IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

KEISHA HUDSON, Plaintiff, v. MONTGOMERY COUNTY, PENNSYLVANIA, Defendant.	Case No. 20-CV-1487 The Honorable Joshua D. Wolson

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

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Defendant Montgomery County, Pennsylvania ("the County") does not cite, or attempt to distinguish, the case that controls the First Amendment issue presented in the motion to dismiss: *Flora v. County of Luzerne*, 776 F.3d 169 (3d Cir. 2015). In *Flora*, the Third Circuit reversed the dismissal of a chief public defender's First Amendment–retaliation claim that he was fired because he filed extraordinary papers in court, on behalf of his office's clients, criticizing the practices of the criminal system in which he worked. *Id.* at 180–181. Here, Plaintiff Keisha Hudson alleges that she was fired because she too filed extraordinary papers in court criticizing the practices of the criminal system in which she worked. She states a First Amendment–retaliation claim.

The arguments the County does make fare no better. First, the County argues that Hudson's First Amendment rights were not implicated (and that she somehow lacks standing as a result) when it fired her for filing an amicus brief merely because she did not sign the brief, even though Hudson pleads that she "directed the filing" of the brief, Doc. 1, Complaint[1] ¶ 1, and her First Amendment rights were violated because the County fired her on the basis of its content. *See Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1418 (2016). Second, the County—neglecting *Flora*—argues that this Court should conclude as a pure matter of law that Hudson spoke pursuant to her *ordinary* job duties, even though the scope her ordinary duties is a mixed question of fact and law, *Dougherty v. School District of Philadelphia*, 772 F.3d 979, 988 (3d Cir. 2014), and even though she pleads that her speech was not part of her ordinary job duties, a factual allegation fully supported by the County's admission that her speech was "outside the intended scope of [her] position." ¶ 62. Third, the County argues that this Court should dismiss

[1] All citations are to the Complaint unless specified otherwise.

Hudson's wrongful-discharge claim on the ground that the public policy of Pennsylvania does not bar firings that seriously compromise the independence of public defenders and that interfere with the courts' ability to hear issues of law. As shown below, the Pennsylvania courts have recognized and vindicated these precise public policy interests. Finally, the County's argument that this Court should dismiss Hudson's wrongful-discharge claim on immunity grounds is misguided because the County is not immune from suits seeking genuinely prospective relief.

I. THE FACTUAL ALLEGATIONS[2]

For purposes of deciding the motion to dismiss, the facts of this case are easy to summarize: Hudson directed the filing of an extraordinary brief in an extraordinary case of statewide importance. Because she did so, the County fired her.

Hudson began working as Deputy Chief Public Defender at the Montgomery County Public Defender's Office in May of 2016, after ten years of service at the Federal Community Defender Office for the Eastern District of Pennsylvania. ¶ 6. In March of 2019, the ACLU of Pennsylvania filed a class-action mandamus petition in the Supreme Court of Pennsylvania, alleging that the bail system in Philadelphia County violated the Federal and State Constitutions by jailing people simply because they cannot pay money. ¶ 22. Four months later, the Supreme Court of Pennsylvania accepted jurisdiction of the case under its King's Bench powers to review issues of extraordinary statewide importance. ¶ 23.

The bail system in Montgomery County also jails people—including many people not represented by the Public Defender's Office—because they cannot pay money. ¶ 17. So, after reviewing the ACLU petition and the Pennsylvania Supreme Court's grant of jurisdiction,

[2] Because the County moved to dismiss, Hudson's well-pleaded facts are taken as true and all reasonable inferences are drawn in her favor. *E.g.*, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

Hudson, separate from her ordinary duties managing the representation of clients in criminal cases, decided to file an amicus brief in the Philadelphia case to show that the constitutional violations alleged in that case were also being committed in Montgomery County and throughout the Commonwealth. ¶ 24.

The brief is extraordinary.[3] It begins with the story of a mother who was jailed for no reason other than her poverty and, as a result, was unable to breastfeed and bond with her newborn child. ¶ 25. This story, the brief contends, is not aberrational: the bail system in Montgomery County senselessly separates countless families and disrupts countless lives, *id.*, and it is systematically unconstitutional because magistrates in Montgomery County routinely use money bail to oppressively jail people, *id.* The brief describes a system in which crucial decisions regarding people's liberty are made without a formal record, without evidence, without counsel, and in violation of the United States Constitution and Pennsylvania law. *Id.*

The reaction of public officials in the County confirms that the brief was extraordinary and that it was outside the scope of Hudson's ordinary duties. Three days after the brief was filed, President Judge of the Court of Common Pleas Thomas Del Ricci angrily instructed Chief Public Defender Dean Beer (whom the County also fired in retaliation for filing the brief) to withdraw the brief. ¶¶ 34, 39. Del Ricci said that he viewed the brief as an attack against him personally and against his court as an institution. ¶ 39. Meanwhile, County Solicitor Josh Stein told Beer via email that he "fully support[s] [the] office in its mission to represent its clients . . . [but] question[s] the persuasive value of this brief for the actual underlying case," suggesting that he viewed the brief as outside of the mission of the office. ¶ 30. Although prior amicus briefs

[3] Hudson does not object to the County introducing the brief as an exhibit.

submitted during Hudson's tenure address important issues,[4] none criticized pervasive and illegal practices by elected officials in the County, and none prompted a reaction of any kind from County officials or local judges. ¶ 26. At the request of the County, and after another round of threats from Del Ricci ("[A] lot of people want you fired," Del Ricci said, ¶ 55), Beer filed a motion to withdraw the amicus brief on February 11, 2020, ¶ 56.

The County was not satisfied. On February 20, 2020, the County's Chief Operating Officer wrote a letter to Beer explaining his "disappointment." ¶ 60. Among other things, *id.*, the letter makes clear that the County viewed criminal-reform activities such as filing the amicus brief to be outside the ordinary duties of the Chief Public Defender and the Deputy Chief Public Defender: "[t]here is no question," the County wrote to Beer, "that your intentions in regards to providing quality representation to clients are genuine." ¶ 58. "As the Public Defender . . . you are . . . tasked . . . with furnishing legal counsel to any person who, for lack of sufficient funds, is unable to obtain it. . . . You, and your staff, are zealous advocates for those you are tasked with defending, and your work in that regard is appreciated beyond measure." ¶ 63. But, and of particular significance, the County also asserted that the amicus brief "act[ed] on desired reforms *in a manner that is outside the intended scope of your position*." ¶ 62 (alteration omitted) (emphasis added). On February 26, 2020, the County fired Hudson and Beer. ¶¶ 66–74. The County explained specifically why Beer was fired, and although it has never given Hudson a reason, the facts support the reasonable inference that she was fired for the same reasons as Beer.

Accordingly, for present purposes, Hudson was fired in retaliation for the filing of the brief. The County contests whether Hudson in fact "filed" the brief and whether she did so as a

[4] Hudson does not object to the County introducing a docket of these briefs as exhibits.

citizen, but the County does not, for purposes of the instant Motion, contest that Hudson has adequately pleaded that the reason she was fired was "for filing the brief." ¶ 118.

II. ARGUMENT

Hudson states a claim for First Amendment retaliation because she was fired for filing an extraordinary brief outside the scope of her official duties. She states a claim for wrongful discharge because firing her was offensive to the clearly articulated public policy of Pennsylvania. And the County is not immune from her wrongful-discharge claim because Hudson seeks only genuinely prospective relief that would not require the County to compensate her for any harms that she suffered while unemployed as a result of the County's actions.[5]

A. Hudson States a First Amendment–Retaliation Claim

Hudson alleges that her First Amendment rights were violated when the County fired her for filing a brief criticizing the practices of the Montgomery County criminal system. To state a claim for retaliation in violation of the First Amendment, a plaintiff must plead facts sufficient to conclude that her "speech is protected by the First Amendment and that the speech was a substantial or motivating factor in what is alleged to be the employer's retaliatory action." *Flora*, 776 F.3d at 174. The County does not contest that Hudson has adequately alleged an adverse employment action, and the County does not contest that Hudson has adequately alleged that the County took that action because of the amicus brief. *See generally* Doc. 10-1, Memorandum of

[5] The County also suggests that Hudson's claim for an injunction protecting her from further retaliatory filing if she is reinstated should be "stricken." Doc. 10-1 at 16–17. The County does not file a separate motion to strike, and if it did, that motion would fail because nothing about Hudson's request for relief is "redundant, immaterial, impertinent, or scandalous." *See* Charles Alan Wright et al., Federal Practice and Procedure § 1380 (3d ed. 2019). The County's request that this claim be *stricken* is in fact a request that the claim be *dismissed*, *id.*, and its arguments in support of that request are merely recitations of its argument that it did not violate Pennsylvania law by firing Hudson because she was an employee at will, Doc. 10-1 at 16–17. Hudson addresses the County's arguments in the section on the wrongful-discharge claim.

Law in Support of Motion to Dismiss. And so the only question is whether that brief is protected from retaliation.

Speech is protected from retaliation when "(1) in making it, the employee spoke as a citizen, (2) the statement involved a matter of public concern, and (3) the government employer did not have 'an adequate justification for treating the employee differently from any other member of the general public' as a result of the statement he made." *Hill v. Borough of Kutztown*, 455 F.3d 225, 241–42 (3d Cir. 2006) (citation omitted). The County does not contest that the amicus brief involved a matter of public concern and that the County lacked an adequate justification for firing Hudson if the amicus brief were citizen speech. The County argues only that the brief is not Hudson's speech and that the brief was filed pursuant to Hudson's official duties. Because Hudson indeed spoke, and because that speech was not made pursuant to her official duties, she states a claim for First Amendment retaliation.

1. Hudson Spoke

The County first argues that Hudson's First Amendment claims should be dismissed because "Plaintiff has no standing to seek the protections of the First Amendment for speech that factually is not even **her** speech." Doc. 10-1 at 6 (emphasis in original). Thus, the County concludes, this Court should dismiss this case for lack of subject-matter jurisdiction. *Id.* The County's arguments are misguided.

First, the Complaint amply alleges that Hudson in fact spoke through the amicus brief. Hudson alleges that she "decided to file" the amicus brief, ¶ 24, and that she "directed the filing" of the amicus brief, ¶ 1. As a factual matter, then, the brief is indeed her speech. The fact that she did not put pen to paper (or fingers to keys, more likely) does not mean that she did not speak. *See Smith v. California*, 361 U.S. 147, 149 (1959) (adjudicating First Amendment claim of bookseller even though he was not alleged to have authored any books in his store, nor even to

have specifically known the contents of any books in his store).

Second, even if it were true that Hudson did not in fact speak through the amicus brief—indeed, even if she had nothing whatever to do with the brief—her First Amendment rights would still have been violated because she was fired on the basis of the brief's content. In *Heffernan v. City of Paterson*, 136 S. Ct. 1412 (2016), the plaintiff police officer brought his bedridden mother a lawn sign for a mayoral candidate that the defendant city disfavored, but the plaintiff himself expressed no view on the mayoral candidate. *Id.* at 1416. The plaintiff nonetheless prevailed on his First Amendment claim. *Id.* at 1418. The Supreme Court held that "[w]hen an employer [takes adverse action against] an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment and 42 U.S.C. § 1983—even if, as here, the employer makes a factual mistake about the employee's behavior." *Id.* Therefore, even if Hudson had nothing to do with the drafting or filing of the amicus brief, which is not true, the County still would have violated the First Amendment for firing her because it believed that she did.

Finally, Hudson has standing sufficient to confer Article III jurisdiction on this Court to *decide* the question whether her speech was protected from retaliation. "It is firmly established . . . that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998). To plead standing, Hudson need only allege that she has suffered an injury that is fairly traceable to the challenged action and likely to be redressable by the Court. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180–181 (2000). Hudson was fired from her job. As redress, she seeks damages and reinstatement. There is no question that this

Court has jurisdiction.

2. Hudson Spoke as a Citizen

The County's core argument is that the amicus brief was filed within the scope of Hudson's official duties and, therefore, that her claim is barred by *Garcetti v. Ceballos*, 547 U.S. 410 (2006). The County ignores *Flora*, 776 F.3d 169, which controls this case, and ignores the Supreme Court's clarification in *Lane v. Franks*, 573 U.S. 228 (2014), that *Garcetti* bars only speech made in the course of an employee's *ordinary* duties. The County's official statements relating to the amicus brief constitute an admission that the County understood the filing of the brief to be outside of Hudson's ordinary duties, and that admission shows that as a factual matter the filing of the brief was outside Hudson's ordinary duties. Moreover, in contrast to the County's cited cases—most of which pre-date *Flora* and *Lane*—Hudson did not rely on information acquired solely as the First Assistant Defender; any attorney in the County could have acquired the same information about the bail system and could have filed an amicus brief on that issue. Hudson spoke as a citizen.

The Supreme Court has twice addressed the question whether government employees speak as citizens or as government employees. In *Garcetti*, the Court held that speech "pursuant to . . . official duties" is not protected from retaliation. 547 U.S. at 421. But, because the question was undisputed, the *Garcetti* Court "ha[d] no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." *Id.* at 424. Instead, the Court said that "[t]he proper inquiry is a practical one . . . and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes." *Id.*

In *Lane*, the Court unanimously upheld the First Amendment claim of a government

employee who was fired for providing truthful testimony in court, 573 U.S. at 231, and in doing so the Court elaborated the standard for "official duties" under *Garcetti*, *id.* at 237–241. "[T]he Supreme Court clarified that '[t]he critical question under *Garcetti* is whether the speech at issue is itself *ordinarily* within the scope of an employee's duties . . . .'" *Flora*, 776 F.3d at 178 (quoting *Lane* 573 U.S. at 240) (emphasis in *Flora*). The Third Circuit has twice declined to decide whether *Lane* modifies, rather than merely clarifies, *Garcetti*. *See Flora*, 776 F.3d at 179 n.11; *Dougherty*, 772 F.3d at 990; *see also Mpoy v. Rhee*, 758 F.3d 285, 295 (D.C. Cir. 2014) ("In particular, the use of the adjective 'ordinary'—which the [*Lane*] court repeated nine times—could signal a narrowing of the realm of employee speech left unprotected by *Garcetti*. Neither *Garcetti* nor any other previous Supreme Court case had added ordinary as a qualifier."); *Hagan v. City of New York*, 39 F. Supp. 3d 481, 510 (S.D.N.Y. 2014) ("After *Lane*, the focus is on [plaintiff's] 'ordinary' job responsibilities."). Regardless, there is no doubt that now the key question is whether the speech *itself* is within the scope of an employee's *ordinary* job duties. *Javitz v. County of Luzerne*, 940 F.3d 858, 866 (3d Cir. 2019).

a. *Flora* Controls This Case

In *Flora*, a chief public defender, after years of attempting to increase the budget for his office, "initiate[d] a class action lawsuit for the benefit of indigent criminal defendants . . . [w]ith three clients of the Public Defender's Office as the named plaintiffs in the suit."[6] *Flora*, 776 F.3d at 172. He alleged that he was fired for, among other things, filing the suit. *Id.* The Third Circuit ruled that the plaintiff had adequately alleged that filing a petition in court *on behalf of his*

[6] That suit ultimately reached the Pennsylvania Supreme Court, which held that "the system-wide deficiencies [in the Luzerne County Public Defender Office] have created circumstances in which the constructive denial of counsel is imminent and likely, if not all but certain." *Kuren v. Luzerne County*, 146 A.3d 715, 748–49 (Pa. 2016).

office's clients was not part of his ordinary duties, and that the question whether that filing was indeed part of his ordinary duties could not be resolved on a motion to dismiss given those allegations. *Id.* at 178–81. Even though the plaintiff's complaint "include[d] allegations that, as the Chief Public Defender, he was responsible for his office's representation of its clients and that he was terminated for enforcing those clients' rights," and even though "[h]e also allege[d] that he learned about . . . the funding crisis . . . in the course of his job duties," he still prevailed because "when channeling his speech 'up the chain of command' failed to produce results, he took drastic measures by filing the funding lawsuit against the County . . . ," and because "he describe[d] . . . the funding crisis . . . issue as [an] extraordinary circumstance[] impelling him to extraordinary speech." *Id.* at 180. The court noted that "[a]s claimed in his complaint, and as described in the statute creating the Public Defender, [Plaintiff]'s ordinary job duties did not include . . . the filing of a class action suit to compel adequate funding for his office. Rather, he represented indigent clients in criminal court and in related proceedings." *Id.* The Court ultimately concluded that the scope of the plaintiff's ordinary job duties was a factual question and that he had alleged that his speech was not made pursuant to those duties sufficiently to survive a motion to dismiss. *Id* at 180–81.

So too here. Here, *a fortiori Flora*, Hudson was not even representing her office's clients when she filed the amicus brief. ¶ 24; *see also* Doc. 10-2, Ex. A., Amicus Brief. Here, as in *Flora*, she was motivated in part by her clients' interests, and she learned about the bail system in Montgomery County in the course of her job. Here, as in *Flora*, Hudson engaged in extraordinary speech in response to extraordinary circumstances. And here, as in *Flora*, the statute establishing her office confirms that her ordinary job duties do not include filing this brief. Under Pennsylvania law, public defenders' ordinary duties are to furnish legal counsel to

indigent defendants upon appointment by the court. *See* 16 Pa. Stat. Ann. § 9960.6 (West 2020) ("The public defender shall be responsible for furnishing legal counsel, in [all eligible cases], to any person who, for lack of sufficient funds, is unable to obtain legal counsel."). Defenders are not specifically authorized to file amicus briefs, and this amicus brief was extraordinary in its direct and comprehensive attack on the bail system in Montgomery County and other jurisdictions within Pennsylvania. Finally, as more fully argued below, the County itself believed that Hudson was fired for acting outside her duties, thus creating a factual bar to the motion to dismiss.

b. Hudson Adequately Alleges That Her Ordinary Job Duties Do Not Include Filing the Brief

Flora held that the question of ordinary job duties is a mixed question of fact and law, and that where a plaintiff adequately alleges that his speech is not included within his ordinary duties, his claim may not be dismissed without discovery. The question of ordinary duties "is a practical one," *Dougherty*, 772 F.3d at 988 (quoting *Garcetti*, 573 U.S. at 424), meant to reflect the "'the enormous variety of fact situations" in which a public employee claims First Amendment protection.'" *Id.* (quoting *Garcetti*, 573 U.S. at 418 (quoting *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205, Will County, Ill.*, 391 U.S. 563, 569 (1968))). Hudson has alleged facts more than sufficient to give rise to a reasonable inference that her ordinary duties do not include publicly exposing, in the Commonwealth's Supreme Court, the rampant and systematic violations of the United States Constitution committed in the County's criminal system.

The County contends in its motion that filing amicus briefs is a regular part of Hudson's duties, but—in addition to being in direct conflict with *Flora*, which relied on the allegations of the complaint and the Public Defender Act to define the duties of a public defender, 776 F.3d at 180—the County pitches the question at the wrong level of generality. The question is properly

whether *this* brief is within Hudson's ordinary job duties. *Id.* at 175 ("[T]he key question in the citizen speech analysis is 'whether the speech at issue *is itself* ordinarily within the scope of an employee's duties.'" (quoting *Lane*, 134 S. Ct. at 2379) (emphasis added)). The County's argument treats Hudson's duties as "advocating on behalf of the indigent defendants in [her] County," Doc. 10-1 at 8, which would cover speech, like the *Flora* plaintiff's, that the Third Circuit explicitly ruled protected. That is not the law. Instead, this Court must determine whether the facts as alleged by Hudson support a reasonable inference that her ordinary duties, as a practical matter, do not include the speech at issue here.

Three facts are particularly relevant. First, the County has itself asserted that the brief was outside of Hudson's ordinary duties. The County explicitly contrasted the Public Defender Office's mission ("furnishing legal counsel to any person who, for lack of sufficient funds, is unable to obtain it") with its employees' "advocacy" efforts and placed the brief squarely in the latter category. ¶¶ 62–63. Second, the County's and Del Ricci's reaction to the amicus brief confirm that, as a factual matter, it is outside Hudson's ordinary duties. Never before had a brief occasioned a public reaction of any kind from local judges or County officials. This brief prompted threats of retaliation from Del Ricci, admonishment from the County, and ultimately termination. Finally, the amicus brief at issue here was factually extraordinary when compared with prior briefs filed in Montgomery County. This brief, unlike the others, criticized, root and branch, the County's pretrial criminal system. Accordingly, at a minimum, relevant facts are in dispute and discovery is necessary.

c. The County's Cases Are Off Point And More Recent Precedent Supports Hudson

The County relies on *Gorum v. Sessoms*, 561 F.3d 179 (3d Cir. 2009), *Foraker v. Chaffinch*, 501 F.3d 231 (3d Cir. 2007), and *Fraternal Order of Police, Lodge 1 v. City of*

Camden, 842 F.3d 231 (3d Cir. 2016), to argue that Hudson's speech was made pursuant to her official duties because the brief used specialized knowledge acquired in the course of her duties. These cases address issues fully distinct from the ones presented in this case. At the same time, the County ignores *Flora* (as explained above), as well as *De Ritis v. McGarrigle*, 861 F.3d 444 (3d Cir. 2017), *Javitz*, 940 F.3d 858, and *Dougherty*, 772 F.3d 979. These cases show that Hudson states a claim for relief.

First, the mere fact that the brief used "specialized" knowledge cannot help the County. For one thing, it is not true that the information in the brief "could only have been acquired as a result of the specialized knowledge and experience gained during the course and scope of employment at the [Public Defender's Office]." Doc. 10-1 at 10. The individual stories in the brief were adjudicated in open court where any member of the public could have observed them. *See generally* Doc. 10-2. And any attorney who represents criminal defendants could have acquired identical information. This is unlike *Gorum*, where the plaintiff college professor advised college athletes in disciplinary proceedings in a system that would not allow outsiders to do so. *Gorum*, 561 F.3d at 186 (supporting the conclusion that knowledge acquired in disciplinary hearings is relevant to official-duties analysis because "only a member of the faculty, staff or student body of the University can serve as an advisor at a disciplinary hearing" (quotation marks and citation omitted)).

In *Dougherty* and *Javitz*, the Third Circuit rejected the argument that speech was pursuant to official duties because "the content of the speech was gained from 'special knowledge' and 'experience' and the speech 'owes its existence to' professional duties." *Javitz*, 940 F.3d at 865 (quoting *Dougherty*, 772 F.3d at 989) (cleaned up). In *Dougherty*, the plaintiff could have learned about the information in his speech *only* through his job, and yet he still prevailed. 772

F.3d at 989. *Foraker* and *Fraternal Order of Police* are quite different because the plaintiffs in those cases used speech forms that were available only to people who had their jobs. *Foraker*, 501 F.3d at 238 (speech up the chain of command); *Fraternal Order of Police*, 842 F.3d at 244 (internal police counseling forms). Here, any member of the public—and surely any attorney in the area—could have known and written about the Montgomery County bail system, and could have been amicus or counsel for amici on the issues before the Pennsylvania Supreme Court. *See also De Ritis*, 861 F.3d at 454 (holding that public defender speaks pursuant to official duties while in court on behalf of individual clients, but noting that "an employee does not speak as a citizen if the mode and manner of his speech were possible *only* as an ordinary corollary to his position as a government employee" (emphasis added)). Hudson spoke as a citizen, and the County's motion should be denied.

B. Hudson States a Wrongful-Discharge Claim

Hudson alleges that firing her constituted wrongful discharge under Pennsylvania law because it was against the manifest public policy of the Commonwealth. The County argues that the Commonwealth's public policy is insufficiently specific on this point and that the County is immune under the Pennsylvania State Torts Claims Act (PSTCA). The County's arguments fail, and its motion should be denied.

1. Pennsylvania's Public Policy Forbids Hudson's Firing

Although employment in Pennsylvania is generally at will, there is a well-established public-policy exception to at-will dismissals that violate Constitutional mandates, statutory requirements, governmental regulations, clear dictates of public policy, or judicial rulings interpreting these governing sources of law. *See Hunger v. Grand Cent. Sanitation*, 670 A.2d 173, 175 (Pa. Super. Ct. 1996); *see also Mamlin v. Genoe*, 17 A.2d 407, 409 (Pa. 1941) (saying of the public-policy exception that "[t]here must be a positive, well-defined, universal public

sentiment, deeply integrated in the customs and beliefs of the people and in their conviction of what is just and right and in the interests of the public weal."). Under this exception, courts have recognized strong public-policy reasons to remedy dismissals for seeking statutory benefits such as worker's compensation, *Shick v. Shirey*, 716 A.2d 1231 (Pa. 1998); service on a jury, *Reuther v. Fowler & Williams, Inc.*, 386 A.2d 119 (Pa. 1978); reporting pursuant to federal law, *Field v. Phila. Elec. Co.*, 565 A.2d 1170 (Pa. Super. Ct. 1989); and even refusing to submit to a polygraph test, *Kroen v. Bedway Security Agency, Inc.*, 633 A.2d 628 (Pa. Super. Ct. 1993).

Here, Hudson's firing violates two substantial public policies of the Commonwealth. First, being fired because she filed a paper in court, *Shick*, 716 A.2d at 1237, of "importance to our legal process," *Reuther*, 386 A.2d at 120, undermines the Commonwealth's policy regarding access to courts. Second, her retaliatory firing threatens the independence of the Office of the Public Defender. *See In re Articles of Incorporation of Defender Ass'n of Phila.*, 307 A.2d 906, 912 (Pa. 1973) (noting constitutional importance of independence of public defenders).

a. Access to Courts

Pennsylvania has a strong public policy enshrined in its Constitution and reflected in appellate rulings protecting access to the courts, and the County violated that policy when it fired Hudson for filing an amicus brief on an issue of high public and legal importance.

Pennsylvania courts have consistently held that a discharge is wrongful if it is made in retaliation for valid judicial filings or if it would tend to frustrate the proper operation of the courts. In *Shick*, the Pennsylvania Supreme Court held that a discharge is wrongful when it is made in retaliation for filing a claim for worker's compensation because such a discharge "would have a deleterious effect on the exercise of a . . . right." 716 A.2d at 1237 (quoting *Frampton v. Cent. Indiana Gas Co.*, 297 N.E.2d 425, 427 (Ind. 1973)). In *Reuther*, the Pennsylvania Supreme Court held that a discharge is wrongful when it is made in retaliation for missing work due to

jury service because such a discharge would frustrate the courts' mission to conduct jury trials. *Reuther*, 386 A.2d at 120. Because public policy protects those who serve on juries, which are mandated by the Pennsylvania and United States Constitutions to protect the fair trial rights of criminal defendants, it must protect a public defender who seeks to present relevant arguments to the state Supreme Court on the constitutionally protected right to a fair bail system. Frustration of either process—jury selection or appellate review of bail systems—violates public policy.

Further, in *Novosel v. Nationwide Insurance Company*, the Third Circuit interpreted Pennsylvania law to forbid firing an employee for refusing to participate in the employer's campaign to lobby public officials. 721 F.2d 894, 899 (3d Cir. 1983). "While no Pennsylvania law directly addresses the public policy question at bar," the Court held, "the protection of an employee's freedom of political expression would appear to involve no less compelling a societal interest than the fulfillment of jury service or the filing of a workers' compensation claim." *Id.*

These cases support the conclusion that Pennsylvania law forbids discharges in retaliation for engaging in important court-related functions and for the exercise of constitutional and statutory rights. Here, Hudson was fired for voicing important legal arguments and, therefore, her firing violates the public policy of the Commonwealth.

b. Independence of the Public Defender

Hudson's firing also violates another Pennsylvania public policy: the constitutionally protected independence of the Office of the Public Defender. Firing public defenders for advocacy permitted by state law, albeit outside their core functions of individual client representation, threatens their ability to perform their core functions because it sends a chilling message that legal advocacy offending local political leaders or local judges will not be tolerated.

Pennsylvania courts have long been clear that the Pennsylvania and United States

Constitutions require that public defenders be free from political influence. In *Defender Association*, the Pennsylvania Supreme Court reviewed an amendment to the corporate charter of the Defender Association of Philadelphia, a non-profit corporation that provides defense services to indigent people charged with criminal offenses in Philadelphia County. 307 A.2d at 912. The charter amendment was challenged on the ground that the City of Philadelphia's representation on the amended corporation's board of directors rendered the Defender Association subject to the City's influence and thereby created a significant conflict of interest that could compromise the constitutionally mandated provision of criminal-defense representation. *Id.*

The court approved the amendment, but only based on its conclusion that the Defender Association's board structure was sufficiently protective of its independence because the City had the power to appoint only one-third of the board. "The[re] is no dispute," the court wrote, "that any plan to provide counsel to persons who need representation in criminal proceedings should be designed to provide counsel who is both competent and independent. 'The plan and the lawyers serving under it should be free from political interference.'" *Id.* at 909 (quoting A.B.A. Project on Providing Defense Services § 1.4 at 19 (Approved Draft, 1968)).

Most significantly, the court made clear that *actual interference* would violate Pennsylvania law:

> Our holding in no way precludes the possibility of judicial relief in the future if the occasion should arise. As only one example, should it appear that pressure has been brought to bear on Association attorneys to persuade their clients to forego jury trials or appeals in order to avoid the cost to the City that they entail, a clear case of unconstitutional conflict of interest would be made out, not to speak of violations of the standards of professional responsibility. Evidence of improper influence or pressure, whether overt or covert, will trigger an appropriate judicial response.

Id. at 912 n.21.

Plainly, the Pennsylvania courts are authorized, as a matter of constitutional doctrine and public policy, to remedy political interference by localities in the day-to-day representation of Defender clients (e.g., taking cases to trial, filing appeals).[7] The same public policy considerations must protect a public defender from interference with protected advocacy such as the submission of an amicus brief that upsets the local executive or judicial branches of government.

In *Kuren v. Luzerne County*, 146 A.3d 715, 748–49 (Pa. 2016), the Pennsylvania Supreme Court reiterated the crucial importance of effective and zealous defender operations in Pennsylvania. There, plaintiffs claimed that Luzerne County had violated the rights of public defender clients by failing to provide the Office of Public Defender with sufficient funding to ensure the provision of effective assistance of counsel under the United States and Pennsylvania Constitutions.[8] The county argued that prior case law required that a defendant show both deficient performance by his lawyer at trial (or on appeal) and prejudice to be entitled to relief on a claim of ineffectiveness, and therefore no Sixth Amendment or state constitutional claim could be made until after the trial and only on fully developed record. Accordingly, the county argued

[7] The County contends that Hudson's public-policy arguments are impermissibly in conflict with her First Amendment arguments because the former supposedly require that she be fired for actions done pursuant to her job duties. Doc. 10-1 at 9 ("Certainly, the County could not interfere with the independence of the OPD if the filing of the Brief was done as a citizen, and not as a part of the operations of the OPD."). Not so. Firing the Office's employees for *any* speech critical of the County's political system threatens to chill the employees' advocacy on behalf of clients who are, by definition, raising claims that are opposed to the County's criminal system. And regardless, Hudson is permitted to plead in the alternative. *See* Fed. R. Civ. P. (8)(d)(3) ("*Inconsistent Claims or Defenses*. A party may state as many separate claims or defenses as it has, regardless of consistency.").

[8] It is more than a mere coincidence that the original plaintiff in ***Kuren*** was Public Defender Flora, the successful plaintiff in the Third Circuit First Amendment case, *supra*, who was fired by the County for bringing an action seeking sufficient funding to satisfy the constitutional guarantee of effective assistance of counsel for defender clients.

neither Constitution provided a basis for the equitable remedy of a mandatory injunction.

The Pennsylvania Supreme Court unanimously rejected this argument, ruling that the systemic underfunding of a public defender office is likely to result in ineffective representation of defender clients, even though the clients could not be identified in advance. The Court ruled that the constitutional mandate of effective assistance was so integral to the proper workings of the criminal-justice system that judicial remedies for violation of this right could not be limited to post-conviction challenges authorized by *Strickland v. Washington*, 466 U.S. 668 (1984), and its progeny. To the contrary, the Court found that the duties of county public defenders in Pennsylvania to afford effective assistance of counsel to each of their clients required full and adequate funding of these offices.

As the Court stated, "[n]o other guarantee in the Bill of Rights that affects the criminal justice system parallels the right to counsel in its universality," *Kuren,* 146 A.3d at 736, and that "[t]he right to counsel is fundamental, pervasive, and necessary to protect a defendant's right to a fair trial." *Id* at 737. As a result, denying equitable relief would be "fundamentally irreconcilable" with the role of counsel in our system of justice. *Id* at 743. And the Court was not deterred from expanding the remedial structure for ineffectiveness claims by "the prospect that additional lawsuits could follow." *Id* at 749. As the Court noted with some particularity, Pennsylvania stood alone among the states in not providing state funding for public defenders. *Id.*

The Court was convinced of the importance of an effective and independent public defender office. To ensure that public defenders are provided with adequate resources, independence, and the ability to provide zealous advocacy for their clients, the Court held that a full range of remedies was necessary. Not only do these constitutional strictures reflect the public

policy in this Commonwealth of providing effective assistance of counsel, but also, given that defender independence is equally important in assuring competent and dedicated counsel for indigents, *Defender Ass'n,* 307 A.2d 906, these constitutional strictures reflect a public policy of defender independence and the right to be free from retaliatory firings. As the Commonwealth Court of Pennsylvania has stated, the clearest and most important source of public policy is the Pennsylvania Constitution. *Brozovich* v. *Dugo*, 651 A.2d 641, 644 (Pa. Commw. Ct. 1994).

Just a few months ago, the Superior Court of Pennsylvania affirmed that issues that "involve the right to competent counsel" and public defenders' "rights to earn a livelihood and to be compensated for the[ir] representation" are "deeply rooted in public policy." *Commonwealth v. Marshall*, No. 3137 EDA 2018, 2020 WL 1074604, at *2 (Pa. Super. Ct. March 6, 2020). There, a public defender office sought interlocutory appeal on the issue of whether it was empowered by Pennsylvania law to refuse to represent court-appointed clients seeking post-conviction relief where the county had not provided adequate funding or other resources to allow for effective assistance of counsel. *Id.* The court found the rights asserted by the public defenders met the threshold for interlocutory appeal, which requires that the implicated rights be so important as to be "deeply rooted in public policy," *id.* (quoting *Commonwealth v. Magee*, 177 A.3d 315, 319–20 (Pa. Super. Ct. 2017)). And on the merits, the court, relying on *Kuren*, held that the Defender's duty to provide adequate assistance of counsel mandated that the county provide the "time, resources, and skill to adequately represent the indigent party." *Id* at *4. (citing *Kuren*, 146 A.3d at 736).

Since the right to competent counsel and that counsel's right to be compensated for their representation are "deeply rooted public policy," the County's argument that the Pennsylvania courts would permit a county to discharge the defender who refused to take these cases on a

court-appointment basis fails. In other words, the state courts would find that Pennsylvania public policy provides an exception to at-will employment status in that circumstance, and Hudson's circumstance is materially identical.

In addition to these cases, the text of the Public Defender Act also demonstrates why Hudson's firing violates the public policy of the Commonwealth. 16 Pa. Stat. Ann. § 9960.3 (West 2020). The Act mandates far more than an appointment of a defender in each county in Pennsylvania. As interpreted in *Kuren*, the Act requires funding and independence sufficient to ensure effective assistance of counsel. And complying with statutory mandates is grounds for public-policy exception to at will employment. *Krolczyk v. Goddard Sys., Inc.*, 164 A.3d 521, 528–29 (Pa. Super. Ct. 2017). Where, as here, a public defender appointed to carry out those statutory and regulatory mandates is discharged for doing just that, the public-policy exception to at-will employment must apply.

2. The County is Not Immune from Hudson's Request for Injunctive Relief

Hudson alleges that the County wrongfully discharged her for presenting arguments to the Supreme Court in violation public policy and state law. As redress, she seeks an injunction requiring reinstatement and a guarantee that she may operate independently in that position. Because Hudson does not seek damages for this claim, and the relief she seeks—to return to her position as Deputy Chief Public Defender, as she was prior to the wrongful termination—will not require any additional expenditures by the County, it is not immune from Hudson's claim.

The County argues that it is immune from this claim under the Pennsylvania State Tort Claims Act (PSTCA). The PSTCA provides that "no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person." 42 Pa. Cons. Stat. § 8541. Although the PSTCA is limited by its terms to damages claims, the County argues that "[e]ven to the extent that Plaintiff

seeks reinstatement of h[er] employment via a request for injunctive relief, the County remains immune under PSTCA because such immunity applies both to damages claims and to claims for injunctive relief that require the government agency to take affirmative action." Doc. 10-1 at 12.[9]

But the County is immune from only injunctions that "would be equivalent to an action for damages" insofar as the injunction "would require the expenditure of an amount of funds equal to damages." *Swift v. Dep't of Transp. of Com.*, 937 A.2d 1162, 1169 (Pa. Commw. Ct. 2007). Because Hudson's injunction is not equivalent to an action for damages, the County is not immune, and the claim should not be dismissed.

Each case cited by the County supports this conclusion. In *Swift*, property owners alleged that a county had caused erosion of a waterway and sought "[a]n order requiring Defendants to abate the nuisance by restoring and repairing the Property and drainage easement to its condition [prior to the erosion], and for an order that Defendants are under a duty to maintain the drainage easement in [that] condition," or, "[i]n the alternative, . . . an order permanently diverting water from the drainage easement and Plaintiffs' Property." 937 A.2d at 1168. The court reasoned that each of these requests, whether framed as a claim for damages, injunctive, or declaratory relief, would require the defendant county to "perform the affirmative action of returning the watercourse to its [pre-erosion] condition which would require the expenditure of an amount of funds equal to damages." *Id.* at 1169. Because the requests were "equivalent to an action for damages," the defendant county was immune. *Id.*.

In *Plaza v. Herbert, Rowland & Grubic, Inc.*, No. 344 C.D. 2016, 2017 WL 519827 (Pa. Commw. Ct., Jan. 30, 2017), plaintiffs brought a trespass claim against a county for laying a

[9] Plaintiff does not contest that if she were seeking damages from the County for her wrongful-discharge claim, the County would be immune. She does not seek damages on this Count.

water pipe on their property without permission and sought "an injunction or judgment in ejectment requiring removal of the portion of the water line that is under the [property]." *Id.* at *2. Citing *Swift*, the court found that the PSTCA "applie[d] both to damages claims and to claims for injunctive relief that require the government agency to take affirmative action to make physical alterations to property," and ruled that the government had immunity.[10] *Id.* at *3 (quotation marks omitted). But in so doing, the court acknowledged that an "injunction restraining local agency from taking action is not barred by PSTCA because it is not a damages claim." *Id.* (citing *E-Z Parks, Inc. v. Larson*, 498 A.2d 1364, 1369–70 (Pa. Commw. Ct. 1985), *aff'd without op.*, 503 A.2d 931 (Pa. 1986)).

Hudson requests reinstatement. This request for injunctive relief is more like a request to restrain the County from firing her (or hiring someone else to replace her) than a request for damages because it would not require the County to make additional expenditures or pay for lost past or future income or other damages. The County will hire and pay a Deputy Chief Public Defender regardless of whether that person is Keisha Hudson. Her request is simply that she be that person. *See E-Z Parks*, 498 A.2d at 1369–70 (holding that "[s]ince governmental immunity under Section 8541 of the Judicial Code extends only to liability for *damages*," and petitioner "seeks to enjoin the Authority from inducing, or participating in, the breach of Petitioner's

[10] Defendant also relies on *Rooney v. City of Philadelphia*, 623 F. Supp. 2d 644 (E.D. Pa. 2009), asserting that it holds the "city and SEPTA immune from suit for affirmative action by way of injunctive relief under PSTCA." Doc. 10-1 at 12. *Rooney* was limited to the question of whether any of the exceptions to immunity applied and did not address the issue of whether the claim would require affirmative action by Defendants, and the court found an issue of material fact existed as to whether the City was immune from suit. *Rooney*, 623 F. Supp. 2d at 656–57. The court found SEPTA immune only because it did not own the underlying property and therefore could not be held liable under the real estate exception to immunity. *Id.* at 658–59.

lease," "Petitioner must be permitted to pursue his claim against the Authority for injunctive relief."). Accordingly, Hudson's claim for reinstatement due to her wrongful discharge is not barred by immunity.

II. CONCLUSION

Hudson was fired because she filed an extraordinary brief in an extraordinary case. Because the brief was well outside her ordinary duties, the motion to dismiss her First Amendment claim should be denied. And because she seeks genuinely prospective relief for a violation of clear public policy, the motion to dismiss her wrongful-discharge claim should be denied as well.

Respectfully submitted,

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