UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Jennifer McWilliams, *Plaintiff*, *v.* **Frankton-Lapel Community Schools Building Corporation**; **Robert Fields**, in his official capacity as Superintendent of Frankton-Lapel Community Schools; **Ronda Podzielinski**, in her official capacity as Principal of Frankton Elementary School; **Kimberly Gray**, in her official capacity as the Title I Program/Reading Director for Frankton-Lapel Community Schools; **Frankton-Lapel Community Schools Board of School Trustees**; *Defendants.*	**Civil Case No. 1:20-cv-1419-JPH-TAB**

Memorandum in Support of Plaintiff's Motion for Preliminary Injunction

Plaintiff Jennifer McWilliams is entitled to a preliminary injunction enjoining all Defendants from mentioning or referring to Ms. McWilliams' employment termination by requiring Defendants to expunge the record of her employment termination from her Frankton Schools' employment records. Further, Ms. McWilliams is entitled to a preliminary injunction on her employment termination, restoring her employment as a Title I Reading Teacher in Frankton Elementary School.

Factual Background

The facts of this case are detailed in the Complaint, [Dkt. 1], but are summarized here for

the Court's convenience. In the fall of 2019, teachers and administrators in Frankton Schools began discussing and supporting the "Red for Ed" movement in Indiana. *See id.* at ¶ 14. The Red for Ed movement is supported by the National Education Association, the public school teachers' union. *Id.* at ¶ 15. Ms. McWilliams disagreed with many of the political and policy agendas of the Red for Ed movement and disagreed that the teachers in Frankton Schools were encouraged to support the movement during school hours. *See id.* at ¶¶ *16-20.* Because of her concerns, Ms. McWilliams began an Indiana chapter of "Purple for Parents," a national organization dedicated to empowering parents. *Id.* at ¶ 21. Ms. McWilliams involvement in Purple for Parents prompted several email exchanges and discussions with Defendant Robert Fields, the Superintendent of Defendant Frankton Schools, including a meeting with Defendants Ronda Podzielinski and Kimberly Gray in which Mr. Fields called Ms. McWilliams a "far-right radical conspiracy theorist." *See id.* at ¶ ¶ 25-27.

Frankton Schools has adopted the use of the "Leader in Me" curriculum in its schools. *See id.* at ¶ *28.* This curriculum purports to be a "social emotional learning" curriculum designed to develop students' skills in the area of leadership, conflict resolution, and social interactions. *Id.* Ms. McWilliams has concerns about the Leader in Me curriculum specifically, and social emotional learning curriculum more generally. *See id.* at ¶ 30. Some of Ms. McWilliams concerns and opinions about the Leader in Me curriculum include:

- the curriculum is largely based on church doctrine and results in an inappropriate combination of church and state;
- the curriculum encroaches on the teachings of morals and values, usurping the parents' primary role for such teachings in their children's lives;
- time dedicated to Leader in Me activities takes away from time better spent in academic learning;

- parents had no way to "opt out" of the curriculum as it is incorporated in virtually every aspect of the school's culture and programming;
- Frankton Schools would begin mentoring other schools to implement the Leader in Me curriculum; and
- part of the teachers' evaluations were based on how well he or she implemented the curriculum.
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Id. Ms. McWilliams' concerns about this curriculum prompted her to express her concerns and opinions about the curriculum on her personal Facebook page. *See id.* at ¶ 34. Ms. McWilliams used her personal computer and personal cell phone to post and comment on this curriculum and did so after school hours and outside of school property. *Id.*

Nonetheless, four days after posting her personal opinions and concerns regarding the curriculum, Defendants Podzielinski and Gray gave Ms. McWilliams the choice to resign or be fired from her employment as a Title I Reading Teacher at Frankton Elementary School. *See id.* at ¶ 37. During this termination meeting, Defendants Podzielinski and Gray confirmed she was being fired because of what she had said that concerned the reputation of the school and their opinion of the truthfulness of Ms. McWilliams' statements. *See id.* at ¶ 38. However, when pressed on which statements led Defendants Podzielinski and Gray to that conclusion, they only pointed to her social media post regarding the curriculum and stated that disagreements with school programs could not be shared outside of the school and confirmed she was being fired because of that post on her personal Facebook page. *See id.* at ¶¶ 38-41.

Frankton Schools has a written and implied policy that has led teachers to believe that it is school policy that they cannot post "anything negative" about the school on their private social media accounts. *See id.* at ¶¶ 42-43. Ms. McWilliams has received increased employment scrutiny, investigations, and harassment based upon her personal political speech and ultimately

was fired for exercising her free speech rights on a matter of public concern. *See id.* at ¶¶ 23, 24, 26, 41.

Preliminary Injunction Standard

To be entitled to preliminary relief, a plaintiff must establish that: (1) she is likely to succeed on the merits, (2) she is likely to suffer irreparable harm in the absence of preliminary relief, and (3) the balance of the equities tips in her favor, and that an injunction is in the public interest. *Higher Soc'y of Indiana v. Tippecanoe Cty., Indiana*, 858 F.3d 1113, 1116 (7th Cir. 2017) (internal citations omitted). However, "in First Amendment cases, 'the likelihood of success on the merits will often be the determinative factor.'" *Am. Civil Liberties Union of Ill. v. Alvarez*, 679 F.3d 583, 589 (7th Cir. 2012) (quoting *Joelner v. Vill. of Washington Park*, 378 F.3d 613, 620 (7th Cir. 2004)). The likelihood of success on the merits is decisive in First Amendment cases because "even short deprivations of First Amendment rights constitute irreparable harm," and the public interest is not harmed by preliminarily enjoining unconstitutional actions by the government. *See id.* at 589–90. So "the analysis begins and ends with the likelihood of success on the merits of the [First Amendment] claim." *Korte v. Sebelius*, 735 F.3d 654, 666 (7th Cir. 2013).

Ms. McWilliams is likely to succeed on the merits of this case. Defendants unconstitutionally retaliated against Ms. McWilliams' exercising her right to free speech by terminating her employment as a Title I Reading Teacher. Ms. McWilliams' speech at issue was protected under the First Amendment because at all times relevant to her claims, she was speaking as a private citizen, not as a public employee, on a matter of public concern.

Additionally, the Defendants' interests, acting under the color of state law, do not outweigh Ms. McWilliams' First Amendment rights.

Argument

To prove a First Amendment retaliation claim, a public employee must establish three elements: (1) that she engaged in constitutionally protected speech; (2) that she suffered a deprivation likely to deter protected speech; and (3) that her protected speech was a motivating factor in the deprivation. *Harnishfeger v. United States*, 943 F.3d 1105, 1112-13 (7th Cir. 2019) (internal citations omitted).

Ms. McWilliams engaged in constitutionally protected speech. Firing a public employee is certainly a deprivation that is likely to deter constitutionally protected speech, and Ms. McWilliams was fired from her job as a Title I Reading Teacher because of her private speech on a matter of public concern. Since Ms. McWilliams can establish all three elements defined by this circuit's precedent, she is likely to succeed on the merits in this litigation.

I. Ms. McWilliams' Speech Was Protected Under the First Amendment.

The foundational case for this type of First Amendment case is *Pickering v. Bd. of Educ.*, 391 U.S. 563, 564 (1968). In *Pickering*, a teacher was fired after sending a letter to the local newspaper, which criticized a tax increase recently proposed by the school board. *Id.* The Board fired Mr. Pickering because it determined, after a full hearing, that the publication of the letter was "detrimental to the efficient operation and administration of the schools of the district." *Id.* The Court unequivocally rejected any notion that teachers relinquish their 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." *Id.* at 568.

The *Pickering* Court then developed a balancing test to determine if the government's interest outweighs the employee's First Amendment rights. *See id.* The balancing test as applied by the Seventh Circuit is discussed more in Part 1.C., but two post-*Pickering* cases limited First Amendment protection. Neither post-*Pickering* case applies to the facts of Ms. McWilliams' case.

A. Ms. McWilliams Spoke as a Private Citizen, Not as a Public Employee, So Her Speech Receives First Amendment Protection.

After *Pickering*, the Supreme Court narrowed First Amendment protection for some public employees. *Garcetti v. Ceballos*, 547 U.S. 410 (2006). The *Garcetti* Court held that in order to receive First Amendment protection, the employee must first show that she spoke as a citizen, rather than as a public employee. *Id.* Several Seventh Circuit cases show how it applies the required *Garcetti* analysis.

An employee making statements pursuant to his official duties does not receive First Amendment protection. *Kristofek v. Vill. of Orland Hills*, 832 F.3d 785, 792 (7th Cir. 2016). However, the court held that the speech "does not lose protection simply because it 'concerns' or is 'acquired by virtue of [the citizen's] public employment.'" *Id.* at 793. (internal citations omitted). The Seventh Circuit requires the speech to "ordinarily [fall] within the scope of the [employee's] duties" in order to be excluded from First Amendment protection—but just bearing some relation to the subject matter of the job is not dispositive. *Id.* (holding the First Amendment *did* protect a part-time police officer who shared his concerns about voided citations with the FBI). *See also, Renken v. Gregory*, 541 F.3d 769, 773 (7th Cir. 2008) (finding no First

Amendment protection for professor who complained about grant matching procedures to university officials); *Vose v. Kliment*, 506 F.3d 565, 572 (7th Cir. 2007) (holding officer's report of wrongdoing in narcotics unit not protected because it was not beyond his official duty as a sergeant of the narcotics unit to ensure the security and propriety of the narcotics unit's operations).

Ms. McWilliams' speech passes the *Garcetti* test. Her social media posts were made on her own time, on her own computer/phone, and were not directed to or about her specific supervisors. While she gained knowledge of the curriculum in question from her job, as the *Kristofek* court noted, acquiring knowledge of the subject matter of the speech from your job is not enough to turn otherwise protected private speech into unprotected "official duty" speech. Unlike the professor in *Renken* and the police officer in *Vose*, Jennifer was speaking to a broad public audience (Facebook "friends" and the like), not to supervisors or co-workers about matters that were part of her official duties. Therefore, Ms. McWilliams spoke as a private citizen, not as a pubic employee, so her speech receives First Amendment protection.

B. Ms. McWilliams Spoke on a Matter of Public Concern.

The Supreme Court also narrowed First Amendment protection for public employees in *Connick v. Myers*, 461 U.S. 138 (1983). Under *Connick*, to receive potential First Amendment protection, the employee must show she spoke on a matter of public concern rather than "matters only of personal interest." *Id.* at 147. "Public concern" is defined as speech that impacts a social, political, or community issue. *Id.* at 146. Whether the speech at issue is a matter of public concern is a threshold question of law for the court to decide. *Id.* To make that determination,

courts look at the content, form and context of the speech to determine whether the speech was a matter of public concern. *Id.*

The *Connick* case involved a disgruntled attorney in a district attorney's office who circulated a "questionnaire" to fellow employees regarding office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns. *Id* at 141. The Court found, with the exception of the political campaign question, the questionnaire was simply an ill-disguised effort to "gather ammunition" for her personal controversy with her supervisors. *Id.* at 148. That type of "private matter" speech does not receive First Amendment protection.

Here, Ms. McWilliams's speech did not concern a personal controversy with her supervisors. Ms. McWilliams spoke on a matter of public concern – education, and specifically a programs and curriculum being implemented in the Frankton Schools. Ms. McWilliams' criticisms and concerns about the Leader in Me program are directly analogous to the teacher's letter to the editor in *Pickering,* which addressed potential tax increases resulting from the school board's decisions.

C. The *Pickering* balancing favors Ms. McWilliams.

Finally, if the employee spoke as a private citizen on a matter of public concern, the court will apply a balancing test to determine if the government's interest outweighs the employee's First Amendment rights. *See Pickering*, 391 U.S. at 568. The burden of production and persuasion on this point belongs to the defendant. *Harnishfeger*, 943 F.3d at 1115. Although the defendant only has to provide evidence that shows its interest outweighs the employee by a

"preponderance" of the evidence, the evidence has to be fairly specific and supportable. *Id.* This is not a "rational basis" review that puts the thumb on the scale in favor of the government. *Id.* at 1116. That being said, the Seventh Circuit applies the following seven factors to a *Pickering* balancing test:

> (1) whether the speech would create problems in maintaining discipline or harmony among co-workers;
>
> (2) whether the employment relationship is one in which personal loyalty and confidence are necessary;
>
> (3) whether the speech impeded the employee's ability to perform her responsibilities;
>
> (4) the time, place and manner of the speech;
>
> (5) the context in which the underlying dispute arose;
>
> (6) whether the matter was one on which debate was vital to informed decision making; and
>
> (7) whether the speaker should be regarded as a member of the general public.

Harnishfeger, 943 F.3d at 1115.

As noted in the Complaint, Ms. McWilliams always participated in any Leader in Me activities and had received positive feedback on her job performance, so her speech did not impede her ability to perform her employment responsibilities. *See* [Dkt. 1 at ¶ 31]. The speech took place after school hours and off school property, so could not have interfered with Ms. McWilliams' job performance or any educational activities at the school. *Id.* at ¶ 34, 35. The context of Ms. McWilliams' speech was her personal Facebook page, where she is wholly separate and distinct from the context of her employment. *Id.* Debate surrounding public matters of education and curriculum are vital to not only civic discourse in general, but specifically to

ensuring that school officials make informed decisions that align with the community it serves. The *Pickering* Court acknowledged this and implied that such speech should receive constitutional protection unless a situation arose "in which a teacher has carelessly made false statements about matters so closely related to the day-to-day operations of the schools that any harmful impact on the public would be difficult to counter because of the teacher's presumed greater access to the real facts." *Pickering*, 391 U.S. at 572.

Ms. McWilliams' speech did not impede her job performance, was made outside of school and outside of the context of work-related speech, concerned matters of education and curriculum which require thoughtful public debate, were not made with careless disregard, and could easily be countered by school communication with the public. All of these *Pickering* factors weigh in favor of Ms. McWilliams. Maintaining discipline and harmony among co-workers and personal loyalty were both tangentially referenced in Ms. McWilliams' termination meeting, but further analysis of both also weigh in Ms. McWilliams' favor.

If the disruptive nature of an employee's speech is deemed extremely important, courts will consider both actual and potential disruptiveness. *Kristofek*, 832 F.3d at 796 (7th Cir. 2016). But even then, if the employee's speech touches on a matter of "strong public concern," the government must "offer particularly convincing reasons" not to protect the speech. *Id.* The government has to offer precise explanations and proof as to how an employee's speech is disruptive—mere hypothetical concerns are not enough. *Id.* For instance, in *Craig v. Rich Twp. High Sch. Dist. 277*, a guidance counselor admitted a "professed inability to refrain from sexualizing females." 736 F.3d 1110, 1115-16 (7th Cir. 2013). The *Craig* Court emphasized the

"inordinate amount of trust and authority" given to Craig in his role and could "easily see how female students may feel uncomfortable seeking advice from Craig given his professed [proclivities]." The school's interest in "ensur[ing] effective delivery of counseling services to female students" was squarely implicated, and immediately endangered, by Craig's speech. *Id.*

During Ms. McWilliams' termination meeting, Defendants Podzielinski and Gray made vague reference to her speech negatively impacting teacher morale, concerns about Ms. McWilliams not acting as a "team player," and about Ms. McWilliams spreading information that was untruthful about the school. [Dkt. 1 at ¶ 38]. When Ms. McWilliams asked for more details, neither Ms. Podzielinski or Ms. Gray provided any specific examples of how Ms. McWilliams one Facebook post negatively or specifically impacted teacher morale. *Id.* Neither presented examples of how Ms. McWilliams had not acted as a "team player." *See id.* To be sure, Ms. Podzielinski and Ms. Gray did not share Ms. McWilliams' concerns about the Leader in Me program. But beyond a difference of opinion, neither could state what factual information Ms. McWilliams shared in her post with a "careless" disregard to the truth. The factors considering maintaining discipline and harmony among co-workers and personal loyalty also weigh in favor of Ms. McWilliams.

Ms. McWilliams spoke as a private citizen, not as a public employee on a matter of public concern. Therefore, she engaged in constitutionally protected speech.

II. Firing a Public Employee Is a Deprivation Likely to Deter Protected Speech.

An adverse employment action is sufficient to meet the requirement for "deprivation under color of law that is likely to deter the exercise of free speech." *See Mosely v. Board of*

Educ. of City of Chicago, 434 F.3d 527, 534 (7th Cir.2006) (quoting *Power v. Summers*, 226 F.3d 815, 820 (7th Cir.2000)); see also, *Massey v. Johnson*, 457 F.3d 711, 716–17 (7th Cir. 2006) (finding because both plaintiffs were terminated, "it is undisputed that each suffered a deprivation likely to deter the exercise of free expression"). Here, Ms. McWilliams was fired from her job as a Title I Reading Teacher because of her Facebook post and suffered the requisite deprivation under color of law that likely deters her exercise of free speech. [Dkt. 1 at ¶ 41].

III. Ms. McWilliams' Constitutionally Protected Speech Was a Motivating Factor in Her Employment Termination.

To establish a causal link between the protected expression and a subsequent action by the employer, the plaintiff must show that the protected conduct was a substantial or motivating factor in the employer's decision. *Id.* The *Massey* Court further clarified, "[a] motivating factor does not amount to a but-for factor or to the only factor, but is rather a factor that motivated the defendant's actions." *Id.* (internal citations omitted). Circumstantial proof, such as the timing of events or the disparate treatment of similar individuals, may be sufficient to establish the defendant's retaliatory motive. *See* Culver v. Gorman & Co., 416 F.3d 540, 545–46 (7th Cir.2005).

Defendants Podzielinski and Gray specifically told Ms. McWilliams that her Facebook post was the reason why she was given the choice to resign or be fired. [Dkt. 1 at ¶ 41]. So there can be no question that it was a "motivating factor" in her employment termination.

Conclusion

Ms. McWilliams engaged in constitutionally protected speech when she spoke as a

private citizen, not as a public employee, on a matter of public concern. Firing a public employee is certainly a deprivation that is likely to deter constitutionally protected speech, and Ms. McWilliams was fired from her job as a Title I Reading Teacher because of that speech. These are the three elements Ms. McWilliams is required to prove for a First Amendment retaliation claim, so her likelihood of success on the merits is high. The likelihood of success on the merits is decisive in a preliminary injunction analysis for First Amendment cases because even short deprivations of First Amendment rights constitute irreparable harm, and the public interest is not harmed by preliminarily enjoining unconstitutional actions by the government.

Therefore, Plaintiff Jennifer McWilliams is entitled to a preliminary injunction to enjoin all Defendants from mentioning or referring to Ms. McWilliams' employment termination by requiring Defendants to expunge the record of her employment termination from her Frankton Schools' employment records. Further, Ms. McWilliams is entitled to a preliminary injunction on her employment termination, restoring her employment as a Title I Reading Teacher in Frankton Elementary School.

Respectfully submitted,

/s/ James Bopp, Jr.
James Bopp, Jr. IN # 2838-84
jboppjr@aol.com
Lead Counsel for Plaintiff
Melena S. Siebert IN # 35061-15
msiebert@bopplaw.com
Counsel for Plaintiff
THE BOPP LAW FIRM, PC
1 South Sixth Street
Terre Haute, IN 47807-3510
(812) 232-2434 - Telephone
(812) 235-3685 - Facsimile

Certificate of Service

I hereby certify that on May 29, 2020, a copy of the foregoing was filed electronically using the Court's CM/ECF system and by certified mail upon:

Frankton-Lapel Community Schools
Building Corporation
c/o Michael Lacey
Hulse, Lacey, Hardacre, Austin, P.C.
911 Meridian Plaza
Anderson, IN 46016
P.O. Box 1448
Anderson, IN 46015

Frankton-Lapel Community Schools Board
of Trustees
c/o Michael Lacey
Hulse, Lacey, Hardacre, Austin, P.C.
911 Meridian Plaza
Anderson, IN 46015
P.O. Box 1448
Anderson, IN 46015

Mr. Robert Fields
1017 S 500 W
Anderson, IN 46011

Ms. Ronda Podzielinski
414 Oxford Dr.
Noblesville, IN 46062

Ms. Kimberly Gray
5008 Sweetwater Dr.
Noblesville, IN 46062

/s/ James Bopp, Jr.

James Bopp, Jr.

Lead Counsel for Plaintiff