 side's papers, and you've addressed the questions I had this
15 morning. I'm prepared to issue an oral ruling on this.

16 The defendants here move to dismiss the plaintiff's
17 claims brought pursuant to the First Amendment of the United
18 States Constitution and New York State constitution.

19 The plaintiff Zuckerman alleges he was terminated
20 from his position as an Assistant District Attorney at the
21 Kings County District Attorney's Office in retaliation for
22 comments he made in a meeting and via text message on
23 December 15 of 2021, expressing that many people were living
24 in fear of contracting COVID-19 in the office and criticized
25 the COVID-19 safety policies.

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1 Federal Rule of Civil Procedure 12(b)(6) provides
2 for dismissal of a complaint that fails to state a claim upon
3 which relief can be granted. To avoid dismissal, a plaintiff
4 must state a claim that is plausible on its face by alleging
5 sufficient facts for the Court to draw the reasonable
6 inference that the defendant is liable for the misconduct
7 alleged. That's a very well known case of Ashcroft vs. Iqbal
8 556 U.S. 662, 678 in 2009.

9 Although the Court will not credit mere conclusory
10 statements or threadbare recitals of the elements of a cause
11 of action, it must accept as true all material factual
12 allegations alleged in the complaint and draw all reasonable
13 inferences in the plaintiff's favor. See Johnson vs.
14 Priceline.com Inc. 711 F.3d 271, 275, Second Circuit 2013.

15 The plaintiff Zuckerman has alleged sufficient
16 material facts to state a plausible First Amendment
17 retaliation claim under Section 1983. A plaintiff asserting a
18 First Amendment retaliation claim must establish, first, that
19 his speech or conduct was protected by the First Amendment.
20 Second, that the defendant took an adverse action against him.
21 And third, there was a causal connection between the adverse
22 action and the protected speech. Matthews vs. City of New
23 York, 779 F.3d 167, 172, Second Circuit 2015.

24 Under the first prong, a public employee's speech is
25 entitled constitutional protection if he's speaking as a

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1 citizen on a matter of public concern. *Connick vs. Myers*, 461
2 U.S. 138, 145 to 148, 1983.

3 Speech involves matters of public concern when it
4 can be fairly considered as relating to any matter of
5 political, social or other concern of a community or when it
6 is the subject of legitimate news interest that is a subject
7 of journal interest and a valuating concern to the public.
8 *Lane vs. Frank* 573 U.S. 228, 241, 2014.

9 To make this determination, courts look to the
10 content form and context of the speech. In *Munafo vs.*
11 *Metropolitan Transportation Authority*, the Second Circuit
12 recognized that safety in the workplace is a matter of public
13 concern, 285 F.3rd 201, 211, 212, Second Circuit 2002. In
14 that case, the plaintiff worked for the public transit
15 authority and complained about unsafe conditions, such as
16 workers being forced to work in proximity to live rails and
17 welders being forced to work without respirators. The Second
18 Circuit opined that the MTA's argument that the plaintiff's
19 complaint about workplace safety constituted mere personal
20 grievance, boarding on the frivolous.

21 Since *Munafo*, courts within the Second Circuit have
22 repeatedly recognized that complaints about work-place safety
23 relate to matters of public concern. For example, I cite
24 *Reynolds vs. The Village of Chittenango*, 2020 Westlaw 1322509,
25 at note three, a Northern District of New York decision of

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1 March 20, 2020. Within that case it sites a number of other
2 cases.

3 In this court's view Mr. Zuckerman's speech, as set
4 forth in the complaint, is analogous to the speech in those
5 cases. He alleges that he spoke in response to false
6 statements made by the members of the COVID-19 committee. He
7 expressed his and others employee's fears of contracting
8 COVID-19 in the office. That he criticized the office's
9 inadequate contract tracing policy. He spoke out of concern
10 for himself, his co-workers, and members of the public who
11 visit the DA's Office.

12 He also alleges that he sent a text message to
13 30-plus ADAs warning them about COVID-19 conditions in the
14 office and the lack of responsiveness from leaders.

15 Similar to the speech in Munafo and similar cases,
16 plaintiff's statements about safety conditions and policies
17 related to the pandemic in the DA's office is of, to quote,
18 "social or other concern to the community and subject of
19 general interest in evaluating concern to the public." Lane
20 573 U.S. at 241.

21 The defendant's attempts to frame Mr. Zuckerman's
22 statement as constituting purely personal grievance pertaining
23 to an internal policy of no concern to the public, are not
24 persuasive; nor are the cases to which they attempt to
25 analogize it.

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1 I also considered all arguments raised in the briefs
2 and find that none warrant dismissal of his claims.

3 In particular, plaintiff has plausibly alleged that
4 the defendants Chavis, Thomas Mejia-Ming and Gonzalez were
5 personally involved in the alleged retaliatory termination, as
6 required for Section 1983 claim. See *Grullon vs. City of New*
7 *Haven* 720 F.3d 133, 138 to 139, Second Circuit 2013.

8 Among other relevant facts, Chavis and Thomas are
9 alleged to have attended the December 15, 2021, meeting.
10 Mejia Ming is alleged to have been their co-committee member
11 and sent an e-mail in response to comments made by
12 Mr. Zuckerman in the meeting. And District Attorney Gonzalez
13 is alleged to have had the sole statutory responsibility for
14 hiring and firing ADAs.

15 The plaintiff also plausibly alleged that his
16 statements were causally connected to his termination, given
17 that he was terminated the day after making the statements
18 without explanation and with no history of performance issue.
19 While it is, of course, possible that discovery may shed a
20 different light on these allegations, plaintiff has stated
21 sufficient material facts to survive the motion to dismiss.

22 Nor have defendant shown their entitled to qualified
23 immunity. Government officials performing discretionary
24 functions generally are shielded from liability for civil
25 damages insofar as their conduct does not violate clearly

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1 established statutory or constitutional rights of which a
2 reasonable person would have known. That's Harlow vs.
3 Fitzgerald, 457 U.S. 888, 818, 1982.

4 It is clearly established that public employees have
5 a First Amendment right to be free from retaliation for speech
6 on matters of public concern. See Reuland vs. Hynes 460 F.3d
7 409, 419 to 420, Second Circuit 2006. And Munafo and
8 subsequent cases have established that speech about workplace
9 safety relates to a matter of public concern.

10 Defendants have provided no convincing argument that
11 the right the plaintiff is alleging was violated is not one
12 that was clearly established at the time of the violation.

13 As a final matter, I will also address New York
14 State constitutional claim.

15 It is true that some courts in this circuit have
16 held there is no right of action under the New York State
17 constitution for claims that can be brought under Section
18 1983. See for example, Raymond vs. City of New York, 2017
19 Westlaw 892350, a decision of the Southern District of New
20 York on March 6, 2017.

21 It is also not entirely clear whether the standards
22 of a First Amendment retaliation claim are identical to or
23 broader than a claim brought pursuant to Article I, Section 8
24 of the New York State constitution. See Avery vs. DiFiore,
25 2019 Westlaw 3564570, Southern District of New York, August 6,

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1 2019.

2 What is clear is that there is a significant factual
3 overlap between the federal state claims being alleged; and
4 therefore, any potential discovery as well. And while
5 Mr. Zuckerman's Section 1983 claim is being allowed to proceed
6 for the time being, if that claim is ever defeated he may have
7 to rely on an argument that there is a cognizable state
8 constitutional claim; that's without addressing the validity
9 of the state constitutional claim or the specific standard
10 that might apply. In the interest of efficiency, I decline to
11 dismiss that claim at this time.

12 In conclusion, the defendant's present motion to
13 dismiss is denied in its entirety.

14 Having resolved the motion to dismiss, let me ask,
15 have the parties had any settlement discussions in this case
16 at all?

17 MS. KOISTINEN: We have briefly, your Honor. But
18 they obviously haven't resulted in any --

19 THE COURT: What are the plaintiff's damages?

20 MS. KOISTINEN: The plaintiff's damages are
21 relatively minimal because he found work relatively quickly
22 after being dismissed. However, the main part of his damages
23 relate to his emotional distress and the fact that he wants to
24 get back into public service. And so having a dismissal from
25 a Government agency, it's not helpful if he would want to go

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1 work for the Government in the future.

2 THE COURT: We can go off the record to discuss
3 settlement. Is there any objection to me hearing that?

4 MS. KOISTINEN: No objection.

5 MS. SAINT-FORT: No objection.

6 (Discussion held off the record.)

7 THE COURT: The next conference will be a
8 settlement. It will be February 9 at 2:00 p.m. Thank you.

9 MS. KOISTINEN: Thank you.

10 MS. SAINT-FORT: Thank you.

11 (Whereupon, the matter was concluded.)

12 * * * * *

13 I certify that the foregoing is a correct transcript from the
14 record of proceedings in the above-entitled matter.

15 /s/ Rivka Teich
16 Rivka Teich, CSR RPR RMR FCRR
17 Official Court Reporter
18 Eastern District of New York
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