Circuit Court for Prince George's County
Case No. CAL2111244

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND**

No. 1730

September Term, 2021

PRINCE GEORGE'S COUNTY

v.

ANTHONY BROOKE

Arthur,
Friedman,
Tang,

JJ.

Opinion by Friedman, J.

Filed: August 18, 2023

* This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to MD. R. 1-104(a)(2)(B).

** At the November 8, 2022 general election, the voters of Maryland ratified a constitutional amendment changing the name of the Court of Special Appeals of Maryland to the Appellate Court of Maryland. The name change took effect on December 14, 2022.

Prince George's County appeals an order of the Circuit Court for Prince George's County that stopped disciplinary proceedings against Corporal Anthony Brooke on the basis that the charges against him violated his rights under the First Amendment. For the reasons that follow, we vacate the judgment of the circuit court and remand for further proceedings.

BACKGROUND

In October 2020, several police officers of the Prince George's County Police Department (PGCPD) filed an internal complaint against a fellow police officer named W. The complaint alleged that W. had used excessive force in choking a young man. Surveillance video revealed that W. had used his personal cell phone to take pictures of the victim. As a result, PGCPD sought and obtained a warrant to seize W.'s cell phone and search its contents. While searching the content of W.'s cell phone, PGCPD discovered a series of sixteen racist and demeaning messages written by Brooke and sent to W.'s cell phone. Those text messages from Brooke stated, in part, as follows:

Text 1: "FBI did search warrants on two PGPD officers today out of D4… guess what race they are…"

Text 2: "Yep," in response to W. saying "No doubt… black people in a white man[']s job."

Text 3: "We get a paper [cut] and bleed out, these savages get shot in the head and still won't die."

Text 4: "3 Homicides in D4 last night. I LOVE IT."

Text 5: "Hearing about [homicides] like that and just imagining the whole block out there screaming and crying brings true warmth and happiness to my heart."

Text 6: "This one felt glorious last night." This text accompanied a picture of a Black man in a hospital bed with bandages over his forehead and his eye swollen shut.

Text 7: "Heard the call at [W]alker [M]ill, hope they got shot."

Text 8: "Everybody wants to be a social justice warrior. Fuck [']em."

Text 9: "We all deserve nice things. Fuck these animals!!"

Text 10: "Did you see that little fuck got transferred to MRD what a joke"

Text 11: "Yup all they do is bitch and moan about more more more. Want the most shit from doing the least amount of work. Bottom [line] ol whitey is just better at policing than them!"

Text 12: "I just love that it's constantly them getting caught for fraud, theft, all the shit and all they can do is still blame us."

Text 13: "So glad that dude got locked up on [R]ochell. He's such a bitch. Kenney and I [beat] the shit out of him last year when he ran with a gun on Atwood."

Text 14: "I know it doesn't mean much coming from me but I'm seriously not doing shit anymore, fuck this place. Savages…"

Text 15: "Can't wait to tell you about all the lazy turd #1s[1] in the class smh."

Text 16: "Helping shift 4 with calls! Why don't they bring the little snitch back from MRD if they are so short! Oh wait they can't it's his reward!"

After reviewing these text messages, PGCPD initiated a separate investigation into Brooke and interviewed him regarding his text messages to W. The PGCPD brought sixteen

[1] Here, the term "#1" refers to Black people, according to Brooke's explanation elsewhere in his interview with Internal Affairs.

charges against Brooke, one for each of the text messages, and recommended fines and termination.

Before a disciplinary hearing could take place, however, Brooke filed a complaint and petition for a show cause order in the Circuit Court for Prince George's County pursuant to the then-existing Law Enforcement Officers' Bill of Rights (LEOBR). MD. CODE, PUB. SAFETY ("PS") § 3-105(a) (repealed 2022). Brooke argued that the circuit court should stop the disciplinary hearing from going forward because using his text messages as a basis for disciplining him would violate his free speech rights under both the First Amendment to the U.S. Constitution and Article 40 of the Maryland Declaration of Rights.

The circuit court held a hearing and issued an opinion finding that Brooke's text messages involved a matter of public concern and were thus protected by the U.S. and Maryland Constitutions. As a result of this decision, the PGCPD was prohibited from disciplining Brooke based on those text messages. The County then noted a timely appeal.

DISCUSSION

I. LAW ENFORCEMENT OFFICER'S BILL OF RIGHTS

From 1974, when it was enacted, until 2022, when it was repealed,[2] the Law Enforcement Officer's Bill of Rights, or LEOBR, provided significant protections for

[2] Protests in Maryland and across the country—following the deaths of George Floyd, Breonna Taylor, Rayshard Brooks, and others at the hands of police—prompted the Maryland General Assembly to repeal LEOBR. *Maryland Police Accountability Act of 2021: Hearing on HB 670 Before the H. Judiciary Comm.*, 2021 Leg., 443d Sess. (Md. 2021) (statement of Speaker Adrienne Jones) (Feb. 9, 2021). The repeal of LEOBR became effective on July 1, 2022. Acts of 2021, ch. 59. A new subtitle governing police accountability and discipline was enacted to replace LEOBR. PS §§ 3-101 *et seq.*

police officers when they were the subjects of investigation and discipline by the police departments by which they were employed. PS §§ 3-101 *et seq.*; *Popkin v. Gindlesperger*, 426 Md. 1, 3-4 (2012) (discussing that the LEOBR "guarantee[d] that certain procedural safeguards be offered … during any investigation and subsequent hearing which could lead to disciplinary action, demotion, or dismissal").

One of these protections was the right to challenge the legality of a disciplinary investigation before it even started:

> (a) A law enforcement officer who is denied a right granted by this subtitle may apply to the circuit court of the county where the law enforcement officer is regularly employed for an order that directs the law enforcement agency to show cause why the right should not be granted.
>
> (b) The law enforcement officer may apply for the show cause order:
>
> (1) either individually or through the law enforcement officer's certified or recognized employee organization; and
>
> (2) at any time prior to the beginning of a hearing by the hearing board.
>
> (c) On a finding that a law enforcement agency obtained evidence against a law enforcement officer in violation of a right granted by this subtitle, the court shall grant appropriate relief.

PS § 3-105 (repealed 2022); *Manger v. FOP, Montgomery County Lodge 35, Inc.*, 239 Md. App. 282, 293 (2018); *Mass Transit Admin. v. Hayden*, 141 Md. App. 100, 111 (2001) (discussing prior codification of LEOBR). Moreover, among the "rights granted by this subtitle," PS § 3-105(a), were the right to engage in political activity, PS §3-103(a)(1), and

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Importantly, the new subtitle does not provide an analogous procedure to interrupt police discipline before it gets started.

the right not to be disciplined for the "lawful exercise [of] constitutional rights." PS § 3-103(d)(1)(ii). Thus, under the LEOBR, a police officer could use this show cause procedure to challenge in advance whether a forthcoming disciplinary proceeding would violate the officer's free speech rights.[3]

As noted above, the circuit court determined that disciplining Brooke for these sixteen text messages would violate his free speech rights and therefore issued an order, in effect, precluding the PGCPD from using those text messages as a basis for discipline.

II. FREE SPEECH PROTECTIONS FOR PUBLIC EMPLOYEES

The First Amendment to the U.S. Constitution provides, in pertinent part, that "Congress shall make no law … abridging the freedom of speech." That guarantee is made applicable to the States and subdivisions of the States, including PGCPD, through the 14th Amendment to the U.S. Constitution.[4] When citizens become public employees, they don't

[3] The County characterizes the show cause order as an injunction and argues that the circuit court failed to do a proper analysis of the factors required to support an injunction. While it is true that the relief requested in the show cause petition was in the nature of an injunction, in the sense that it was a "preventative and protective remedy, aimed at future acts, and … not intended to redress past wrongs," *Plank v. Cherneski*, 469 Md. 548, 609 (2020) (cleaned up), a show cause order is a special form of process prescribed by statute. When injunctive relief is provided by statute, "a court's decision to issue injunctive relief is no longer rooted in traditional principles of equity[. R]ather, it is based upon the statutory guidelines." *State Comm'n on Hum. Rels. v. Talbot County Det. Ctr.*, 370 Md. 115, 127 (2002); PS § 3-105(a) (repealed 2022); PAUL V. NIEMEYER & LINDA M. SCHUETTE, MARYLAND RULES COMMENTARY 341-42 (5th ed. 2019). Therefore, we decline to analyze the show cause procedure under PS § 3-105 as we would an injunction.

[4] Marylanders' free speech rights are also guaranteed by Article 40 of the Maryland Declaration of Rights, which provides "that every citizen of the State ought to be allowed to speak, write and publish [their] sentiments on all subjects, being responsible for the

give up their free speech rights entirely. *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006). Instead, public employees' free speech rights are limited to accommodate their public employers' valid and legitimate interest in controlling the workplace. *Rankin v. McPherson*, 483 U.S. 378, 384 (1987). As a result, courts have adopted a two-step test to determine whether public employees may be disciplined for exercising their right to free speech.[5] *Id.* at 384-85, 388.

The *first* step requires the court to determine whether the employee's speech involved a matter of public concern. *Id.* at 384-85. Only speech that involves a matter of public concern is protected. *Connick v. Myers*, 461 U.S. 138, 146 (1983). If it does not involve a matter of public concern, the speech is not protected, and the public employee

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abuse of that privilege." MD. CONST., Decl. of Rts., art. 40. Article 40 is capable of a different interpretation than the First Amendment. *Clear Channel Outdoor v. Dep't of Fin.*, 472 Md. 444, 457 (2021) (noting that Article 40 of the Maryland Declaration of Rights is capable of divergent interpretation from the First Amendment but declining to give it divergent interpretation on the facts and legal argument presented); *The Pack Shack, Inc. v. Howard County*, 377 Md. 55, 64 n.3 (2003) (same). Brooke, however, does not make any arguments based on those differences. As a result, we will analyze this case exclusively under First Amendment doctrine.

[5] Some courts consider additional steps. For example, if a public employee is speaking only in their official capacity, then their speech is not protected. *Garcetti*, 547 U.S. at 421-22. The question of whether an employee is speaking as a citizen on a matter of public concern can thus become two questions: whether they are speaking as a citizen or as an employee, and whether they are speaking on a matter of public concern. Moreover, some courts analyze whether the speech was a substantially motivating factor in disciplining the employee. *E.g.*, *McVey v. Stacy*, 157 F.3d 271, 277-78 (4th Cir. 1998). Here, the County has not argued that Brooke's speech was unprotected because it was made in his official capacity as a police officer. On the other hand, the content of Brooke's speech is unquestionably the motivation for PGCPD's attempt at disciplining him. For our purposes, therefore, we are concerned with only the two steps announced in *Pickering v. Board of Education*. 391 U.S. 563, 568 (1968); *see also Rankin*, 483 U.S. at 388 (recapping *Pickering*'s two-step test).

may be disciplined for the content of the speech. *Id.*; *Garcetti*, 547 U.S. at 418. To determine that the speech involved a matter of public concern, a court must find that the subject matter of the speech had some objective nexus to the public welfare and involved an issue of social, political, or other interest to a community. *Carey v. Throwe*, 957 F.3d 468, 475, 478 (4th Cir. 2020). Perhaps the paradigmatic example of speech on a matter of public concern was offered by *Pickering v. Board of Education*, which concerned a teacher's letter to the newspaper editor criticizing the school board's funding allocation decisions. 391 U.S. 563, 571, 575-77 (1968).

If the public employee's speech involves a matter of public concern, courts then proceed to the *second* step, which requires the court to apply a balancing test, which balances the interest of the employee, as a citizen, in commenting on matters of public concern, and the interest of the public employer, in promoting the efficiency of the public services it performs through its employees.[6] *Pickering*, 391 U.S. at 568; *Rankin*, 483 U.S. at 384. This second step requires a court to consider the interest of the public employee

[6] We note that First Amendment cases expounding on the speech of public employees should not be confused with First Amendment cases analyzing student speech (*Mahoney Area Sch. Dist. v. B.L.*, 141 S. Ct. 2038 (2021)), or explaining when the First Amendment protects against tort liability for intentional infliction of emotional distress (*Snyder v. Phelps*, 562 U.S. 443, 450 (2011)). In *Mahoney*, for example, it is clear that B.L.'s remarks, if she were a public employee, would be considered "purely personal" private venting, and not a matter of public concern, when she said "[f]uck school fuck softball fuck cheer fuck everything." 141 S. Ct. at 2043. Likewise in *Snyder*, 562 U.S. at 451-52, the Supreme Court had no occasion to consider whether the Westboro Baptist Church's speech was done purely as an exercise of their duties as employees, *contra Garcetti*, 547 U.S. at 421, because the speech at issue was not made by public employees. In short, the various tests are not interchangeable.

against "the effective functioning of the public employer's enterprise. Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong [S]tate interest." *Rankin*, 483 U.S. at 388. In conducting this balancing, courts evaluate several factors:

> [W]hether the employee's speech (1) impairs discipline by superiors; (2) impairs harmony among co-workers; (3) has a detrimental impact on close working relationships; (4) impedes the performance of the public employee's duties; (5) interferes with the operation of the agency; (6) undermines the mission of the agency; (7) is communicated to the public or to co-workers in private; (8) conflicts with the responsibilities of the employee within the agency; and (9) makes use of the authority and public accountability the employee's role entails.

McVey v. Stacy, 157 F.3d 271, 278 (4th Cir. 1998) (cleaned up) (quoting *Rankin*, 483 U.S. at 388-91); *see also Newell v. Runnels*, 407 Md. 578, 627 n.24 (2009) (quoting *McVey*).

ANALYSIS

As noted above, the circuit court found that all sixteen of Brooke's text messages to W. involved matters of public concern because they "involved issues of social, political, or *other interest to a community*." (emphasis in circuit court's order). The circuit court's analysis was brief: "the Court cannot find that [Brooke's] speech was purely personal, but speech that is a 'subject of general interest and of value and concern to the public,'" because Brooke is "a law enforcement officer whose duty is to protect and serve the members of the community." The circuit court held, in effect, that racist texts by a police officer are, by definition, a matter of public concern. We hold that the circuit court erred by misapplying the legal test of whether Brooke's text messages involved matters of public concern. While we certainly agree that it can and does cause concern to the public when a police officer

sends racist text messages, we don't agree that sending such text messages makes the subject matter of those text messages one of public concern as the test is defined in the caselaw. *See, e.g.*, *Connick*, 461 U.S. at 148.

We think the circuit court's error is attributable to the imprecision of the phrase "public concern." We understand the circuit court to use "public concern" to mean the *incident* "would cause concern to the public" or "would cause the public to be concerned." Instead, the caselaw uses the phrase, "public concern" to mean that the *subject matter of the speech* objectively "pertains to the public welfare," rather than to merely private interests or viewpoints. *Carey*, 957 F.3d at 475, 478; *Stroman v. Colleton County Sch. Dist.*, 981 F.2d 152, 156 (4th Cir. 1992). Thus, while we have no doubt that a police officer sending racist text messages would cause the public to be concerned, further inquiry is needed to determine whether the *subject matter* of the text messages objectively pertained to the public welfare. As a result, we will return this case to the circuit court to determine if each text message was on a subject matter about which the public is or should be objectively concerned.[7]

[7] There is a serious argument that because Brooke bore the burden of production at the LEOBR show cause hearing, and because, for most of the texts, Brooke produced no evidence to show that they involved any matter of public concern, that a remand was unnecessary. *See Bd. of Trs., Cmty. Coll. of Baltimore County v. Patient First Corp.*, 444 Md. 452, 469 (2015) (noting that the party that pleads the existence of a fact bears the burden of producing sufficient evidence on an issue to present a triable issue of fact and avoid a directed verdict). Despite this, however, we have determined that the circuit court should decide in the first instance whether Brooke's texts involved matters of public concern.

At this first step, a court is only determining whether the subject matter is of public or private concern. Thus, for example, a police officer's speech on the subject matter of staffing, funding, community relations, morale, and the like may be subjects of public concern. *See, e.g.*, *Campbell v. Galloway*, 483 F.3d 258, 269-70 (4th Cir. 2007) (holding complaint of inappropriate conduct toward women suspects and witnesses was a matter of public concern); *DiGrazia v. County Exec. for Montgomery County*, 288 Md. 437, 442, 450-51 (1980) (applying *Pickering* balancing test to department director's statement that half the department's officers were unqualified to serve). This can be true even if the speech is in the form of, or contains, racist and vulgar language. *See Grutzmacher v. Howard County*, 851 F.3d 332 (4th Cir. 2017) (racist or vulgar expression doesn't prevent speech from involving public concern). But if the subject matter of the speech is an officer's private concerns, including personal grievances about conditions of employment or general venting of frustrations, it is not of public concern. *See, e.g.*, *Connick*, 461 U.S. at 140-41 (personal grievances about conditions of employment are not subject matter of public concern); *Hawkins v. Dep't of Public Safety and Correctional Servs*., 325 Md. 621, 623, 632-33 (1992) (personal venting is not subject matter of public concern). If the speech is mixed, and is on subjects of both public and private concern, then the speech is treated as being of public concern. *See, e.g.*, *Connick*, 461 U.S. at 149-50; *Campbell*, 483 F.3d at 270.

We remand to the circuit court to review the texts to determine whether the subject matter of the speech involved matters of public concern.[8] If the subject matter of a text did

[8] In conducting this review, we recommend that the circuit court evaluate each text message individually, including Brooke's explanations for each, to decide whether the

not involve a matter of public concern, the circuit court must deny the show cause petition as to that text and return the matter to PGCPD to proceed with disciplining Brooke on that basis. If, on the other hand, it finds that the subject matter of a text did involve a matter of public concern, then the circuit court should proceed to the second step in the *Pickering* balancing test.[9] *Pickering*, 391 U.S. at 568.

CONCLUSION

We hold that the circuit court erred in using an improper test to determine that all sixteen of Brooke's text messages involved matters of public concern. We, therefore, vacate the judgment of the circuit court and remand for further proceedings consistent with this opinion.

JUDGMENT OF THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY IS VACATED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. COSTS TO BE PAID BY APPELLEE.

subject matter of the speech involved matters of public concern. *Carey*, 957 F.3d at 475. In this context, if the circuit court finds significance in Brooke's summation that these texts "were just two officers venting about, you know, stuff on the department and the current climate," then that statement alone may be dispositive.

[9] *See McVey*, 157 F.3d at 278 (enumerating factors to consider under *Pickering*).