

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

BRITTNEY BROWN,)	
)	
Plaintiff,)	CASE NO.: 4:25-cv-419
)	
vs.)	
)	
ROGER A. YOUNG in his official capacity)	
as Executive Director of the Florida Fish)	
and Wildlife Conservation Commission,)	
and MELISSA TUCKER,)	
in her individual capacity,)	
)	
Defendants.)	
	/	

PLAINTIFF’S PRETRIAL BRIEF

Plaintiff submits this pretrial brief pursuant the Court’s Order for Pretrial Conference, ECF 38, and Federal Rule of Civil Procedure 16, with citation of authorities and arguments in support of her position on disputed issues of law.

INTRODUCTION

It is a fundamental tenet of First Amendment jurisprudence that an employee’s “exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment.” *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., Ill.*, 391 U.S. 563, 574 (1968). The evidence

supporting Plaintiff’s claims will be presented at trial. As directed by the Court, this Brief addresses only those issues of law which remain contested.

ARGUMENT

I. Plaintiff’s free speech interests outweigh Defendants’ employer interests.

A. Public employers cannot engage in viewpoint discrimination.

Defendants’ first public statement on the Whale Statement was to publicize that they did not “condone nor tolerate” what they saw as “hateful sentiment.” ECF 8-4. They continue to argue that they were concerned with being publicly associated with the Whale Statement and the viewpoints it expressed. Government actions that punish those who express a disfavored viewpoint are presumptively unconstitutional. *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015) (“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional . . .”); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828–29 (1995); *see also Rankin v. McPherson*, 483 U.S. 378, 383–84 (1987) (holding that terminating a public employee for expressing arguably objectionable views about an attempted presidential assassination violates the First Amendment). Where an employee’s speech is protected, the government must have “an adequate justification for treating the employee differently from any other member of the general public.” *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). If being associated with the government were sufficient justification, public

employees would have no protection for their public statements at all.

Plaintiff disputes that the Whale Statement had any impact on FWC's public trust or reputation, which will be determined at trial. But regardless how that factual dispute is resolved, "[t]he reaction of a community cannot always dictate constitutional protections to employees." *McMullen v. Carson*, 754 F.2d 936, 940 (11th Cir. 1985). These sorts of reputational concerns are considered in *Pickering* balancing only where relevant to the work at hand. *See, e.g., id.* at 939–40 (finding *Pickering* balancing favored employer where efficient law enforcement required mutual respect, trust, and support based on uncontradicted evidence that city's Black community would "categorically distrust the Sheriff's office if a known Klan member were permitted to stay."). Retaliation because of an employee's views on an issue irrelevant to their work is "completely out of bounds," regardless of whether those views have been publicly associated with the employer. *Oakes Farms Food & Distrib. Servs., LLC v. Adkins*, 154 F.4th 1338, 1348 (11th Cir. 2025); *see also Rosenberger*, 515 U.S. at 828 ("Discrimination against speech because of its message is presumed to be unconstitutional."). The rationale for a public employee's termination cannot be the "ideology or the opinion or perspective" expressed in their speech. *Rosenberger*, 515 U.S. at 829. Just as the government cannot exercise viewpoint discrimination "even when the limited public forum is one of its own creation", *id.* at 829, and just as it cannot exercise viewpoint discrimination when

disciplining public school children, *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1265 (11th Cir. 2004), it cannot exercise viewpoint discrimination when disciplining its employees. *Oakes Farms*, 154 F.4th at 1348.

B. Public employers cannot empower a Heckler’s Veto to suppress employee speech.

Governments cannot outsource their viewpoint discrimination by employing a Heckler’s Veto. “Protests, and even the threat of protests” do not outweigh public employees’ free speech rights. *Id.* (citing *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 543 n.8 (2022) and *Holloman*, 370 F.3d at 1274 –75). To be relevant to *Pickering* balancing and not an unconstitutional “heckler’s veto”, public hostility must be relevant to the job at hand. *Id.*

This principle is consistent with *Labriola v. Miami-Dade Cnty.*, 142 F.4th 1305 (11th Cir. 2025). In *Labriola*, a media aide’s use of inflammatory insults against LGBT people in a public opinion piece against a proposed policy sparked both internal turmoil among his coworkers and major public backlash directed at the Miami-Dade County Commission. *Id.* at 1307–10. Labriola was ultimately fired after refusing to participate in anti-discrimination training ordered by his employer in response to his speech. *Id.* at 1307–08. The Commission’s work involved setting policy and, as a media aide, Labriola was involved in both crafting and communicating the messaging around those policies. *See Labriola v. Miami-Dade Cnty.*, 693 F. Supp. 3d 1284, 1290 (S.D. Fla. 2023), *aff’d*, 142 F.4th 1305 (11th Cir.

2025) (finding that “patently offensive slurs and statements in the Opinion Piece compromised Defendant’s confidence in Plaintiff’s ability to fulfill his role as a writer for the voice of the County.”). This public backlash was both relevant and extreme, creating an actual disruption to the Commission’s day-to-day operations. *Id.* at 1309–10. Thus, Labriola’s choice of words to argue against a policy and the resulting public backlash was relevant to both Labriola’s ability to do his job effectively and to the Commission’s ability to fulfill its responsibilities.

In contrast, the Whale Statement was irrelevant to Plaintiff’s job duties and FWC’s mission and there is absolutely no evidence it interfered with FWC operations. While public employers “need not wait for disruption or disturbance to occur before acting”, “[r]easonable possibility of adverse harm” is required. *Moss v. City of Pembroke Pines*, 782 F.3d 613, 622 (11th Cir. 2015) (quoting *Anderson v. Burke Cnty., Ga.*, 239 F.3d 1216, 1221 (11th Cir. 2001)).

“Government ‘justification[s]’ for interfering with First Amendment rights ‘must be genuine, not hypothesized or invented post hoc in response to litigation.’” *Kennedy*, 597 U.S. at 543 n.8 (quoting *United States v. Va.*, 518 U.S. 515, 533 (1996)); *see also Holloman*, 370 F.3d at 1274 (“Where students’ expressive activity does not materially interfere with a school’s vital educational mission, and does not raise a realistic chance of doing so, it may not be prohibited simply because it conceivably might have such an effect.”).

Here, it would be unreasonable to base any prediction of future disruption on public disapproval of speech irrelevant to Plaintiff's, and FWC's, work. This is not a case where a public employee's speech reasonably calls into doubt their ability to perform their job duties or impairs their public employer's ability to fulfill its mission. It is a case where a public employer used its "authority over employees to silence discourse, not because it hamper[ed] public functions, but simply because superiors disagree[d] with the content of employees' speech." *Rankin*, 483 U.S. at 384. That some people across the Internet were aligned with Defendants' disagreement does not make silencing that discourse constitutional.

Furthermore, the record shows that the termination decision was made in a matter of minutes during the course of a college football game without any investigation or actual consideration of the potential impairment of Plaintiff's, or FWC's, work. In addition, FWC fired two other employees for statements similarly critical of Kirk with no public attention whatsoever. This strongly suggests that Defendants discriminated against Ms. Brown based on their instant reaction to viewpoints expressed in the Whale Statement, while the limited public criticism provided a mere *post hoc* rationalization after this lawsuit was filed.

C. Plaintiff's speech should be afforded full protection.

Defendants argue that Plaintiff's speech should be afforded less protection because FWC is a public-facing agency with law enforcement officers. That is not

the law. A public employee's speech may be afforded fewer protections when *they* are in law enforcement, which courts have found "require[] mutual respect, trust, and support." *McMullen*, 754 F.2d at 938–40 (finding *Pickering* favored Sheriff "faced with an explosive racial situation in a city already marked by poor relations"). There is no legal justification for discounting the speech rights of a shorebird biologist.

Defendants also point to the idea that some settings require credibility and adherence to command structure. Thus, a public employee who tells a reporter that his boss is a "paid lackey" might impair the boss's ability to command the respect and loyalty of other subordinates. *See Dartland v. Metro. Dade Cnty.*, 866 F.2d 1321, 1324 (11th Cir. 1989). But Plaintiff didn't publicly disparage her supervisor's ability to protect shorebirds; she shared her views about a political activist on her private Instagram account without any mention of FWC.

II. Defendants would not have terminated Plaintiff but for the protected speech.

Despite this Court's determination that "it's an easy call" that Plaintiff's speech played a substantial role in her termination, ECF 26 at 7–8, Defendants assert an affirmative defense that they would have terminated Plaintiff for "lawful, non-retaliatory reasons independent of any alleged protected speech." ECF 35 at 29; *see Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (negating retaliation if defendants can show they "would have reached the same decision as to

respondent's reemployment even in the absence of the protected conduct”). But Defendants have repeatedly admitted that Plaintiff would not have been fired in the absence of the Whale Statement. ECF 42-5 at 35:23–36:9; ECF 42-6 at 137:7–:13; ECF 42-9 at 55:21–56:2. Defendants are attempting to draw a distinction by suggesting that their decision was based on the public’s reaction to the Whale Statement, rather than the Whale Statement itself. As this Court already determined, “that dog won’t hunt.” ECF 26 at 7. Nothing in Defendants’ termination decision was “independent” of the Whale Statement.

III. Defendant Tucker is liable for the harm inflicted on Plaintiff.

A. Following orders does not insulate Tucker from liability.

Defendant Tucker argues that she cannot be held responsible for implementing a decision that had already been made. Despite her central role in effectuating Plaintiff’s termination, she claims she did not personally participate in the termination, as she was just following orders. The cases Defendant has relied on for this argument are inapposite. In *Quinn v. Monroe Cnty.*, 330 F.3d 1320, 1326 (11th Cir. 2003), the court affirmed that municipalities cannot be held liable under § 1983 on a theory of *respondeat superior* and that municipal liability for an unlawful termination required that the decisionmaker possess final authority to terminate. This is irrelevant: Defendants are not municipalities, and it is undisputed that Defendant Tucker had the power to terminate Plaintiff. As *Quinn* explains, “The ‘final

policymaker’ inquiry addresses who takes actions that may cause the municipality (here, Defendant Monroe County) to be held liable for a custom or policy. The ‘decisionmaker’ inquiry addresses who has the power to make official decisions and, thus, be held *individually* liable.” *Id.* (emphasis in original). Defendants’ citation to *McCarthy v. City of Cordele, Ga.*, 111 F.4th 1141 (11th Cir. 2024), further undermines their argument. *McCarthy* found a commissioner who encouraged the commission to terminate the city manager could not be held individually liable as the commissioner did not have the authority to effectuate the termination. *Id.* at 1147.

Defendants have cited no caselaw supporting the notion that a supervisor who effectuates the termination of an employee evades liability because she was exercising her power to terminate at the direction of another. This is unsurprising because, “since World War II, the ‘just following orders’ defense has not occupied a respected position in our jurisprudence, and officers in such cases may be held liable under § 1983 if there is a ‘reason why any of them should question the validity of that order.’” *O’Rourke v. Hayes*, 378 F.3d 1201, 1210 n.5 (11th Cir. 2004) (quoting *Brent v. Ashley*, 247 F.3d 1294, 1306 (11th Cir. 2001)). Here, there was ample reason why Defendant Tucker should have questioned the validity of the order to terminate Plaintiff, and in fact she did question it.

B. Defendant Tucker is not entitled to qualified immunity.

Defendant Tucker asserts qualified immunity as an affirmative defense. ECF 35 at 29. This defense fails as Tucker violated Plaintiff’s clearly established rights. A reasonable official would have understood that summarily terminating a public employee based on disapproval of that employee’s statement on an issue of public concern was a violation of the First Amendment.

“[A] judicial precedent with identical facts is not essential for the law to be clearly established.” ECF 33 at 6 (quoting *Gates v. Khokar*, 884 F.3d 1290, 1296 (11th Cir. 2018)). Here, it has long been clearly established that the government cannot fire an employee for speaking on a matter of public concern. It is clearly established that that premise isn’t overcome because an employee is at-will. *See, e.g., Rankin*, 483 at 383–84. It isn’t overcome because an employee shared arguably objectionable views on the assassination of a public figure. *Id.* And it isn’t overcome by reputational concerns or public backlash untethered to actual government operations. *See* Discussion, *supra* at 2–6; *Kennedy*, 597 at 543 n.8 (rejecting an argument that the risk of a reasonable observer mistakenly inferring that school district endorsed coach’s religious message and explaining that “protected speech or religious exercise [does not] readily give way to a ‘heckler's veto.’” (citations omitted)). Instead, it is clearly established that the relevant inquiry is workplace and operational efficiency. *See, e.g., Labriola*, 142 F.4th at 1305.

IV. The termination is a continuing violation of Plaintiff's rights which can be remedied.

Despite this Court's affirmation that "wrongful termination 'is a continuing violation . . . despite relating to a past violation'", ECF 33 at 2 (quoting *Johnson v. Madden*, No. 3:22-cv-17910, 2023 WL 4060180, at *3 (N.D. Fla. June 19, 2023) (citations omitted)), Defendants continue to assert that Plaintiff is merely experiencing the continuing effects of a completed past action, rather than an ongoing violation of her rights. ECF 35 at 30. This argument is foreclosed by *Pickering* and its progeny. "[R]equests for reinstatement constitute prospective injunctive relief that fall within the scope of the *Ex parte Young* exception and, thus, are not barred by the Eleventh Amendment." *Lane v. Cent. Ala. Cmty. Coll.*, 772 F.3d 1349, 1351 (11th Cir. 2014) (citations omitted).

CONCLUSION

For the foregoing reasons, the Court should resolve these legal issues in Plaintiff's favor. Once the trial resolves all disputed issues of fact, the trial record will support one conclusion. Defendants violated Ms. Brown's constitutional rights, and she must be reinstated to her employment at FWC.

Respectfully submitted May 12, 2026,

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