Multiple Documents

Part	Description
1	7 pages
2	Proposed Order

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

AL FLORA, JR., Chief Public Defender Of Luzerne County Plaintiff, v. LUZERNE COUNTY and ROBERT C. LAWTON, COUNTY MANAGER, in his official capacity, Defendants	No. 12-cv- ELECTRONICALLY FILED

PLAINTIFF'S' MOTION FOR PRELIMINARY INJUNCTION

1. Plaintiff hereby moves, pursuant to Fed. R. Civ. P. 65, for entry of a Preliminary Injunction to enjoin Defendants from terminating his employment on account of his public statements and his lawsuit against them regarding funding for the Luzerne County Office of the Public Defender ("OPD").

2. Plaintiff is the Chief Public Defender of Luzerne County, and has been since May 2010. He has repeatedly, but fruitlessly, petitioned Defendant County for additional resources for the OPD and warned that the OPD attorneys are

so overworked that they cannot properly represent all of the indigent criminal defendants in Luzerne County.

3. Beginning in December 2011, Plaintiff Flora informed the Court of Common Pleas that the OPD would decline appointments in most new criminal cases because of the OPD's inability to provide constitutionally adequate representation. The OPD currently approves new applications for representation only from indigent adult defendants with homicide or felony sex offense charges, or individuals who are incarcerated or subject to extradition. The OPD also continues to provide representation to individuals in mental health, state parole, county probation/parole revocation, and juvenile cases. The OPD has continued representation in all cases that the OPD was handling before December 19, 2011.

4. In response, the County's Interim Manager, Tom Pribula, publicly threatened that the County Manager and County Council would remove Plaintiff Flora from his position if he did not provide "cooperation."

5. Plaintiff Flora will, today, commence suit in the Luzerne County Court of Common Pleas to compel the County and County Manager to provide additional resources for the OPD.

6. Defendants' threat to terminate Plaintiff Flora in retaliation for his legal

action for additional funding violates the public policy of this Commonwealth, as well as Plaintiff's First Amendment rights to speak freely and to petition the government for redress of grievances.

7. Plaintiff incorporates by reference the facts alleged in the Verified Complaint.

8. Plaintiff also incorporates herein by reference the legal arguments contained in the Memorandum in Support of Motion for Preliminary Injunction. Plaintiff has satisfied the four-part test for granting a preliminary injunction.

9. As is more fully set forth in the accompanying legal memorandum, Plaintiff is are likely to prevail on the merits of his claims under Pennsylvania's Wrongful Discharge tort and the First Amendment.

10. Plaintiff will suffer irreparable harm unless the requested injunctive relief is granted.

11. Since the Defendant are a political subdivision and its agent, they have no legally-cognizable interest in violating the public policy of the Commonwealth or in suppressing constitutionally-protected speech and petition.

12. Granting Plaintiff the requested preliminary relief will not result in any foreseeable harm to Defendants or the public.

13. Plaintiff, through undersigned counsel, gave notice to Vito DeLuca, the acting Solicitor for Luzerne County, on April 10, 2012, that Plaintiff would be filing this action and seeking preliminary injunctive relief.

14. This being a non-commercial case involving a relatively small amount of money, and the balance of hardships favoring the Plaintiff, the Fed. R. Civ. P. 65(c) security bond requirement should be waived. *Elliot v. Kiesewetter*, 98 F.3d 47, 59-60 (3d Cir. 1996); *Temple University v. White*, 941 F.2d 201, 219-20 (3d Cir. 1991).

WHEREFORE, Plaintiff respectfully requests that this Court enter a preliminary injunction to enjoin Defendants from terminating Plaintiff from his position as the Chief Public Defender for Luzerne County.

Respectfully submitted,

Date: April 10, 2012.

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULES

I certify that on April 10, 2012, counsel for Plaintiffs sought concurrence in this motion as required by L.R.7.1, from the Acting Solicitor and presumed counsel for Defendants, Vito DeLuca, and that counsel did not concur.

/s/ Mary Catherine Roper
Mary Catherine Roper

CERTIFICATE OF SERVICE

I, Mary Catherine Roper, hereby certify that on this 10th day of April 2012, I emailed copies of the foregoing Motion for Preliminary Injunction, along with the Memorandum and proposed order in support thereof and the Verified Complaint, to counsel for Defendant:

Vito DeLuca
Acting Solicitor, Luzerne County
200 North River Street
Wilkes-Barre, PA 18711-1001

/s/ Mary Catherine Roper
Mary Catherine Roper

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

AL FLORA, JR., Chief Public Defender Of Luzerne County Plaintiff, v. LUZERNE COUNTY and ROBERT C. LAWTON, COUNTY MANAGER, in his official capacity, Defendants	No. 12-cv- ELECTRONICALLY FILED

ORDER GRANTING INJUNCTION

AND NOW, this _____ day of _____ 2012, after due consideration of Plaintiff's Verified Complaint, Motion for Preliminary Injunction and Brief in Support thereof, the Plaintiff and Defendants having appeared before the Court by their attorneys and presented argument and evidence; and it further appearing that Plaintiff will suffer immediate and irreparable harm, and injury and damage from Defendants' conduct unless Defendants are enjoined and restrained as requested in Plaintiff's motion, it is hereby ORDERED, ADJUDJED and DECREED as follows:

1. The Court makes the following findings:

a. There is a likelihood that Plaintiff will succeed on the merits of his claims that Defendant's threatened termination of his employment would violate both Pennsylvania public policy and Plaintiff's First Amendment rights.

b. Substantial and irreparable injury to Plaintiff will follow unless this order is entered;

c. As to the relief granted below, greater injury will be inflicted upon Plaintiff by the denial of relief than will be inflicted upon Defendants by the granting of relief;

d. Plaintiff has no adequate remedy at law; and

e. The public interest will be served by the injunction.

2. IT IS THEREFORE ORDERED THAT Defendants, together with their representatives, agents, servants, and all others acting on its behalf or in concert with it, be and hereby are ENJOINED and RESTRAINED, until further Order of the Court, from terminating Plaintiff from his position as the Chief Public Defender of Luzerne County.

3. This being a non-commercial case involving a relatively small amount of money, and the balance of hardships favoring the Plaintiff, the Fed. R. Civ. P. 65(c) security bond requirement is hereby waived. *Elliot v. Kiesewetter*, 98 F.3d 47, 59-60 (3d Cir. 1996); *Temple University v. White*, 941 F.2d 201, 219-20 (3d Cir. 1991).

4. Plaintiff, by his attorneys, agents or others designated by it, may serve copies of this Order upon Defendants and upon any person acting in concert or participating with them in the activities referred to above.

BY THE COURT

_____

Caputo, J.

General Information

Case Name	Flora v. Luzerne County et al
Docket Number	3:12-cv-00665
Court	United States District Court for the Middle District of Pennsylvania
Nature of Suit	Civil Rights: Other

UNITED STATES DISTRICT COURT FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

AL FLORA, JR. Chief Public Defender of Luzerne County Plaintiff, v. LUZERNE COUNTY and ROBERT C. LAWTON, COUNTY MANAGER, in his official capacity, Defendants	No. 12-cv- ELECTRONICALLY FILED

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiff, the Chief Public Defender for Luzerne County, seeks injunctive relief to protect his job in light of Defendant County's threat to fire him if he does not "cooperate" with the County's refusal to provide adequate funds for the Luzerne County Public Defender's Office ("OPD"). Plaintiff is filing suit today against the County seeking to compel the County to increase resources for the OPD and has reason to believe that doing so will subject him to retaliatory action by the County.

PROCEDURAL HISTORY

This action was commenced by Verified Complaint on April 10, 2012.

STATEMENT OF FACTS

Plaintiff incorporates herein by reference the facts set forth and Exhibits attached to his Verified Complaint.

STATEMENT OF QUESTIONS PRESENTED

1. Whether Plaintiff is likely to succeed on his claim that his discharge would violate public policy and be void under Pennsylvania tort law?

2. Whether Plaintiff is likely to succeed on his claim that his discharge would be unlawful retaliation for exercising his First Amendment rights to speak and to petition the government?

3. Whether Plaintiff will suffer irreparable harm in the absence of injunctive relief?

4. Whether any potential harm Defendants may suffer does not outweigh Plaintiff's First Amendment rights or the Commonwealth's public policy interest in protecting Plaintiff Flora's actions?

5. Whether the public interest is best served by allowing individuals to exercise their First Amendment rights and preventing public officials from terminating employees who refuse to act in violation of the public's interest?

ARGUMENT

The court's issuance of a preliminary injunction depends on four factors: (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably harmed by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the non-moving party; and (4) whether granting preliminary relief is in the public interest. *Allegheny Energy, Inc. v. DQE, Inc.*, 171 F.3d 153, 158 (3d Cir. 1999).

As the Third Circuit Court of Appeals recently explained, a plaintiff "needs only to show a *likelihood* of success on the merits (that is, a reasonable chance, or probability, of winning) to be granted relief. A 'likelihood' does not mean more likely than not." *Singer Mgmt. Consultants, Inc. v. Milgram*, 650 F.3d 223, 229 (3d Cir. 2011) (emphasis in original). Balancing the factors in this First Amendment matter, in which irreparable harm to Plaintiff and the public is certain and severe and Defendants' potential hardship is speculative and minor, the Court should grant the requested injunction because Plaintiff is likely to succeed on the merits.

A. Plaintiff Is Likely To Succeed On His Claim That His Discharge Would Violate Public Policy And Be Void Under Pennsylvania Tort Law.

Plaintiff Flora is likely to succeed on his wrongful discharge claim because his termination would violate a clear public policy mandate. Removing Mr. Flora for advocating publicly – including through legal action – for the funding necessary for the OPD to function in accordance with constitutional, statutory, and professional standards would contravene the Commonwealth's interest in the fulfillment of those standards.

***Pennsylvania's Public Policy Exception** To At-Will Employment*

In Pennsylvania, an employment relationship is presumed at-will, "absent a statutory or contractual provision to the contrary . . . ." *Geary v. U.S. Steel Corp.*, 319 A.2d 174, 176 (Pa. 1974); *Weaver v. Harpster*, 975 A.2d 555, 562 (Pa. 2009). However, an employee can maintain a cause of action for wrongful discharge under Pennsylvania common law by demonstrating that "some *public* policy of *this* Commonwealth is implicated, undermined, or violated because of the employer's termination of the employee." *McLaughlin v. Gastrointestinal Specialists, Inc.*, 750 A.2d 283, 289 (Pa. 2000) (emphasis in original). "[T]he precise extent to which public policy limits an employer's free reign over his business can only be

determined on a case by case basis." *Turner v. Letterkenny Fed. Credit Union*, 505 A.2d 259, 260 (Pa. Super. Ct. 1985).

"The right of a court to declare what is or is not in accord with public policy exists, 'only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regards to it.'" *Weaver*, 975 A.2d at 563 (citing *Mamlin v. Genoe*, 17 A.2d 407, 409 (Pa. 1941)). A claimed violation of public policy must implicate an interest of the Commonwealth, not only an interest of the terminated employee, to overcome the presumption of at-will employment. *McLaughlin*, 750 A.2d at 288-89. Recognized sources of public policy include the Pennsylvania Constitution, court decisions, and statutes. *Weaver*, 975 A.2d at 563. Indeed, "[n]o more clear statement of public policy exists than that expressed in the Pennsylvania Constitution." *Brozovich v. Dugo*, 651 A.2d 641, 644 (Pa. Commw. Ct. 1994).

Pennsylvania courts have recognized "public policy exceptions to at-will employment where the wrongful discharge claims have involved infringements on statutory and constitutional rights." *Weaver*, 975 A.2d at 563. Public policy prohibits an employee's discharge where necessary to protect the rights to trial by jury, due process, and political expression and association. *See, e.g., Novosel v. Nationwide Insurance*, 721 F.2d 894, 899-900 (3d Cir. 1983) (plaintiff's

termination for political views and refusal to participate in employer's lobbying effort violated public policy concerning importance of political expression and association); *Hunter v. Port Auth. of Allegheny County*, 419 A.2d 631, 635 (Pa. Super. Ct. 1980) (violation of due process under PA Constitution when defendant refused to hire plaintiff due to pardoned misdemeanor conviction); *Reuther v. Fowler & Williams, Inc.*, 386 A.2d 119, 120 (Pa. Super. Ct. 1978) (trial by jury).

The most analogous cases are, of course, those involving the proper functioning of the court system. In *Reuther v. Fowler & Williams, Inc.*, the Superior Court found that the public policy exception protected an employee who had been fired for complying with a jury summons. The court held that the constitutional right to a jury trial and a state statute requiring individuals summoned for jury duty to appear provided the requisite expression of public interest because of the jury's vital role in the judicial process. 386 A.2d at 120-21. The court reasoned, "[t]he jury system and jury service are of the highest importance to our legal process. . . . In our view, the necessity of having citizens freely available for jury service is just the sort of 'recognized facet of public policy' alluded to by our Supreme Court in *Geary v. United States Steel Corp.* . . ." *Id.* Thus, "this Commonwealth recognizes a cause of action for damages resulting

when an employee is discharged for having performed his obligation of jury service." *Id.* at 120.

Here, as in *Reuther*, the conduct that would trigger Plaintiff Flora's termination is completely consistent with Pennsylvania's constitutional and statutory directives regarding indigent defense, as well as Plaintiff Flora's obligations under the Pennsylvania Rules of Professional Conduct.

Pennsylvania's Interest In Ensuring Adequate Indigent Defense Is Embodied In The Pennsylvania Constitution, The Public Defender Act, Court Decisions, The Rules Of Professional Responsibility, And Even A Recent Report From The Joint State Government Commission's Task Force And Advisory Committee On Services To Indigent Criminal Defendants.

The Pennsylvania Constitution guarantees the right to counsel in criminal prosecutions. Pa. Const. art. I, § 9. The Public Defender Act (the "Act") requires the governing body of every county in Pennsylvania (except Philadelphia) to appoint a public defender to provide representation for indigent criminal defendants prosecuted in its county. 16 P.S. §§ 9960.3, 9960.4. The County, through the public defender, is responsible for "furnishing legal counsel, in [enumerated] cases, to any person who, for lack of sufficient funds, is unable to obtain legal counsel," including "any other situations where representation is constitutionally required." 16 P.S. § 9960.6. As the Act expressly references, the County's obligation to provide indigent defense tracks the Commonwealth's

constitutional obligation to provide a criminal defense to those it prosecutes who cannot afford to obtain counsel themselves:

> [W]hen a State brings its judicial power to bear on an indigent defendant in a criminal proceeding, it must take steps to assure that the defendant has a fair opportunity to present his defense. This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.

Ake v. Oklahoma, 470 U.S. 68, 76 (1985). The Pennsylvania right to counsel – and to adequate counsel – mirrors that under the Sixth Amendment to the U.S. Constitution. *Commonwealth v. Sneed*, 899 A.2d 1067, 1075-76 (Pa. 2006).

The obligation to provide for criminal defense includes the obligation to provide for representation throughout the defendant's criminal case. Criminal defendants are entitled to "more than just the opportunity to be physically accompanied by a person privileged to practice law." *Frazer v. United States*, 18 F.3d 778, 782 (9th Cir. 1994); *accord Evitts v. Lucey*, 469 U.S. 387, 395 (1985). Indigent defendants must be represented by an attorney "who plays the role necessary to ensure that the trial is fair." *Evitts*, 469 U.S. at 395 (quoting *Strickland v. Washington*, 466 U.S 668, 685 (1984)). "[T]he essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant . . . ." *Wheat v. United States*, 486 U.S. 153, 159 (1988) (emphasis added). The Sixth Amendment

requires defense counsel who can "play[] a role that is critical to the ability of the adversarial system to produce just results." *Strickland*, 466 U.S. at 685. And it expects defense counsel to render services that will make "the adversarial testing process work in the particular case." *Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) (internal citation omitted).

"Because the right to counsel is fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits." *Evitts*, 469 U.S. at 395. "A party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all." *Id.* at 396. Therefore, "inadequate assistance does not satisfy the Sixth Amendment right to counsel." *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980). Unless an accused has an attorney "able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself." *Id.* at 343 (internal citation omitted).

The Pennsylvania Rules of Professional Responsibility also dictate proper attention, diligence, and communication during the course of criminal representation. *See* Compl. at ¶¶ 30-34. Finally, the Commonwealth's particular concern with indigent defense in Luzerne County is illustrated by the December

2011 report of the Joint State Government Commission's Task Force and Advisory Committee on Services to Indigent Criminal Defendants. That report indicated that the OPD is operating under excessive workloads and would require an additional 8.5 full-time attorneys to meet nationally recognized standards. (This number does not include the four current, budgeted vacancies that Plaintiff Flora has not been authorized to fill.) *See* Compl. at ¶ 44.

Pennsylvania's** Public Policy Of Ensuring Adequate Indigent Defense Would Be "Implicated, Undermined, Or Violated" **If Plaintiff Flora Were Terminated For His Public Statements And Legal Action.

Removing Plaintiff as Chief Public Defender would violate the foregoing public policies and interests of the Commonwealth, and is, therefore, subject to the public policy exception to the at-will employment doctrine. Plaintiff Flora has not sought any personal gain in his campaign for adequate funding for the OPD. His actions – from informing the County of the need for additional funding, to declining additional cases while the OPD remains under-resourced, to making the dire situation of the OPD known to the public, to, finally, filing suit – have one purpose only: ensuring that the OPD can meet its constitutional, statutory, and professional obligations. To allow the County to punish him for his efforts would ensure that *no one* could rescue the OPD.[1]

[1] Plaintiff, as the Chief Public Defender of Luzerne County, is the only

Preliminary Injunctive Relief Is An Appropriate Way Of Protecting ***Pennsylvania's*** *Public Policy Of Ensuring Adequate Indigent Defense.*

Injunctive relief is the appropriate remedy for Plaintiff Flora – indeed, he seeks no other. In *Sasinoski v. Cannon*, for instance, the Commonwealth Court affirmed the grant of a permanent injunction that reinstated the Public Defender when the County Manager improperly placed him on administrative leave. 696 A.2d 267, 268, 272 (Pa. Commw. Ct. 1997). While *Sasinoski* addressed the issue of who had the authority to terminate the Public Defender and not whether he was wrongfully discharged, the Court noted that

> [A]ctions that disrupt the Office of the Public Defender, that threaten the rights of the clients served and that pose an interference in the functioning of the court system cannot [sic] be tolerated. . . . [T]he Court hereby affirms the trial court's order restoring the Public Defender to his office and enjoining [defendant] from further interference with the Public Defender in the discharge of his duties.

Id. at 272. Pennsylvania courts have entertained requests for injunctive relief in wrongful discharge cases. *See Davenport v. Reed*, 785 A.2d 1058, 1061 (Pa.

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person, apart from the indigent defendants the OPD serves, with standing to bring suit to compel the County to provide the resources necessary for him to fulfill his statutory and constitutional obligations. *See Dauphin County Pub. Defender's Office v. Court of Common Pleas of Dauphin County*, 849 A.2d 1145, 1148-49 (Pa. 2004) (public defender had standing to pursue writ of prohibition, because "the Public Defender . . . has the statutory obligation to provide legal representation to financially eligible criminal defendants. . . . [T]here is a clear causal connection between the Administrative Order and the Public Defender's diminished ability to make eligibility determinations and to provide representation to the defendants of its choice.").

Commw. Ct. 2001) (reinstatement sought); *Ballas v. City of Reading*, 2001 WL 73737, 1 (E.D. Pa. 2001) (reinstatement sought); *Cisco v. United Parcel Servs., Inc.*, 476 A.2d 1340, 1341 (Pa. Super. Ct. 1984) (reinstatement sought); *Hunter*, 419 A.2d at 632 (injunction sought to enjoin "[defendant] from refusing to admit [plaintiff] to its bus driver training class and refusing to employ [plaintiff]"). Therefore, an injunction is the appropriate remedy in this case to prevent Manager Lawton's wrongful discharge of Mr. Flora as the Chief Public Defender of Luzerne County.

The Superior Court has noted that, "[s]ome public policies are of greater importance than others. It follows that the more important the public policy implicated by the discharge, the harder it will be to assert a sufficient separate and legitimate business reason to justify the discharge." *Veno v. Meredith*, 515 A.2d 571, 581, n.5 (Pa. Super. Ct. 1986). There are few public policies more compelling than the assurance of due process and adequate representation for indigent criminal defendants. For all of these reasons, Plaintiff Flora is likely to succeed on his claim that his discharge would violate Pennsylvania public policy.

B. Plaintiff Is Likely To Succeed On The Claim That His Discharge Would Be Unlawful Retaliation For Exercising His First Amendment Rights To Speak And To Petition The Government

As the Supreme Court has consistently held, the First Amendment protects a public employee's right to speak as a citizen addressing matters of public concern. *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). Indeed, the importance of promoting the public's interest in receiving the well-informed views of government employees, is such that the First Amendment interests at stake extend beyond the individual speaker. *Id.* at 419. These First Amendment interests "limit[] the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Id.* Accordingly, when the government acts as employer, it violates its employees' free-speech rights if it takes adverse action against an employee in retaliation for that employee's protected speech. *See, e.g.*, *Pro v. Donatucci*, 81 F.3d 1283, 1288 (3d Cir. 1996).

A public employee's speech is protected by the First Amendment only if the employee spoke as a citizen on a matter of public concern and 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 his

statements. *Garcetti*, 547 U.S. at 418.[2] *See also Hill v. Kutztown*, 455 F.3d 225, 241-42 (3d Cir. 2006) ("A public employee's statement is protected activity 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.") (quoting *Garcetti*, 547 U.S. at 421). In addition to satisfying these requirements, a public employee must show that the protected activity was a substantial or motivating factor in the alleged retaliatory action. *Pro*, 81 F.3d at 1288.

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[2] The Supreme Court recently held that claims of retaliation for the filing of a suit against a public employer are governed by the same standard: "The framework used to govern Speech Clause claims by public employees, when applied to the Petition Clause, will protect both the interests of the government and the First Amendment right. If a public employee petitions as an employee on a matter of purely private concern, the employee's First Amendment interest must give way, as it does in speech cases. *City of San Diego v. Roe*, 543 U.S. 77, at 82–83, 125 S.Ct. 521 (2004) (*per curiam*). When a public employee petitions as a citizen on a matter of public concern, the employee's First Amendment interest must be balanced against the countervailing interest of the government in the effective and efficient management of its internal affairs. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, *supra*, at 568, 88 S. Ct. 1731 (1968). If that balance favors the public employee, the employee's First Amendment claim will be sustained. If the interference with the government's operations is such that the balance favors the employer, the employee's First Amendment claim will fail even though the petition is on a matter of public concern." *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488, 2500 (2011).

***Neither Plaintiff's Threats** To Sue The County Nor The Suit Itself Were Pursuant To His Employment Duties*

The Supreme Court provided guidance as to what constitutes speaking as a citizen as opposed to an employee in *Garcetti*, which held that public employees do not speak as citizens when they "make statements pursuant to their official duties." *Id.* at 421. The Court explained that:

> Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. . . . Refusing to recognize First Amendment claims based on government employees' work product does not prevent them from participating in public debate.

Id. at 421-22.

Garcetti bars a claim for First Amendment retaliation only where the employee's speech "owes its existence to a public employee's professional responsibilities." *Id.* at 421. Reasoning that government employers should be able to exercise "control over what the employer itself has commissioned or created," the Court crafted a rule to ensure that government employers would be able to direct the performance of their employees' *official* communications. *Id.* at 421-23 (explaining that "[o]fficial communications have official consequences," so "[s]upervisors must ensure that their employees' official communications are

accurate, demonstrate sound judgment, and promote the employer's mission"). These are communications that an employee is "paid to perform." *Id.* at 421.

Plaintiff Flora was appointed Chief Public Defender to oversee the OPD's provision of legal representation. *See* 16 P.S. § 9960.6. His duties do not include threatening to sue his employer, nor, in fact, filing suit. It is of no moment that Plaintiff's communications were based on information that he learned as a result of his position. One of the foremost reasons for protecting public-employee speech is to safeguard the public's right to receive information from those most knowledgeable on the subject:

> Were [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it.

Roe, 543 U.S. at 82 (citation omitted); *see also Garcetti*, 547 U.S. at 419 ("The Court has acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion."). Plaintiff's speech and legal action, therefore, satisfy *Garcetti's* first requirement.

Plaintiff's Speech Touched On A Matter Of Public Concern.

Plaintiff's speech and his lawsuit unquestionably are about a matter of public concern, as is demonstrated by the abundant authority cited above establishing that Pennsylvania public policy demands the provision of adequate representation to indigent criminal defendants.

The Public's Interest In Addressing The Problems With The Luzerne County Office Of The Public Defender Outweighs Any Interest The County Has In Compelling Plaintiff's ***"Cooperation"*** *In Maintaining The* ***Office's Severe*** *Underfunding.*

In communicating his concerns about the under-funding and resulting deficiencies of the OPD, Plaintiff Flora spoke as a citizen on a matter of public concern. *See Garcetti*, 547 U.S. at 418. Accordingly, the County's threat to terminate him is unconstitutional retaliation unless the County "had an adequate justification for treating [Flora] differently from any other member of the general public." *Id.*; *Hill*, 455 F.3d at 242. To determine whether the County had an adequate justification for disciplining Plaintiff Flora for his protected conduct, the Court must consider whether Plaintiff's and the public's "interests in the speech outweigh the [County's] countervailing interests in the 'efficiency and integrity in the discharge of official duties, and [in maintaining] proper discipline in the public service.'" *McGreevy v. Stroup*, 413 F.3d 359, 365 (3d Cir. 2005) (quoting *Connick v. Meyers*, 461 U.S. 138, 150-51 (1983)). The County "bears the burden of

justifying the [discipline], which 'varies depending upon the nature of the employee's expression.'" *Baldassare v. New Jersey*, 250 F.3d 188, 198 (3d Cir. 2001) (quoting *Watters v. City of Philadelphia*, 55 F.3d 886, 895 (3d Cir. 1995)). *See also McGreevy*, 413 F.3d at 365 ("The 'more tightly the First Amendment embraces the speech the more vigorous a showing of disruption must be made.'") (citation omitted).

The County cannot meet this burden. As an initial matter, the County can claim no legitimate interest in preventing its Chief Public Defender from taking every lawful step necessary to ensure that indigent defendants in Luzerne County are afforded constitutionally adequate representation. And though the County may have a general interest in preventing employees from airing the County's "dirty laundry," that interest is necessarily limited:

> [I]t would be absurd to hold that the First Amendment generally authorizes . . . officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office. . . . [T]he balancing test articulated in *Pickering* is truly a balancing test, with office disruption or breached confidences being only weights on the scales.

Baldassare, 250 F.3d at 200 (quoting *O'Donnell v. Yanchulis*, 875 F.2d 1059, 1062 (3d Cir. 1989)). There is no reason to believe that Plaintiff's statements or suit will disrupt the efficiency and integrity in the discharge of the OPD's official duties. *See McGreevy*, 413 F.3d at 365. To the contrary,

Plaintiff Flora's insistence on proper funding and on reducing OPD attorney caseloads can only *promote* the operations of the OPD.

***Plaintiff Flora's First Amendment Protected** Activity Is A Substantial Or Motivating Factor In The Threatened Retaliatory Action*

There is no question that, should Plaintiff be terminated at this point, the reason will be his outspoken opposition to and legal action to undo the hobbling of the OPD through fiscal starvation. Plaintiff is a highly regarded criminal defense attorney with decades of experience in the OPD. He has been a highly efficient and conscientious manager of that office. He rescued the County from ignominy after the "kids for cash" scandal by finding funding for and establishing a model Juvenile Unit. The only thing that has changed about Plaintiff Flora is that he has sued the County for the resources he needs to operate the OPD in accordance with constitutional strictures. And that is the reason the Interim County Manager threatened to fire him.

The burden, therefore, shifts to the Defendants to "establish that [they] would have taken the adverse employment action regardless of whether the employee had engaged in the protected conduct." *Pro*, 81 F.3d at 1288; *see also O'Donnell*, 875 F.2d at 1060-61 (in a public-employee speech case, government "bears the burden of justifying the [disciplinary action]"). The County cannot establish that it would have terminated or taken other action against Plaintiff if he did not sue the County. And hence, any additional reason proffered by the County

will constitute nothing more than a *post hoc* justification invented in the face of litigation.

C. Plaintiff Will Suffer Irreparable Harm in the Absence of Injunctive Relief

"The loss of First Amendment freedoms, for even minimal periods of time, unquestionably *constitutes irreparable injury*." *Elrod v. Burns*, 427 U.S. 347, 373-374 (1976) (emphasis added). *See also American Civil Liberties Union v. Reno*, 217 F.3d 162, 180 (3d Cir. 2000) (generally, in First Amendment challenges, plaintiffs who meet merits prong of test for a preliminary injunction "will almost certainly meet the second, since irreparable injury normally arises out of the deprivation of speech rights."), *rev'd on other grounds, Ashcroft v. American Civil Liberties Union*, 535 U.S. 564 (2002); 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE AND PROCEDURE 2948.1 (2d ed.1995) ("When an alleged constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary."). Defendants' threat to fire Plaintiff Flora, an experienced and dedicated Public Defender and the only Luzerne County Chief Public Defender willing to speak out about the need for change in the office, sends an unmistakable message not only to him, but to all County employees: keep your mouth shut if you see high-level County officials engaged in wrongdoing. Unless this Court grants the requested preliminary injunction to enjoin the Defendants' termination of Plaintiff, the right of Plaintiff and the rights of all

County officials trying to meet their obligations to the public to comment on matters of public concern will be chilled.

D. Any Potential Harm Defendants May Suffer Does Not Outweigh **Plaintiff's First Amendment Right** To Free Expression Or The **Commonwealth's Public Policy Interest In Protecting Plaintiff Flora's Actions.**

Defendants can point to no evidence that they will be irreparably harmed if Plaintiff remains the Chief Public Defender of Luzerne County pending the resolution of this lawsuit. Plaintiff has a distinguished history with the OPD and has been a highly efficient and conscientious manager of that office. He rescued the County from ignominy after the "kids for cash" scandal by finding funding for and establishing a model Juvenile Unit. Nothing he has done and nothing Defendants can point to undermines Plaintiff's ability to perform in his position. And because the Defendants are a governmental unit and its agent, they have no legally cognizable interest in suppressing Plaintiff's constitutionally protected rights.

E. The Public Interest Is Best Served By Allowing Individuals To Exercise Their First Amendment Rights And Preventing Public Officials From Terminating Employees Who Refuse To Act In Violation Of T**he Public's** Interest.

Because there exists a need for "informed, vibrant dialogue in a democratic society[,] . . . widespread costs may arise when dialogue is repressed." *Garcetti*, 547 U.S. 419. The contributions of governmental employees to that dialogue is

essential to informing the public about the conduct and operation of publicly funded agencies, as public employees are often the "most likely to have informed and definite opinions" about those operations. *Id.* (quoting *Pickering*, 391 U.S. at 572).

A "large-scale disincentive to Government employees' expression . . . imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said." *United States v. Treasury Employees*, 513 U.S. 454, 470 (1995). Denying the injunction will contravene the public interest because it will deter public officials from speaking out about how County budgetary decisions affect the public's interests and rights, thus burdening the public's right to hear this important information. The Court should thus grant the injunction to ensure that public discourse on this quintessential government function is not unduly chilled.

In addition, of course, the authorities cited above to demonstrate the public policy in favor of constitutionally adequate indigent defense establish the public interest in preventing the termination of Plaintiff.

CONCLUSION

For all the foregoing reasons, Plaintiff respectfully requests that this Court issue the requested injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULES

I certify that this brief complies with the length requirements of L.R. 7.8(b), in that it contains less than 5000 words, exclusive of tables and certifications. The body of this brief contains 4,831 words.

/s/ Mary Catherine Roper
Mary Catherine Roper

General Information

Case Name	Flora v. Luzerne County et al
Docket Number	3:12-cv-00665
Court	United States District Court for the Middle District of Pennsylvania
Nature of Suit	Civil Rights: Other