21-719

United States Court of Appeals for the Second Circuit

SALVATORE DAVI,

Plaintiff-Appellee,

v.

MICHAEL P. HEIN, in his official capacity, SAMUEL SPITZBERG, in his individual and official capacity, KRISTA ROCK, in her individual and official capacity, JILL SHADICK, in her official capacity,

Defendants-Appellants,

ERIC SCHWENZFEIER, in his individual capacity, SHARON DEVINE, in her individual capacity, SAMUEL ROBERTS, in his individual capacity, DONNA FARESTA, in her indivdual capacity, WILMA BROWN-PHILIPS, in her individual and official capacity,

Defendants.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF AND SPECIAL APPENDIX FOR APPELLANTS

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PRELIMINARY STATEMENT

The New York State Office of Temporary and Disability Assistance (OTDA) employs hearing officers to adjudicate appeals from the denial of public benefits. Here, OTDA transferred plaintiff Salvatore Davi from his position as a hearing officer after the agency received a complaint that Davi had posted comments on Facebook disparaging recipients of public benefits and was informed that the complaint had been shared with the Legal Aid Society, an organization that often represents parties in fair hearings before the agency. OTDA made a reasoned assessment that leaving Davi in place would be substantially likely to undermine public confidence in the fair hearing system. The U.S. District Court for the Eastern District of New York (Korman, J.) nonetheless held that Davi's transfer to a non-public-facing position violated his First Amendment rights and subsequently entered a permanent injunction directing OTDA to reinstate Davi as a hearing officer.[1]

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[1] Davi sued the OTDA Commissioner and several OTDA employees in their individual and official capacities. For purposes of this brief, the official capacity defendants, who are the appellants here, will be referred to collectively as "OTDA."

This Court should vacate the district court's permanent injunction and reverse that court's entry of partial summary judgment in Davi's favor. The district court fundamentally misapplied the balancing test set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968), when concluding that Davi's interest in his speech outweighed the agency's interest in maintaining the integrity of the fair hearing system.

First, the district court improperly discounted OTDA's justifications for transferring Davi. Not only did the court wholly ignore OTDA's interest in maintaining an appearance of impartiality, but, in direct contravention of this Court's precedent, the district court faulted the agency for acting before it had experienced any *actual* disruption. The district court further erred in disregarding OTDA's objectively reasonable predictions of harm, which an arbitrator expressly upheld in binding arbitration.

Second, the district court erred when assessing the strength of Davi's speech interests. The court rested its analysis primarily on its conclusion that Davi's Facebook comments touched on an issue of significant public concern. But in weighing the First Amendment value of Davi's speech, the court was also required to consider the context and

the manner in which Davi's comments were delivered. As a hearing officer, Davi bore a burden of caution with respect to his speech, especially on an issue related to his duties.

Thus, a proper application of the *Pickering* balancing test favors OTDA. Moreover, because Davi cannot point to any evidence in the record that OTDA acted with retaliatory intent, this Court should vacate the order of reinstatement and enter partial summary judgment in favor of OTDA on Davi's claim for injunctive relief.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over Davi's claim for injunctive relief under 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1) over OTDA's appeal from a district court order granting a permanent injunction (SPA.[2] 32). OTDA's timely notice of appeal (A. 719) brings up for review not only the injunction order, but also the district court's earlier opinion and order granting partial summary judgment against OTDA (SPA. 1-31). *See Shakhnes v. Berlin*, 689 F.3d 244, 250 n.3

[2] References to "A. #" and "SPA. #" are to documents included in the Joint Appendix and Special Appendix, respectively.

(2d Cir. 2012) ("In reviewing an order granting a permanent injunction," the Court "may also address the summary judgment order that served as the district court's principal legal basis for granting the injunction." (quotation marks omitted)).

ISSUE PRESENTED

Whether OTDA was justified in transferring Davi from his position as a hearing officer under the balancing test set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968).

STATEMENT OF THE CASE

A. The New York State Office of Temporary and Disability Assistance (OTDA)

OTDA is the New York State agency charged with overseeing public assistance programs for low-income individuals and families. *See* N.Y. Social Services Law (S.S.L.) § 20. The agency's mission is to enhance the "economic security" of vulnerable groups by helping them access "appropriate benefits and services." (A. 569.) Among the public assistance programs supervised by the State are the Supplemental Nutrition Assistance Program (SNAP), Family Assistance benefits, and Safety Net Assistance benefits. *See* S.S.L. §§ 2(19), 95.

To administer these benefits, OTDA oversees the work of local social services districts ("districts"). (*See* A. 46, 154, 569, 570.) These districts are tasked with processing benefits applications, making initial eligibility determinations, and issuing benefits to eligible recipients. *See* S.S.L. §§ 61-62. Individuals who receive an adverse determination from their district are entitled to a "fair hearing" before a "hearing officer" employed by OTDA's Office of Administrative Hearings (OAH). *See id.* § 22. (A. 47, 570.)

Because hearing officers regularly interact with benefits applicants and recipients and serve as a public face of the agency, they are required to perform their work impartially and to maintain an appearance of impartiality. (A. 380, 697.) These duties are expressly codified in the *Manual for Administrative Law Judges and Hearing Officers* ("*Manual*"), which all hearing officers receive during their training. (*See* A. 88, 96.) The duties are also set forth in Executive Order No. 131 (issued by the Office of the Governor) and various state laws and regulations governing the conduct of public employees. (*See* A. 90-92.) The Supreme Court has

emphasized that "an impartial decision maker is essential" in administrative hearings to adjudicate entitlement to public benefits. *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

From 2010 to 2016, Davi was employed as a hearing officer within OAH. (A. 697.) His primary responsibilities included conducting "fair hearings" to review benefits determinations and drafting recommended decisions. (A. 302, 697.) During his tenure, Davi often presided over as many as thirty hearings per day to review decisions adverse to benefits applicants and recipients by districts. (A. 407; *see also* 405-406.)

B. OTDA Receives a Complaint About Davi's Comments Disparaging Public Benefits Recipients

On November 4, 2015, OTDA received an anonymous letter that Davi had posted disparaging comments on another individual's Facebook page about recipients of social services benefits. (A. 65.) The complaint enclosed a screenshot of comments that Davi had written in response to an article and discussion about SNAP, a program for which he conducted fair hearings. (A. 66.) Davi's comments included the following statements:

- "It is not the government's job to subsidize laziness and failure."
- "I have zero sympathy for anyone who refuses to work and/or get the education or training to earn a livable wage."
- "This country has turned welfare into a generational career path!"
- "Your 'morals' suck because they create an underclass dependant on government handouts that translates into generational poverty, while at the same time taxing productive members of our society to the breaking point."

(A. 66.)

The complainant asserted that Davi's comments reflected a severe bias against benefits applicants and recipients and urged the agency to investigate whether he was conducting fair hearings impartially. (*See* A. 65.) The complainant also indicated that the complaint was copied to Project FAIR,[3] a joint project of the Legal Aid Society and another legal services organization. Project FAIR regularly represents clients in fair hearings before OTDA and maintains space in the lobby of the fair hearing

[3] OTDA later identified the author of the complaint and received confirmation from her that she forwarded the complaint to the Legal Aid Society. (A. 504, 700-701; *see also* A. 537-538).

waiting room to offer individuals free legal advice and representation. (A. 65, 380, 577, 698.)

C. OTDA Removes Davi from His Position as a Hearing Officer

Upon learning of the complaint, a group of senior OTDA officials, including those named in this action, promptly met to discuss the matter. (A. 699.) Based on the severity of the allegations, OTDA immediately commenced an investigation and removed Davi from the hearing calendar pending the investigation's outcome.[4] (A. 699.) The decisionmakers within the group collectively decided that, if Davi had in fact posted the Facebook comments, he could no longer preside over fair hearings without jeopardizing the public's perception of the fair hearing system. (A. 501-502; *see also* A. 440, 461.)

Chief among OTDA's concerns was how Davi's actions would adversely affect public perceptions of whether benefits applicants "would have an opportunity for a fair hearing." (A. 518.) Defendants uniformly

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[4] OTDA immediately attempted to authenticate the Facebook comments. (*See* A. 548.) The Director of OAH also listened to a sample of Davi's hearings to ascertain whether OTDA needed to take further action with respect to Davi's previous decisions. (*See* A. 382.)

testified that they believed Davi's continued presence on the bench "would at least cause others to perceive . . . that he's not a fair and impartial hearing officer." (A. 461; *see also* A. 484, 505-506.) Their contemporaneous emails confirm that OTDA officials were concerned Davi's comments would garner negative press and tarnish the agency's reputation in the community. (*See* A. 544-545, 547, 550-551, 553).) As one official explained, the threatened reputational harm went directly to "the purpose of OAH," which is "to provide fair hearings to appellants." (A. 518.)

OTDA was also concerned that Davi's actions would provide public applicants and recipients with a good-faith basis to seek his recusal or to request reconsideration of his past decisions. (A. 380, 460-461.) Such requests would require the agency to, at a minimum, review "the record of the hearing and the decision . . . to be issued." (A. 397.) And the process for adjudicating a single recusal or reconsideration request could require "several hours of analysis and work." (A. 381.) OTDA thus determined that Davi's continued presence on the bench could impose a substantial burden on the agency's operations.

Defendants acknowledged and discussed Davi's right to "free speech," but ultimately concluded that, if Davi had in fact posted the

Facebook comments, maintaining him as a hearing officer would severely undermine the agency's "appearance of impartiality" and could potentially result in "disruptions" to OAH's core functions. (A. 502.)

OTDA thus initiated the disciplinary process set forth in the collective bargaining agreement (CBA) between the agency and Davi's union. (A. 375.) Pursuant to that process, OTDA first questions any employee who is a "likely subject for disciplinary action." (A. 78.) If the agency concludes that there is "probable cause" the employee's "continued presence on the job . . . would severely interfere with operations," the agency may then suspend the employee pending the issuance of the Notice of Discipline. (A. 79.)

OTDA interrogated Davi on November 13, 2015. (A. 585.) During the interview, Davi refused to admit or deny making the comments at issue and provided no exculpatory information. (A. 432-433; *see also* A. 376.) At the conclusion of the meeting, OTDA issued Davi a Notice of Suspension. (A. 376.) As OTDA explained in the Notice, the suspension was motivated by the agency's concerns that Davi's continued presence on the job would substantially interfere with OTDA's operations in light of

his comments publicly disparaging benefits recipients—the very population OTDA serves. (A. 73.)

Over the next six weeks, OTDA and Davi engaged in protracted negotiations in an attempt to resolve the matter without issuing Davi a Notice of Discipline. (*See* A. 376*; see also* A. 540-542 (email chain reflecting negotiation of terms); A. 556, 558-560 (same).) Because OTDA could not transfer Davi to another civil service title without his consent, OTDA offered to forgo formal discipline in exchange for Davi's accepting a transfer to a position that had no hearing responsibilities but was at the same grade and pay as his hearing officer position. (*See* A. 376; *see also* A. 561-562 (proposed settlement agreement).) Davi refused. (A. 564.)

Unable to reach a resolution in which Davi would agree to serve in a non-public-facing role, the agency issued a Notice of Discipline on December 29, 2015.[5] OTDA charged Davi with failing to maintain an appearance of impartiality—as required by the *Manual*, Public Officers

[5] In accordance with the CBA, OTDA converted Davi's "suspension without pay" to a "suspension with pay" after the deadline for issuing a Notice of Discipline under the CBA expired (A. 376.)

Law, and other applicable policies and regulations—and sought his termination. (A. 88-93.)

D. Davi Fails to Overturn His Discipline in Binding Arbitration Proceedings

Davi challenged his proposed dismissal through his union in binding arbitration proceedings. (A. 703-704.) Over the course of the proceedings, the parties presented extensive evidence, argument, and briefing. (*See* A. 359.) At the conclusion, a neutral, third-party arbitrator upheld Davi's suspension and removal from the hearing officer position on the basis that his Facebook comments violated his duty to maintain an appearance of impartiality. (*See* A. 362-365.)

The arbitrator reasoned that, although Davi proffered that he had a "95% affirmation rate" and "tried to explain that he did not have preconceived notions against [public benefits recipients], his words speak for themselves." (A. 362, 364.) "No one would feel comfortable with him being their decision maker after reading his post." (A. 364.) The arbitrator thus concluded that "the agency [was] not trying to deny [Davi] the ability to communicate on public policy," but rather, was acting in the interest of preserving "[c]onfidence in the system"—an attribute necessary for

OTDA to "fulfill its responsibilities to the citizens of New York State" (A. 362, 363).

Although the arbitrator found that OTDA was justified in removing Davi as a hearing officer, he ultimately concluded that Davi's transfer (and not his termination) was the more appropriate consequence. (A. 364.) He thus reduced the penalty to an unpaid, six-month suspension and permitted OTDA to transfer Davi to a position—at the same pay grade—that did not include the duties of a hearing officer. (A. 365.) Pursuant to the arbitration award, OTDA reassigned Davi to the civil service position of Senior Attorney, effective July 1, 2016. (A. 705.) Davi unsuccessfully sought to vacate the arbitration award via a suit in state court that was dismissed for lack of standing. The state court held that it would have, in any event, confirmed the award on the merits. (A. 367-371.)

E. Prior Proceedings in This Federal Action

On September 13, 2016, Davi filed this federal action against the Commissioner of OTDA and several OTDA employees in both their individual and official capacities, alleging that OTDA's disciplinary action

violated the First Amendment.[6] (A. 4.) Davi sought the injunctive relief of reinstatement, restoration of seniority, and expungement of any findings of misconduct, as well as damages from defendants in their personal capacities pursuant to 42 U.S.C. § 1983. (A. 28-30.)

In October 2019, Davi moved for partial summary judgment on his claim for injunctive relief. (A. 43-44.) Defendants cross-moved for summary judgment on Davi's claims for both damages and injunctive relief. (A. 372-373.) On March 3, 2021, the district court granted Davi's motion and denied defendants' cross-motion on Davi's claim for injunctive relief. (SPA. 30.) With respect to Davi's damages claim, the court granted summary judgment in favor of three OTDA officials who the court concluded were not "personally involved" in Davi's disciplinary process. (SPA. 27-30.) The court held that the damages claims against the remaining three officials could proceed to trial because there was enough evidence of their

[6] Davi also alleged in his amended complaint that OTDA later rejected his applications for positions as a supervisory hearing officer and a hearing officer in retaliation for his Facebook comments. (A. 27.) The district court did not address these claims in its summary judgment decision.

personal involvement, and the court concluded that the officials were not entitled to summary judgment on qualified immunity. (SPA. 24-27.)

The district court held that Davi's speech was protected by the First Amendment because he was speaking as a private citizen on a matter of public concern. (SPA. 13-16.) The court then applied the balancing test set forth in *Pickering*, 391 U.S. 563, and concluded that, on this record, Davi's interests in his speech outweighed the agency's interest in maintaining the efficiency and effectiveness of its operations. (SPA 16-22.)

The district court stated that Davi's "speech touche[d] on matters of significant public concern," and that OTDA therefore needed to show "a correspondingly greater risk of disruption to the government" than ordinarily required to justify Davi's transfer. (SPA. 17 (quotation marks omitted).) The court then concluded that OTDA failed to carry its burden under this heightened standard because the summary judgment record did not contain evidence that Davi had displayed actual bias against public assistance recipients in his decision-making, or that the agency had experienced any actual disruption before seeking to remove him as a hearing officer. (SPA. 18-21). In so doing, the court ignored OTDA's objectively reasonable concern that Davi's comments could undermine

the public's perception of the agency. The court also placed great weight on the purported fact that OTDA's "investigation revealed that Davi awarded public benefits to applicants in approximately 95%" of cases (SPA. 6; *see also* SPA. 3, 19)—a factual assertion that has no basis in the summary judgment record.

On March 24, 2020, the district court ordered OTDA to reinstate Davi to the hearing officer position by April 1, 2021, and to assign him duties, including conducting hearings, by April 23, 2021. (SPA 32.) Defendants filed a notice of appeal the next day (A. 719), and also moved in this Court for a stay of the order pending appeal and for an administrative stay, (CA2 ECF No. 20 (Mar. 29, 2021)). After a single judge of this Court denied the interim stay (CA2 ECF No. 28 (Apr. 2, 2021)), the parties reached a resolution regarding the stay motion (CA2 ECF No. 49 (Apr. 19, 2021)), and OTDA withdrew that motion with prejudice (CA2 ECF No. 55 (Apr. 19, 2021)).

SUMMARY OF ARGUMENT

This Court should reverse the district court's permanent injunction reinstating Davi as a hearing officer and grant partial summary judgment in favor of OTDA on that claim. OTDA's transfer of Davi to a non-public-facing role was justified under the balancing test set forth in *Pickering*, 391 U.S. 563.

OTDA reasonably determined that Davi's Facebook comments created the potential to disrupt the agency's operations: a concern that this Court has long held to be a sufficient basis for dismissal under *Pickering*. *See Piscottano v. Murphy*, 511 F.3d 247, 270-71 (2d Cir. 2007); *Melzer v. Board of Educ.*, 336 F.3d 185, 198 (2d Cir. 2003). Any objective reading of Davi's Facebook comments raises at least the appearance of Davi's partiality. Thus, as OTDA determined, and an independent arbitrator agreed, Davi's continued service as a hearing officer would jeopardize the public's confidence in the fair hearing system. The agency also reasonably determined that, because Davi's comments would provide a good faith basis to seek his recusal, OTDA could potentially be forced to adjudicate multiple requests to recuse Davi or to reconsider his prior decisions.

The district court's *Pickering* analysis was erroneous in two key respects. *First*, the district court improperly discounted OTDA's assessment of the disruptive impact of Davi's speech. The court wholly ignored OTDA's interest in maintaining an appearance of impartiality, instead focusing on the lack of pending recusal requests. This was error.

Evidence that "harms or disruptions have in fact occurred is not necessary" before an employer may act; rather, the proper inquiry requires the court to also consider whether the employer has proffered a reasoned assessment of *potential* harm. *Piscottano*, 511 F.3d at 271. Moreover, in concluding that OTDA's predictions of harm were unreasonable, the district court failed to afford OTDA's judgements "a wide degree of deference" and improperly substituted its judgment for that of the agency. *See Connick v. Meyers*, 461 U.S. 138, 152 (1983). The court also disregarded the findings of an independent arbitrator, which are entitled to "probative weight." *See Collins v. New York City Transit Auth.*, 305 F.3d 113, 115 (2d Cir. 2002).

Second, the district court compounded its error by overvaluing the strength of Davi's speech interests. The court incorrectly concluded that OTDA must demonstrate a "greater risk of disruption" than ordinarily

required because Davi's comments touched on an issue of "significant public concern." In assessing the strength of Davi's speech interests, the court was required not only to consider the subject matter of Davi's comments, but also "the manner, time, and place of [his] expression" as well as "the context." *See Rankin v. McPherson*, 483 U.S. 378, 388 (1987). Here, the disparaging thrust of Davi's comments about public benefits recipients and their relationship to his duties as a hearing officer—a position involving extensive public contact with benefits applicants and recipients—weighs heavily against Davi in the balancing of the parties' interests.

Because a proper application of *Pickering* balancing favors OTDA, the permanent injunction and entry of partial summary judgment in Davi's favor must be reversed. Moreover, OTDA is entitled to partial summary judgment unless Davi can show that OTDA's "motivation for the discipline was retaliation for the speech itself, rather than for any resulting disruption," *Melzer,* 336 F.3d at 193. He cannot do so on the record below, which is devoid of any evidence that OTDA sought to retaliate against Davi because he held or expressed certain views. The

district court was wrong to extrapolate retaliatory intent from its conclusion that Davi's comments posed no reasonable likelihood of disruption. Thus, OTDA is entitled to partial summary judgment on Davi's claim for injunctive relief.

STANDARD OF REVIEW

The district court's grant of partial summary judgment is "reviewed de novo, construing the facts in the light most favorable to the non-moving party and drawing all reasonable inferences in that party's favor." *Burns v. Martuscello*, 890 F.3d 77, 83 (2d Cir. 2018) (quoting *Kazolias v. IBEW LU 363*, 806 F.3d 45, 49 (2d Cir. 2015)). This Court reviews the district court's grant of a permanent injunction for an abuse of discretion. *See Davis v. Shah*, 821 F.3d 231, 243 (2d Cir. 2016). The injunction must be reversed if it "rests on an error of law" or "a clearly erroneous factual finding." *Id.* (quotation marks omitted).

ARGUMENT

THE DISTRICT COURT ERRED IN CONCLUDING THAT OTDA VIOLATED DAVI'S FIRST AMENDMENT RIGHTS

A. OTDA's Actions Satisfied the *Pickering* Balancing Test.

The Supreme Court has long recognized that a public employer may discipline an employee for disruptive speech so long as the balancing of their interests satisfies the test set forth in *Pickering*, 391 U.S. 563. That inquiry, which "presents a question of law for the court to resolve," *Locurto v. Safir*, 264 F.3d 154, 166 (2d Cir. 2001), requires the court to first ascertain that the public employee's speech relates to "a matter of public concern" before balancing the employee's "free speech concerns" against the employer's interest in "efficient public service," *Melzer*, 336 F.3d at 193.

To prevail, a government agency must show that it made a "reasonable determination" that the employee's speech created "the potential" for disrupting the agency's operations. *Piscottano*, 511 F.3d at 271. The agency may consider the potential impact of the speech on its ability to maintain "efficiency, discipline, and integrity," as well as the public's perception of its "judgment and professionalism." *Id.*

Even assuming that Davi's Facebook comments qualify as protected speech, OTDA was more than justified in removing Davi from his position

as a hearing officer and transferring him to a non-public-facing role. As explained below, OTDA reasonably determined that Davi's comments could bring the agency's "judgment and professionalism" into "serious disrepute," *id.*, and that his continued presence on the bench could provide individuals appearing before him with a good faith basis to request his recusal or to seek reconsideration of his decisions.

1. OTDA was justified in transferring Davi because his Facebook comments undermined the agency's appearance of impartiality.

OTDA reasonably concluded that Davi's comments disparaging public assistance recipients could undermine public trust in the fair hearing system if he continued to preside over hearings. Indeed, OTDA learned about Davi's Facebook comments precisely because a member of the public complained that the comments exhibited "a severe bias against many of the individuals who may be coming before" Davi and urged the agency "to conduct an investigation" into whether Davi's past decisions were affected by actual bias. (A. 65.) The complainant also indicated that she had sent the comments to the Legal Aid Society (A. 700-701), leading OTDA to reasonably conclude that Davi's conduct could be further publicized to

the press or to attorneys who represent clients in fair hearings (*see* A. 547, 553).

In response to an article about SNAP, a benefit administered by OTDA, Davi commented that the circumstances of certain applicants were due to their own "laziness and failure" and demeaned them as members of "an underclass dependant on government handouts." He further stated that he had "zero sympathy" for certain applicants who were unable to "earn a livable wage." (A. 66.) As found by an independent arbitrator, "[a]ny objective reading" of these comments "would certainly allow for a suspicion of bias" on the part of Davi and OTDA. (A. 363.)

The agency thus had ample justification to remove Davi from his position as a hearing officer and to transfer him to a non-public-facing role at the same grade and pay. This Court has recognized in numerous cases that, where an employee serves in a position of trust or a role with frequent public contact, the employer is permitted to consider the impact of the speech on the public's perception of the employer in determining whether the speech is disruptive to the employer's operations. *See, e.g.*, *Melzer*, 336 F.3d at 198 (school teacher); *Locurto v. Giuliani*, 447 F.3d 159, 178-79, 182 (2d Cir. 2006) (police officers); *see also United States Civil Serv.*

Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 564-65 (1973) (noting government's significant interest in appearance of impartiality).

In *Pappas v. Giuliani*, the Court upheld on this very basis the discipline of a police officer who circulated anti-Black and anti-Semitic flyers. 290 F.3d 143, 146-47 (2d Cir. 2002). Although the officer had mailed the messages anonymously, the Court concluded that his speech nevertheless posed "a significant risk of harm," *id.* at 151, to the "public perception" of the police because the police officer's identity could potentially be discovered and publicized, *id.* at 148-49. As the Court explained: "The effectiveness of a city's police department depends importantly on the respect and trust of the community and on the *perception* in the community that it enforces the law fairly, even-handedly, and without bias." *Id.* at 146 (emphasis added). Thus, when any particular officer treats "a segment of the population" with "contempt," "respect for law enforcement is eroded, and the ability of the police to do its work in that community is impaired." *Id.* at 146-47.

Here, OTDA is required by statute to provide fair hearings to public assistance applicants and recipients in order to ensure that districts are properly administering benefits programs. *See also* S.S.L. § 22. (A. 518.)

OAH's ability to carry out that function is dependent on "the respect and trust of the community," especially the "perception" of public assistance applicants that hearing officers will "enforce[] the law fairly, even-handedly, and without bias." *See Pappas*, 290 F.3d at 146. Davi's comments treat those applicants with "contempt," thus jeopardizing their and the public's confidence in the fair hearing system. *See id.*

Had the agency kept Davi on the bench, its inaction could have been "perceived as tolerating" Davi's expressed bias and "being in passive complicity." *See id.* at 151. Thus, as the defendants uniformly testified, and as an arbitrator determined, OTDA reasonably believed that removing Davi from his role as a hearing officer was necessary to preserve the integrity of its operations. (*See* A. 460-461, 477-478, 480, 501-502; *see also* A. 363 (arbitration decision) ("The agency could not allow its impartiality to be damaged and still fulfill its responsibilities to the citizens of New York State.").)

2. OTDA was justified in transferring Davi because it reasonably determined that his comments could engender recusal requests.

Davi's transfer was further justified by OTDA's reasonable assessment that applicants who learned about Davi's comments might seek his recusal or might ask OTDA to reconsider his past decisions, thus potentially creating significant work for the agency and interfering with Davi's ability to successfully adjudicate cases. As a threshold matter, OTDA reasonably concluded that applicants and recipients might learn about Davi's comments and act on them. The complainant who alerted OTDA to Davi's Facebook comments confirmed that she had sent a copy of the comments to Project FAIR, which maintains space in the lobby of the fair hearing waiting room in OAH's Brooklyn office. Individuals appearing for a fair hearing are thus able to meet with any Project FAIR staff present "to ask questions or request representation." (*See* A. 380-381.) The arbitrator who reviewed OTDA's discipline of Davi also found that "[t]here is no doubt that" applicants who knew of Davi's comments "would initiate actions which would lead to recusal demands." (A. 362; *see also* A. 380 (testimony of OAH Director that applicants would have a

good faith basis to seek Davi's recusal); A. 460-461 (testimony of OTDA General Counsel stating the same).)

OTDA was likewise reasonable to conclude that such requests could impose an operational burden. As Davi himself acknowledged, each recusal request requires individual attention and, at a minimum, review of "the record of the hearing and the decision that was to be issued." (A. 397; A. 381 (testimony of OAH Director explaining that the review process for a single request may take "several hours of analysis and work").) Here, OTDA was facing the potential of adjudicating multiple requests for recusal and reconsideration.

B. The District Court Erred in Two Key Respects in Its *Pickering* Analysis.

1. The district court improperly discounted OTDA's interest in transferring Davi.

As an initial matter, the court wholly ignored OTDA's interest in preserving public confidence in its services. Although the record and defendants' briefing made clear that Davi's transfer was motivated by a concern that his Facebook comments would undermine public trust in the fair

hearing system,[7] the district court failed to even mention—let alone weigh—this important governmental interest. The district court instead faulted OTDA for failing to establish "actual bias" (SPA. 21), suggesting that Davi's having created the appearance of bias was not sufficient to justify transferring him. This omission is fatal to the decision below.

As the Supreme Court has long recognized, the government has a legitimate interest in administering its services in an unbiased manner *and* in avoiding any appearance of partiality. *See National Ass'n of Letter Carriers,* 413 U.S. at 564-65. Thus, the relevant inquiry under *Pickering* requires the court to consider not only whether the employee possesses actual bias, but also whether his expressive conduct has the potential to undermine the public's perception of the agency. *See Piscottano*, 511 F.3d at 271 (crediting agency's interest in "avoiding even the appearance that its . . . officers have conflicts of interest"). Here, OTDA's interest in preserving confidence in the fair hearing system amply justifies transferring Davi from his position as a hearing officer. See *supra* at 22-25.

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[7] *See* Defs.' Mem. of Law in Supp. of Mot. for Summ. J. at 13-14 (E.D.N.Y. Aug. 29, 2019), ECF No. 93.

In addition, the district court improperly relied on the absence of pending requests to recuse Davi when concluding that OTDA's assessment of harm was speculative. (SPA. 19-20.) As this Court has observed, evidence that "harms or disruptions have in fact occurred is not necessary" before an employer may act. *Piscottano*, 511 F.3d at 271.[8]

In *Castine v. Zurlo*, for example, the Court upheld the Board of Election's decision to temporarily remove the county Election Commissioner while she ran for Town Justice, based solely on the Board's concern for its appearance of partiality. *See* 756 F.3d 171, 176-77 (2d Cir. 2014). The Court explained that the Election Commissioner's participation in a race supervised by the Board, in which she "played a governing role," presented "an unacceptable conflict of interest" that would undermine

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[8] *See also Connick*, 461 U.S. at 152 (employer need not "allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action"); *Pappas*, 290 F.3d at 151 ("A governmental employer's right to discharge an employee by reason of his speech in matters of public importance does not depend on the employer's having suffered *actual* harm resulting from the speech."); *Heil v. Santoro*, 147 F.3d 103, 109 (2d Cir. 1998) ("the government can prevail if it can show that it reasonably believed that the speech would potentially interfere with or disrupt the government's activities"); *Jeffries v. Harleston*, 52 F.3d 9, 13 (2d Cir. 1995) (proper inquiry under *Pickering* is the speech's "potential disruptiveness").

public confidence in the Board's "ability to supervise elections fairly." *Id.* The Court thus held that the Commissioner's satisfied *Pickering* without regard for whether any member of the public had complained about her apparent conflict of interest. *See id.*

The Court likewise upheld the discharge of three corrections officers in *Piscottano* even though the agency "presented no evidence that actual disruption had yet occurred." 511 F.3d at 276. In so doing, the Court relied on "the testimony of [the agency's] top-ranking officials" that the officers' association with the "Outlaws" motorcycle club posed a substantial *likelihood* of disruption. *Id.* at 277. Based on that testimony and other evidence in the record, the Court found that the officers' affiliation "had the potential to interfere with" the agency's "collaboration with other law enforcement agencies" because the club's criminal ties could lead others to question the officers' loyalties. *Id.* And the Court agreed that the officers' affiliation called into question their ability to treat inmates belonging to rival clubs fairly. *Id.*

Here, the district court's reliance on the lack of pending requests to recuse Davi was mistaken for a further reason too: as OTDA explained—and as the arbitrator credited (A. 363)—the absence of recusal requests

simply reflected the agency's swift action to remove Davi from the hearing calendar.[9] Thus, the fact that no benefits applicant had moved to recuse Davi before OTDA issued the Notice of Discipline in no way undermines OTDA's reasoned assessment that applicants were likely to perceive Davi as biased and to seek his recusal if he were again permitted to hear cases.

In rejecting OTDA's assessment of harm as unreasonable, the district court also impermissibly substituted its judgment for that of the agency. The court improperly relied on its own subjective views that Legal Aid was not going to further publicize Davi's comments (SPA. 18, 21); that Legal Aid would be "unlikely ever to file a motion for Davi's recusal" because Davi supposedly ruled in favor of benefits applicants 95 percent of the time (SPA. 19); and that Davi's comments would not provide a good

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[9] The district court reasoned that the absence of recusal requests is nevertheless telling because applicants in the cases Davi was already calendared to conduct *could have* requested his recusal in advance of their scheduled hearing. (*See* SPA. 19-20 (citing A. 243, 265-266).) But nothing in the record suggests that applicants ordinarily make recusal requests in advance. In fact, OTDA's regulations require applicants to make all requests "at the hearing," 18 N.Y.C.R.R. § 358-5.6(c)(3)(ii), and Davi himself testified that he has never encountered an advance request for recusal (A. 396).

faith basis to seek recusal (*see* SPA. 20). Each of these assumptions was error.

Courts must afford "a wide degree of deference to the employer's judgment" where "close working relationships are essential to fulfilling public responsibilities." *Connick*, 461 U.S. at 151-52. Here, the district court re-weighed the evidence before the agency and improperly drew all inferences in Davi's favor. The district court's reliance on Davi's purported 95 percent grant rate (SPA. 6, 19) was particularly wrong because that rate was not an undisputed fact in the summary judgment record, nor was it even mentioned in Davi's summary judgment papers. Rather, Davi proffered this number in his arbitration briefing. (*See* A. 362). The district court thus erred in asserting that OTDA's "investigation revealed that Davi awarded public benefits to applicants in approximately 95%" of his cases." (SPA. 6.) In fact, OTDA does not track this type of data because the agency is prohibited from considering the grant rates of its hearing officers or establishing quotas for how hearing officers should rule. *See* Exec. Order No. 131 (Dec. 4, 1989), 9 N.Y.C.R.R. § 4.131(II)(C)-(D). Moreover, as the record clearly establishes, OTDA was unaware of Davi's purported grant rate at the time it issued the Notice of Discipline

and thus had no way of comparing Davi's purported track record against that of other hearing officers. (*See* A. 107-108.)

Even if the district court were correct that benefits applicants and recipients would be unlikely to seek Davi's recusal or would be unsuccessful if they tried (SPA. 19-20), OTDA still satisfies its burden under *Pickering*. As explained above, the agency was principally concerned that Davi's continued presence in the role of a hearing officer would undermine the public's trust in the agency. This harm can manifest in ways other than the filing of recusal requests against Davi specifically. (*See, e.g.*, A. 362 (concluding that benefits applicants may lose confidence in the fair hearing system); A. 460 (noting concern that OTDA's reputation would be "tarnished in the eyes of Legal Aid and others in the public"); A. 547 (discussing potential for negative press); A. 553 (same).)

Nor does the reasonableness of OTDA's actions turn on whether Legal Aid might, or actually did, publicize the complaint against Davi. This Court has expressly rejected the notion that an agency must refrain from disciplining an employee unless his speech is widely publicized. In fact, the Court upheld the police department's disciplinary action in *Pappas* even though the officer's speech was made anonymously. 290 F.3d at 150-51.

Although the Court acknowledged that "no one would have known that the[] offensive materials were being distributed by a police officer" absent "the Department's decision to bring disciplinary charges," the Court nevertheless credited the employer's assessment of potential harm and disruption and held these outweighed plaintiff's free speech interests. *Id.* at 150.

Finally, the district court's analysis erroneously failed to give proper weight to the binding arbitration award upholding OTDA's decision to discipline Davi. Instead, the court directly contradicted the arbitrator's conclusions without proffering any basis for doing so.

This Court has held that in employment suits, courts must give "probative weight" to arbitration findings so long as they are rendered "based on substantial evidence after a fair hearing." *Collins*, 305 F.3d at 115. Here, after two days of hearings during which the parties presented evidence and argument, the arbitrator expressly found that OTDA was justified in removing Davi from his role as a hearing officer and determined that the agency could transfer him to a different role. (*See* A. 363-364.) In particular, the arbitrator concluded that Davi's Facebook comments "portrayed a clear animus towards" public assistance recipients

that "severely discredit[ed] the premise of impartiality" of Davi himself "and by extension, that of the agency." (A. 363.)

Despite the substantial overlap between these two proceedings, the district court's opinion barely mentioned the arbitrator's findings, let alone pointed to "strong evidence" as to why "the decision was wrong." *Collins*, 305 F.3d at 119. In fact, in reaching the contrary conclusion that OTDA's justifications were unreasonable, the district court expressly relied on the fact that OTDA had not shown actual bias by Davi or pointed to any pending recusal requests against him (SPA. 18-21)—grounds the arbitrator found immaterial to whether Davi's statements had the *potential* to undermine the agency's appearance of impartiality (A. 363-364).

2. The district court erred in assessing the strength of Davi's speech interests.

In addition to improperly discounting OTDA's interests as a government employer, the district court overvalued Davi's interest in the Facebook comments. Specifically, the court concluded that OTDA must show "a greater risk of disruption" to its operations than ordinarily would be required because Davi's Facebook comments touched on a "matter of significant public concern." (SPA. 17 (quotation marks omitted).) This

conclusion improperly ignored OTDA's showing that the First Amendment value of the comments was undermined by the context in which the comments were offered, the disparaging thrust of the comments, and the relationship between Davi's comments and his official duties as a hearing officer.

In assessing Davi's speech interests, the district court was required to consider not only the subject matter of Davi's comments, but also "the manner, time, and place of [his] expression" as well as "the context." *Rankin*, 483 U.S. at 388. Courts have long recognized, for instance, that speech by government employees that is vulgar, vituperative, or ad hominem in character can be particularly disruptive and therefore subject to discipline even if its content touches on a matter of public concern. *See, e.g.*, *Sheppard v. Beerman*, 317 F.3d 351, 355 (2d Cir. 2003) (prediction of disruption was "eminently reasonable" where employee's outburst was "grossly disrespectful" and expressed "personal contempt").[10]

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[10] *See also Cygan v. Wisconsin Dep't of Corr.*, 388 F.3d 1092, 1101 (7th Cir. 2004) (considering "loud and profane" manner of employee's speech); *Craven v. University of Colo. Hosp. Auth.,* 260 F.3d 1218, 1228-29 (10th Cir. 2001) (factoring in abrasive and demeaning manner of employee's speech); *Morris v. Crow*, 117 F.3d 449, 457-58 (11th Cir. 1997)

(*continued on the next page*)

Moreover, employees who exercise authority or are held to public accountability bear a greater "burden of caution" with respect to their words, especially when the speech relates to their duties. *Rankin*, 483 U.S. at 390; *see also Locurto*, 447 F.3d at 178 (part of the job of "public servants" is to "safeguard the public's opinion of them"). This burden is elevated where the employee serves in a "confidential, policymaking, or public contact role." *Rankin*, 483 U.S. at 390-91. (*See* A. 407 (Davi testifying that he heard as many as thirty cases per sitting day); A. 410 (Davi acknowledging that hearing officers are under a strict duty to maintain an appearance of impartiality).)

Here, Davi indisputably served in a "public contact" role, and his comments touched on an issue within the scope of his employment as a hearing officer: whether and to whom public benefits should be provided. Furthermore, far from engaging in civilized public discourse, Davi offered his comments in the context of a heated argument with a classmate in which he repeatedly demeaned benefits recipients, calling them "an underclass dependant on government handouts" and suggesting that their

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(same); *Germann v. City of Kansas City*, 776 F.2d 761, 765-66 (8th Cir. 1985) (same).

circumstances were due to their "laziness and failure." (A. 66.) Thus, a proper application of *Pickering* required the district court to impose a lesser—and not a greater—burden on OTDA to justify Davi's transfer. *See Melzer*, 336 F.3d at 197 ("A position requiring . . . public contact lessens the public employer's burden in firing an employee for expression that offends the employer."). Indeed, as this Court has recognized, "[t]he First Amendment does not require a Government employer to sit idly by while its employees insult those they are hired to serve and protect." *Locurto*, 447 F.3d at 183.

C. A Proper Application of *Pickering* Requires Vacatur of the Permanent Injunction and Entry of Partial Summary Judgment in Favor of OTDA.

Because a proper application of *Pickering* balancing favors OTDA, the district court's order reinstating Davi to his prior position as a hearing officer must be vacated, and its entry of partial summary judgment in Davi's favor reversed. Moreover, OTDA is entitled to partial summary judgment on Davi's claim for injunctive relief because the record is devoid of any evidence that the agency acted with retaliatory intent.

"[W]hen the government prevails" on *Pickering* balancing, a plaintiff may only "carry the day" if he can show that "the employer's motivation

for the discipline was retaliation for the speech itself, rather than for any resulting disruption." *See Melzer,* 336 F.3d at 193 (quotation marks omitted). The district court did not expressly reach this final step of the *Pickering* analysis because the court incorrectly concluded that *Pickering* balancing favored Davi. But the court asserted in passing that "Defendants' failure to show any reasonable likelihood of disruption suggests that their justifications were pretextual." (SPA. 21.)

Even if the agency's predictions about the harmful effects of Davi's speech were misguided or incorrect, that would not establish that OTDA transferred Davi in retaliation for his personal views. This Court has "long held" that, "when considering the legitimacy of an employer's reason for an employment action," courts should "look to what *motivated* the employer rather than to the truth of the allegations against the plaintiff on which it relies." *Vasquez v. Empress Ambulance Serv. Inc.*, 835 F.3d 267, 275 (2d Cir. 2016) (quotation and alteration marks omitted); *see also Cobb v. Pozzi*, 363 F.3d 89, 109 (2d Cir. 2004) (employer's "mistaken" belief that employees had engaged in misconduct "does not transform the basis of the defendants' decision" into retaliatory animus).

To survive summary judgment on the issue of retaliatory intent, Davi must "show 'particularized evidence of direct or circumstantial facts' supporting his claim of unconstitutional motive." *Sheppard v. Beerman*, 94 F.3d 823, 829 (2d Cir. 1996). In *Sheppard*, the plaintiff alleged that his supervisor had "expressed deep concern over" his "notes" detailing the supervisor's "public corruption," had "seized" his "personal files," and had "instructed" others "not to talk with" him. *Id.* at 828-29. The Court concluded that these allegations, if substantiated, could suffice to show that the "actual motive" for the employee's termination was the "content of his speech" rather than his alleged insubordination.[11] *Id.* at 828.

There is no such evidence of retaliatory intent here. In the context of a qualified immunity analysis, the district court found a triable issue of fact regarding the intent of three of the defendants: Samuel Spitzberg,

[11] Although *Sheppard* addressed the showing of retaliatory intent necessary to defeat a defendant's entitlement to qualified immunity, its reasoning applies equally here. In *Sheppard*, this Court vacated the district court's dismissal of the plaintiff's claim for damages and injunctive relief precisely because it found that the plaintiff's allegations, if substantiated through discovery, could likely survive summary judgment on the issue of retaliatory intent. *See* 94 F.3d at 828-29.

the Director of OAH; Eric Schwenzfeier, the Assistant Deputy Commissioner of OTDA's Division of Administrative Services; and Sharon Devine, then–Executive Deputy Commissioner. (SPA. 24-27.) But the only evidence the court cited in support of its conclusion that Spitzberg and Devine may have acted with retaliatory intent is that they disciplined Davi despite having uncovered no evidence of his actual bias or any complaints by Legal Aid. (SPA. 24-25, 26-27.) As explained above, that analysis overlooks OTDA's concerns that Davi's comments could undermine his and the agency's *appearance* of impartiality in a way that could give rise to future requests for recusals or reconsideration. See *supra* at 27-31.

The court likewise erred in finding a triable issue as to whether Schwenzfeier acted with retaliatory intent. As an initial matter, the court erroneously treated testimony offered by OTDA pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure as evidence of Schwenzfeier's *individual* intent (SPA. 25-26). But in the Rule 30(b)(6) testimony, Schwenzfeier was speaking as OTDA's representative about *the agency's* reasoning for the disciplinary action. *See* Fed. R. Civ. P. 30(b)(6) (organization must designate "one or more officers" to "testify *on its behalf*" (emphasis added)). Schwenzfeier was not speaking in a personal

capacity—and, in fact, Davi chose not to depose Schwenzfeier in his individual capacity during discovery.

In any event, even the Rule 30(b)(6) testimony does not give rise to a genuine dispute of material fact regarding OTDA's motives. The court erred in concluding that OTDA "decid[ed] to suspend Davi without regard to the result of any investigation." (SPA. 26.) As Schwenzfeier testified, and the record confirms, the agency decided that action was warranted if OTDA determined that Davi had posted the Facebook comments at issue. (*See* A. 506; *see also* 376, 545.) There is no evidence that this decision was motivated by animus toward Davi for holding or expressing particular views. Instead, as shown by contemporaneous email communications, the agency was concerned about the fact that Davi made statements about some of the agency's clients in a manner that created a serious risk of engendering negative press and tarnishing the agency's reputation.[12]

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[12] The court also misconstrued the Rule 30(b)(6) testimony when it asserted that Schwenzfeier, in his individual capacity, "would have taken action against Davi simply because of [Davi's] views." (SPA. 26.) Schwenzfeier's testimony, in context, reflects the opposite. He testified, on behalf of OTDA, that it was "irrelevant" whether Davi believed the views he expressed on Facebook because the agency was concerned that the state-

(*continued on the next page*)

(*E.g.*, A. 546, 553.) As this Court expressly recognized in *Locurto*, an employer is permitted "to take into account the public's perception of the employee's expressive acts" without running afoul of the First Amendment. 447 F.3d at 179.

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ments themselves, which "indicated a predisposition of bias," would undermine the agency's appearance of impartiality. (A. 169, 505.) Contemporaneous email communications and other officials' testimony all confirm that OTDA took action not because Davi held or expressed certain views, but because he expressed them in a manner that threatened to harm the public's perception of the agency. See *supra* at 8-9.

CONCLUSION

For the foregoing reasons, the district court's permanent injunction should be vacated and the entry of partial summary judgment for Davi on his claim for injunctive claim reversed. Partial summary judgment should instead be entered in OTDA's favor.

Dated: New York, New York
July 8, 2021

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Kelly Cheung, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 8,259 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7) and Local Rule 32.1.

/s/ *Kelly Cheung*

SPECIAL APPENDIX

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Salvatore Davi,

Plaintiff,

– against –

Samuel D. Roberts, Commissioner, New York State Office of Temporary and Disability Assistance, in his individual and official capacity, *et al.*,

Defendants.

MEMORANDUM & ORDER

16-cv-5060 (ERK)

KORMAN, *J.*:

This case arises out of a Facebook argument about the value and efficacy of welfare benefits. Plaintiff Salvatore Davi, a hearing officer at a state agency responsible for reviewing denials of welfare benefits, commented on an article posted by a law school classmate. Davi agreed that "there should most certainly be a safety net, but it should be of limited duration and designed to get people back to self-sufficiency." Among other comments in a similar vein, he added that it was not "the government's job to subsidize laziness and failure" and that "I have zero sympathy for anyone who refuses to work and/or get the education or training to earn a livable wage." After his law school classmate took issue with this observation and engaged in a heated argument, she sent his employer a complaint, which highlighted Davi's comments and indicated a copy was being sent to a legal group

representing benefit recipients. The agency suspended Davi from overseeing hearings and ultimately sought to terminate him—a penalty that was modified by an arbitrator, who reduced it to a six-month unpaid suspension and a reassignment to a position at the same pay level that did not involve public contact. The arbitrator did so even though an investigation revealed that Davi's decisions showed no bias against benefit applicants. On the contrary, it revealed "empirical data of his ability to make an unbiased recommendation on all proceedings in his jurisdiction," namely that he ruled in applicants' favor in an overwhelming 95% of cases. Indeed, Davi's supervisors not only spoke to his "unbiased approach to his job" and "his value as an employee," but also "praised his work ethics, his sense of responsibility, his intelligence, his demeanor and clearly felt he was an overall asset to the office."

After his challenge to the arbitrator's decision in state court was rejected, Davi filed this lawsuit alleging that this discipline constituted unlawful retaliation in violation of the First Amendment. Defendants are various agency employees sued in their official and individual capacities. The parties have filed cross motions for summary judgment, which I proceed to address in some detail below.

BACKGROUND

Beginning in 2010, plaintiff Salvatore Davi was a hearing officer at the New York State Office of Temporary and Disability Assistance ("OTDA"). OTDA defines its mission as enhancing the economic security of low-income New Yorkers,

including through the provision of public benefits, "with a focus on employment wherever possible." As a hearing officer—what OTDA also calls an administrative law judge—Davi reviewed the denial or reduction of welfare benefits by social service districts that make initial decisions on applicants' eligibility for benefits, including food stamps, disability benefits, and other forms of supplemental income. Defendants' 56.1 Resp. ¶¶ 16, 18, ECF No. 92; *see also* N.Y. Comp. Codes R. & Regs. tit. 18, §§ 358-2.9, 358-3.1, 358-5.6.

While the hearing officers' responsibility could encompass more, the hearings Davi held were generally limited to such matters as whether applicants who had been denied benefits had submitted documents requested by an agency; whether they appeared at appointments to discuss their eligibility for benefits; and whether the applicants satisfied income and eligibility thresholds. Defendants' 56.1 Resp. ¶ 23; ECF Nos. 82 at ¶ 19; 83-11 at 25–27; *see also Lisnitzer v. Zucker*, 983 F.3d 578, 581 (2d Cir. 2020). Davi recommended that applicants receive benefits (*i.e.*, recommended the reversal of denials or reductions in benefits) in 95% of cases. ECF No. 83-24 at 11, 14. These rulings were recommendations subject to review by a supervisor.

On October 28, 2015, Davi responded to an article that had been posted on the personal Facebook page of someone he knew. The article was from the website Daily Kos and entitled "Anti-poverty programs like food stamps are working. Let's

expand them, not make more cuts."[1] Davi and a law school classmate, Erin Lloyd, then had an argument in the comments of the Facebook post. Both the Facebook post and the argument appear not to have been accessible to the general public. ECF No. 83-8 at 105–07. Because the context is significant, I reproduce the relevant portion of their conversation verbatim (without correcting spelling or grammar):

> **DAVI**: This article and the underlying study use the wrong metric. These programs should be judge by how many people or families they get back on their feet and off government assistance, not how well these programs enable their recipients to be poor and collect government assistance for the rest of their lies.
>
> **LLOYD**: "enable their recipients to be poor" – RIGHT! of course! people who need $150/mo to get their basic food needs met are just being ENABLED! The goal of any public assistance program should be to AID the poor. It's the job of politicians and employers to… [*See more*][2]
>
> **DAVI**: Says who? Where does it say ANY of that in the Constitution? It is not the government's job to subsidize laziness and failure. I agree that there should most certainly be a safety net, but it should be of limited duration and designed to get people back to self-sufficiency. But I have zero sympathy for anyone who refuses to work and/or get the education or training to earn a living wage.
>
> This country has turned welfare into a generational career path!

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1 *See* https://www.dailykos.com/stories/2015/10/27/1440684/-Anti-poverty-programs-like-food-stamps-are-working-Let-s-expand-them-not-make-more-cuts.

2 This comment is abridged in the copy sent with the anonymous complaint to Davi's employer. The full comment is available elsewhere in the record and is not necessary to follow the conversation. *See* ECF No. 90-22 at 3.

At this point, the conversation turned personal and nasty. Lloyd told the defendant "I remember your bullshit from law school, so I've got no patience for you. Who brought up the constitution? Not me. I didn't say a word about the law. I'm talking MORALS, my friend." Davi responded: "If you are going to be that nasty then fuck you, too. Your 'morals' suck because they create an underclass dependent on government handouts that translates into generational poverty, while at the same time taxing productive members of our society to the breaking point." ECF No. 83-1 at 4.

On November 4, 2015, OTDA received an anonymous complaint claiming falsely to have observed this discussion on a mutual friend's Facebook page and enclosing a copy of it. The complainant—who claimed not to personally know Davi but who was later revealed to be Lloyd herself—called Davi's comments "wholly unethical and expose a severe bias against many of the individuals who may be coming before him" as an administrative law judge. She urged OTDA "to conduct an investigation," including into "whether past rulings reflect bias against benefit recipients." The letter indicated that a copy was being sent to Project Fair of the Legal Aid Society, which provides pro bono representation to benefit applicants appearing before OTDA's administrative law judges. As Defendants note, "[a]nyone who passes through the lobby of the building on their way to a Fair Hearing has an opportunity to meet with Project Fair staff to ask questions or request

representation." ECF No. 93 at 4.

On November 5, OTDA's senior staff held a meeting to discuss the complaint and agreed to remove Davi from the hearing calendar pending the outcome of their investigation. OTDA's assistant deputy commissioner (who participated in that meeting) testified that the participants decided on that day to suspend Davi without pay, but that they waited one week to do so because "[g]eneral office practice is to afford an opportunity to [the] employee to be interviewed." ECF No. 83-8 at 62. That same day, OTDA's director listened to recordings of ten of Davi's hearings and wrote in an email that he found Davi "polite in every case" and that he "was fair and provided clients with good advice and explanations." ECF No. 83-19; *see* ECF No. 88 at ¶ 9. On November 10, the director provided an update that he had found nothing to contradict that initial assessment. ECF No. 83-19. Indeed, the investigation revealed that Davi awarded public benefits to applicants in approximately 95% of the hundreds of cases he reviewed each month. *See* ECF No. 83-24 at 11, 14.

Around that same time, OTDA's director called an acquaintance at Legal Aid and asked if he had heard any "scuttlebutt" about hearing officers, presumably to determine if Legal Aid had received the complaint and, if so, how it intended to

respond.[3] ECF No. 88 at ¶ 10. His Legal Aid contact replied that he had not heard anything. *Id.* On November 13, OTDA interviewed Davi and, at the end of the interview, suspended him without pay pending a formal notice of discipline, effective immediately. On November 18, OTDA contacted Lloyd, who confirmed that she had sent the complaint and said that she had sent a copy to Legal Aid. No benefit applicant sought Davi's recusal based on his remarks, even though OTDA sent out hearing notices for mid-November and early December 2015 that indicated he would be the hearing officer. Defendants' 56.1 Resp. ¶ 77; ECF No. 83-18; ECF No. 83-11 at 52–53. Nor did any applicant seek reconsideration of any adverse rulings in the months after Legal Aid was sent Davi's comments.

Having determined that Davi was unbiased and that his comments were unlikely to cause disruption, OTDA nevertheless sent Davi a notice of discipline on December 29 proposing to terminate his employment on the ground that the comments created an appearance of bias and reflected actual bias. Davi's union challenged the discipline in binding arbitration. The arbitrator dismissed the agency's claims that Davi was biased, finding "[t]here was no evidence offered that [Davi] was biased in conducting hearings assigned to him nor did he have any

[3] Legal Aid would also have been a source for general information about OTDA's hearing officers in light of the fact that it offered pro bono representation to appellants appearing before those hearing officers—and indeed, because Legal Aid had offices in the same building as OTDA.

involvement in any [action] before him." ECF 83-24 at 7, 13. He further concluded that:

> [Davi] has been employed as a hearing officer since March 2010, and his decisions reveal no bias. All of his previous supervisors who had the responsibility of signing his recommendations testified that they never detected any bias in his recommendations. The record shows that he has ruled in favor of the clients 95% of the time, thus providing empirical data of his ability to make an unbiased recommendation on all proceeding in his jurisdiction.
>
> Not only did his supervisors speak to his unbiased approach to his job but also to his value as an employee. They praised his work ethics, his sense of responsibility, his intelligence, his demeanor and clearly felt he was an overall asset to the office.

Id. at 14.

The arbitrator nonetheless upheld the charge that Davi's comments created an appearance of bias because Legal Aid was now "armed with information that would severely discredit the premise of impartiality of [Davi] and by extension, that of the agency." *Id.* at 13. The arbitrator concluded that it was "not believable" to assume that Legal Aid "would not use the public words of [Davi] in an effort to either not allow [Davi] to decide the fate of their clients or to appeal an adverse recommendation," crediting OTDA's purported concern that his comments would cause disruption. *Id.* He determined that Davi's conduct warranted discipline but concluded that the proper punishment was six months' suspension followed by a transfer to another position at the same pay grade (which "need not include the duties of a hearing officer"). *Id.* at 14–15. The arbitrator did not explain how suspending

Davi for six months without pay would address the agency's concern that his Facebook comments would disrupt its operations.

Davi sought to vacate the arbitration award in an Article 75 proceeding, which was denied on the ground that he lacked standing because he was not a party to the arbitration. Following his suspension, Davi was transferred to the role of senior attorney at OTDA, where his responsibilities include litigation, keeping abreast of developments affecting hearing officers, and reviewing requests for recusal of hearing officers. Both during and after his suspension, Davi applied for jobs at OTDA as a supervising hearing officer or hearing officer, which he did not receive.

Under these circumstances, the issue presented by Davi's complaint and his motion for partial summary judgment is whether OTDA and its supervising officials unlawfully retaliated against him. He seeks equitable relief to reinstate him to his former position. Defendants seek summary judgment on the theory that their actions were constitutional and, in the alternative, that the individual defendants are entitled to qualified immunity.

STANDARD OF REVIEW

Summary judgment may be granted only if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine dispute of material facts exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving

party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The movant bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the non-movant bears the burden of proof at trial, the movant's initial burden at summary judgment can be met by pointing to a lack of evidence supporting the non-movant's claim. *Id.* at 325. Once the movant meets its initial burden, the non-moving party may defeat summary judgment only by producing evidence of specific facts that raise a genuine issue for trial. *See Anderson*, 477 U.S. at 250.

DISCUSSION

A public employee claiming retaliation based on his speech must demonstrate (1) his speech was protected by the First Amendment; (2) the defendant took adverse action against him; and (3) there was a causal connection between the adverse action and the protected speech. *Montero v. City of Yonkers*, 890 F.3d 386, 394 (2d Cir. 2018). Defendants concede that they took adverse action against Davi. ECF No. 93 at 8. Nor do they dispute the causal connection between Davi's speech and the adverse action taken against him.

The Supreme Court has long recognized that government employees do not "relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of" their employment. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). "At the same

time, however, 'the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.'" *Lynch v. Ackley*, 811 F.3d 569, 577 (2d Cir. 2016) (quoting *Pickering*, 391 U.S. at 568). Thus, the Supreme Court has recognized that "[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

To balance these interests, the Supreme Court has applied a "two-step inquiry into whether a public employee's speech is entitled to protection." *Lane v. Franks*, 573 U.S. 228, 237 (2014). First, as a threshold matter, the employee must have spoken "as a citizen on a matter of public concern," rather than pursuant to his official duties or based on a personal grievance related to his employment. *Id.* If he has, the question is then "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public." *Garcetti*, 547 U.S. at 418. The employee may nonetheless prevail if he shows that the government retaliated against him for the content of his speech rather than because of the justifications it has offered. *Melzer v. Bd. of Educ.*, 336 F.3d 185, 193 (2d Cir. 2003).

I. Davi's Claims Are Not Procedurally Barred

As an initial matter, I reject Defendants' argument that Davi is precluded from relitigating the issues decided by the arbitrator or that his claims are otherwise barred from federal-court review. First, Defendants argue that Davi is precluded from challenging the arbitrator's finding that he was disciplined because of the risk of disruption. The Supreme Court has long held, however, that arbitrations pursuant to a collective bargaining agreement do not preclude re-litigation of the issues or claims in a subsequent suit under § 1983. *McDonald v. City of West Branch*, 466 U.S. 284, 287–90 (1984). Thus, the arbitrator's decision is not entitled to issue-preclusive effect. *See Wilson v. New York*, 2018 WL 1466770, at *8–9 (E.D.N.Y. Mar. 26, 2018) (Amon, *J.*) (applying *McDonald* to deny preclusive effect to arbitrator's decision) (citing *Siddiqua v. N.Y. State Dep't of Health*, 642 F. App'x 68, 70 (2d Cir. 2016)).

Likewise, the *Rooker-Feldman* doctrine, which bars federal-court review of "cases brought by state-court losers complaining of injuries caused by state-court judgments[,]" is inapplicable. *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 285 (2005). Davi's harm arose from Defendants' conduct, not the state court's dismissal of his petition, and *Rooker-Feldman* does not apply when "the exact injury of which the party complains in federal court existed *prior* in time to the state-court proceedings, and so could not have been 'caused by' those proceedings." *McKithen v. Brown*, 481 F.3d 89, 98 (2d Cir. 2007) (emphasis in

original); *see also Cho v. City of New York*, 910 F.3d 639, 647 (2d Cir. 2018). I therefore turn to the merits.

II. Davi Spoke As a Citizen on a Matter of Public Concern

Davi easily satisfies *Pickering*'s first step: he spoke as a citizen on a matter of public concern, which are both issues determined as a matter of law. *See Singer v. Ferro*, 711 F.3d 334, 339 (2d Cir. 2013). Defendants appropriately concede that Davi spoke as a citizen. ECF No. 93 at 9.

Davi likewise spoke on a matter of public concern. A "public concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication." *City of San Diego v. Roe*, 543 U.S. 77, 83–84 (2004). That includes speech that relates to "any matter of political, social, or other concern to the community." *Connick v. Myers*, 461 U.S. 138, 146 (1983). By contrast, "speech that primarily concerns an issue that is personal in nature and generally related to the speaker's own situation, such as his or her assignments, promotion, or salary, does not address matters of public concern." *Gorman v. Rensselaer Cty.*, 910 F.3d 40, 45 (2d Cir. 2018) (internal quotation omitted). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147–48.

The Supreme Court has repeatedly held that speech on the appropriate

generosity of government benefits is a matter of public concern. In *Harris v. Quinn*, 573 U.S. 616 (2014), the Court held that, under the *Pickering* test, "it is impossible to argue that the level of Medicaid funding (or, for that matter, state spending for employee benefits in general) is not a matter of great public concern." *Id.* at 654. Similarly, in *Rankin v. McPherson*, 483 U.S. 378 (1987), the Court held that a clerical employee's speech was protected when she was overheard saying, after learning of an attempt on President Reagan's life, that because the President was "cutting back Medicaid and food stamps . . . if they go for him again, I hope they get him." *Id.* at 381. The Court concluded that the employee spoke on a matter of public concern in part because her statement "was made in the course of a conversation addressing the policies of the President's administration." *Id.* at 386 & n.10. Likewise, the Second Circuit has emphasized that "discussion regarding current government policies and activities is perhaps the paradigmatic matter of public concern." *Harman v. City of New York*, 140 F.3d 111, 118 (2d Cir. 1998) (internal quotation and alteration omitted). In sum, Davi's argument that public benefits should be limited in scope is speech on a quintessential matter of public concern.

Defendants have two rejoinders, but neither is persuasive. First, they argue that Davi's comments were not on a matter of public concern because they were made on a personal Facebook page that was not accessible to the general public. But the "public concern" test is largely focused on what the employee says, not how

widely disseminated his remarks are. The Supreme Court has "recognized that certain private remarks . . . touch on matters of public concern and should thus be subject to *Pickering* balancing." *Roe*, 543 U.S. at 84 (internal citation omitted); *see Connick*, 461 U.S. at 146 (explaining that "First Amendment protection applies when a public employee arranges to communicate privately with his employer" on a topic of public concern "rather than [] express his views publicly"). Indeed, the Supreme Court in *Rankin* held that the employee's speech was on a matter of public concern even though she had a private conversation that was overheard by someone who was (unbeknownst to her) also in the room. 483 U.S. at 381.

Defendants next argue that Davi's speech was not on a matter of public concern because his comments were "derogatory remarks about the recipients of social services benefits." ECF No. 93 at 11 (emphasis in original). This argument may be relevant to whether Defendants could permissibly discipline Davi, but it does not undermine the conclusion that his speech discussed a topic of public concern. In context, these comments were used to further Davi's argument that welfare benefits should be limited. "The inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Rankin*, 483 U.S. at 387. Even speech that is "vulgar or misguided" is entitled to First Amendment protection. *Locurto v. Giuliani*, 447 F.3d 159, 183 (2d Cir. 2006); *see also Marquadt v. Carlton*, 971 F.3d 546, 550 (6th Cir. 2020). Thus, even construing

Davi's remarks as disparaging of welfare recipients, they remain within the First Amendment's ambit.

III. The *Pickering* Balancing Test Favors Davi

Under *Pickering*'s second step, "if an employee speaks as a citizen on a matter of public concern, the next question is whether the government had an adequate justification for treating the employee differently from any other member of the public based on the government's needs as an employer." *Lane*, 573 U.S. at 242 (internal quotation omitted). This analysis "requires 'a balance between the interests of the employee, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Rankin*, 483 U.S. at 384 (quoting *Pickering*, 391 U.S. at 568). "The weighing of the competing interests is a matter of law for the court." *Jackler v. Byrne*, 658 F.3d 225, 237 (2d Cir. 2011). At the same time, factual disputes as to whether the government had reasonable grounds to fear disruption from the employee's speech may preclude summary judgment. *Johnson v. Ganim*, 342 F.3d 105, 115 (2d Cir. 2003).

Courts must "assess the extent of the disruption caused by the employee's speech . . . and determine whether the disruption justifies the employer's attempt to stifle the employee's expressive activity." *McEvoy v. Spencer*, 124 F.3d 92, 98 (2d Cir. 1997). The government's interests "may include such considerations as

maintaining efficiency, discipline, and integrity, preventing disruption of operations, and avoiding having the judgment and professionalism of the agency brought into serious disrepute." *Piscottano v. Murphy*, 511 F.3d 247, 271 (2d Cir. 2007) (citing *Waters v. Churchill*, 511 U.S. 661, 675 (1994) (plurality opinion)). "The employer does not meet its burden" to justify its action, "however, if there is no demonstrated nexus between the employee's speech and the employer's operations." *Id.* Additionally, "some attention must be paid to the responsibilities of the employee within the agency. The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails." *Rankin*, 483 U.S. at 390.

While they need not prove actual harm, Defendants bear the burden of making a "substantial showing" that Davi's speech was "likely to be disruptive" to prevail at this step. *Jeffries v. Harleston*, 52 F.3d 9, 13 (2d Cir. 1995); *see also Locurto*, 447 F.3d at 172. Where, as here, "the employee's speech touches on matters of significant public concern," Defendants must show a correspondingly greater risk of disruption to the government. *Jackler*, 658 F.3d at 237. After considering the government's and employee's interests, the court must balance them, which "is less a matter of calculating and comparing absolute values than it is a *process* that looks at all the circumstances in a given situation and determines which interest weighs more heavily." *Melzer*, 336 F.3d at 197 (emphasis in original).

As I have already observed, Davi's comments are primarily political speech about the proper role of government, which is among the most highly protected speech in our constitutional order. *Snyder v. Phelps*, 562 U.S. 443, 451–52 (2011). Moreover, that speech was conducted in Davi's personal capacity (without identifying himself as an administrative law judge) and apparently on his own time, which weighs in his favor. *Connick*, 461 U.S. at 153 n.13. In its investigation, OTDA concluded that Davi harbored no actual bias that affected his job performance. ECF No. 88 ¶ 9; *see also* ECF No. 83-19. To the contrary, he was a well-regarded administrative law judge who overwhelmingly ruled in favor of the applicants for public benefits who appeared before him. ECF No. 83-24 at 13–14.

Defendants have failed to carry their burden to demonstrate that Davi's comments were reasonably likely to disrupt OTDA's operations. OTDA's investigation made clear that Davi's remarks were quite *unlikely* to affect his job as a hearing officer. OTDA's director learned from his contact at Legal Aid that he had not heard of any issues relating to the agency's hearing officers, which suggests either that Legal Aid had not received a copy of the complaint or had not judged it worthy of escalation. ECF No. 88 at ¶ 10. The director did not ask more specifically if Legal Aid viewed any hearing officers as being biased against benefit applicants. *Id.* The director's justification for not being more specific was that he did not want to draw attention to the letter. *Id.* This explanation is hard to comprehend since the

letter indicated that a copy was sent to Legal Aid. Indeed, the Defendants' disruption argument is premised on the assumption that the letter was received and was likely to be weaponized by Legal Aid through motions for recusal or reconsideration. *See* ECF Nos. 93 at 13–15; 99 at 3. In any event, nothing prevented the director from asking a somewhat more precise question without drawing attention to the letter.

Moreover, even if the complaint had been brought to the attention of Legal Aid litigators who appeared before Davi, it was implausible that they would seek his recusal. Precisely because Davi ruled overwhelmingly in favor of benefit applicants—95% of the time—in his five years as a hearing officer, he would have had a sterling reputation among those Legal Aid lawyers practicing before him. Indeed, as the arbitrator noted, Project Fair of Legal Aid "has space in the location where the hearings are held and [has] access to the people appearing for benefit increases." ECF No. 83-24 at 10.

Under these circumstances, Legal Aid would be extraordinarily unlikely ever to file a motion for Davi's recusal. Nor did they. Defendants respond that OTDA's rules require that any recusal motion be made at the hearing itself, and because Davi was suspended from holding hearings there was no occasion for applicants to seek recusal. But although Defendants are correct about OTDA's recusal rules, *see* N.Y. Comp. Codes R. & Regs. tit. 18, § 358-5.6(c)(3)(ii), Defendants concede that applicants sometimes request recusal in advance of hearings. ECF Nos. 83-11 at 30;

83-12 at 21–22. Because OTDA continued sending hearing notices with Davi listed as the hearing officer during his suspension, the absence of such requests sharply undercuts Defendants' theory that Davi's comments were likely to substantially disrupt OTDA's operations. Nor was a motion for reconsideration ever filed based on Davi's comments in a case he had previously decided. Indeed, as Davi argues, it is not apparent that his comments would even have been grounds for recusal or reconsideration under the standard set out by OTDA's governing regulations. The only grounds for recusal listed there are (1) prior involvement in the substance of the matter which is the subject of the hearing (except in the capacity as hearing officer); (2) financial conflict of interest; or (3) "displayed bias or partiality *to any party to the hearing*." *See* N.Y. Comp. Codes R. & Regs. tit. 18, § 358-5.6(c)(1). It is unclear whether a hearing officer's statement on a matter of policy, not directed at any specific "party to the hearing," would entitle a benefit applicant to that hearing officer's recusal.

In sum, although a government employer's "reasonable predictions of disruption" are entitled to "substantial weight," *Waters v. Churchill*, 511 U.S. 661, 673 (1994) (plurality opinion), "to be 'reasonable,' that prediction must be supported with an evidentiary foundation and be more than mere speculation." *Gazarkiewicz v. Town of Kingsford Heights*, 359 F.3d 933, 944 (7th Cir. 2004); *see also Heil v. Santoro*, 147 F.3d 103, 109–10 (2d Cir. 1998). Defendants have only pointed to

speculation to attempt to satisfy their burden of proof that Davi's comments would disrupt OTDA's operations. Davi's interest in commenting on government policies of significant public concern, by contrast, weighs heavily in his favor. In this context, there was no reason to think that Davi's comments would prompt Legal Aid or other litigants to take action and no evidence that the comments would be further disseminated. In commenting on this issue of public importance as a private citizen, Davi had "a legitimate interest in maintaining a zone of privacy where he can speak . . . without fear of censure." *Waters v. Chaffin*, 684 F.2d 833, 837 (11th Cir. 1982); *see Pickering*, 391 U.S. at 572 (holding that "it is essential" that public employees "be able to speak out freely" on matters of public concern "without fear of retaliatory dismissal").

None of this is to deny that Davi's remarks are controversial and provided a basis for his initial removal from the hearing calendar pending an investigation into whether his views affected his job performance (as requested by Lloyd). Rather, I conclude only that Defendants have not met their burden to show that Davi's comments reflected any actual bias that affected his job performance or that the comments were likely to cause disruption in his particular context. Indeed, Defendants' failure to show any reasonable likelihood of disruption suggests that their justifications were pretextual and that they instead sought to fire Davi because he held disfavored views. Yet "[i]f there is any fixed star in our constitutional

constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Davi is therefore entitled to reinstatement to his position as an administrative law judge. Although Davi may also ultimately be entitled to back pay for the period of his unpaid suspension, I cannot grant such relief against Defendants in their *official* capacities consistent with the doctrine of sovereign immunity. *Dwyer v. Regan*, 777 F.2d 825, 836–37 (2d Cir. 1985); *see also Dotson v. Griesa*, 398 F.3d 156, 178 (2d Cir. 2005). Accordingly, I turn to whether Davi can pursue damages from Defendants in their individual capacities. *See Dwyer*, 777 F.2d at 836–37.

IV. Certain Individual Defendants Are Entitled to Summary Judgment

State employees may be held individually liable for damages under 42 U.S.C. § 1983 only if they were "personally involved in the alleged deprivation" of Davi's rights. *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 127 (2d Cir. 2004). "Personal involvement can be established by showing that:

> (1) the defendant participated directly in the alleged constitutional violation, (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, (4) the defendant was grossly negligent in supervising subordinates who committed the wrongful acts, or (5) the defendant exhibited deliberate indifference . . . by failing to act on information indicating that unconstitutional acts were occurring."

Littlejohn v. City of New York, 795 F.3d 297, 314 (2d Cir. 2015) (internal quotation omitted). Davi must also establish that the individuals' actions "were the proximate cause of the plaintiff's constitutional deprivation." *Id.*

Moreover, the individual defendants argue that they are entitled to qualified immunity because "at the time of the challenged conduct there was no clearly established law that such conduct constituted a constitutional violation." *Lynch*, 811 F.3d at 578 (internal quotation omitted). But although qualified immunity may foreclose liability based on a novel application of the *Pickering* balancing test, *see id.* at 583, the Second Circuit has held that qualified immunity does not apply when there is evidence that defendants' actual motive was to retaliate against the employee's speech rather than due to a concern about disruption. *Locurto v. Safir*, 264 F.3d 154, 167 (2d Cir. 2001). That is because "applying an objective test to a subjective element is a contradiction in terms," and thus qualified immunity is unavailable to the extent Davi shows "particularized evidence of direct or circumstantial facts supporting his claim of unconstitutional motive." *Sheppard v. Beerman*, 94 F.3d 823, 828 (2d Cir. 1996); *see Locurto*, 264 F.3d at 167. Indeed, Davi does not argue that the application of the *Pickering* balancing test was clearly established in this context, but rather relies solely on the evidence that the individual defendants acted with retaliatory intent. ECF No. 94 at 26.

Before proceeding to the individual defendants, one general point must be

made. The defendants properly argue that they can only be held liable for their individual actions, and they note that they played differing roles in the various measures taken against Davi. Nevertheless, Davi asserts only a single claim in this litigation—that Defendants retaliated against him in violation of the First Amendment—and to the extent any of the individual defendants are liable under the demanding standard described above, they are not entitled to summary judgment.

A. ***Samuel Spitzberg***

Samuel Spitzberg, OTDA's director, had perhaps the greatest personal involvement of the defendants in disciplining Davi and the most knowledge from which a jury could conclude he acted with retaliatory intent. By his admission, Spitzberg participated in the November 5 decision to suspend Davi and removed him from the hearing calendar. ECF No. 88 at ¶¶ 5, 8. Spitzberg then reviewed Davi's decisions "and found no evidence of actual bias therein." *Id.* ¶ 9; *see also* ECF No. 83-19. Moreover, Spitzberg reached out to a contact at Legal Aid who said he had not heard of any "scuttlebutt" regarding OTDA's hearing officers. ECF No. 88 at ¶ 10. After Davi rejected OTDA's settlement offers, Spitzberg nonetheless "concluded that there was no alternative but to seek to terminate Plaintiff's employment." *Id.* ¶ 12. He therefore signed Davi's notice of discipline. *Id.* ¶ 13.

A jury could reasonably conclude that Spitzberg took this adverse action against Davi despite knowing there was no evidence that Davi acted with actual bias

and that Legal Aid had either not received Davi's comments or had not found them worthy of escalation. Moreover, Spitzberg authorized a notice of discipline charging Davi with actual bias despite knowing otherwise. These actions more than suffice to demonstrate Spitzberg's personal involvement in decisions that, construed in the light most favorable to Davi, violated his constitutional right not to be retaliated against for the content of his speech.

B. ***Eric Schwenzfeier***

Eric Schwenzfeier, the assistant deputy commissioner for OTDA's Division of Administrative Services at the relevant time period, participated in the November 5 meeting with other senior officials at OTDA shortly after receiving the anonymous complaint. ECF No. 89 at ¶ 4. He asserts that, at that meeting, a "collective decision was made to remove Plaintiff from his duty of holding hearings pending further investigation." *Id.* Moreover, he testified that, at that meeting, they decided that Davi could no longer be a hearing officer and that he should be suspended without pay. ECF No. 83-8 at 62, 64. Although Davi was initially only removed from the hearing calendar, Schwenzfeier testified that this first step was essentially only for show and that the decision had already been made to suspend Davi. The only reason they waited a week to effectuate that decision was because "[g]eneral office practice is to afford an opportunity to [the] employee to be interviewed." *Id.* at 62. Schwenzfeier also testified that, in his view, Davi's statements reflected actual bias,

and he notably agreed that OTDA would have been justified in taking action against anyone who held Davi's views even if they had not been voiced. *Id.* at 72.

Schwenzfeier's decision to remove Davi from the hearing calendar pending an investigation was reasonable and did not violate clearly established law. Nonetheless, a jury could find that he acted with retaliatory intent by deciding to suspend Davi without regard to the result of any investigation, even though Schwenzfeier had no known involvement in the decision to terminate Davi. Moreover, Schwenzfeier's testimony that he would have taken action against Davi simply because of his views could reasonably be understood to mean that Schwenzfeier did not care whether those views affected Davi's job performance or would cause disruption. Schwenzfeier is therefore not entitled to summary judgment on qualified immunity in light of the evidence from which a jury could conclude that he retaliated against Davi because Davi held disfavored views rather than due to the risk of disruption. *Sheppard*, 94 F.3d at 828.

C. ***Sharon Devine***

Sharon Devine, then OTDA's executive deputy commissioner, played a direct role in two decisions: she approved the decision to suspend Davi in early November 2015 and approved the notice of discipline in late December. *See* ECF Nos. 88 at ¶ 5; 90-2 at 47. Although there is less direct evidence of Devine possessing an unconstitutionally retaliatory motive, it is nonetheless sufficient to deny her motion

for summary judgment. General counsel Krista Rock testified that Devine made the decision to issue the notice of discipline and seek Davi's termination in consultation with Samuel Spitzberg. ECF No. 90-4 at 56. As discussed elsewhere, however, Spitzberg was intimately involved in investigating Davi, had concluded that Davi's decisions did not reflect actual bias, and had contacted Legal Aid and learned that his contact was unaware of any "scuttlebutt" about OTDA's hearing officers. Indeed, Spitzberg testified that he "would not have issued the [notice of discipline] without Sharon Devine's approval." ECF No. 90-5 at 90. Yet the notice of discipline that Devine authorized charged Davi with actual bias and sought his termination. Thus, a jury could reasonably conclude that, at the time Devine approved the notice of discipline, she did so for pretextual reasons despite having learned that Davi had no actual bias and that his comments were unlikely to generate disruption.

D. ***Donna Faresta***

Donna Faresta, the former head of OTDA's human resources department, is entitled to summary judgment because Davi points to no "particularized evidence of direct or circumstantial facts supporting his claim of unconstitutional motive." *Sheppard*, 94 F.3d at 828. Davi points to two acts she took: first, Faresta signed a letter apprising Davi that, after his interview on November 13, 2015, he was suspended without pay. ECF No. 83-1 at 11–12. Second, after Davi's six-month unpaid suspension, she sent him a letter confirming his transfer to the role of senior

attorney, as permitted by the arbitrator. *Id.* at 67.

Davi points to no particularized evidence, however, that she took either action based on a retaliatory motive. At most, Davi and Schwenzfeier testified that Faresta was generally involved in the decision to suspend Davi and to transfer him to the role of senior attorney, and defendants have admitted the same. *See, e.g.*, ECF Nos. 90-1 at 83; 90-6 at 139–42; 83-2 at 16. By contrast to Devine, however, Davi has pointed to no evidence that Faresta personally had reason to know that the decisions she implemented were based on anything other than neutral concerns about disruption. Accordingly, since Davi has failed to satisfy his burden, Faresta is entitled to summary judgment.

E. ***Krista Rock***

Krista Rock, the general counsel of OTDA, is likewise entitled to summary judgment. Davi seeks to hold Rock liable because she participated in the November 5 meeting in which Defendants decided to remove Davi from the hearing calendar, and for the role she allegedly played in rejecting his 2016 application to serve as a supervising hearing officer. ECF Nos. 90-1 at 93; 90-4 at 30–33. As Rock testified—and as Davi has not disputed—she only had the ability to discipline individuals working in the general counsel's office, but had no authority to discipline or make hiring decisions related to Davi. ECF No. 90-4 at 37. At most, she arranged to implement the decisions others had made. *See* ECF No. 96-12 at 70–71. Because

the evidence indicates that Rock provided legal advice and did not have authority over Davi, she lacked sufficient "personal involvement" in the deprivation of Davi's rights, was not the proximate cause of that deprivation, and is entitled to summary judgment. *See Zehner v. Jordan-Elbridge Bd. of Educ.*, 2019 WL 4083040, at *9 (N.D.N.Y. Aug. 29, 2019) (collecting cases).

F. *Samuel Roberts*

Finally, Samuel Roberts, who led OTDA as its commissioner, is entitled to summary judgment. Davi points to no evidence of Roberts' personal involvement other than that he was copied on the original letter Lloyd wrote and that Davi sent Roberts a letter challenging OTDA's treatment of him. *See* ECF Nos. 83-1 at 3; 96-11. Roberts submitted a declaration in which he denied having any "role or involvement in any employment decision" related to Davi, and said that he did not view the anonymous complaint or Davi's letter. ECF No. 85 at ¶ 4. The other defendants agree that Roberts was uninvolved. *See, e.g.*, ECF Nos. 90-3 at 151; 90-4 at 101, 105; 90-5 at 151.

The Second Circuit has held that the mere receipt of letters is insufficient to demonstrate personal involvement under § 1983. *Sealey v. Giltner*, 116 F.3d 47, 51 (2d Cir. 1997); *accord Allah v. Annucci*, 2018 WL 4571679, at *6 (S.D.N.Y. Sept. 24, 2018) (collecting cases). Davi argues, however, that he should be entitled to reopen discovery under Fed. R. Civ. P. 56(d) to determine if Roberts played a greater

role because he was not given the opportunity to depose Roberts. But Judge Mauskopf denied him that opportunity because "[h]igh-ranking government officials, such as Commissioner Roberts, should not be subject to deposition unless a plaintiff can show that they possess unique personal knowledge, not obtainable through other, less burdensome, means of discovery." *Davi v. Roberts*, 2018 WL 4636805, at *2 (E.D.N.Y. Sept. 26, 2018). Davi has still not made that showing, and Roberts' motion for summary judgment is granted.

V. Official Capacity Defendants

Because Roberts and Faresta have left OTDA's employment, their successors are automatically substituted for the claims asserted against them in their official capacity. Fed. R. Civ. P. 25(d). Although Defendants argue that all official capacity claims other than the one against Roberts' successor should be dismissed as duplicative, I see no practical reason to do so. To the extent those officials have a role in the equitable relief to which Davi is entitled, the claims against them in their official capacity can remain.

CONCLUSION

Davi's motion for partial summary judgment is granted. Defendants' motions for summary judgment are denied, except that the claims against Faresta, Rock and Roberts in their individual capacities are dismissed. The parties are directed to confer on a proposed order reinstating Davi as an administrative law judge and

should submit it within seven days.

SO ORDERED.

Edward R. Korman

Brooklyn, New York
March 3, 2021

Edward R. Korman
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SALVATORE DAVI, Plaintiff, -against- SAMUEL D. ROBERTS, COMMISSIONER, NEW YORK STATE OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE, in his individual and official capacity, *et al.* Defendants.	16-cv-5060 (ERK) **ORDER**

IT IS HEREBY ORDERED:

Plaintiff will be reinstated to the position of Hearing Officer, G-25, at the 14 Boerum Place location of New York's Office of Temporary and Disability Assistance on or before April 1, 2021. On or before April 23, 2021, he will be assigned duties that include conducting Fair Hearings, *i.e.*, hearings to resolve disputes over the propriety of decisions by social service agencies regarding benefits to be provided recipients through social welfare programs.

SO ORDERED.

Edward R. Korman

Brooklyn, New York
March 24, 2021

Edward R. Korman
United States District Judge

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.