No. 16-

IN THE

Supreme Court of the United States

KEVIN PATRICK BUKER,

Petitioner,

v.

HOWARD COUNTY, MARYLAND, CHIEF WILLIAM F. GODDARD, III, JOHN JEROME AND JOHN S. BUTLER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the *Pickering* balancing is a pure question of law, as the Fourth Circuit holds, or a mixed question of law and fact, as every other circuit considering the issue holds.

2. Whether the *Pickering* balancing requires a trial court to submit factual disputes to a jury, as the Second and Eighth Circuits hold, or whether the *Pickering* balancing gives a trial court discretion on whether to submit factual disputes to a jury, as the Tenth and Eleventh Circuits hold.

3. Whether the Fourth Circuit's interpretation of the *Pickering* balancing violates the procedural due process and free speech rights of government employees by depriving them of the ability to confront and cross-examine witnesses when facts are in dispute.

PARTIES TO THE PROCEEDING

The case caption contains the names of all the parties in the case. Petitioner is Kevin Patrick Buker. Respondents are Howard County, Maryland, Chief William F. Goddard, III, John Jerome, and John S. Butler. The claims of Mark Grutzmacher have been resolved by the parties.

CORPORATE DISCLOSURE STATEMENT

Kevin Patrick Buker is not a corporate entity.

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CITATIONS OF THE OPINIONS AND ORDERS ENTERED

The decision of the United States Court of Appeals for the Fourth Circuit in this matter is reported, and can be found at *Grutzmacher, et al. v. Howard County, et. al.*, 851 F.3d 332 (4th Cir. 2017). The decision of the United States District Court for the District of Maryland in this matter is unreported. It can be found at *Buker, et al. v. Howard County., et al.*, No. MJG-13-3046, 2015 WL 3456750 (D. Md. May 27, 2015).

STATEMENT OF BASIS FOR JURISDICTION

The United States Court of Appeals for the Fourth Circuit entered its judgment in this matter on March 20, 2017. This Court has jurisdiction to review the Fourth Circuit's decision pursuant to 28 U.S.C. § 1254(1) (2012).

CONSTITUTIONAL PROVISIONS AT ISSUE

The First Amendment to the Constitution of the United States provides, in pertinent part, that "Congress shall make no law … abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and the right of the people … to petition the Government for a redress of grievances." U.S. Const. amend. I.

The Fifth Amendment to the Constitution of the United States provides, in pertinent part, that "[n]o person shall… be deprived of life, liberty or property, without due process of law." U.S. Const. amend. V.

STATEMENT OF THE CASE

This case concerns how the lower courts apply the balancing articulated in *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) and confirmed in its progeny. *See, e.g.*, *Connick v. Myers*, 461 U.S. 138, 142 (1983); *Rankin v. McPherson,* 483 U.S. 378, 388 (1987); *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004); *Garcetti v. Ceballos*, 547 U.S. 410, 417-20 (2006); *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 386 (2011). This Court has made clear that striking the balance between an employee's interest in speaking as a citizen on a matter of public concern and the government's interest in an efficient workplace is a question of law. *Connick v. Myers*, 461 U.S. 138, 147-48 n. 7 (1983). The circuits uniformly apply this element of the *Pickering* analysis. *See, e.g.*, *Weaver v. Chavez*, 458 F.3d 1096, 1101 (10th Cir. 2006); *Gardetto v. Mason*, 100 F.3d 803, 815 (10th Cir. 1996); *Joyner v. Lancaster*, 815 F.2d 20, 23 (4th Cir. 1987); *Johnson v. Ganim*, 342 F.3d 105, 114 (2d Cir. 2003); *Rivera-Jimenez v. Pierluisi*, 362 F.3d 87, 94 (1st Cir. 2004); *Nichols v. Dancer*, 657 F.3d 929, 934 n. 3 (9th Cir. 2011).

This Court, however, has never addressed whether disagreement regarding the existence of disruption to the government workplace is a question of fact that would preclude summary judgment. *See Weaver v. Chavez*, 458 F.3d 1096, 1101 (10th Cir. 2006) ("The Supreme Court has not addressed the role of the jury specifically in the *Pickering/Connick* context"); *Waters v. Churchill*, 511 U.S. 661, 693 (1994) (Scalia, J.) (noting that the plurality opinion does not address what issues in the *Pickering* analysis are questions of law or fact); *Lytle v. City of Haysville,* 138 F.3d 857, 864 n. 1 (10th Cir. 1998)

(recognizing circuit split); J. Robert Wilson, *Speech v. Trial by Jury: The Role of the Jury in the Application of the Pickering Test,* 18 Geo. Mason U. Civ. Rts. L.J. 389, 405-10 (2008) (recognizing circuit split). Although most circuits recognize the possibility of factual disputes regarding disruption, the Fourth Circuit does not, and instead treats the Pickering balancing as a purely legal analysis. *See Joyner v. Lancaster*, 815 F.2d 20, 23 (4th Cir. 1987); Wilson, *supra*, at 405-10. Such an approach violates both the free speech and procedural due process rights of government employees.

Even among the circuits that recognize a factual component to the balancing, there is a split on how to resolve factual disputes. Some circuits *require* the trial courts to submit factual disputes to the jury and others allow discretion to do so. *Compare Johnson v. Ganim*, 342 F.3d 105, 114-15 (2nd Cir. 2003) *with Weaver v. Chavez*, 458 F.3d 1096, 1101 (10th Cir. 2006). The circuits' varying treatment of this issue affects the outcome of cases and defines the scope of the free speech rights of government employees throughout the country. This Court should grant Mr. Buker's request for a Writ of Certiorari to resolve the disagreement among the circuits, correct the Fourth Circuit's rule and provide guidance to the government and employees alike.

A. District Court Proceedings

The Howard County Department of Fire and Rescue Services ("Department") employed Mr. Buker as a paramedic and battalion chief. Appendix 5a. On January 20, 2013, Mr. Buker made a series of satirical posts ("January 20 Posts") related to gun control on his personal Facebook account. Appendix 8a.

When the January 20 Posts came to the Department's attention, Assistant Chief John Jerome ordered Mr. Buker to remove them. Appendix 9a. On January 23, 2013, Mr. Buker complied, but made additional posts asserting that Mr. Jerome's directive violated the First Amendment and that various government officials were unconstitutionally attempting to curtail the free speech rights of government employees. Appendix 9a-10a. After learning of the January 23 Posts, the Department moved Mr. Buker out of field operations pending the results of an internal investigation. Appendix 11a.

On February 17, 2013, Michael Donnelly, a volunteer firefighter with a local fire company and one of Mr. Buker's Facebook "friends," posted a picture of an elderly woman with her middle finger extended on his Facebook account. Appendix 11a. Mr. Donnelly added his own commentary to the photograph by posting "for you Chief" directly above it. Appendix 11a. Mr. Buker understood the post to be in support of him and so he "liked"[1] ("February 17 Post") the post using his Facebook account. Appendix 11a.

On February 25, 2013, the Department issued charges of dismissal to Mr. Buker, identifying sections of the Department's policies that he purportedly violated when he made the January 20, January 23 and February 17 Posts. Appendix 11a. The Department terminated Mr. Buker's employment on March 14, 2013. Appendix 13a.

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1. The Fourth Circuit's opinion in *Bland v. Roberts*, 730 F.3d 368, 385 (4th Cir. 2013) includes a description of the functionality of the Facebook social media platform.

On October 12, 2013, Mr. Buker filed a two-count complaint in the United States District Court for the District of Maryland asserting violation of his First Amendment right to freedom of speech and freedom of association.[2] Appendix 13a. The district court had jurisdiction pursuant to 28 U.S.C. § 1331. On July 30, 2014, the Department and individual defendants filed a motion for summary judgment seeking the dismissal of Mr. Buker's First Amendment retaliation claim.[3]

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2. Mr. Buker later abandoned the freedom of association claim as duplicative of his freedom of speech claim.

3. Mr. Buker filed his response on August 18, 2014, asserting that Department's Social Media Guidelines and Code of Conduct were facially unconstitutional, and that his First Amendment retaliation claim should be allowed to proceed to trial. On September 5, 2014, the Department and the individual Respondents filed a reply memorandum, claiming that Mr. Buker did not assert a facial challenge.

During the oral argument on the motion and in a subsequent letter to counsel, the district court determined that Mr. Buker had properly asserted a facial challenge to the policies, and allowed the Department and the individual Respondents to conduct additional discovery and file a second motion for summary judgment. On February 9, 2015, they filed a second motion for summary judgment asserting that the policies passed constitutional muster and seeking to dismiss Mr. Buker's facial challenge.

On June 22, 2015, while the second motion for summary judgment was pending, the Department amended the Social Media Guidelines and Code of Conduct to remove the unconstitutional provisions that Mr. Buker identified in the summary judgment briefing. The Department and individual Respondents filed a third motion for summary judgment the same day claiming that the facial challenge to the policies was moot and that, even if the challenge was not moot, Mr. Buker did not have standing to

On March 30, 2015, the district court granted the motion with respect to Mr. Buker's retaliation claim and, on May 27, 2015, entered a memorandum decision in support of its order. Appendix 14a, 41a. The district court properly determined that Mr. Buker was speaking as a citizen on a matter of public concern when he made the January 20 Posts. Appendix 20a-21a, 66a. It held that Mr. Buker's termination was nevertheless proper because the January 20 Posts were "capable of impeding the [Fire Department]'s ability to perform its duties efficiently" and the *Pickering* balance tilted in favor of the government. Appendix 14a, 71a. Although the Department did not set forth any evidence of actual disruption in the workplace, the district court accepted the Department's assertions that it had a reasonable apprehension of disruption and rejected Mr. Buker's evidence to the contrary. *See* Appendix 68a-71a. The district court also held that the January 23 and February 17 Posts did not amount to protected speech because Mr. Buker failed to show that he was speaking as a citizen on a matter of public concern when he made those posts. Appendix 74a.

B. Fourth Circuit Court of Appeals Proceedings

On September 9, 2015, Mr. Buker timely filed a notice of appeal with the Fourth Circuit. Appendix 15a. Mr. Buker asked the Fourth Circuit, in part, to determine: "Whether the District Court erred in granting [the

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assert it. The district court granted the third motion for summary judgment on August 12, 2015.

The Fourth Circuit affirmed the district court's grant of summary judgment on mootness. Appendix 34a. Mr. Buker does not request that the Court issue a Writ of Certiorari on that issue.

Department's] motion for summary judgment despite genuine issues of material fact as to the disruption or reasonable apprehension of disruption of [the Department's] workplace."[4] Appendix 37a.

The Fourth Circuit partially reversed the district court, holding that the January 20 Posts and the January 23 Posts constituted speech on a matter of public concern.[5] Appendix 20a. It affirmed the district court's grant of summary judgment, however, on the basis that the *Pickering* balance tilted in favor of the Department. Appendix 25a, 30a. Citing the deposition testimony of Department personnel, it held that the Department had a reasonable apprehension of disruption to the workplace that justified Mr. Buker's termination. Appendix 26a-30a. Like the district court, the Fourth Circuit did not consider the factual disputes surrounding the reasonableness of the Department's predictions of disruption. *See* Appendix 18a, 23a-25a. Instead, it followed the rule it articulated in *Joyner v. Lancaster*, 815 F.2d 20, 23 (4th Cir. 1987), that *Pickering* balancing is a pure question of law that has no factual component to submit to a jury. *See id.*

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4. Mr. Buker also asserted that "the District Court erred in affording undue weight to [the Department's] interest in the efficient operation of the workplace" and "in holding that [Mr. Buker's] Facebook postings of January 23, 2013 and February 17, 2013 were not entitled to First Amendment protection because they did not relate to a matter of public concern." Appendix 37a.

5. The Fourth Circuit did not reach the issue of whether the February 17 Post also addressed a matter of public concern but treated it as such for the purposes of its analysis. Appendix 18a-23a.

REASONS FOR GRANTING THE PETITION

I. The Court Should Issue a Writ of Certiorari to Resolve the Entrenched Split Among the Circuits Over Whether the *Pickering* Balancing is Solely a Question of Law or a Mixed Question of Law and Fact that Can or Must Be Submitted to a Jury for Resolution.

Pickering and its progeny require lower courts to consider whether a government employee is speaking as a citizen on a matter of public concern and, if so, whether the employee's interest is outweighed by the government employer's need for an efficient workplace. *See Pickering v. Board of Educ.,* 391 U.S. 563, 568 (1968); *Connick v. Myers*, 461 U.S. 138, 142 (1983); *Rankin v. McPherson*, 483 U.S. 378, 388 (1987); *City of San Diego v. Roe*, 543 U.S. 77, 82 (2004); *Garcetti v. Ceballos*, 547 U.S. 410, 417-20 (2006); *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 386 (2011). This Court made clear in *Connick* that this weighing of interests is a question of law for the trial court. *Connick*, 461 U.S. at 148 n. 7. The circuits have uniformly recognized this instruction. *See, e.g.*, *Weaver v. Chavez*, 458 F.3d 1096, 1101 (10th Cir. 2006); *Gardetto v. Mason*, 100 F.3d 803, 815 (10th Cir. 1996); *Joyner v. Lancaster*, 815 F.2d 20, 23 (4th Cir. 1987); *Johnson v. Ganim*, 342 F.3d 105, 114 (2d Cir. 2003); *Rivera-Jimenez v. Pierluisi*, 362 F.3d 87, 94 (1st Cir. 2004); *Nichols v. Dancer*, 657 F.3d 929, 934 n. 3 (9th Cir. 2011).

This Court, however, has not addressed whether disagreement over the existence or apprehension of disruption to the workplace is a question of fact that will preclude summary judgment. There is a recognized split

among the circuits on this issue. *See Weaver v. Chavez*, 458 F.3d 1096, 1101 (10th Cir. 2006) (recognizing circuit split); *Lytle v. City of Haysville,* 138 F.3d 857, 864 n. 1 (10th Cir.1998) (same) (citing *Waters v. Churchill*, 511 U.S. 661, 693 (1994) (Scalia, J., concurring)); J. Robert Wilson, *Speech v. Trial by Jury: The Role of the Jury in the Application of the Pickering Test,* 18 Geo. Mason U. Civ. Rts. L.J. 389, 405-10 (2008) (same).

The circuit courts' posture on this question is more than a split—it is a splintering. Nearly all circuits that have considered the issue recognize that a disagreement between the government and the employee regarding the existence of disruption or a reasonable apprehension of disruption is a question of fact that can preclude summary judgment. *See Riviera-Jimenez v. Pierlusi*, 362 F.3d 87, 94 (1st Cir. 2004); *Johnson v. Ganim*, 342 F.3d 105, 114-15 (2d Cir. 2003); *Kinney v. Weaver*, 367 F.3d 337, 363 (5th Cir. 2004) (en banc), *cert. denied*, 543 U.S. 872 (2004); *Johnson v. Univ. of Cincinnati*, 215 F.3d 561, 585 (6th Cir. 2000); *Gustafson v. Jones,* 290 F.3d 895, 909 (7th Cir. 2002); *Belk v. City of Eldon*, 228 F.3d 872, 881 (8th Cir. 2000); *Nichols v. Dancer*, 657 F.3d 929, 934 n. 3 (9th Cir. 2011) (citing cases); *Weaver v. Chavez*, 458 F.3d 1096, 1102 (10th Cir. 2006); *Jackson v. Ala. State Tenure Comm'n*, 405 F.3d 1276, 1286 (11th Cir. 2005). These circuits uniformly recognize that determining disruption or risk of disruption is rooted in the specific circumstances of each case. *See, e.g.*, *Gustafson v. Jones*, 290 F.3d 895, 909 (7th Cir. 2002) (describing the Pickering analysis as a "highly fact-specific injury").

Within the majority view, there is a further split on how to resolve factual disputes. Two circuits hold that

a district court is *required* to submit factual disputes regarding disruption to a jury prior to performing the balancing itself. *See Johnson*, 342 F.3d at 114-15; *Belk*, 228 F.3d at 881. Two others hold that the trial court has discretion to submit disruption disputes to a jury as a predicate to the court's application of the balancing. *See Weaver*, 458 F.3d at 1102; *Jackson*, 405 F.3d at 1285.

The Fourth Circuit stands alone in treating the *Pickering* balancing as a pure question of law and rejects any jury role in the analysis. *See Joyner v. Lancaster*, 815 F.2d 20, 23 (4th Cir. 1987). Its position requires that the *Pickering* balancing be addressed on summary judgment and that the judge resolve competing versions of events without the benefit of live testimony or cross-examination.

A. The Majority of Circuits Acknowledge that the *Pickering* Balancing Involves Underlying Questions of Fact.

Nine of the ten circuits that have addressed the *Pickering* balancing have held that the existence of disruption or a reasonable apprehension of disruption is a fact question. In *Riviera-Jimenez v. Pierlusi*, 362 F.3d 87 (1st Cir. 2004), plaintiffs filed a retaliation suit against defendants after facing adverse employment actions following an investigation into defendants' corruption. *Id*. at 91. The district court denied defendants' summary judgment motion on the basis that there were factual issues that needed to be resolved surrounding defendants' motivation for firing plaintiffs, i.e., whether a disruption in the workplace occurred. *Id*. at 90, 92. In affirming the district court's denial of summary judgment, the First Circuit held the district was correct to deny summary

judgment where defendants' allegations of disruption were still in dispute. *Id*. at 94. In making this determination, the First Circuit described the process for applying the *Pickering* balancing:

> the second [inquiry] is whether an employee's First Amendment interests outweigh the government's interests as an employer in avoiding disruption in the workplace. . . . Although this determination is usually a legal one, it may be necessary to resolve disputed questions of fact (such as whether a defendant's claim of potential disruption is reasonable) before an evaluation can properly be made.

Id. (internal quotations and citations omitted) (citing *Johnson v. Ganim*, 342 F.3d 105, 114-15 (2d Cir. 2003)).

In *Gorman-Bakos v. Cornell Co-op Extension of Schenectady Cnty.*, 252 F.3d 545 (2d Cir. 2001), former volunteers with a youth program sued a government-funded cooperative and its officers, directors, and board members, alleging that defendants retaliated against them by terminating their volunteer status and participation in the program in violation of the First Amendment. *Id.* at 548-51. The district court granted summary judgment in favor of defendants. *Id.* at 551. The parties disagreed over whether plaintiffs' speech disrupted, or had the potential to disrupt, defendants' functioning. *Id.* at 557. Each side supported their respective positions with deposition testimony, affidavits, and other documents, and presented a plausible interpretation of the conflicting evidence. *Id.* at 557-58. The Second Circuit vacated summary judgment, holding that the underlying factual issue of whether

there was, or could potentially be, workplace disruption remained unresolved. *Id.* It stated:

> Both sides' arguments rest heavily on the proper characterization of plaintiffs' speech and defendants' motives. Making these determinations correctly depends on an evaluation of conflicting testimonial evidence, which a factfinder is in the best position to evaluate. It would be improper at this stage for the district court—or this court on appeal—to resolve the factual disputes between the parties, or to decide the proper balance between the parties' interests. Accordingly, after these underlying factual disputes are decided by a factfinder, the district court should consider the factual findings to come to its own legal conclusions about whether the employer's interest in efficiency or the employee's interest in free speech is paramount. This determination depends on an evaluation of conflicting testimonial evidence, which a factfinder is in the best position to determine.

Id. at 558.

In *Kinney v. Weaver*, 367 F.3d 337 (5th Cir. 2004) (en banc), *cert. denied*, 543 U.S. 872 (2004), plaintiff police academy instructors sued defendant law enforcement officials for retaliation after the instructors served as expert witnesses. *Id.* at 340. The district court denied defendants' motion for summary judgment. *Id.* In affirming the denial of summary judgment, the Fifth Circuit recognized that governmental interests at stake in

a particular case necessarily depend upon the facts of the case. *Id*. at 363. "[T]he relevant issue is not the weight of the governmental interest considered in abstract terms; we look instead to how the speech at issue *affects* the government's interest in providing services efficiently." *Id.* at 362 (emphasis in original). In recognizing the factual nature of this inquiry, the court noted:

> "[W]e most certainly do not . . . pervert the First Amendment analysis by changing the *Pickering* balancing inquiry into a question for the jury. It is for the court to determine the importance of a plaintiff's speech interest, to determine the importance of the governmental interest in efficient operations, and to balance the relative weight of each. But the government interests that are at stake in a particular case necessarily depend on the facts of the case . . . . In this case—an interlocutory appeal of summary judgment—we are not permitted to indulge in our own preferred view as to the true facts of the case, much less can we simply accept the defendant's version of the disputed facts as true. Instead, we must accept the genuine factual disputes identified by the district court and conduct the inquiry as if the plaintiffs' version is true.

Id. at 363 (citing *Victor v. McElveen*, 150 F.3d 451, 457 (5th Cir. 1998) (explaining that a sheriff was unable to show his interests in efficient functioning of the department outweighed a deputy's speech interests, given that it was disputed whether the comment was disruptive)).

In *Johnson v. Univ. of Cincinnati*, 215 F.3d 561 (6th Cir. 2000), plaintiff alleged that defendants retaliated against him for voicing his concerns about defendants' affirmative action program. *Id.* at 583. In overturning summary judgment in favor of individual defendants, the Sixth Circuit stated:

> the district court's grant of summary judgment based upon its determination that there were no material factual disputes regarding the disruptive impact of Plaintiff's complaints upon the University's business was improper in any event; the contested issues of fact, based upon the parties' differing characterizations of the evidence, are very much in dispute and would be best left for determination at trial.

Id. at 585 (citing *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

In *Gustafson v. Jones,* 290 F.3d 895 (7th Cir. 2002), defendants appealed a jury verdict for plaintiffs in their First Amendment retaliation claim. *Id*. at 900. In affirming the verdict, the court stated that:

> *Pickering* contemplates a highly fact-specific inquiry into a number of interrelated factors: [listing factors]. *Pickering* balancing is not an exercise in judicial speculation. While it is true that in some cases the undisputed facts on summary judgment permit the resolution of a claim without a trial, that means only that the *Pickering* elements are assessed in light of a record free from material factual disputes.

> … We are not entitled to speculate as to what the employer might have considered the facts to be and what concerns about operational efficiencies it might have had, once the record shows what those concerns really were. To put the point another way, this is not like "rational basis" review of state legislation, under which it is enough to imagine any rational underpinning for the law the legislature chose to enact. First Amendment rights cannot be trampled based on hypothetical concerns that a governmental employer never expressed.

Id. at 909–10 (internal citations omitted). Thus, according to the court, the underlying factual disputes must be resolved before the court can balance the employee's rights against the employer's interests in promoting the efficiency of the public services it performs. *See id*.

In *Bailey v. Dep't of Elem. & Secondary Educ.*, 451 F.3d 514, 516-17 (8th Cir. 2006), plaintiff sued defendant school system for terminating him for his allegedly protected speech—complaints about the administration of a social benefit program. *Id*. at 516. At the conclusion of trial, the district court submitted special interrogatories to the jury regarding the government's claims of disruption. *Id.* at 521. The Eighth Circuit both affirmed the contents of the interrogatories and confirmed the factual issues underlying the *Pickering* balancing: "The second issue is the *Pickering* balancing test. It is a question of law and was also the subject of the district court's ruling, although its underlying factual questions should be and were submitted to the jury." *Id*. at 518 n. 2 (citing cases).

In *Robinson v. York*, 566 F.3d 817, 820-21 (9th Cir. 2009), a public safety officer claimed he was passed over for promotion in retaliation for a number of reports regarding misconduct among his fellow officers. *Id*. at 820. The trial court denied defendants' motion for summary judgment because plaintiff's "violation of a written chain of command policy was not dispositive, but merely one of the factors to be considered as part of the balancing test established *Pickering*." *Id*. at 821. In affirming the district court, the Ninth Circuit held that:

> Although we have sometimes found a police department's interests in discipline and *esprit de corps* to outweigh First Amendment interests, genuine factual disputes here—including, for example, the extent of potential workplace disruption and whether the justifications [d]efendants assert for their actions were pretextual—preclude such a determination at this stage of the litigation.

Id. at 825. (citing *Cochran v. City of Los Angeles,* 222 F.3d 1195, 1196 (9th Cir. 2000); *Kannisto v. San Francisco,* 541 F.2d 841, 843–44 (9th Cir.1976)).

The Tenth and Eleventh Circuits characterize the *Pickering* balancing as a mixed question of law and fact and recognize that a trial court may need to submit factual disputes to a jury for resolution. *See Weaver v. Chavez*, 458 F.3d 1096, 1102 (10th Cir. 2006) ("[T]he decision to submit questions of fact to the jury is within the sound discretion of the district court."); *Jackson v. Ala. State Tenure Comm'n*, 405 F.3d 1276, 1285 (11th Cir. 2005) ("We acknowledge that sometimes a situation might present a

factual dispute which must be resolved by the jury before the trial judge is able to make the law calls required" in deciding the Pickering balance.).

B. The Second and Eighth Circuits Require the Trial Court to Submit Factual Questions Regarding the Impact of an Employee's Speech on the Workplace to a Jury for Resolution.

The Second Circuit holds that, while applying *Pickering* balancing remains the province of a judge as a question of law, when there is a dispute as to the existence or extent of disruption in the workplace, the jury must resolve such a dispute prior to the court's application of the *Pickering* balancing. *See Johnson v. Ganim*, 342 F.3d 105 (2003). In *Johnson*, a former city employee sued a city, mayor, and labor relations officer alleging that he was suspended and terminated in retaliation for a letter he wrote criticizing the mayor's administration. *Id*. at 107-11. The district court granted summary judgment in favor of defendants. *Id.* at 111. In vacating summary judgment, the Second Circuit held that the *Pickering* balancing can only be applied after a jury decided the factual disputes pertaining to the potential for disruption in the workplace. *Id.* at 114-15. The court noted that because there was no evidence anyone saw the letter plaintiff wrote, except for upper level members of the city's administration, the district court improperly concluded that the letter was an attempt to entice plaintiff's co-workers to engage in workplace violence, and that if the court were to assume anyone else read the speech, there still remained a factual question of whether the message contained therein would cause the type of "drum banging" necessary to cause upheaval in workplace efficiency. *Id.* As such, reasonable

minds could differ as to whether the speech had the potential to cause disruption, and summary judgment was inappropriate without further involvement from the jury to find such facts. *Id*. ("The second issue is the *Pickering* balancing. It is a question of law and was also the subject of the district court's ruling, although its underlying factual questions should be and were submitted to the jury."); *see also Belk v. City of Eldon*, 228 F.3d 872, 881 (8th Cir. 2000); *Casey v. City of Cabool*, 12 F.3d 799 (8th Cir. 1993) (quoting *Shands v. City of Kennet*, 993 F.2d 1337, 1342 (8th Cir. 1993) ("Any underlying factual disputes concerning whether the plaintiff's speech is protected, however, should be submitted to the jury . . . .")).

The Eighth Circuit also holds that the jury must resolve a dispute about the existence or extent of a disruption in the workplace before the court can weigh competing interests. *See Bailey v. Dep't of Elem. & Secondary Ed.*, 451 F.3d 514 (8th Cir. 2006). In *Bailey*, a psychologist with the state education department sued the department and his supervisors, alleging that his termination was in retaliation for protected speech on matters of public concern. *Id*. at 514-18. The district court entered judgment as a matter of law against plaintiff. *Id*. at 517. During trial, the court drafted special jury interrogatories regarding the balance between plaintiff's and defendants' interests, asking the jury whether plaintiff's speech "cause[d], or could . . . have caused, disharmony or disruption in the working relationship between those working for [defendant]." *Id*. at 517. In affirming the district court's decision to ask the jury to determine whether there was or could have been disruption in the workplace, the circuit court held that where there is evidence that a disruption has occurred, it is the jury's function to weigh disputing claims or interpretations of such evidence. *Id*. at 521.

C. The Tenth and Eleventh Circuits Hold That the Trial Court Has Discretion to Submit Disputes Regarding Workplace Disruption to a Jury Prior to Applying the *Pickering* Balance

The Tenth Circuit holds that the assignment of factual questions to a jury is not susceptible to a bright line rule, and that the decision is within the district court's discretion. *See Weaver v. Chavez*, 458 F.3d 1096 (10th Cir. 2006). In *Weaver*, a former assistant city attorney sued her employer alleging that she was discharged in retaliation for her political support of an opponent of the mayor and for her speech criticizing what she perceived to be patronage hiring in the city attorney's office. *Id*. at 1097-98. At trial, the district court specifically asked the jury to make a finding whether plaintiff's conduct was disruptive to the City Attorney's Office. *Id*. at 1100. The jury concluded it was. *Id*. Although the court directed the jury to make this finding through a special verdict form,[6] the court itself ultimately conducted the required balancing in ruling for the city. *Id*. at 1101. Plaintiff appealed, arguing the district court erred in submitting any fact question to the jury. *Id*.

In affirming the district court's decision to direct the jury through a special verdict form, the Tenth Circuit held that "in the context of [*Pickering* balancing], the decision to submit questions of fact to the jury is within the sound discretion of the court." *Id.* at 1102. The court noted that

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6. The special verdict form asked: "Did plaintiff's criticism of what she perceived to be politically motivated hiring practice in the city Legal Department cause disharmony or disruption in the workplace?" *Weaver*, 458 F.3d at 1100, *n. 3*.

it is particularly appropriate to submit factual questions to the jury where the parties dispute the effect of speech on the workplace. *Id.*

The Eleventh Circuit holds that there is no categorical rule that requires the court submit issues to the jury before it can undertake the *Pickering* balancing. *See Jackson v. Ala. State Tenure Comm'n*, 405 F.3d 1276 (2005). In *Jackson*, a teacher was fired from his job after several confrontations with school board members. *Id.* at 1279. Plaintiff sued the school board and its officers, alleging that he was impermissibly fired because of his exercise of free speech. *Id.* The district court granted defendants judgment as a matter of law after evidence was presented. *Id.* at 1281. The Eleventh Circuit affirmed the district court's decision, reasoning that the decision was appropriate because many of the facts contained in the record were undisputed. *Id.* at 1284. It "acknowledge[d] [,however,] that sometimes a situation might present a factual dispute which must be resolved by the jury before the trial judge is able to make the law calls required in deciding the *Pickering* balance. . . . When the facts underlying the balance are clear, courts can and do decide the *Pickering* balance without the aid of a jury." *Id.* at 1285. This suggests that, as was the case for the circuits that currently recognize the jury's role in determining the underlying facts of the balancing, given the right circumstances, i.e., whether the actual or potential disruption in workplace efficiency was disputed between the parties to the litigation, a district court would not act inappropriately in submitting the dispute to the jury.

D. The Fourth Circuit Holds That the *Pickering* Balancing Is Strictly a Question of Law and the Jury Plays No Role in Such Analysis.

The Fourth Circuit holds that the jury has no role in the *Pickering* balancing because it is purely a question of law. *See Joyner v. Lancaster*, 815 F.2d 20 (1987). In *Joyner*, a deputy sheriff alleged he was fired in retaliation for campaigning on behalf of the incumbent sheriff's challenger in an election. *Id.* at 22. The sheriff's department conceded that this was the case, but argued that the captain's activities sowed discord in the department and hindered its efforts to protect the public. *Id.* The trial court impaneled a jury to make the factual determination of whether the captain's activities disrupted the department's operations. *Id.* The jury found no disruption, but the judge set aside the jury's findings as being contrary to the clear weight of the evidence. *Id.* On appeal, the Fourth Circuit affirmed, holding that "[t]he district court properly concluded that the question presented is one of constitutional law for the court. In the resolution of that question, the advisory jury had no role to play. Even if its verdict had not been against the clear weight of the evidence, the entire matter was one for determination by the court." *Id.* at 23.

II. The Court Should Grant a Writ of Certiorari to Prevent the Fourth Circuit's Rule from Depriving Government Employees of their Procedural Due Process and First Amendment Rights.

The rule in the Fourth Circuit violates the due process rights of government employees to confront and cross-examine adverse witnesses when facts are in

dispute. The significance of this violation is amplified in the context of First Amendment rights because depriving a government employee of the ability to challenge the government's version of events has the practical effect of unconstitutionally narrowing the scope of their First Amendment right to free speech.

A. The Rule in the Fourth Circuit Violates the Procedural Due Process Rights of Government Employees.

"A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). The Fifth Amendment guarantees litigants a right to a fair trial in federal civil proceedings. *See, e.g., Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 510 (1989) ("Civil litigants in federal court share equally the protections of the Fifth Amendment's Due Process Clause"); *Davidson v. Riley*, 44 F.3d 1118, 1122 (2d Cir. 1995); *Bailey v. Sys. Innovation, Inc.*, 852 F.2d 93, 98 (3d Cir. 1988); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 248 (7th Cir. 1975). Our legal system and this Court's Fifth Amendment due process jurisprudence presume the availability of a trial or evidentiary hearing because "in almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

The Federal Rules of Civil Procedure are designed to preserve litigants' procedural due process rights. *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 465 (2000); F. R. Civ. P. 1. Rule 56 protects the right to confront and cross-examine by allowing factual disputes to proceed to trial

for resolution. Summary judgment is appropriate only when there are no genuine disputes of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). To the extent there are factual disputes, they must be resolved in favor of the non-moving party. *Tolan v. Cotton*, 134 S. Ct. 1861, 1866 (2014); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Rule 56 is consistent with Fifth Amendment Due Process requirements because it preserves litigants' opportunity to confront and cross-examine adverse witnesses when facts are in dispute. The court's function at the summary judgment stage is not to weigh evidence or determine the truth of the matter, but to determine whether there is a genuine issue for trial. *See Anderson*, 477 U.S. at 249; *see also, e.g., Hunt v. Cromartie*, 526 U.S. 541, 553 (1999); *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 888 (1990); *First Nat'l Bank of Ariz. v. Cities Service Co.*, 391 U.S. 253 (1968).

To properly preserve litigants' due process rights, Rule 56 requires the proper characterization of issues. Characterizing an issue as a question of law, fact or both completely alters the summary judgment analysis. When an issue is couched as a pure question of law, the trial court is required to resolve it at the summary judgment stage without evaluating competing accounts of the state of the world. *See, e.g.*, *Joyner v. Lancaster*, 815 F.2d 20, 23 (4th Cir. 1987). If no factual disputes exist, a trial court can properly perform its task without running afoul of a litigant's procedural due process rights because a litigant had no right to confront or cross-examine in the first instance. When an issue is characterized as a question of

fact, Rule 56 recognizes that a trial court cannot resolve it at the summary judgment stage because doing so would deprive the litigant of the opportunity to confront and cross-examine adverse witnesses.

Factual disputes mischaracterized as questions of law upset the carefully crafted due process protections embedded in Rule 56. Treating a question of fact like a question of law forces a trial court to speculate as to whose—the movant or non-movant's—version of events it believes. *See, e.g.*, *Gustafson v. Jones,* 290 F.3d 895, 909-10 (7th Cir. 2002). Even the most diligent and well-intentioned court is not able to make a determination where the parties dispute the speech's effect on the workplace. *See Weaver v. Chavez*, 458 F.3d 1096, 1102 (10th Cir. 2006); *Gustafson,* 290 F.3d at 909-10; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Attempting to make this determination without the benefit of live testimony and cross-examination deprives government employees of a meaningful opportunity to challenge the deprivation of their First Amendment rights. The rule in the Fourth Circuit results in exactly this kind of due process violation.

B. Violating the Procedural Due Process Rights of Government Employees in this Context Results in a Substantive Violation of their First Amendment Rights.

The Fourth Circuit's denial of due process is particularly pernicious in the First Amendment context. The Fourth Circuit's rule allows the government's claims or predictions of disruption to avoid the glare of cross-examination or the contradiction of conflicting evidence. Such an approach gives the government a license to craft

a narrative disconnected from reality, particularly, when the government's allegation was based – as it was in the instant case – on the *potential* for workplace disruption. Potential disruption involves prediction, surmise and opinions about whether and how speech will impact the workplace. It is a difference of opinion about the future. Shielded from cross-examination and insulated from evaluation of credibility, government officials may predict disruption from any speech that they find disagreeable, uncomfortable or inconsistent with their own views. The Fourth Circuit's rule gives the government more than a thumb on the *Pickering* scale. It allows the government, as a practical matter, to define or eliminate its employees' First Amendment rights by crafting a story about its fears of disruption. No proof necessary; no questions asked.

The First Amendment does not exist to protect popular speech; it exists to protect speech that is unpopular, caustic, and embarrassing. *See, e.g.*, *Rankin v. McPherson*, 483 U.S. 378, 388 (1987); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988); *Snyder v. Phelps*, 562 U.S. 443, 448 (2011). It does not require government employees to check their right to free speech at the door of the government workplace. *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968) ("To the extent that the [lower court's] opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court."); *Connick v. Myers*, 461 U.S. 138, 144 (1983); *Keyishian v. Board of Regents*, 385 U.S. 589, 605-06

(1967). Just as fundamental rights cannot be bargained away by employment status; they should not be swept away by allegations of disruption that never need to be proven, by persons whose credibility and bias will never be challenged. *See Borough of Duryea v. Guarnieri*, 564 U.S. 379, 386 (2011) (emphasizing importance of free speech rights of government employees).

III. This Case is Ideally Suited for Resolving the Issues Presented.

Both the district court and Fourth Circuit found that Mr. Buker's posts addressed matters of public concern but no judge or jury ever had the opportunity to hear testimony or see the government's witnesses under cross-examination. Despite conflicting evidence, Mr. Buker lost his First Amendment claims on summary judgment. This would not have occurred had Mr. Buker worked in any other circuit in the country.

First Amendment rights should not be different depending on where you work. This case provides an opportunity to resolve the circuit split and reaffirm the free speech rights of government employees no matter where they are located.

CONCLUSION

For all the reasons stated above, this Court should grant Kevin Patrick Buker's request for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED MARCH 20, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-2066
(1:13-cv-03046-MJG)

MARK GRUTZMACHER,

Plaintiff,

and

KEVIN PATRICK BUKER,

Plaintiff-Appellant,

v.

HOWARD COUNTY; CHIEF WILLIAM F. GODDARD, III; JOHN JEROME; JOHN S. BUTLER,

Defendants-Appellees.

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED MARCH 20, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-2066

MARK GRUTZMACHER,

Plaintiff,

and

KEVIN PATRICK BUKER,

Plaintiff - Appellant,

v.

HOWARD COUNTY; CHIEF WILLIAM F. GODDARD, III; JOHN JEROME; JOHN S. BUTLER,

Defendants - Appellees.

December 7, 2016, Argued
March 20, 2017, Decided

Appeal from the United States District Court for the District of Maryland, at Baltimore. Marvin J. Garbis, District Judge. (1:13-cv-03046-MJG).

Before GREGORY, Chief Judge, and WYNN and THACKER, Circuit Judges. Judge Wynn wrote the opinion, in which Chief Judge Gregory and Judge Thacker joined.

WYNN, Circuit Judge:

Plaintiff Kevin Patrick Buker is a former Battalion Chief with the Howard County, Maryland Department of Fire and Rescue Services (the "Department"). Defendants are Howard County, Maryland; former Howard County Fire Chief William F. Goddard, III ("Chief Goddard"); former Howard County Deputy Chief John Butler ("Deputy Chief Butler");[1] and Howard County Assistant Chief John Jerome ("Assistant Chief Jerome," and collectively with Howard County, Chief Goddard, and Deputy Chief Butler, "Defendants").

Plaintiff brought this matter in the District Court for the District of Maryland, at Baltimore, alleging that Defendants retaliatorily fired him for exercising his First Amendment free-speech rights and, second, that the Department's social media policy, which played a role in Plaintiff's termination, was facially unconstitutional under the First Amendment. This appeal arises from the district court's orders granting summary judgment in favor of Defendants on Plaintiff's First Amendment retaliation claim and dismissing as moot Plaintiff's facial challenge to the social media policy. On review, we affirm the judgment of the district court.

1. Butler was appointed as Fire Chief in January 2015, following Fire Chief Goddard's retirement.

I.

A.

The Department employed Plaintiff as a paramedic for the Howard County Fire Department from 1997 through 2012. In 2012, Chief Goddard promoted Plaintiff to the rank of battalion chief and assigned Plaintiff to the second battalion as its commander. According to Chief Goddard, as a battalion chief, Plaintiff was responsible for "manag[ing] the day-to-day operations of the field," as well as "ensur[ing] . . . the policies and procedures as written in the department are complied with." J.A. 139.

As a paramilitary-type organization, the Department executes the enforcement of its orders in a hierarchical manner that requires employees to strictly follow a chain-of-command. At the top of the Department's chain-of-command is the fire chief, followed by deputy fire chiefs, assistant chiefs, battalion chiefs, and, lastly, first responders. Although positioned at the lower end of the chain-of-command, Chief Goddard described the rank of battalion chief as "the most critical leadership position in the organization," as battalion chiefs directly supervise first responders. J.A. 138.

In 2011, Chief Goddard, along with the Department's public information officer, began drafting a social media policy for the Department, partially in response to national debate about the use of social media within fire and emergency services departments. The Department's decision to develop a social media policy also stemmed

from an incident involving a Howard County volunteer firefighter posting to Facebook a photograph of a lynching, depicted by a noosed, brown beer bottle surrounded by white beer cans with paper cones for hoods. In a comment accompanying the photograph, the volunteer firefighter said that he "[w]ant[ed] to go fishing for mud sharks / there are way to many here in Maryland. They are not good to eat though, I hear they taste like decayed chicken." J.A. 835; Dist. Ct. Dkt. 40-4, at 5; Dist. Ct. Dkt. 40-7, at 3; Dist. Ct. Dkt. 40-24. Throughout the drafting process, the Department provided internal stakeholders—including Plaintiff, as well as all of the other battalion chiefs—opportunities to review and comment on the forthcoming policy.

On November 5, 2012, the Department issued General Order 100.21, entitled "Social Media Guidelines," which set forth the Department's policy regarding the use of social media by Department personnel. Under the Social Media Guidelines, the Department prohibited personnel "from posting or publishing any statements, endorsements, or other speech, information, images or personnel matters that could reasonably be interpreted to represent or undermine the views or positions of the Department, Howard County, or officials acting on behalf of the Department or County." J.A. 32. The Social Media Guidelines also barred Department employees "from posting or publishing statements, opinions or information that might reasonably be interpreted as discriminatory, harassing, defamatory, racially or ethnically derogatory, or sexually violent when such statements, opinions or information, may place the Department in disrepute

or negatively impact the ability of the Department in carrying out its mission." J.A. 32. Additionally, the Social Media Guidelines prohibited Department personnel from "post[ing] any information or images involving off-duty activities that may impugn the reputation of the Department or any member of the Department." J.A. 32.

Further, on December 6, 2012, the Department issued General Order 100.22, entitled "Code of Conduct," which was "aimed at ensuring members of the Department maintain the highest level of integrity and ethical conduct both on and off duty." J.A. 34. In relevant part, the Code of Conduct prohibited Department personnel from "intentionally engag[ing] in conduct, through actions or words, which are disrespectful to, or that otherwise undermines the authority of, a supervisor or the chain of command" and "publicly criticiz[ing] or ridicul[ing] the Department or Howard County government or their policies." J.A. 38-39. The Code of Conduct also required "[m]embers [to] conduct themselves at all times, both on and off duty, in such a manner as to reflect favorably on the Department." J.A. 38. The Code of Conduct further prohibited Department employees from engaging in "[c]onduct unbecoming" to the Department, which it defined as "any conduct that reflects poorly on an individual member, the Department, or County government, or that is detrimental to the public trust in the Department or that impairs the operation and efficiency of the Department." J.A. 38.

On January 20, 2013, Plaintiff was watching news coverage of a gun control debate in his office and posted

the following statement to his Facebook page while on-duty[2]:

> My aide had an outstanding idea . . lets all kill someone with a liberal . . . then maybe we can get them outlawed too! Think of the satisfaction of beating a liberal to death with another liberal . . . its almost poetic . . .

J.A. 82-83 (ellipses in original). Twenty minutes later, Mark Grutzmacher, a county volunteer paramedic, replied to Plaintiff's earlier post with the following comment:

> But . . . . was it an "assult liberal"? Gotta pick a fat one, those are the "high capacity" ones. Oh . . . pick a black one, those are more "scary". Sorry had to perfect on a cool idea!

J.A. 84 (ellipses in original). Six minutes later, Plaintiff "liked" Grutzmacher's comment and replied, "Lmfao! Too cool Mark Grutzmacher!" J.A. 85.

Two Department employees subsequently forwarded Plaintiff's and Grutzmacher's Facebook posts to another battalion chief within the Department. On January 22, 2013, that battalion chief sent a screenshot of Plaintiff's initial Facebook post to Assistant Chief Jerome with a text message stating, "Chief, not sure this is something that should be displayed from one of our battalion chiefs."

2. We reproduce the Facebook posts and comments as they appear in the record and without the benefit of editing.

J.A. 82. Assistant Chief Jerome then contacted his direct supervisor, Deputy Chief Butler, along with another assistant chief, regarding Plaintiff's Facebook posts. Later that day, the three chiefs met to discuss whether Plaintiff's posts violated the Social Media Guidelines or Code of Conduct and, if so, what corrective measures the Department would take. Following their meeting, Assistant Chief Jerome emailed Plaintiff, directing him to review his recent Facebook posts and to remove anything inconsistent with the Department's social media policy. Though Plaintiff maintained that he was in compliance with the social media policy, Plaintiff removed the January 20 posts.

On January 23—a few hours after Plaintiff informed Assistant Chief Jerome that he had removed the posts—Plaintiff posted the following to his Facebook "wall":

> To prevent future butthurt and comply with a directive from my supervisor, a recent post (meant entirley in jest) has been deleted. So has the complaining party. If I offend you, feel free to delete me. Or converse with me. I'm not scared or ashamed of my opinions or political leaning, or religion. I'm happy to discuss any of them with you. If you're not man enough to do so, let me know, so I can delete you. That is all. Semper Fi! Carry On.

J.A. 96. One of Plaintiff's Facebook friends then replied, "As long as it isn't about the [Department], shouldn't you be able to express your opinions?" J.A. 96. Plaintiff responded:

> Unfortunately, not in the current political climate. Howard County, Maryland, and the Federal Government are all Liberal Democrat held at this point in time. Free speech only applies to the liberals, and then only if it is in line with the liberal socialist agenda. County Governement recently published a Social media policy, which the Department then published it's own. It is suitably vague enough that any post is likely to result in disciplinary action, up to and including termination of employment, to include this one. All it took was one liberal to complain . . . sad day. To lose the First Ammendment rights I fought to ensure, unlike the WIDE majority of the Government I serve.

J.A. 96 (ellipses in original). Another of Plaintiff's Facebook friends then commented, "Oh, your gonna get in trouble for saying that too." J.A. 96. "Probably . . .," Plaintiff replied. J.A. 96.

The following day, January 24, a captain in the Department emailed Chief Goddard a screenshot of Plaintiff's January 23 Facebook posts. The captain also emailed Deputy Chief Butler and an assistant chief a "summary of the Buker issue," in which he noted the "racial overtones" of Grutzmacher's comment on Plaintiff's January 20 Facebook post. J.A. 101. The captain stated that by replying to the comment, Plaintiff "endorsed" Grutzmacher's racially charged statement. J.A. 101. The captain also characterized Plaintiff's January 23 posts as "insubordinate toward [management]." J.A. 101. The

captain suggested treating the incidents "like any other investigation" and determining any disciplinary action "after the conclusion of the investigation." J.A. 101. The next day, the Department moved Plaintiff out of field operations to an administrative assignment pending the results of an internal investigation.

Approximately three weeks later, on February 17, 2013, Mike Donnelly, a member of a Department-affiliated volunteer company, posted to his own Facebook page a picture of an elderly woman with her middle finger raised. Overlaid across the picture was the following caption: "THIS PAGE, YEAH THE ONE YOU'RE LOOKING AT IT'S MINE[.] I'LL POST WHATEVER THE FUCK I WANT[.]" J.A. 100. Above the picture, Donnelly wrote, "for you Chief." J.A. 100. Plaintiff, who was one of Donnelly's Facebook friends, "liked" the photograph.

Chief Goddard served Plaintiff with charges of dismissal on February 25. The charges referenced Plaintiff's: (1) January 20 and January 23 Facebook posts; (2) "like" of and reply to Grutzmacher's January 20 comment; (3) replies to comments on Plaintiff's January 23 post; and (4) "like" of Donnelly's February 17 post.[3]

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3. We observe that the act of "liking" a Facebook post makes the post attributable to the "liker," even if he or she did not author the original post. *See Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013), *as amended* (Sept. 23, 2013) ("[C]licking on the 'like' button literally causes to be published the statement that the User 'likes' something, which is itself a substantive statement. . . . That a user may use a single mouse click to produce that message . . . instead of typing the same message with several individual key strokes is of no constitutional significance.").

The charges asserted that these posts violated the Department's Code of Conduct and Social Media Guidelines. In particular, the charging document asserted, among other things, that Plaintiff's Facebook activity improperly:

- "[A]dopted" and "approv[ed]" Grutzmacher's comment, which "had racial overtones and was insensitive and derogatory in nature";

- Reflected a "[f]ailure to grasp the impact and implications of [the] comments" on Plaintiff's "leadership position within the Department as a Battalion Chief," in which Plaintiff was "responsible for enforcing Department policies and taking appropriate action for violations of those policies by the people [he] supervise[d]";

- Demonstrated "repeated insolence and insubordination" by replacing the January 20 post "with another posting tirade mocking the Chain-of-Command, the Department, and the County"; and

- "[I]nterfered with Department operations" and caused "disruption [in] the Department's Chain-of-Command and authority."

J.A. 105.

Accordingly, for ease of reference, we refer to Plaintiff's various Facebook posts, comment replies, and "likes," collectively, as Plaintiff's "Facebook activity" or "speech."

Chief Goddard provided Plaintiff with an opportunity to rebut the specific charges at a pre-termination meeting held on March 8. Following that meeting, on March 14, 2013, Chief Goddard terminated Plaintiff's employment with the Department.

B.

On October 12, 2013, Plaintiff brought an action under 42 U.S.C. § 1983 in federal district court seeking reinstatement and damages. Plaintiff alleged that his Facebook posts were a substantial motivation for his termination and that, by terminating him, the Department impermissibly retaliated against Plaintiff for exercising his First Amendment rights. Plaintiff also alleged that the Department's Social Media Guidelines and Code of Conduct, as drafted and applied to Plaintiff, violated the First Amendment by impermissibly restricting Department employees' ability to speak on matters of public concern. The district court later construed the second of Plaintiff's claims as a facial challenge to the Department's Social Media Guidelines and Code of Conduct.

Following discovery, Defendants moved for summary judgment, arguing that Plaintiff's Facebook activity did not involve matters of public concern and that Plaintiff's interest in speaking did not outweigh the Department's interest in minimizing disruption. Defendants later filed a second motion for summary judgment as to Plaintiff's facial-challenge claims, arguing that the Department's policies were not unconstitutionally overbroad or vague and did not constitute prior restraints.

The district court granted Defendants' first summary judgment motion on March 30, 2015. *Buker v. Howard County.*, Nos. MJG-13-3046, MJG-13-3747, 2015 U.S. Dist. LEXIS 68764, 2015 WL 3456750 (D. Md. May 27, 2015). In doing so, the district court concluded that Plaintiff's January 20 Facebook posts and "like" were unprotected speech because they were "capable of impeding the [Fire Department]'s ability to perform its duties efficiently." 2015 U.S. Dist. LEXIS 68764, [WL] at *13 (alteration in original) (internal quotation marks omitted) (quoting *Duke v. Hamil*, 997 F. Supp. 2d 1291, 1302 (N.D. Ga. 2014)). The district court further concluded that Plaintiff's January 23 posts and February 17 "like" similarly did not amount to protected speech because Plaintiff failed to show that he was speaking as a citizen on a matter of public concern. 2015 U.S. Dist. LEXIS 68764, [WL] at *13-14. The district court's memorandum decision and order did not, however, address Defendants' second motion for summary judgment, leaving unresolved Plaintiff's facial challenge.

On June 22, 2015, the Department replaced its Social Media Guidelines and Code of Conduct policies with revised versions. The revised version of the Social Media Guidelines eliminated many of the earlier version's prohibitions on Department personnel's private use of social media. And the revised Code of Conduct did not include any of the provisions in the previous version that Plaintiff had challenged. Highlighting these changes, Defendants moved to dismiss Plaintiff's facial challenge as moot, arguing that the Department's revised policies did not contain the provisions Plaintiff challenged as

overbroad, void for vagueness, or prior restraints. The district court thus denied Defendants' earlier motion for summary judgment as moot and granted Defendants' motion to dismiss on August 12, 2015.

Plaintiff timely appealed the district court's (1) award of summary judgment in favor of Defendants on Plaintiff's First Amendment retaliation claim and (2) dismissal on mootness grounds of Plaintiff's facial challenge to the Social Media Guidelines and Code of Conduct.

II.

A.

On appeal, Plaintiff first argues that the district court erred in granting summary judgment in favor of Defendants on his First Amendment retaliation claim. Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "We review a district court's decision to grant summary judgment de novo, applying the same legal standards as the district court and viewing all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party." *Smith v. Gilchrist*, 749 F.3d 302, 307 (4th Cir. 2014) (quoting *T-Mobile Ne. LLC v. City Council of Newport News*, 674 F.3d 380, 384-85 (4th Cir. 2012)).

From the outset, we point out that "[t]he First Amendment 'was fashioned to assure unfettered

interchange of ideas for the bringing about of political and social changes desired by the people.'" *Connick v. Myers*, 461 U.S. 138, 145, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983) (quoting *Roth v. United States*, 354 U.S. 476, 484, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957)). "Protection of the public interest in having debate on matters of public importance is at the heart of the First Amendment." *McVey v. Stacy*, 157 F.3d 271, 277 (4th Cir. 1998) (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968)).

To resolve Plaintiff's appeal, we start by considering the First Amendment rights of public employees. Public employees do not "relinquish First Amendment rights to comment on matters of public interest by virtue of government employment." *Connick*, 461 U.S. at 140. To the contrary, the Supreme Court has long recognized

> that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public. Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues.

City of San Diego v. Roe, 543 U.S. 77, 82, 125 S. Ct. 521, 160 L. Ed. 2d 410 (2004) (per curiam) (citing *Pickering*, 391 U.S. at 572). To that end, the Supreme Court has repeatedly "underscored the 'considerable value' of 'encouraging, rather than inhibiting, speech by public

employees. For government employees are often in the best position to know what ails the agencies for which they work.'" *Hunter v. Town of Mocksville*, 789 F.3d 389, 396 (4th Cir. 2015) (quoting *Lane v. Franks*, 134 S. Ct. 2369, 2377, 189 L. Ed. 2d 312 (2014)). As such, we do not take lightly "[o]ur responsibility . . . to ensure that citizens are not deprived of fundamental rights by virtue of working for the government." *Connick*, 461 U.S. at 147.

"That being said, precedent makes clear that courts must also consider 'the government's countervailing interest in controlling the operation of its workplaces.'" *Hunter*, 789 F.3d at 397 (quoting *Lane*, 134 S. Ct. at 2377). Just as there is a "public interest in having free and unhindered debate on matters of public importance," *Pickering*, 391 U.S. at 573, "[t]he efficient functioning of government offices is a paramount public interest," *Robinson v. Balog*, 160 F.3d 183, 189 (4th Cir. 1998). Therefore, a public employee "by necessity must accept certain limitations on his or her freedom." *Garcetti v. Ceballos*, 547 U.S. 410, 418, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006). In particular, under the balancing test developed by the Supreme Court in *Pickering* and *Connick*, "the First Amendment does not protect public employees when their speech interests are outweighed by the government's interest in providing efficient and effective services to the public." *Lawson v. Union Cty. Clerk of Court*, 828 F.3d 239, 247 (4th Cir. 2016).

Regarding Plaintiff's retaliation claim, "a public employer contravenes a public employee's First Amendment rights when it discharges . . . '[the] employee . . . based

on the exercise of' that employee's free speech rights." *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 316 (4th Cir. 2006) (alteration in original) (quoting *Suarez Corp. Indus. v. McGraw*, 202 F.3d 676, 686 (4th Cir. 2000)). To state a claim under the First Amendment for retaliatory discharge, a plaintiff must satisfy the three-prong test set forth in *McVey v. Stacy*, 157 F.3d 271 (4th Cir. 1998). In particular, the plaintiff must show: (1) that he was a "public employee . . . speaking as a citizen upon a matter of public concern [rather than] as an employee about a matter of personal interest;" (2) that his "interest in speaking upon the matter of public concern outweighed the government's interest in providing effective and efficient services to the public;" and (3) that his "speech was a substantial factor in the employer's termination decision." 157 F.3d at 277-78.

The district court found that Plaintiff's January 20 speech failed on the second prong of the *McVey* test, and that Plaintiff's January 23 and February 17 speech failed on the first *McVey* prong. *Buker*, 2015 U.S. Dist. LEXIS 68764, 2015 WL 3456750, at *9-14. Plaintiff urges us to reverse the district court's grant of summary judgment to Defendants and, in doing so, makes two arguments. First, Plaintiff argues that the district court erred in granting summary judgment when there remained a factual dispute regarding whether Plaintiff could meet his burden under the *McVey* test's second prong. Specifically, Plaintiff maintains that his January 20 speech did not disrupt the Department or cause a reasonable apprehension of disruption, such that the Department's interest in maintaining an efficient workplace outweighed Plaintiff's

interest in speaking. Second, Plaintiff argues that the district court erred in finding that his January 23 and February 17 posts and "like" were not on a matter of public concern and, therefore, failed *McVey*'s first prong. For the reasons below, we hold that the district court properly granted summary judgment to Defendants.

1.

We first address whether Plaintiff's Facebook posts and "likes" addressed matters of public concern. In determining whether speech addresses matters of public concern, "we examine the content, context, and form of the speech at issue in light of the entire record." *Urofsky v. Gilmore*, 216 F.3d 401, 406 (4th Cir. 2000) (en banc). "Speech involves a matter of public concern when it involves an issue of social, political, or other interest to a community." *Id.* This "public-concern inquiry centers on whether 'the public or the community is likely to be truly concerned with or interested in the particular expression.'" *Kirby v. City of Elizabeth City*, 388 F.3d 440, 446 (4th Cir. 2004) (quoting *Arvinger v. Mayor of Baltimore*, 862 F.2d 75, 79 (4th Cir. 1988)); *see also Goldstein v. Chestnut Ridge Volunteer Fire Co.*, 218 F.3d 337, 352-53 (4th Cir. 2000) ("This is a subtle, qualitative inquiry; we use the content, form, and context as guideposts in the exercise of common sense, asking throughout: would a member of the community be truly concerned with the employee's speech?").

Conversely, "[i]n the absence of unusual circumstances, a public employee's speech 'upon matters only of personal

interest' is not afforded constitutional protection." *Seemuller v. Fairfax Cty. Sch. Bd.*, 878 F.2d 1578, 1581 (4th Cir. 1989) (quoting *Connick*, 461 U.S. at 147); *see also Jurgensen v. Fairfax County*, 745 F.2d 868, 879 (4th Cir. 1984) ("If the speech relates primarily to a matter of 'limited public interest' and . . . center[s] instead on matters primarily, if not exclusively 'of personal interest' to the employee . . . that fact must be weighed in determining whether a matter of true public concern is involved . . . ."). To that end, "[t]he Supreme Court has warned us to guard against 'attempt[s] to constitutionalize the employee grievance.'" *Brooks v. Arthur*, 685 F.3d 367, 373 (4th Cir. 2012) (second alteration in original) (quoting *Connick*, 461 U.S. at 154). Accordingly, "[p]ersonal grievances[and] complaints about conditions of employment . . . do not constitute speech about matters of public concern." *Campbell v. Galloway*, 483 F.3d 258, 267 (4th Cir. 2007) (internal quotation marks omitted) (quoting *Stroman v. Colleton Cty. Sch. Dist.*, 981 F.2d 152, 156 (4th Cir. 1992)). Likewise, we must also "ensure that matters of internal policy, including mere allegations of favoritism, employment rumors, and other complaints of interpersonal discord, are not treated as matters of public policy." *Goldstein*, 218 F.3d at 352.

Set against this backdrop, at least some of Plaintiff's Facebook activity referenced in the Department's charging document touched on issues of public concern. In particular, Plaintiff's and Grutzmacher's January 20, 2013, discussion about "liberal[s]" and "assault liberal[s]" was, according to an expert report submitted by Plaintiff, a commentary on gun control legislation using "a lexicon

that is extremely common in contemporary American gun culture." J.A. 566-71. The report maintains that Plaintiff's and Grutzmacher's exchange reflects a "well-known meta-narrative" under which "'liberal' . . . is a collectivist ideologue, a statist, who believes in the absolute power of government even at the expense of individual autonomy and rights, including an individual's right to own, carry and use firearms." J.A. 567-68. Courts have long recognized that "[t]he debate over the propriety of gun control legislation is . . . a matter of public concern." *Thomas v. Whalen*, 51 F.3d 1285, 1290 (6th Cir. 1995). Consequently, the "liberal" and "assault liberal" post and comment implicated a matter of public concern.

Likewise, Plaintiff's January 23, 2013, post describing the Department's Social Media Guidelines and expressing concern that those guidelines infringed on Plaintiff's First Amendment rights also addressed a matter of public concern. As explained above, the public employee speech doctrine recognizes the unique role government employees—individuals who "are often in the best position to know what ails the agencies for which they work"—play in keeping the electorate informed about the operations of public employers. *See Liverman v. City of Petersburg*, 844 F.3d 400, 408 (4th Cir. 2016) (internal quotation marks omitted) (quoting *Waters v. Churchill*, 511 U.S. 661, 674, 114 S. Ct. 1878, 128 L. Ed. 2d 686 (1994) (plurality opinion)). To that end, the interest advanced by the public employee speech doctrine "is as much *the public's interest in receiving informed opinion* as it is the employee's own right to disseminate it." *Roe*, 543 U.S. at 82 (emphasis added); *see also Garcetti*, 547 U.S.

at 419 ("The Court has acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion."); *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 470, 115 S. Ct. 1003, 130 L. Ed. 2d 964 (1995) ("The large-scale disincentive to Government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said."). Because the public has an interest in receiving the "informed" opinions of public employees, it necessarily also has an interest in information about policies that circumscribe public employees' speech and public employees' opinions of such policies.

However, we also acknowledge that some of the Facebook activity prompting Plaintiff's termination did not implicate matters of public concern. For instance, Plaintiff's "like" of the image depicting an elderly woman raising her middle finger and entitled "for you Chief"—on the heels of the Department's investigation into Plaintiff's January 20 and 23 Facebook activity—"amounted to no more than an employee grievance not protected by the First Amendment." *Stroman*, 981 F.2d at 157.

When "a single expression of speech" encompasses both matters of public concern and matters of purely personal interest, "the proper approach is to consider [the speech] . . . in its entirety." *Id.* Whether a series of related posts and "likes" over a several-week period to a dynamic social networking platform—like the posts and "likes" that prompted Plaintiff's termination—constitute

"a single expression of speech" is an open question. Rather than resolve that unsettled question—and because at least some of Plaintiff's speech addressed matters of public concern—we will "weigh whatever public interest commentary may be contained in [Plaintiff's Facebook activity] against the [Department's] dual interest as a provider of public service and employer of persons hired to provide that service." *Id.* at 158 (citing *Pickering*, 391 U.S. at 568). We note that this approach accords with the Department's decision to terminate Plaintiff, which was based on the "public statements [Plaintiff] made over a number of days (not simply one incident—one day)" and "the totality of the circumstances [of] his violations." J.A. 119, 242.

2.

Having concluded that at least some of the Facebook activity prompting Plaintiff's termination implicated matters of public concern, we now must determine "whether [Plaintiff's] interest in speaking upon the matter[s] of public concern outweighed the [Department's] interest in providing effective and efficient services to the public." *McVey*, 157 F.3d at 277.[4]

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4. Although the district court concluded that Plaintiff's January 23 and February 17 Facebook activity did not address matters of public concern, *Buker*, 2015 U.S. Dist. LEXIS 68764, 2015 WL 3456750, at *13-14, "[o]ur review is not limited to the grounds the district court relied upon, and we may affirm 'on any basis fairly supported by the record,'" *Lawson*, 828 F.3d at 247 (quoting *Eisenberg v. Wachovia Bank, N.A.*, 301 F.3d 220, 222 (4th Cir. 2002)).

"Whether [an] employee's interest in speaking outweighs the government's interest is a question of law for the court." *Smith*, 749 F.3d at 309. In balancing these interests, we must "consider the context in which the speech was made, including the employee's role and the extent to which the speech impairs the efficiency of the workplace." *Id.* (citing *Rankin v. McPherson*, 483 U.S. 378, 388, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987)).

> Factors relevant to this inquiry include whether a public employee's speech (1) impaired the maintenance of discipline by supervisors; (2) impaired harmony among coworkers; (3) damaged close personal relationships; (4) impeded the performance of the public employee's duties; (5) interfered with the operation of the institution; (6) undermined the mission of the institution; (7) was communicated to the public or to coworkers in private; (8) conflicted with the responsibilities of the employee within the institution; and (9) abused the authority and public accountability that the employee's role entailed.

Ridpath, 447 F.3d at 317 (citing *McVey*, 157 F.3d at 278).

To demonstrate that an employee's speech impaired efficiency, a government employer need not "prove that the employee's speech actually disrupted efficiency, but only that an adverse effect was 'reasonably to be apprehended.'" *Maciariello v. Sumner*, 973 F.2d 295, 300 (4th Cir. 1992) (quoting *Jurgensen*, 745 F.2d at 879);

see also Durham v. Jones, 737 F.3d 291, 302 (4th Cir. 2013) ("While [it] is correct that 'concrete evidence' of an actual disruption is not required, there must still be a reasonable apprehension of such a disruption."). Additionally, this Court has previously recognized that "[a] social media platform amplifies the distribution of the speaker's message—which favors the employee's free speech interests—but also increases the potential, in some cases exponentially, for departmental disruption, thereby favoring the employer's interest in efficiency." *Liverman*, 844 F.3d at 407.

For several reasons, we conclude that the Department's interest in efficiency and preventing disruption outweighed Plaintiff's interest in speaking in the manner he did regarding gun control and the Department's social media policy. First, Plaintiff's Facebook activity interfered with and impaired Department operations and discipline as well as working relationships within the Department. "[F]ire companies have a strong interest in the promotion of camaraderie and efficiency" as well as "internal harmony [and] trust," and therefore we accord "substantial weight" to a fire department's interest in limiting dissension and discord. *Goldstein*, 218 F.3d at 355; *see also Janusaitis v. Middlebury Volunteer Fire Dep't*, 607 F.2d 17, 26 (2d Cir. 1979) ("When lives may be at stake in a fire, an *esprit de corps* is essential to the success of the joint endeavor. Carping criticism and abrasive conduct have no place in a small organization that depends upon common loyalty—'harmony among coworkers.'" (quoting *Pickering*, 391 U.S. at 570)).

Here, Plaintiff's Facebook activity led to "dissension in the [D]epartment" and resulted in "[n]umerous" conversations between at least one battalion chief and lower-level employees in which the battalion chief "had to[,] . . . as a supervisor[,] justify[] that it's okay for anybody to say or do anything against the policy." J.A. 550. Additionally, at least one lieutenant perceived Grutzmacher's comment regarding "picking a black one," which Plaintiff "liked," as "referr[ing] to a black person." J.A. 337. Three African-American employees within the Department approached the president of the Phoenix Sentinels—the Howard County affiliate of the International Association of Black Professional Firefighters, a constituent group representing African-American and other minority firefighters—about the posts, with one member stating, "I don't want to work for [Plaintiff] anymore. I don't trust him."[5] J.A. 240. Accordingly, we accord "substantial weight" to Defendants' interest in preventing Plaintiff from causing further dissension and disharmony.

Second, Plaintiff's Facebook activity significantly conflicted with Plaintiff's responsibilities as a battalion

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5. Although Plaintiff maintains that this testimony is inadmissible hearsay and that the district court should not have considered it, the district court did not rely on the statement for the truth of the matter asserted, but relied on it to illustrate the disruptive effect of Plaintiff's speech. *See United States v. Pratt*, 239 F.3d 640, 644 (4th Cir. 2001) (finding that an out-of-court statement not intended to prove the truth of the matter asserted is not hearsay and, thus, is not excluded by the hearsay rule). Thus, the district court did not err in considering this testimony.

chief. Courts have long recognized that "[t]he expressive activities of a highly placed supervisory . . . employee will be more disruptive to the operation of the workplace than similar activity by a low level employee with little authority or discretion." *McEvoy v. Spencer*, 124 F.3d 92, 103 (2d Cir. 1997) (citing authorities); *see also Brown v. Dep't of Transp.*, 735 F.2d 543, 547 (Fed. Cir. 1984) ("[Plaintiff's] position as a supervisor . . . weighs heavily on the agency's side."). As a leader within the Department, Plaintiff was responsible for acting as an impartial decisionmaker and "enforcing Departmental policies and taking appropriate action for violations of those policies." J.A. 105. The record demonstrates that Plaintiff's actions led to concerns regarding Plaintiff's fitness as a supervisor and role model, and concerns that Plaintiff's subordinates would not take him seriously if Plaintiff tried to discipline them in the future. By flouting Department policies he was expected to enforce, Plaintiff "violated the trust [his inferiors] have in him to be in his administrative role as a battalion chief, because people count on him to be fair." J.A. 226-27. Accordingly, Plaintiff's managerial position also weighs in the Department's favor.

Third, Plaintiff's speech frustrated the Department's public safety mission and threatened "community trust" in the Department, which is "vitally important" to its function. J.A. 284-85. "[T]he more the employee's job requires . . . public contact, the greater the state's interest in firing her for expression that offends her employer." *McEvoy*, 124 F.3d at 103 (alteration in original) (internal quotation marks omitted) (quoting Craig D. Singer, Comment, *Conduct and Belief: Public Employees' First*

Amendment Rights to Free Expression and Political Affiliation, 59 U. Chi. L. Rev. 897, 901 (1992)). "[F] irefighters . . . are quintessentially public servants. As such, part of their job is to safeguard the public's opinion of them, particularly with regard to a community's view of the respect that . . . firefighters accord the members of that community." *Locurto v. Giuliani*, 447 F.3d 159, 178-79 (2d Cir. 2006).

Here, Plaintiff's January 20 post, made while he was on-duty and in his office, "advocat[ed] violence to certain classes of people" and "advocated using violence to [e]ffect a political agenda." J.A. 183, 646. Additionally, the Department reasonably was concerned that Plaintiff's Facebook activity—particularly his "like" of Grutzmacher's comment regarding "black one[s]"—could be interpreted as supporting "racism" or "bias," J.A. 283, and thereby "interfere with the public trust of [Plaintiff] being able to make fair decisions for everybody," J.A. 231; *see also Locurto*, 447 F.3d at 182-83 ("[E]ffective police and fire service presupposes respect for the members of [African-American and other minority] communities, and the defendants were permitted to account for this fact in disciplining the plaintiffs."). The potential for Plaintiff's statements to diminish the Department's standing with the public further weighs in favor of the Department.

Fourth, Plaintiff's speech—particularly his "like" of the image depicting a woman raising her middle finger—"expressly disrespect[ed] [his] superiors." *LeFande v. District of Columbia*, 841 F.3d 485, 495 (D.C. Cir. 2016). A public employee's interest in speaking on matters of

public concern "does not require that [a public] employer[] tolerate associated behavior that [it] reasonably believed was disruptive and insubordinate." *Dwyer v. Smith*, 867 F.2d 184, 194 (4th Cir. 1989); *see also Connick*, 461 U.S. at 154 ("The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships."). Here, Plaintiff's "continued unrestrained conduct" after already being reprimanded "'smack[ed] of insubordination.'" *See Graziosi v. City of Greenville*, 775 F.3d 731, 740 (5th Cir. 2015) (quoting *Nixon v. City of Houston*, 511 F.3d 494, 499 (5th Cir. 2007)). Employees within the Department viewed Plaintiff's "like" of Donnelly's Facebook picture of an older woman with her middle finger raised as a "sparring match between the battalion chief and an assistant chief [that publicly] escalated to the level of telling the fire chief to fuck off." J.A. 297-98. Therefore, the disrespectful and insubordinate tone of Plaintiff's relevant Facebook activity also weighs in the Department's favor.

Lastly, we observe that the record is rife with observations of how Plaintiff's Facebook activity, subsequent to Assistant Chief Jerome's request that Plaintiff remove any offending posts, disregarded and upset the chain of command upon which the Department relies. Fire departments operate as "paramilitary" organizations in which "discipline is demanded, and freedom must be correspondingly denied." *Maciariello*, 973 F.2d at 300. Accordingly, we afford fire departments "greater latitude . . . in dealing with dissension in their ranks." *Id.* Although the Department's status as

a paramilitary organization is not dispositive of the *Pickering* analysis, *see Liverman*, 844 F.3d at 408, it does further tip the scale in the Department's favor.

By contrast, though we recognize that at least some of Plaintiff's speech addressed matters of public concern—gun control and the Department's Social Media Guidelines—the public's interest in Plaintiff speaking on those matters of public concern does not outweigh the significant governmental interests set forth above. In particular, we have recognized that a public safety official's interest in speaking on matters of public concern is sufficient to outweigh the compelling government interests set forth above when, for example, the official's speech is "grounded . . . in specialized knowledge [or] expresse[s] a general 'concern about the inability of the [Department] to carry out its vital public mission effectively.'"[6] *Liverman*, 844 F.3d at 410 (third alteration in original) (quoting *Cromer v. Brown*, 88 F.3d 1315, 1325-26 (4th Cir. 1996)). For instance, in *Liverman*, we found statements by veteran police officers raising "[s]erious concerns regarding officer training and supervision" were sufficient to overcome the government's interest in preventing workplace disruption. *Id.* at 411; *see also Durham*, 737 F.3d at 302 ("Serious, to say nothing of corrupt, law enforcement misconduct is a substantial

6. By identifying speech grounded in a public employee's specialized knowledge or raising questions about public safety as *examples* of public employee speech warranting the highest level of First Amendment protection, we do not suggest that those are the *only* two categories of public employee speech warranting such protection.

concern that must be met with a similarly substantial disruption in the calibration of the controlling balancing test."); *Goldstein*, 218 F.3d at 355 ("[T]he substance of the public concern included allegations that some emergency personnel lacked required training and certifications; that the leadership of the company was overlooking violations of safety regulations; and that the conduct of crewmembers was jeopardizing the safety of the crew and of the public. These allegations were a matter of the highest public concern, and as such, they were entitled to the highest level of First Amendment protection." (footnote omitted)). Plaintiff's Facebook activity is not of the same ilk as the speech at issue in *Liverman, Durham*, and *Goldstein*, which this Court found sufficient to outweigh the types of significant governmental interests at issue here.

In sum, we conclude the Department's interest in workplace efficiency and preventing disruption outweighed the public interest commentary contained in Plaintiff's Facebook activity. In reaching this conclusion, we emphasize that this balancing test is a "particularized" inquiry. *Goldstein*, 218 F.3d at 356. Therefore, although we resolve the balancing test in favor of the Department, we expressly caution that a fire department's interest in maintaining efficiency will not always outweigh the interests of an employee in speaking on matters of public concern. *See id.*

Because the Department's interest in managing its internal affairs outweighs the public interest in Plaintiff's speech, we need not reach the third prong of the *McVey* test. As such, we conclude that the district court properly

granted summary judgment in favor of Defendants on Plaintiff's First Amendment retaliation claim.

B.

Plaintiff also contends that the district court improperly dismissed his facial challenge to the Department's Social Media Guidelines and Code of Conduct as moot. When a plaintiff challenges a government policy "for vagueness or overbreadth, the Supreme Court has concluded that [he] ha[s] standing to assert the rights of third parties whose protected speech may have been impermissibly curtailed by the challenged prohibition, even though as applied to the plaintiff[], the [policy] only curtailed unprotected expression." *Brandywine, Inc. v. City of Richmond*, 359 F.3d 830, 835 (6th Cir. 2004) (citing *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 59 n.17, 96 S. Ct. 2440, 49 L. Ed. 2d 310 (1976)). Because we find the district court properly granted Defendants' motion for summary judgment against Plaintiff, we decline to review Plaintiff's as-applied facial challenge and review only the district court's determination regarding Plaintiff's third-party facial challenge.

"We review the district court's mootness determination de novo." *S.C. Coastal Conservation League v. U.S. Army Corps of Eng'rs*, 789 F.3d 475, 482 (4th Cir. 2015). A claim becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *County of Los Angeles v. Davis*, 440 U.S. 625, 631, 99 S. Ct. 1379, 59 L. Ed. 2d 642 (1979) (internal quotation marks omitted) (quoting *Powell v. McCormack*, 395 U.S. 486, 496, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969)).

On appeal, Defendants contend that the district court's mootness finding was proper because the Department has repealed the previous Social Media Guidelines and Code of Conduct in operation at the time of Plaintiff's termination; the revised policies did not include any of the provisions Plaintiff challenged in the prior iterations of the policies; and the Department "did not intend to readopt or enforce the challenged prior versions of either policy." Appellees' Br. at 17. Conversely, Plaintiff argues that the Department's subsequent actions have not mooted his facial challenge, as the Department is free to "re-enact the unconstitutional provisions of the old policies." Appellant's Br. at 36. We reject Plaintiff's contention.

"It is well established that a defendant's "voluntary cessation of a challenged practice' moots an action only if "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Wall v. Wade*, 741 F.3d 492, 497 (4th Cir. 2014) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000)). Here, in addition to adopting a new Social Media Policy and revised Code of Conduct, current Fire Chief Butler submitted a sworn affidavit that, "[a]s head of the Fire Department, [he] fully intend[s] to operate under the newly issued [policies] and do[es] not intend to re-issue the original versions." J.A. 924. Additionally, Defendants' counsel declared at oral argument that the Department has no intent to reenact the offending policies. And from the record, we discern "no hint" that the Department has any intention of reinstituting the prior policies. *See Troiano v. Supervisor of Elections*,

382 F.3d 1276, 1284-85 (11th Cir. 2004). Based on these formal assurances and the absence of any evidence to the contrary, Defendants have met their "heavy burden of persuad[ing]" this Court that they will not revert to the challenged policies. *Wall*, 741 F.3d at 497 (alteration in original) (internal quotation marks omitted) (quoting *Laidlaw*, 528 U.S. at 189); *see Winsness v. Yocom*, 433 F.3d 727, 736 (10th Cir. 2006) (finding that public officials' alteration of challenged policy, coupled with sworn affirmation that they would not revert to policy previously in effect, rendered plaintiff's challenge moot). Thus, the district court properly dismissed Plaintiff's third-party facial challenge as moot.

III.

For these reasons, the judgment of the district court is

AFFIRMED.

APPENDIX C — EXCERPTS FROM BRIEF FOR PLAINTIFF-APPELLANT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED FEBRUARY 2, 2016

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Case No. 15-2066

MARK GRUTZMACHER,

Plaintiff,

and

KEVIN PATRICK BUKER,

Plaintiff-Appellant,

v.

HOWARD COUNTY; CHIEF WILLIAM F. GODDARD, III; JOHN JEROME; JOHN S. BUTLER,

Defendants-Appellees.

Appeal from an Order entered from the United States District Court for the District of Maryland at Baltimore

BRIEF FOR PLAINTIFF-APPELLANT

Appendix C

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***

I. JURISDICTIONAL STATEMENT

On October 12, 2013, Appellant Kevin Buker filed a two-count complaint in the United States District Court for the District of Maryland seeking relief under the First Amendment of the United States Constitution and 42 U.S.C. § 1983. The District Court had jurisdiction pursuant to 28 U.S.C. § 1331. On August 12, 2015, it entered an order denying Mr. Buker's only remaining claims as moot and entered judgment in favor of all Appellees. That order was a final order. On September 9, 2015, Mr. Buker timely filed his notice of appeal with the District Court. This Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.

II. STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in granting Appellees' motion for summary judgment when Appellees' social media guidelines and code of conduct were facially unconstitutional.

Suggested Response: Yes.

2. Whether the District Court erred in ruling that Appellant did not have standing to assert a facial challenge to Appellees' social media guidelines and code of conduct and that Appellant's challenge was moot after Appellees amended the policies in response to this litigation.

Suggested Response: Yes.

3. Whether the District Court erred in affording undue weight to Appellees' interest in the efficient operation of the workplace.

Suggested Response: Yes.

4. Whether the District Court erred in granting Appellees' motion for summary judgment despite genuine issues of material fact as to the disruption or reasonable apprehension of disruption of the workplace.

Suggested Response: Yes.

5. Whether the District Court erred in holding that Appellant's Facebook postings of January 23, 2013 and February 17, 2013 were not entitled to First Amendment protection because they did not relate to a matter of public concern.

Suggested Response: Yes.

III. STATEMENT OF THE CASE

Mr. Buker was a member of the Howard County Department of Fire and Rescue Services ("Department") for 15 years. He joined the Department in 1997, after serving in the United States Marine Corps from 1989 until 1995. R. at A11, A21. Appellee Howard County ("County") employed Mr. Buker as a Battalion Chief when the matters at issue arose. R. at A11, A21.

****

APPENDIX D — JUDGMENT ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, FILED AUGUST 12, 2015

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. MJG-13-3046

KEVIN PATRICK BUKER,

Plaintiff,

vs.

HOWARD COUNTY, *et al*.,

Defendants.

JUDGMENT ORDER

By separate Order issued this date, the Court has dismissed Plaintiff's facial challenge claim and has, previously, dismissed Plaintiff's other claims.

Accordingly:

1. Judgment shall be, and hereby is, entered in favor of Defendants against Plaintiff dismissing all claims with prejudice with costs.

2. Any and all prior rulings disposing of any claims against any parties are incorporated by reference herein.

3. This Order shall be deemed to be a final judgment within the meaning of Rule 58 of the Federal Rules of Civil Procedure.

SO ORDERED, this Wednesday, August 12, 2015.

/s/
Marvin J. Garbis
United States District Judge

APPENDIX E — MEMORANDUM DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, FILED MAY 27, 2015

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. MJG-13-3046
(Consolidated with MJG-13-3747)

KEVIN PATRICK BUKER, *et al.*,

Plaintiffs,

vs.

HOWARD COUNTY, *et al.*,

Defendants.

May 27, 2015, Decided
May 27, 2015, Filed

MEMORANDUM DECISION RE: SUMMARY JUDGMENT AS TO PLAINTIFF BUKER

In the Order Re: Summary Judgment Motions, [Document 45], pertaining to Plaintiffs' § 1983 claims,[1] the Court granted the Defendants summary judgment as to Plaintiff Kevin Patrick Buker ("Buker") and denied

1. Plaintiffs' facial challenge claims are the subject of a pending summary judgment motion.

the Defendants summary judgment as to Plaintiff Mark Grutzmacher ("Grutzmacher").

The instant Memorandum Decision states the grounds for granting summary judgment with regard to Buker. By separate Memorandum Decision Re: Summary Judgment as to Plaintiff Grutzmacher issued herewith, the Court states the grounds for denying Defendants summary judgment with regard to Grutzmacher.

I. BACKGROUND

On January 20, 2013, Buker, a Battalion Chief in the Emergency Services Bureau of Defendant Howard County, Maryland Department of Fire and Rescue Services (the "Fire Department"), posted a statement on his Facebook wall to which Grutzmacher responded. Buker then "liked" (*i.e.* adopted) Grutzmacher's posting. Thereafter, as discussed herein, there were additional pertinent postings by Buker.

Buker contends that he was fired in retaliation for his Facebook postings in violation of his First Amendment free speech rights. By their [First] Motion for Summary Judgment [Document 28],[2] Defendants sought summary judgment on Plaintiffs' First Amendment retaliation claims pursuant to Federal Rule of Civil Procedure 56.

2. Defendants' [Second] Motion for Summary Judgment, [Document 40], remains pending. The Second Motion is addressed to Plaintiffs' facial challenge to the Fire Department's Social Media Guidelines and Code of Conduct. The Court will issue a separate Memorandum and Order Re: Summary Judgment as to Defendants' Second Motion.

II. SUMMARY JUDGMENT STANDARD

A motion for summary judgment shall be granted if the pleadings and supporting documents "show[] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

The well-established principles pertinent to summary judgment motions can be distilled to a simple statement: The Court may look at the evidence presented in regard to a motion for summary judgment through the non-movant's rose-colored glasses, but must view it realistically. After so doing, the essential question is whether a reasonable fact finder could return a verdict for the non-movant or whether the movant would, at trial, be entitled to judgment as a matter of law. *See, e.g., Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Shealy v. Winston*, 929 F.2d 1009, 1012 (4th Cir. 1991).

Thus, in order "[t]o defeat a motion for summary judgment, the party opposing the motion must present *evidence* of specific facts from which the finder of fact could reasonably find for him or her." *Mackey v. Shalala*, 43 F. Supp. 2d 559, 564 (D. Md. 1999) (emphasis added). However, "self-serving, conclusory, and uncorroborated statements are insufficient to create a genuine issue of material fact." *Int'l Waste Indus. Corp. v. Cape Envtl. Mgmt., Inc.*, 988 F. Supp. 2d 542, 558 n.11 (D. Md. 2013); *see also Wadley v. Park at Landmark, LP*, 264 F. App'x 279, 281 (4th Cir. 2008).

When evaluating a motion for summary judgment, the Court must bear in mind that the "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Celotex*, 477 U.S. at 327 (quoting Fed. R. Civ. P. 1).

III. DISCUSSION

A. "Facts"[3]

The Fire Department is arranged in a hierarchical chain-of-command led by the Fire Chief. Three Deputy Chiefs, including the Deputy Chief of Operations, report directly to the Fire Chief. Below the Deputy Chiefs in the chain-of-command are the Assistant Chiefs. The Assistant Chief of the Emergency Services Bureau and the Assistant Chief of the Administrative Bureau report to the Deputy Chief of Operations. Below the Assistant Chiefs are the Battalion Chiefs. Goddard Dep. 21:17-24.

At all times relevant hereto, Defendant William F. Goddard, III ("Goddard") was Fire Chief, Defendant John S. Butler ("Butler") was Deputy Chief of Operations, Defendant William Anuszewski ("Anuszewski") was Assistant Chief of the Administrative Services Bureau, and Defendant John Jerome ("Jerome") was Assistant Chief of the Emergency Services Bureau, which oversees the delivery of fire and medical services.

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3. For summary judgment purposes.

Buker joined the Fire Department in 1997 as a recruit. Buker Dep. 9:21-24. During the entire course of his employment, he worked as a paramedic. *Id.* 12:23-13:3. At all times relevant hereto, Buker was a Battalion Chief assigned to the Second Battalion of the Emergency Services Bureau in charge of one of three eight-hour shifts (for a total of twenty-four hours). *Id.* 12:14-22; Goddard Dep. 206:6-13.

1. Fire Department's Social Media Guidelines and Facebook

On November 5, 2012, the Fire Department issued its Social Media Guidelines (the "Policy"). [Document 28-4]. The Policy states, in pertinent part:

> 3.4 Personnel are prohibited from posting or publishing any statements, endorsements, or other speech, information, images or personnel matters that could reasonably be interpreted to represent or undermine the view or positions of the Department Howard County, or officials acting on behalf of the Department or the County . . . .
>
> . . . .
>
> 3.6 Personnel shall refrain from posting or publishing statements, opinions or information that might reasonably be interpreted as discriminatory, harassing, defamatory, racially or ethnically derogatory, or sexually violent

> when such statements, opinions or information, may place the Department in disrepute or negatively impact the ability of the Department in carrying out its mission.
>
> . . . .
>
> 3.8 Personnel are prohibited from posting on any social media site or electronically transmitting messages, images, comments or cartoons displaying threatening or sexuallyexplicit material, epithets or slurs based on race, ethnic or national origins, gender, religious affiliation, disability, sexual orientation, or harassing, offensive, discriminatory, or defamatory conduct.

[Document 28-4] at 4.

The Policy applies to Fire Department personnel "whether on or off duty." *Id.* at 1. As part of the Policy implementation, Jacqueline Kotei, the Fire Department's Public Information Officer, and Fadra Nally, an independent digital media strategist, met with the Battalion Chiefs, including Buker, "to introduce how [the Fire Department] wanted to roll the guidelines out in a way that would be embraced by the department" and to get feedback from the Battalion Chiefs. Nally Dep. 44:21-45:10, 113:4-21. During the meeting, Buker only expressed his concern about having a Fire Department photographer on site at emergency scenes. *Id.* 114:17-25.

The Policy covers Fire Department personnel activity on social networking sites, including Facebook. [Document 28-4] at 1. At all times relevant hereto, Buker maintained a Facebook account under the name "Kevin Buker." Buker's Facebook friends included employees of the Fire Department and other public safety agencies, as well students from an EMT (emergency medical technician) class that he taught. Buker Dep. 15:4-16:13. Buker set his Facebook privacy settings such that only his "friends" - and not the general public on Facebook - could view his Facebook activity. *See* [Document 28-16] at 1.

Buker did not list the Fire Department as his employer on his Facebook page. However, he posted photographs of himself in uniform participating in the Fire Department's Honor Guard at a parade during a firemen's convention and "tagged" himself in one of the photographs. Buker Dep. 59:6-61:12, 68:11-18; [Document 28-9]. Buker's Facebook page also contained photographs of him teaching EMT classes, including one of him sitting in front of a cake that read "Thank You Chief Buker." Buker Dep. 56:22-58:25; [Document 28-10] at 12. Moreover, Buker's family members "tagged" him in at least two photographs congratulating him on his promotion to Battalion Chief. [Document 28-6] at 135-36.

2. January 20, 2013[4] Facebook Posts and Reactions

On the afternoon of Sunday, January 20, Buker was in his office at the Second Battalion at the Fire Department

4. All dates herein are in the year 2013 unless otherwise indicated.

working and watching news coverage of the gun control debate. [Document 28-16] at 1. At 2:33 PM, Buker posted the following statement on his Facebook page:

> My aide had an outstanding idea . . lets (*sic*) all kill someone with a liberal . . . then maybe we can get them outlawed too! Think of the satisfaction of beating a liberal to death with another liberal . . . its (*sic*) almost poetic . . .

[Document 28-11] at 2; [Document 28-16] at 1.

Twenty minutes later, at 2:53 PM, Grutzmacher wrote the following comment on Buker's Facebook wall:

> But . . . was it an "assault liberal"? Gotta pick a fat one, those are the "high capacity" ones. Oh . . . pick a black one, those are more "scary". Sorry had to perfect on a cool Idea!

[Document 28-11] at 3-4.

At 2:59 PM, Buker "liked" Grutzmacher's comment and posted the following statement: "Lmfao![[5]] Too cool Mark Grutzmacher!" [Document 28-11] at 4.

On January 22, First Battalion Chief Robert Utz ("Utz"), who worked the same shift as Buker, sent a screenshot of Buker's initial Facebook post to Assistant Chief Jerome with a message that stated: "Chief, not sure

5. "Laughing my f***ing ass off."

this is something that should be displayed from one of our battalion chiefs." [Document 28-11] at 1.

Jerome forwarded the message to Assistant Chief Anuszewski and Deputy Chief Butler. [Document 28-12] at 1. Butler emailed the screenshot to Fire Chief Goddard, who responded "Let's make sure we snapshot their posts." [Document 28-12] at 4. Butler informed Goddard via email that "Many other inappropriate comments were made re Buker's posting, by others from within the [fire] dept. No one above the FF [firefighter] rank though." [Document 28-12] at 4.

Lieutenant Bruce Bennett, vice-president of the local firefighters union, testified at his deposition that in the days following the January 20 Facebook posts, "[t]here was lots of talk and chatter in the field from everybody that had seen the posts" and that "it was running rampant through the department." Bennett Dep. 41:22-42:6. For instance, members of the Phoenix Sentinels, the Howard County affiliate of the International Association of Black Professional Firefighters, contacted Battalion Chief Louis Winston ("Winston") after seeing the January 20 Facebook posts. Winston Dep. 30:13-31:12. Winston called Butler because a senior member of the Phoenix Sentinels had expressed concern that Grutzmacher's "comment of picking a black one referred to a black person." Winston Dep. 30:15, 34:10-21. The same firefighter also expressed to Winston that he "had concerns with having to work for [Buker]," even though at the time, the firefighter was not working directly under Buker. *Id.* 30:10-25.

On January 22 at 7:16 PM, Assistant Chief Jerome sent an email to Buker at his Fire Department email address that stated:

> It has come to my attention that you may have an inappropriate Facebook post posted in your account. I am asking that you take a look at your recent posts and take down what you feel might not be consistent with Department social media policy.

Please let me know when accomplished.

[Document 28-13] at 3.

The following afternoon, Buker replied:

> Pretty vague. I am in compliance with the Social Media policy. However, an employee who formerly had access to my timeline (since rectified) recently complained about being offended by a post. While I believe it meets the Policy dictates, I have deleted both the comment and the employee to prevent further complains or misunderstandings. . . .

Id.

3. January 23 Facebook Posts and Reactions

On January 23, the same afternoon on which he informed Jerome he had removed the original January 20 post, Buker posted the following statement on his Facebook page:

> To prevent future butthurt and comply with a directive from my supervisor, a recent post (meant entirely in jest) has been deleted. So has the complaining party. If I offend you, feel free to delete me. Or converse with me. I'm not scared or ashamed of my opinions or political leaning, or religion. I'm happy to discuss any of them with you. If you're not man enough to do so, let me know, so I can delete you. That is all. Semper Fi! Carry on.

[Document 28-14] at 2. The post received at least 40 "likes."

In response to a comment from a Facebook friend asking "As long as it isn't about the FD, shouldn't you be able to express your opinions?", Buker replied below the first January 23 post:

> Unfortunately, not in the current political climate. Howard County, Maryland, and the Federal Government are all Liberal Democrat held at this point in time. Free speech only applies to the liberals, and then only if it is in line with the liberal socialist agenda. County Government recently published a Social media policy, which the Department then published it's [sic] own. It is suitably vague enough that any post is likely to result in disciplinary action, up to and including termination of employment, to include this one. All it took was one liberal to complain . . . sad day. To lose the First Amendment rights I fought to ensure unlike the WIDE majority of the Government I serve.

Id. (alteration in original). Another Facebook friend of Buker's commented: "Oh, your [sic] gonna get in trouble for saying that too," to which Buker replied: "Probably . . ." *Id.* (alteration in original).

On the afternoon of January 24, then-Captain Joe Calo[6] of the Special Projects Section of the Administrative Services Bureau emailed a screen shot of Buker's January 23 Facebook posts to Fire Chief Goddard with the comment "[p]osting once he was requested to take it down." [Document 28-15] at 1. Calo emailed Fire Chief Goddard and Assistant Chief Anuszewski a "Buker Summary," in which he noted that Buker escalated the situation "when he was advised to remove the [January 20] posting. Could've complained about having to remove it and aired his displeasure but instead he became insubordinate toward mgmt. [and g]ave metaphorical middle finger." [Document 28-18] at 1. Calo suggested that the incident "be treated like any other investigation [and d]isciplinary action should be determined after the conclusion of the investigation." *Id.*

Fire Chief Goddard responded to Calo:

> Make sure we have snapshots of those pictures and posts that reflect [Buker's] relationship to the [Fire Department], if any. If there are no such pictures or posts that tie him to HCDFRS [Howard County Department of Fire and Rescue Services], he has the right to express

---

6. Later promoted to Battalion Chief on February 11, 2013. Calo Dep. 15:14-25.

> his opinions and I will not support any further actions or considerations by the Department.

[Document 28-15] at 3.

The following day - January 25 - the Fire Department moved Buker out of field operations and into an administrative assignment pending the results of the Fire Department's internal investigation by Battalion Chief Timothy Diehl ("Diehl"). [Document 28-19] at 3. Diehl interviewed Buker on January 29 at the Fire Department Headquarters. *Id.* Buker also provided the Fire Department with a written statement, in which he wrote that he "fully, completely meant [the January 20 post] as a joke" that "was not intended to offend per se." [Document 28-16]. Buker's statement did not reference his January 23 posts.

On February 5, Assistant Chiefs Anuszewski and Jerome gave Buker permission to use the Fire Department's training facility to hold a previously scheduled session with his EMT class. [Document 30-32] at 2. The class was sponsored by the Maryland Fire and Rescue Institute, not the Fire Department, and Buker was not acting as an agent of the Fire Department when he taught the class. Jerome Aff. ¶¶ 4-10.

4. February 17 Facebook Posts and Termination of Buker's Employment

On February 17, 2013, Mike Donnelly, a member of the Elkridge, Maryland Volunteer Fire Department, posted a photograph on his Facebook page of an elderly woman

with her middle finger raised. Butler Dep. 122:16-123:8; [Document 28-17] at 1. The photograph contained the following message:

THIS PAGE, YEAH THE ONE
YOU'RE LOOKING AT IT'S MINE
I'LL POST WHATEVER THE
FUCK I WANT.

[Document 28-14] at 1. Above the photograph, Donnelly wrote, "for you Chief." *Id.* Buker, who was Facebook friends with Donnelly, "liked"[7] the post. *Id.*; [Document 28-8] at 5. Buker, and at least one other Fire Department employee, understood that Donnelley's post "was in support of me," *i.e.*, Buker. Buker Dep. 111:7-22; Godar Dep. 19:6-11.

As a result of Donnelly's February 17 Facebook post, the Fire Department made Donnelly a "nonoperational" volunteer, which meant that he was still permitted to be a member of the Elkridge Volunteer Fire Department -

7. At least one other Fire Department employee - Cassandra "Casey" Godar ("Godar") - also 'liked' the post. [Document 28-17] at 3. Godar was disciplined by the Fire Department for violating the Policy. Butler Dep. 118:19-119:6. She testified at her deposition that she "had to apologize to Chief Goddard for apparently offending him, and that was the end of it." Godar Dep. 17:17-19. The parties have not presented any evidence of the position Godar holds in the Fire Department.

In addition, Grutzmacher commented under the picture: "Hey. . . . I could use that!" [Document 28-17]. However, the Fire Department already had terminated his volunteer service five days earlier on February 12. [Document 28-22].

an independent non-profit organization - but he was not permitted to wear a Fire Department uniform or ride on a Fire Department truck. Butler Dep. 121:24-123:8.

On February 25, 2013, Buker was served with Charges of Dismissal from Fire Chief Goddard, which stated that the Fire Department intended to terminate Buker's employment effective March 6. [Document 28-19] at 1. Under "Events Giving Rise to My Decision," Goddard discussed all three sets of Facebook posts - from January 20, January 23, and February 17. *Id.* at 1-3. Under "Analysis of Investigative Findings," he wrote:

> You also do not seem to understand that your actions reflect poorly on the Department and the County. . . .
>
> Failure to grasp the impact and implications of your comments is exacerbated by the fact that you hold a leadership position within the Department as a Battalion Chief . . . responsible for enforcing Departmental policies and taking appropriate action for violations of those policies by the people you supervise. If you fail to recognize what conduct violates those policies, you cannot be expected to take appropriate and effective action with those you supervise and/or manage.
>
> However, what causes the greatest concern is your repeated insolence and insubordination. Upon receiving the directive to remove the original post, instead of discretely removing it, you angrily replaced it with another posting

> tirade mocking the Chain-of-Command, the Department, and the County.
>
> . . .
>
> Again, your insubordination is further exacerbated by the fact that, as a Battalion Chief, you are expected and required to serve as an example . . . Your conduct seriously impacts operations because it disrupts the lines of authority and undermines the Chain-of-Command. . . .

Id. at 3-4. The Charges of Dismissal stated that Buker's proposed dismissal was based on a finding that he had violated the Policy, along with the Howard County Code's provisions against Insubordination, Violation of County Policy, and Misconduct. Goddard wrote: "I find your justifications for your behavior neither sufficient nor acceptable. Your repeated and continued insubordination and your lack of understanding is inappropriate for a public safety officer of your tenure and rank." *Id.* at 7.

Buker attended a pre-termination hearing on March 8. [Document 28-21] at 5. On March 14, Fire Chief Goddard issued his final decision terminating Buker's employment. *Id.*

B. Legal Standard

Buker contends that the Defendants violated his First Amendment rights to free speech by terminating his employment in retaliation for his exercising those rights.

Speech by public employees receives less constitutional protection than speech by private citizens. *See Garcetti v. Ceballos*, 547 U.S. 410, 418, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006). However, "[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Id.* at 419.

To determine whether a public employee has stated a First Amendment claim for retaliatory discharge, a court must determine:

(1) whether the public employee was speaking as a citizen upon a matter of public concern or as an employee about a matter of personal interest;

(2) whether the employee's interest in speaking upon the matter of public concern outweighed the government's interest in providing effective and efficient services to the public; and

(3) whether the employee's speech was a substantial factor in the employee's termination decision.

McVey v. Stacy, 157 F.3d 271, 277-78 (4th Cir. 1998); *see also Connick v. Myers*, 461 U.S. 138, 147-48, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983).

"The inquiry into the protected status of speech is one of law, not fact." *Connick*, 461 U.S. at 148 n.7. The employee bears the burden of demonstrating that he was speaking as a citizen on a matter of public concern. *See Brooks v. Arthur*, 685 F.3d 367, 371 (4th Cir. 2012).

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement . . . ." *Connick*, 461 U.S. at 147-48. The United States Courts of Appeals for the Fourth Circuit has stated:

> [T]he "public concern" or "community interest" inquiry is better designed—and more concerned—to identify a narrow spectrum of employee speech that is not entitled even to qualified protection than it is to set outer limits on all that is. The principle that emerges is that *all* public employee speech that by content is within the general protection of the first amendment is entitled to at least qualified protection against public employer chilling action except that which, realistically viewed, is of purely "personal concern" to the employee—most typically, a private personnel grievance.

Berger v. Battaglia, 779 F.2d 992, 998 (4th Cir. 1985). Put more simply, "'[s]peech involves a matter of public concern when it involves an issue of social, political, or other interest to a community.' This does not include 'personal complaints and grievances about conditions of employment.'" *Durham v. Jones*, 737 F.3d 291, 299-300 (4th Cir. 2013) (citations omitted).

Once the employee demonstrates that his speech was on a matter of public concern, the court must balance "the interests 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 v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cnty., Ill., 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).

"Whether the employee's interest in speaking outweighs the government's interest is a question of law for the court." *Smith v. Gilchrist*, 749 F.3d 302, 309 (4th Cir. 2014). "Regarding this balancing, the government bears the 'burden of justifying the discharge on legitimate grounds.'" *Id.*, 749 F.3d at 309 (quoting *Rankin v. McPherson*, 483 U.S. 378, 388, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987)).

The *Pickering* balancing test requires a court "to consider the context in which the speech was made, including the employee's role and the extent to which the speech impairs the efficiency of the workplace." *Id.* Factors relevant to this inquiry include whether a public employee's speech:

(1) impaired the maintenance of discipline by supervisors;

(2) impaired harmony among coworkers;

(3) damaged close personal relationships;

(4) impeded the performance of the public employee's duties;

(5) interfered with the operation of the institution;

(6) undermined the mission of the institution;

(7) was communicated to the public or to coworkers in private;

(8) conflicted with the responsibilities of the employee within the institution; and

(9) abused the authority and public accountability that the employee's role entailed.

Ridpath v. Bd. of Governors Marshall Univ., 447 F.3d 292, 317 (4th Cir. 2006). The government employer is not required "to prove that the employee's speech actually disrupted efficiency, but only that an adverse effect was 'reasonably to be apprehended.'" *Maciariello v. Sumner*, 973 F.2d 295, 300 (4th Cir. 1992) (citation omitted). However, paying mere "lip service," without "articulat[ing] any way in which the office [environment] would have been different or was actually different due to [a plaintiff's] statements," is not sufficient to tip the scale in favor of the government employer. *See Durham v. Jones*, 737 F.3d 291, 302 (4th Cir. 2013).

If the court determines that the employee's interest in speaking on a matter of public concern outweighs the employer's interest in providing efficient service, then "the court turns to the factual question of 'whether the employee's speech was a substantial factor in the employee's termination decision.'" *Brooks*, 685 F.3d at 371. The employee bears the burden of demonstrating the causal relationship. *Ridpath*, 447 F.3d at 318.

"The causation requirement is 'rigorous' in that the protected expression must have been the 'but for' cause of the adverse employment action . . . ." *Ridpath v. Bd.*

of Governors Marshall Univ., 447 F.3d 292, 318 (4th Cir. 2006); *see also Jurgensen v. Fairfax Cnty., Va.*, 745 F.2d 868, 881 (4th Cir. 1984). However, "[t]he employer may nevertheless rebut the showing [that the protected speech was a substantial factor in the termination] by proof that it would have discharged the plaintiff 'even in the absence of the protected conduct.'" *Stroman v. Colleton Cnty. Sch. Dist.*, 981 F.2d 152, 156 (4th Cir. 1992) (quoting *Mount Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977).

C. January 20 Facebook Posts

The content and effect of each of the January 20 Facebook posts is attributable to Buker, regardless of who "authored" the post and who "liked" it. *See Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013), *as amended* (Sept. 23, 2013) ("On the most basic level, clicking on the 'like' button literally causes to be published the statement that the User 'likes' something, which is itself a substantive statement.").

1. McVey Prong #1 - Public Concern v. Personal Interest

The content, form, and context of the January 20 Facebook posts indicate that they were speech on a matter of public concern - the gun control debate - and not private interest.[8]

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8. "Whether a statement is made as an employee or as a citizen is a question of law." *Graziosi v. City of Greenville Miss.*, 775 F.3d 731, 736 (5th Cir. 2015). The Supreme Court has "h[e]ld that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment

Whether they were intended as jokes[9] or as satire,[10] the January 20 posts are vastly different from the unprotected speech present in the cases relied upon by Defendants.

purposes." *Garcetti v. Ceballos*, 547 U.S. 410, 421, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006). There is no evidence that making statements on Facebook was within the ordinary scope of Buker's duties as a Battalion Chief. Moreover, the January 20 posts did not refer to any Fire Department practices or policies. Accordingly, the Court holds that Buker's January 20 Facebook posts were speech as a citizen. *See Graziosi*, 775 F.3d at 737; *Duke v. Hamil*, 997 F. Supp. 2d 1291, 1300 (N.D. Ga. 2014).

9. In a statement given during the Fire Department's investigation, Buker wrote: "This joke occurred to me while watching and working. . . . I fully, completely meant it as a joke." [Document 28-16] at 1. That Buker initially characterized his post as a "joke" is relevant to whether the post was speech on a matter of public concern, but it is not necessarily dispositive. *Cf. Shepherd v. McGee*, 986 F. Supp. 2d 1211, 1221 (D. Or. 2013) ("[W]hile the subjects of tax credits or the use of government resources or entitlement programs are arguably matters of public concern, Plaintiff's comments did not strike at the heart or core of the First Amendment given her own characterization of them as 'humorous and ironic' and 'joke[s]'. As such, they are more on the periphery of First Amendment protection because they were banter rather than speech intended to help the public actually evaluate the performance of a public agency." (alteration in original) (internal citation omitted)).

10. Grutzmacher testified at his deposition that when he saw Buker's initial post, "I took it as satire when I read it initially. I viewed it as a literal impossibility." Grutzmacher Dep. 50:2-11. He explained that he "took [the post] to understand that . . . if they want to get things as the liberal government, quote/unquote, banned because of something silly like a cosmetic feature, then maybe we can get those people banned for something silly as well." *Id.* 51:2-14. The "use of satire to comment on a matter of public concern d[oes] not deprive [an individual] of the protection afforded by the first amendment." *See Muller v. Fairfax Cnty. Sch. Bd.*, 878 F.2d 1578, 1583 (4th Cir. 1989).

For instance, in *Mitchell v. Hillsborough County*, 468 F.3d 1276 (11th Cir. 2006), the Eleventh Circuit concluded that a county employee's comments at a public meeting about a commissioner's "'preoccupation with other women's vaginas'" was not speech on a matter of public concern. *Id.* at 1285. The court explained that "[c]omprised solely of sophomoric name-calling and contempt-communicating expressive acts, there is nothing in the content of Mitchell's speech that communicated anything of value to a matter of public concern. Instead, content-wise, Mitchell's speech, could only be viewed as a personal attack . . . ." *Id.*

Moreover, the posts were not the kinds of jokes or pranks that courts have found to be unprotected speech. *See, e.g., Robinson v. Jones*, No. 3:02CV1470 (CFD), 2006 U.S. Dist. LEXIS 11941, 2006 WL 726673, at *3 (D. Conn. Mar. 20, 2006) ("[The] 'speech' involved placing an election-related bumper sticker on Warden Brian Murphy's state car. . . . The Court finds that Robinson's joke or prank was personal in nature and does not qualify as protected public speech."); *Martinez v. Del Re*, No. 98 C 5841, 2001 U.S. Dist. LEXIS 27114, 2001 WL 1104639, at *4-5 (N.D. Ill. Sept. 18, 2001) ("Absent any content that does not relate to matters of social or political import, and brought forth in the context of the 'Wall of Shame' and other lampoons, it cannot be fairly said that these postings address any topic of public concern.").

The January 20 Facebook posts differ in content, form, and context from other Facebook posts that courts have determined to be outside, or on the periphery of, First Amendment protection. In *In re O'Brien*, No.

A-2452-11T4, 2013 N.J. Super. Unpub. LEXIS 28, 2013 WL 132508 (N.J. Super. Ct. App. Div. Jan. 11, 2013) (per curiam), the court agreed that a public school teacher's Facebook post stating "'I'm not a teacher—I'm a warden for future criminals!'" was not addressed to a matter of public concern, but instead was "a personal statement, driven by her dissatisfaction with her job and conduct of some of her students." 2013 N.J. Super. Unpub. LEXIS 28, [WL] at *4. Similarly, in *Shepherd v. McGee*, 986 F. Supp. 2d 1211, (D. Or. 2013), the court stated that a Department of Human Services case worker's Facebook posts, including, *inter alia*, "'So today I noticed a Self-Sufficiency client getting into a newer BMW. What am I doing wrong here? I think I need to quit my job and get on [public assistance],'" were "more on the periphery of First Amendment protection because they were banter rather than speech intended to help the public actually evaluate the performance of a public agency." *Id.* at 1214-15;[11] *see also Graziosi v. City of Greenville Miss.*, 775 F.3d 731, 739 (5th Cir. 2015) ("[T]he context weighs against a finding that she spoke on a matter of public concern. Graziosi made the [Facebook] posts immediately after returning to work from an unrelated suspension. Furthermore, when making the posts, she admits that she was angry with

11. *But see Shepherd v. McGee*, 986 F. Supp. 2d 1211, 1217 (D. Or. 2013) ("The parties dispute whether Plaintiff's posts constitute speech on a matter of public concern. I need not resolve that issue or whether Plaintiff spoke as a private citizen or public employee because even assuming that the Facebook posts were speech on a matter of public concern and that Plaintiff spoke as a private citizen, I nonetheless grant summary judgment to Defendant because he has shown as a matter of law that DHS had an adequate justification for its termination decision." (internal footnote omitted)).

Chief Cannon . . . and concedes that . . . her posts were 'inappropriately intense.'").

Instead, the January 20 Facebook posts more closely resemble the Facebook posts found to be protected speech in *Duke v. Hamil*, 997 F. Supp. 2d 1291 (N.D. Ga. 2014). In *Duke*, a deputy chief at a university police department was demoted after posting a picture of the Confederate flag on Facebook and commenting "'It's time for the second revolution'" shortly after the conclusion of the 2012 presidential election. *Id.* at 1293. The court concluded that the deputy's "speech can be fairly considered to relate to matters of political concern to the community because a Confederate flag can communicate . . . various political or historical points of view. Combine this symbol with a statement calling for a revolution right after an election, and it is plausible that Plaintiff was expressing his dissatisfaction with Washington politicians." *Id.* at 1300. The court also emphasized that the deputy "expressed no grievances related to the Department's policies or his colleagues." *Id.*

Like the Facebook posts at issue in *Duke*, the January 20 posts constituted speech on a matter of public concern - the gun control debate - and, more specifically, the proposed assault weapons ban. Buker wrote in his Fire Department statement that he made the initial post after watching Sunday news coverage concerning gun control, assault weapons, and gun violence. *See* [Document 28-16]. Just as the officer in *Duke* did not literally want to start a revolution, Buker did not support literally "beating a liberal to death with another liberal." Moreover, other Fire

Department employees expressed their understanding that the January 20 posts were political statements. *See, e.g.*, Bennett Dep. 63:10-13 ("[T]his was in people's minds - First Amendment rights, Second Amendment rights, social media policies, you know, all of those things intertwined . . . ."); Breznak Dep. 21:2-3 ("I understood it was a political statement, yes."); Nally Dep. 57:5-9 ("Q : With respect to the Grutzmacher post, do you understand this to be a political statement? A: Political in that it is specifically about gun control, yes.").

Even though the phrases "beating a liberal to death" and "black one, those are more 'scary'" may be offensive or distasteful, "[t]he inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Rankin v. McPherson*, 483 U.S. 378, 387, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987); *see also Duke*, 997 F. Supp. 2d at 1300.

The Court concludes that Buker's speech on January 20 was him speaking as a citizen on a matter of public concern and not as an employee about a matter of personal interest.

2. McVey Prong #2 - Balancing Buker's Interest in Speech and Fire Department's Interest in Service

Once an employee demonstrates that his speech was on a matter of public concern, the court must balance "the interests 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 v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will Cnty., Ill.*, 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968).

Defendants contend that, even if the January 20 Facebook posts involved matters of public concern, "the Fire Department's interest in minimizing disruption outweighed any minimal First Amendment interest [Buker] claim[s] to have in the[] Facebook posts." [Document 28-1] at 2.

"The debate over the propriety of gun control legislation is, obviously, a matter of public concern." *Thomas v. Whalen*, 51 F.3d 1285, 1290 (6th Cir. 1995). However, the Fourth Circuit has stated that "fire departments[] provide such essential services and depend so much on good working relations within the department that we place a premium on the government's interest as we conduct the *Pickering* balancing test." *Mills v. Steger*, 64 F. App'x 864, 872 (4th Cir. 2003).

Courts "give[] substantial weight to government employers' reasonable predictions of disruption . . . ." *Waters v. Churchill*, 511 U.S. 661, 673, 114 S. Ct. 1878, 128 L. Ed. 2d 686 (1994). Moreover, it is not necessary "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." *Connick*, 461 U.S. at 152.

"[A] public employee, who has a confidential, policymaking, or public contact role and speaks out in a manner that interferes with or undermines the operation of the agency, its mission, or its public confidence, enjoys substantially less First Amendment protection than does a lower level employee." *McVey*, 157 F.3d at 278. Because Buker was a Battalion Chief with key leadership responsibilities, his speech has the unique potential to offend others and interfere with the operation and mission of the Fire Department.

Fire Chief Goddard testified at his deposition that a Battalion Chief "is the most critical leadership position in the organization" because Battalion Chiefs "manage the day-to-day operations of the field, of all of our emergency services" and "direct the day-to-day enforcement of our policies and procedures - with our first responders that are out there every day." Goddard Dep. 203:8-14, 206:14-17. Goddard explained that Battalion Chiefs "understand the procedures because they're the ones that have to actually implement those procedures[, and] have to answer the questions of those that they supervise, which are critical because those decisions that are made in the field certainly have the potential if not followed to lead to some tragic consequences." *Id.* 203:23-204:6.

The content and form of the January 20 Facebook posts arguably "are controversial, divisive, and prejudicial," and [b]ecause these potentially offensive messages came from [an individual high up in] the Department's [chain-of]-command, [the Fire Department] did not have to wait to see if the controversy affected the discipline,

mutual respect, or trust among the [employees Buker] supervised before addressing it." *See Duke*, 997 F. Supp. 2d at 1301, 1303 (concluding that the Defendant police department's "interests outweigh [the Deputy Chief's] interest in speaking"). "Given [Buker]'s supervisory responsibilities, such speech could undermine 'loyalty, discipline, [and the] good working relationships among the [Fire Department's] employees' if left unaddressed." *Id.* at 1302 (citation omitted).

"When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." *Connick*, 461 U.S. at 151-52. Defendants have presented evidence of actual - or at least the potential for - internal unrest within the Fire Department as a result of the January 20 Facebook posts. For instance, Bennett testified at his deposition that after Buker made the January 20 Facebook posts, "it was like a whirlwind. Hey, you know, Chief Buker, did you see the post. It was running rampant out in the department across all three shifts. It did not take long for everybody in the department to know." Bennett Dep. 60:15-23.

Winston testified at his deposition that a senior member of the Howard County affiliate of the International Association of Black Professional Firefighters contacted him expressing concern that the "comment of picking a black one referred to a black person" and "with having to work for [Buker]," even though at the time, the firefighter was not working directly under Buker. Winston Dep. 30:10-25, 34:10-21. In addition, Lieutenant John Breznak

("Breznak") testified at his deposition that when he saw the January 20 posts, he thought there was a "double standard" at play. He testified that he "had recently been . . . disciplined for using a euphemism while on duty [during what he] thought [was] a private conversation with [Buker]" and he felt that he "was disciplined and held to one standard [and] didn't understand why [Buker] wasn't held the same way." Breznak Dep. 22:18-24:8. Breznak also testified that at least two other firefighters saved a screenshot of the January 20 posts to use as "ammunition" in the event that were disciplined by the Fire Department so that he could say to the Department "well, if I'm in trouble, then how could this [post from Buker] not be taken as being wrong as well." *Id.* 17:23-19:24.

Moreover, it was reasonable, based on the contents of the January 20 posts and the comments from other firefighters, for the Fire Department to think that Buker's posts could negatively impact the public's perception of the Department and interfere with its ability to protect the public safety. Buker did not have the Fire Department listed as his employer on his Facebook page, but it was clear from other content on the page - which included, *inter alia*, photographs of Buker marching in a parade in his Honor Guard uniform and teaching EMT classes - that he was affiliated with the Fire Department. And, even though Buker set his Facebook privacy settings such that only his Facebook friends could view his Facebook activity, "his choice to place [the posts] on a social media platform risked sharing [them] with a much broader audience." *Duke*, 997 F. Supp. 2d at 1303.

Calo testified at his deposition that "community trust" is an essential element of the Fire Department's public service mission - "We walk into homes in the middle of the night. We are alone in rooms with property small enough to stick in your pocket. The community must trust that we are aboveboard and we are there for service." Calo Dep. 151:5-152:4. He testified that the Fire Department was concerned with the impact of the January 20 posts on "African American peers, civilians, citizens, everybody" because "we don't ever want to give the impression, ever that we have bias in any way." *Id.* 149:15-150:10. Because Buker was a Battalion Chief in the Fire Department, "his conduct reflected on the Department's reputation more significantly than the conduct of other officers," and it is possible that "many in the community would take offense to his chosen form of speech, not just because they disapprove of it, but because it raises concerns of [his] prejudice—and the Department's." *Duke*, 997 F. Supp. 2d at 1302.

The Court finds that the *Pickering* balancing test tips in favor of the Fire Department because Buker's January 20 Facebook posts were "capable of impeding the [Fire Department]'s ability to perform its duties efficiently." *Id.* Accordingly, Defendants are entitled to summary judgment on Buker's First Amendment retaliation claims.[12]

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12. Because the Court finds that Defendants are entitled to summary judgment based upon the *Pickering* balancing test, it need not proceed to the third prong of *McVey*, whether the January 20 Facebook posts were the "but for" cause of the termination of Buker's employment.

D. January 23 and February 17 Facebook Posts

Even if Buker's interest in making the January 20 Facebook posts had outweighed the Fire Department's interests in promoting respect, trust, and efficiency and protecting the public, Defendants would, nevertheless, be entitled to summary judgment because the January 23 and February 17 Facebook posts were not protected speech and constituted insubordination.

The content, form, and context of the January 23 and February 17 Facebook posts indicate that they focused

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However, in the interest of completeness, the Court will briefly address causation as it relates to the January 20 posts. Buker has not demonstrated that the January 20 Facebook posts were the "but for" cause of his termination. The evidence indicates that after the January 20 posts, and even after the January 23 posts, the Fire Department was not contemplating termination of Buker's employment. For instance, in the initial assessment of the "Buker issue" submitted to Fire Chief Goddard, written after the January 20 and 23 posts but before the February 17 post, Calo noted that there were "3 lines in the sand - first poor judgment (counseling), then racial overtones (suspension), finally insubordination (demotion)." [Document 28-18]. Moreover, even though the Charges of Dismissal reference the January 20 posts, Fire Chief Goddard wrote that "what causes the greatest concern is [the] repeated insolence and insubordination" stemming from the January 23 and, more significantly, February 17 posts. [Document 28-19] at 4.

Accordingly even assuming that Buker prevailed on the *Pickering* balancing test, the Court still would grant summary judgment to Defendants as to the January 20 Facebook posts because they were not the but for cause of Buker's termination.

primarily on allegations of personal mistreatment and not on broader policy concerns.

In the January 23 posts, Buker wrote, *inter alia*:

> To prevent future butthurt and comply with a directive from my supervisor, a recent post (meant entirely in jest) has been deleted.
>
> County Government recently published a Social media policy, which the Department then published it's [sic] own. It is suitably vague enough that any post is likely to result in disciplinary action, up to and including termination of employment, to include this one. All it took was one liberal to complain . . . sad day.

[Document 28-14] at 2 (alteration in original).

Although the January 23 posts discuss the Policy and reference First Amendment rights, they were made in the context of the Fire Department's disciplinary investigation into Buker's posts. *See Graziosi v. City of Greenville*, 985 F. Supp. 2d 808, 813 (N.D. Miss. 2013) ("Graziosi's comments to the Mayor, although on a sensitive subject, were more related to her own frustration of Chief Cannon's decision not to send officers to the funeral and were not made to expose unlawful conduct within the Greenville Police Department. Her posts were not intended to help the public actually evaluate the performance of the GPD. (internal footnote omitted), *aff'd sub nom. Graziosi v. City of Greenville Miss.*, 775 F.3d 731 (5th Cir. 2015).

The January 23 posts were a direct response to Assistant Chief Jerome's email to Buker regarding the January 20 posts and were disputing the application of the Policy to Buker's posts. "When employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view" that the employee's speech addresses a private dispute and not an issue of public concern.[13] *Connick*, 461 U.S. at 153.

On February 17, Buker "liked" Donnelly's Facebook post, which had "for you Chief" written above a photograph of an elderly woman with her middle finger raised with the message "THIS PAGE, YEAH THE ONE YOU'RE LOOKING AT[.] IT'S MINE[.] I'LL POST WHATEVER THE FUCK I WANT." [Document 28-14] at 1. This post clearly was not speech on a matter of public concern. It did not contain a political message, did not speak to a matter of broad policy, and did not expose a wrongdoing. Instead, it was a reference to the Fire Department's investigation of Buker.

There is no evidence in the record that Buker spoke as a citizen on a matter of public concern when he made the January 23 or February 17 Facebook posts. "Rather,

13. Even if the January 23 Facebook posts could be considered to be speech on a matter of public concern, "[t]he limited first amendment interest here does not require that [Buker]'s employers tolerate associated behavior that they reasonably believed was disruptive and insubordinate." *Dwyer v. Smith*, 867 F.2d 184, 194 (4th Cir. 1989).

the record reveals that [Buker] made increasingly hostile statements about managerial decisions he found disagreeable or unwise. Such speech was not entitled to First Amendment protection. Rather, it was wholly unprotected insubordination that" the Fire Department was not required to tolerate. *McReady v. O'Malley*, 804 F. Supp. 2d 427, 440 (D. Md. 2011).

Buker argues that "Defendants created their own cause celebre by instructing Mr. Buker to remove the First Buker Post" because "[b]ut for Defendants' initial and illegal instruction to remove the First Buker post, Mr. Buker's subsequent posts would have never occurred." [Document 30-1] at 42-43. However, he provides no legal support for his contention that his January 23 and February 17 speech is to be considered protected speech and, in effect, "immunized" because his January 20, 2013 speech was protected speech.

IV. CONCLUSION

The instant Memorandum Decision sets forth the reasons that Defendants' Motion for Summary Judgment [Document 28] was GRANTED as to Plaintiff Buker.

SO ORDERED, on Wednesday, May 27, 2015.

/s/ Marvin J. Garbis
United States District Judge

APPENDIX F — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, FILED MARCH 30, 2015

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL ACTION NO. MJG-13-3046
(Consolidated with MJG-13-3747)

KEVIN PATRICK BUKER, *et al.*,

Plaintiffs,

vs.

HOWARD COUNTY, *et al.*,

Defendants.

ORDER RE: SUMMARY JUDGMENT MOTIONS

The Court has before it Defendants' [First] Motion for Summary Judgment [Document 28] ("First Motion"), Defendants' [Second] Motion for Summary Judgment [Document 40] ("Second Motion") and the materials submitted relating thereto. The Court has held a hearing in regard to the First Motion but not yet in regard to the Second Motion.[1]

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1. The briefing was not completed until a week prior to the issuance of this Order.

In the First Motion, Defendants contend that neither Plaintiff has presented evidence adequate to permit a reasonable jury to find that they have proven a claim of retaliation for exercise of their First Amendment rights. Thus, the issue presented is whether, as to each Plaintiff, the evidence is sufficient to present genuine issues of material fact.

The Second Motion is addressed to Plaintiffs' facial challenge to the Fire Department's Social Media Guidelines and Code of Conduct. Defendants contend that there are no factual issues. Plaintiff has not filed a cross-motion for summary judgment although it is possible (perhaps only theoretically) that the Court could conclude that, even based upon Defendants' version of the facts, Plaintiff would have a valid claim.

The Court has, in any event, resolved the First Motion. In so doing, the Court concludes that the two Plaintiffs must be considered separately and that it will be necessary to provide separate decisions stating the grounds for the decisions.

Plaintiff Grutzmacher's speech at issue consists of his January 20, 2013 "assault rifle" posting on Plaintiff Buker's Facebook page. In contrast, Plaintiff Buker's speech at issue is not limited to his arguably "public concern" postings on January 20, 2013, but also includes statements that can only reasonably be found to pertain to matters of personal concern. Moreover, there is a critical difference between Buker's status as a supervisor and Grutzmacher's status as a volunteer.

The Court – for reasons that shall be more fully stated in decisions to be issued hereafter - concludes that the First Motion shall be denied as to Grutzmacher and granted as to Buker.

Accordingly:

1. Defendants' [First] Motion for Summary Judgment [Document 28] is GRANTED IN PART and DENIED IN PART.

    a. Defendants are entitled to summary judgment as to Plaintiff Buker.

    b. Defendants are not entitled to summary judgment as to Plaintiff Grutzmacher.

    c. A separate Memorandum of Decision shall, hereafter, be issued as to each Plaintiff.

2. Scheduling of trial on Plaintiff Grutzmacher's claims shall be deferred pending resolution of Defendants' [Second] Motion for Summary Judgment [Document 40].

3. A hearing on Defendants' [Second] Motion for Summary Judgment [Document 40] shall be scheduled by further Order.

SO ORDERED, on Monday, March 30, 2015.

/s/
Marvin J. Garbis
United States District Judge