



# MUNICIPAL LIABILITY NEWSLETTER

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Welcome to the September, 2016 issue of the Gallagher Sharp municipal newsletter. This issue will provide a primer on First Amendment retaliation claims, and offer some advice on terminating an otherwise problematic employee when that employee has recently engaged in controversial and protected speech. We then look at a recent search and seizure case from the Supreme Court of the United States narrowing the scope of the exclusionary rule, and a Supreme Court of Ohio ruling on public records production.

## First Amendment Retaliation Claims

Amongst other things, the First Amendment protects the right to be free from governmental abridgement of speech. In order to state a First Amendment claim that a governmental employee has been retaliated against for free speech, the plaintiff-employee must show:

- (1) plaintiff engaged in protected conduct; (2) an adverse action was taken against plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two - the adverse action was motivated at least in part by plaintiff's protected conduct.

*Thaddeus-X v. Blatter*, 175 F.3d 378, 394 (6th Cir. 1999) (en banc). First Amendment protected expression "must 'touch upon a matter of public concern,' a requirement satisfied if the speech can fairly be said to relate to a matter of political, social, or other concern of the community rather than merely a personal grievance." *Mnyofu v. Bd. of Ed. of Rich Township, et. al.*, 2005 U.S. Dist. LEXIS 26640 (N.D. Ill. Nov. 1, 2005). Where the communication relates solely to the resolution of a personal problem, it does not rise to the level of protected speech and thus, would not support a federal civil rights action under 42 U.S.C. §1983. *Gray v. Lacke*, 885 F.2d 399, 411 (7th Cir. 1989). Whether statements address a matter of public concern and enjoy a protected status under the First Amendment is a question of law, and "depends upon content, form and context." *Landstrom v. Illinois Dept. of Children & Family Svcs.*, 892 F.2d 670, 678-79 (7th Cir. 1990).

So how does a court determine whether retaliatory conduct was motivated by protected speech? A plaintiff need not produce definitive evidence of a causal connection. *Haji v. Columbus City Schs.*, 621 Fed. Appx. 309 (6th Cir. 2015). Rather, a plaintiff must "produce enough evidence of a retaliatory motive such that a reasonable juror could conclude that [his termination] would not have occurred but for his engagement in protected activity." *Id.* Temporal proximity between an employer's knowledge of protected activity and an adverse employment action can establish a prima facie causal connection by itself. Specifically, courts have held that a gap of three months between the speech and termination may give rise to an inference that the firing was motivated by the speech. *Id.*



*An employer is not liable if it can show that it would have made the same decision even if the employee had not engaged in the protected conduct.*

The *Haji* decision illustrates how the timing and basis for adverse action can be important. In that case, the plaintiff was a Muslim Imam who was hired as an instructional assistant at a public school. In March, 2008 a school official became aware of a YouTube video of Haji identifying himself as a school employee and voicing concern about the school exposing Muslim students to Greek mythology. He was not disciplined for the video, but was suspended for one day on February 25, 2008 due to two unrelated incidents. In the spring of 2008 he got into a dispute with school officials about leaving work for prayer services without prior permission. He was terminated in August, 2008 for violating the attendance policy. He filed suit against the school and officials under 42 U.S.C. §1983 alleging First Amendment retaliation for his religious speech in the video.

The district court granted the defendants' summary judgment, and the Sixth Circuit affirmed. The appellate court found that the temporal proximity between the discovery of the YouTube video and the termination could lead a jury to believe that they were causally connected. However, an employer is not liable if it can show that it would have made the same decision even if the employee had not engaged in the protected conduct. In that case the record clearly showed that Haji was terminated for violating the attendance policy, and violations of policy generally furnish legitimate grounds for termination.

This case teaches that the stated basis for terminating an employee who has engaged in protected speech can be key to winning a lawsuit. If the employer would have terminated the employee irrespective of the protected speech, the employer can prevail, especially where the employee has violated established company policy.

## Supreme Court of the United States

### Supreme Court Narrows the Application of the Exclusionary Rule

Utah Detective Fackrell received an anonymous tip about drug activity, so he watched a residence and concluded there was drug activity taking place based on the number of visitors. Fackrell saw Edward Strieff, Jr. leaving the residence and conducted an investigatory detention. During the questioning, Fackrell discovered that Strieff had an outstanding warrant for traffic violations and arrested him. Fackrell conducted a search incident to the arrest and found methamphetamine and a drug pipe on Strieff.



At a suppression hearing Strieff argued that the evidence was derived from an unlawful investigatory stop. Prosecutors argued that the evidence should be admissible because the existence of the arrest warrant attenuated the connection between the unlawful stop and the discovery of the evidence. The trial court ruled that the evidence was admissible, but the Supreme Court of Utah reversed.

Judge Thomas authored a 5-3 decision that found that the evidence Officer Fackrell seized incident to Strieff's arrest was admissible. "In this case, there was no flagrant police misconduct. Therefore, Officer Fackrell's discovery of a valid, pre-existing, and untainted arrest warrant attenuated the connection between the unconstitutional

investigatory stop and the evidence seized incident to a lawful arrest.” The high court noted that the exclusionary rule is an important judicial remedy for deterring Fourth Amendment violations, but that it is not absolute.

Justice Sotomayor wrote a dissent in which she argued “that unlawful police stops corrode all our civil liberties and threaten all our lives,” and that the majority allows an officer to verify someone’s “legal status at any time.” Justice Kagan also authored a dissent stating that the majority practically invites police to make illegal stops.

The case is a significant win for police. Based on this case, even if an initial stop is ruled unlawful, evidence obtained during the stop may be used if the suspect had an outstanding arrest warrant. [Utah v. Strieff, 579 U.S. \(June 20, 2016\).](#)

## Supreme Court of Ohio

### Supreme Court of Ohio Rules that Detailed Attorney Fee Bill Narratives Need Not Be Produced in a Public Records Request

On May 17, 2016 the Supreme Court of Ohio ruled that the city of Avon Lake need not produce narratives and other information in attorney fee bills. The case arose from a public records request by Pietrangelo seeking invoices from a law firm for services rendered in connection with pending litigation between the city and Pietrangelo. The city provided copies of invoices with the name of the law firm, the general matter for which services were provided, the date of the invoice, the total fees billed for that period, and itemized expenses. However, it redacted narratives of the exact services rendered, the particular attorney who performed the task, the time spent by the attorney on each task, and the billing rate for each attorney. Pietrangelo filed a writ of mandamus in the Ninth District Court of Appeals seeking unredacted invoices.

The Ninth District Court of Appeals ruled that the city needed to disclose the “Professional Fee Summary” in the bills as well, which included a description of the hours, rate, and money charged for the services, but need not produce anything else. The Supreme Court affirmed, holding that the dates, hours, and rates not identified in the Professional Fee Summary were “inextricably intertwined with the narratives of services that are privileged materials,” so that information is exempt from disclosure. [Ex Rel. Pietrangelo v. Avon Lake, 146 Ohio St.3d 292, 2016-Ohio-2974.](#)

### *About Gallagher Sharp LLP*

*For over 100 years Gallagher Sharp LLP has provided aggressive and cost-efficient representation in a wide variety of civil litigation. Our registered service mark -- “Solutions, Not Surprises” -- embodies Gallagher Sharp’s core philosophies and illustrates our commitment to partnering with clients by providing prompt and accurate reporting, case evaluations focused on early resolution strategies, thorough knowledge of your industry, client oriented seminars, publications, and news advisories, rapid and on-site response to accidents, and nurse paralegals to assist in injury and wrongful death issues. We believe our client team structure gives clients the benefits of small firm responsiveness and accountability as well as large firm stability, experience, and resources.*

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