

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2013

(Argued: March 11, 2014 Decided: June 23, 2014)

Docket No. 13-1834-cv

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2 SUSAN R. CASTINE,

3 *Plaintiff-Appellant,*

4 v.

5 MICHAEL E. ZURLO, in his individual and official capacity, CLINTON
6 COUNTY,

7 *Defendant-Appellees.*¹

8 -----X

9

10 Before: JACOBS, LEVAL, and POOLER, *Circuit Judges:*

11 Plaintiff Susan R. Castine appeals from a judgment of the United States
12 District Court for the Northern District of New York (Hurd, J.) dismissing her
13 suit against Defendants Clinton County and the County Administrator. Castine
14 alleged that Defendants violated her First Amendment rights by removing her
15 from her office as Election Commissioner while she ran for an elective town
16 office pursuant to an ordinance that disqualified candidates for elective office

¹ The Clerk of Court is directed to amend the official caption to conform to the caption above.

1 from employment in the Board of Elections. She asserted a state law claim as
2 well. The district court concluded that Defendants were entitled to summary
3 judgment. The Court of Appeals (Leval, J.) holds that the district court properly
4 granted summary judgment in favor of Defendants on Castine’s First
5 Amendment retaliation claim. The court vacates and remands the claim brought
6 under New York state law. The judgment of the district court is therefore
7 AFFIRMED in part and VACATED in part and REMANDED.

8 THOMAS MARCELLE, Law Office of
9 Thomas Marcelle, Slingerlands, NY, for
10 *Plaintiff-Appellant*.

11 JOHN F. MOORE, Towne, Ryan &
12 Partners, P.C., Albany, NY, for *Defendant-*
13 *Appellees*.

14 LEVAL, *Circuit Judge*:

15 Plaintiff Susan R. Castine appeals from a judgment of the United States
16 District Court for the Northern District of New York (Hurd, J.) dismissing her
17 suit against Defendants Clinton County Administrator Michael E. Zurlo and
18 Clinton County. Castine brought this suit within the federal question
19 jurisdiction of the federal courts, 28 U.S.C. § 1331, protesting her temporary
20 removal from the office of Clinton County Election Commissioner during her
21 candidacy for Beekmantown Town Justice. Her complaint alleges that her
22 removal from office under Clinton County Local Law No. 1 of the Year 2000
23 (“Local Law No. 1”) was an unconstitutional retaliation for the exercise of her

1 First Amendment rights in running for elective office and seeks damages,
2 declaratory, and injunctive relief under 42 U.S.C. § 1983. The district court
3 granted Defendants' motion for summary judgment on that claim. The court
4 concluded that Castine's evidence failed to show a genuine issue of material fact
5 supporting her claim of unconstitutional retaliation. We agree and therefore
6 affirm the judgment insofar as it dismissed her federal claim.

7 Castine's complaint included a second claim, brought under supplemental
8 jurisdiction, *see* 28 U.S.C. § 1367, seeking a declaratory judgment that Clinton
9 County Local Law No. 1 is void under New York state law. The District Court
10 granted summary judgment in favor of the defendants on that claim as well. We
11 vacate that aspect of the judgment and remand for further consideration.

12 **FACTUAL BACKGROUND**

13 In 2006, Castine was elected to the position of Beekmantown Town Justice
14 for a four-year term beginning January 1, 2007. In 2008, while serving as Town
15 Justice, she was appointed as the Democratic Party's Election Commissioner for
16 Clinton County to fill a two-year vacancy beginning January 1, 2009.

17 As Election Commissioner, Castine served at the head of the Board of
18 Elections, which was charged with, among other things, determining the validity

1 of petitions, determining which voters are entitled to vote by absentee ballot,
2 counting, tallying, and canvassing votes for primary and general elections, and
3 approving the form of the ballots for primary and general elections. Election
4 Commissioners also share responsibility for preparing the form of the ballot,
5 including deciding the placement of candidates on the ballot. These
6 responsibilities extend to Beekmantown local elections, including its election for
7 Town Justice.

8 To preserve the integrity of local elections, Local Law No. 1 prohibits
9 candidates for elective public office from simultaneously holding employment or
10 office in the Board of Elections. That law provides, in relevant part, that “[a]ny
11 person who shall become a candidate for elective public office shall be
12 disqualified during the period of his or her candidacy from appointment or
13 continued employment from the Board of Elections.” Local Law No. 1.

14 On July 12, 2010, while serving as Election Commissioner, Castine filed a
15 petition with the Clinton County Board of Elections to become a candidate for
16 reelection to the position of Beekmantown Town Justice. In response, at a July 14
17 meeting of the Clinton County Legislature, Zurlo called an executive session
18 seeking direction on how to handle Castine’s simultaneous employment as

1 Election Commissioner and candidacy for Beekmantown Town Justice. In
2 particular, Zurlo sought a determination whether to enforce Local Law No. 1.
3 After receiving advice from the County Attorney, the Legislature unanimously
4 agreed that Local Law No. 1 should be enforced against Castine.²

5 On July 15, 2010, Zurlo wrote Castine a letter informing her of the Clinton
6 County Legislature's determination to enforce Local Law No. 1 against her. The
7 letter also informed Castine that, unless she provided evidence of the declination
8 of her candidacy for Town Justice prior to July 16, 2010, she would be expected to
9 terminate her employment as Election Commissioner. The next day, Zurlo sent
10 Castine an e-mail saying: "I just wanted to confirm that you will be sending me a
11 copy of proof of declination today." Castine wrote back almost immediately: "I
12 will be responding today," but sent no further communication.

13 Castine had multiple conversations with Clinton County Personnel
14 Director Alan Gibson. Gibson asked Castine to complete a termination form and
15 to vacate her office. Castine responded that she believed Gibson did not have the

² In her complaint and in certain filings below, Castine also raised an argument about the potentially improper motivation of the Clinton County Legislature in deciding to enforce Local Law No. 1 against her, suggesting that the action was taken in order to advance the candidacy of a legislator's nephew who was also running for Beekmantown Town Justice. Castine has abandoned this argument on appeal.

1 authority to remove her from office and that she would leave her office only with
2 a deputy present.

3 On July 19, 2010, Gibson went to Castine's office with a deputy sheriff who
4 waited outside her door. Gibson asked Castine to sign a termination checklist,
5 which she refused to do. He and the deputy then escorted Castine from the
6 building. That same day, Castine filed this lawsuit.

7 On November 2, 2010, Castine won the election for Beekmantown Town
8 Justice, and the next day she returned to her position as Election Commissioner.

9 **PROCEDURAL HISTORY**

10 Castine, the Clinton County Democratic Party, and Martin Mannix (as
11 Chairman of the Clinton County Democratic Party) brought this action on July
12 19, 2010, against County Administrator Zurlo (in his individual and official
13 capacities) and the County. In October 2011, Mannix and the Clinton County
14 Democratic Party then voluntarily dismissed all of their claims. In late 2011 and
15 early 2012, Castine and Defendants cross moved for summary judgment. On
16 April 12, 2013, the district court granted summary judgment in favor of the
17 Defendants on all of Castine's claims. Castine appealed. She contests only the
18 dismissal of the two claims described above.

1 being spent on athletics. The Board fired Pickering for writing the letter, and
2 Pickering brought suit, alleging that the firing in retaliation for his exercise of a
3 First Amendment-protected right was a tort in violation of the Constitution. *Id.*
4 at 564, 567.

5 The Supreme Court ruled in the teacher's favor, but only after engaging in
6 a balancing of interests. The Court made clear that, while public school teachers
7 do not relinquish their First Amendment right to speak as citizens on matters of
8 public interest regarding their schools, that right does not necessarily protect
9 them from adverse employment action by reason of their speech. This is because
10 "the State has interests as an employer in regulating the speech of its employees
11 that differ significantly from those it possesses in connection with regulation of
12 the speech of the citizenry in general." *Id.* at 568. The Court's reasoning thus
13 relied on the proposition that a public employer does not necessarily violate an
14 employee's First Amendment rights by taking an adverse employment action
15 against that employee to discipline her for speech on matters of public concern,
16 even when that speech is protected (in other ways) under the First Amendment.
17 In such circumstances, rather than consider the speech under the lens of strict
18 scrutiny, courts must "arrive at a balance between the interests of the teacher, as

1 a citizen, in commenting upon matters of public concern and the interest of the
2 State, as an employer, in promoting the efficiency of the public services it
3 performs through its employees." *Id.*

4 Applying this test to the facts of Pickering's case, the court found that the
5 balance favored Pickering. His letter to the editor in no way impaired
6 Pickering's performance of his job as a teacher or the ability of the schools to
7 function properly:

8 [His] statements [were] in no way directed towards any
9 person with whom [he] would normally be in contact in the
10 course of his daily work as a teacher. Thus no question of
11 maintaining either discipline by immediate superiors or
12 harmony among coworkers [was] presented [Pickering's]
13 employment relationships with [those he criticized were] not
14 the kind of close working relationships for which it can
15 persuasively be claimed that personal loyalty and confidence
16 are necessary to their proper functioning.

17
18 *Id.* at 569-70. Pickering's assertions that "too much money [was] being spent on
19 athletics . . . [could not] reasonably be regarded as *per se* detrimental to the
20 district's schools." *Id.* at 571. His criticisms of and disagreements with the Board
21 did not "in any way either impede[] [the] proper performance of his daily duties
22 in the classroom or . . . interfere[] with the regular operation of the schools
23 generally." *Id.* at 572-73 (footnote omitted).

1 While for those reasons the balance of factors distinctly favored the
2 employee in Pickering’s case, we have formulated considerations that bear upon
3 how state defendants may “avoid liability under . . . the *Pickering* balancing test,”
4 *Anemone v. Metro. Transp. Auth.*, 629 F.3d 97, 115 (2d Cir. 2011).⁴ “Under this
5 defense, ‘[a] government employer may take an adverse employment action
6 against a public employee for speech on matters of public concern if: (1) the
7 employer’s prediction of the disruption that such speech will cause is reasonable;
8 (2) the potential for disruption outweighs the value of the speech; and (3) the
9 employer took the adverse employment action not in retaliation for the
10 employee’s speech, but because of the potential for disruption.’” *Anemone*, 629
11 F.3d at 115 (quoting *Johnson v. Ganim*, 342 F.3d 105, 114 (2d Cir. 2003)); *see also*
12 *Mandell v. County of Suffolk*, 316 F.3d 368, 382-83 (2d Cir. 2003).

13 On numerous occasions, we have rejected claims of First Amendment
14 retaliation involving dismissals from employment on this basis. For example, we
15 have upheld disciplinary terminations of police officers because they
16 disseminated racially biased public speech, notwithstanding that they were

⁴ In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), the Supreme Court expressed the view that, if a public “employee [speaks] as a citizen on a matter of public concern,” then the “question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.” *Id.* at 418.

1 speaking anonymously as private citizens, on their own time, and on matters of
2 public concern. See *Locurto v. Giuliani*, 447 F.3d 159, 178 (2d Cir. 2006); *Pappas v.*
3 *Giuliani*, 290 F.3d 143, 146-47 (2d Cir. 2002). We reached this conclusion in
4 recognition that a police department is impaired in the performance of its duties
5 to the extent it is viewed by the public as staffed by racially biased officers. See
6 *Locurto*, 447 F.3d at 178; *Pappas*, 290 F.3d at 146-47. In other contexts, too, we
7 have recognized that public employers must, to a degree, be able to restrict the
8 speech of their employees, or they will be unable to perform important work
9 necessary to the functioning of the State. See, e.g., *Piscottano v. Murphy*, 511 F.3d
10 247, 276-78 (2d Cir. 2007); *Lewis v. Cowen*, 165 F.3d 154, 164-65 (2d Cir. 1999).

11 Here, Castine argues that Defendants impermissibly retaliated against her
12 by temporarily removing her from her position as Election Commissioner during
13 her candidacy for Beekmantown Town Justice. We assume, for purposes of this
14 opinion, that she has made out a prima facie case of First Amendment retaliation.
15 Her act of running for elective public office is a form of speech that is protected
16 by the First Amendment.⁵ And there is no doubt that the Defendants' act of

⁵ In the context of First Amendment retaliation claims by public employees, we have not always used the term "protected speech" to refer to the same thing. In some contexts, we have referred to "protected speech" to mean any speech potentially protected by the First Amendment. See, e.g., *Name.Space, Inc. v.*

1 temporarily removing her from office at the Board of Elections was an adverse
2 employment action taken by reason of her running for elective office.

3 Nevertheless, the uncontroverted record evidence compels the conclusion
4 that, under the *Pickering* balancing test, Defendants' conduct did not violate the
5 First Amendment. First, it was reasonable for Defendants to expect that
6 Castine's candidacy for elective office would create a conflict of interest with her
7 position as Election Commissioner and that it would impair the integrity of
8 Clinton County elections to permit Castine to occupy those two roles
9 simultaneously. Second, it is clear that Defendants temporarily suspended

Network Solutions, Inc., 202 F.3d 573, 585 (2d Cir. 2000). This meaning of "protected speech" is expansive, covering almost anything that can be described as speech, with only the narrowest exceptions for shouting fire in a crowded theater, obscenity, speech likely to incite imminent violence, and the like. *See, e.g., Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 245-46 (2002); *United States v. Irving*, 452 F.3d 110, 120 (2d Cir. 2006). But we have also used the term "protected speech" to mean speech that a public employee is entitled to make without incurring any adverse employment actions by his or her government employer (subject to the *Pickering* balancing defense). *See, e.g., Nagle v. Marron*, 663 F.3d 100, 105-06 (2d Cir. 2011). This second meaning of "protected speech" is significantly narrower than the first, as public employees cannot state a claim for First Amendment retaliation unless (among other requirements) they speak as citizens on matters of public importance. *See Garcetti*, 547 U.S. at 417. The speech at issue here, running for public office, is protected in the first sense. Because we conclude that the Defendants in any event prevail under *Pickering* by showing that the Castine's run for public office while sitting in the Board of Elections would disrupt the efficacy of the Board, we need not now decide whether Castine's speech satisfies all the requirements to qualify as protected in the second, narrower sense.

1 Castine in order to advance the permissible objective of enforcing local law and
2 minimizing the potential damage to the integrity of local elections. Third, the
3 Defendants' interest in avoiding disruption to the work of the Election
4 Commission outweighs Castine's interest in running for public elective office
5 while simultaneously serving as Election Commissioner.

6 We have no hesitation in concluding that the balance of interests here
7 favors Defendants. Although presented in a slightly different manner, the same
8 factors that dictated the results of *Locurto* and *Pappas* similarly require the
9 rejection of Castine's claim. In the office of Election Commissioner, Castine
10 played a governing role in the body charged with responsibility to supervise the
11 conduct of elections. As a candidate for Town Justice, Castine would participate
12 in an election supervised by the Board of Elections. The Clinton County
13 legislature reasonably concluded that the Board's ability to supervise elections
14 fairly, as well as the public perception of its fairness in performing that function,
15 would be impaired if the persons involved in exercising the supervisory
16 responsibility were themselves candidates in the elections they were supervising.
17 This would present an unacceptable conflict of interest. The legislature therefore
18 enacted the law disqualifying candidates for elective office from simultaneous

1 employment in the Board of Elections. At least the appearance of fairness, and in
2 all likelihood the fact as well, would have been substantially impaired if a
3 candidate for election were to participate in the functions of the Board of
4 Elections supervising that election. The act of the Defendants in removing
5 Castine from her position as Commissioner for the duration of her campaign for
6 elective office reasonably gave effect to this altogether reasonable provision of
7 law. Although without doubt the enforcement of the law caused some
8 curtailment of Castine's exercise of her First Amendment rights, the *Pickering* test
9 authorizes such a result. Granting to Castine the right to retain her position as
10 Election Commissioner while she ran for office in an election supervised by the
11 Board of Elections would have impaired the Board's ability to perform its
12 functions appropriately.

13 We find further support for our analysis in the Supreme Court's clear
14 pronouncements that the Constitution affords States substantial leeway to ensure
15 the fairness of their own elections in matters unrelated to campaign finance
16 regulations. *See, e.g., Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("Common sense,
17 as well as constitutional law, compels the conclusion that government must play
18 an active role in structuring elections."). "[W]hen a state election law provision

1 imposes only ‘reasonable, nondiscriminatory restrictions’ upon the First and
2 Fourteenth Amendment rights of [individuals], ‘the State’s important regulatory
3 interests are generally sufficient to justify’ the restrictions.” *Id.* at 434 (quoting
4 *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). Applying this standard (or its
5 antecedents), the Supreme Court has upheld many state restrictions on elections,
6 including Minnesota’s prohibition on multi-party candidacies for elected office,
7 see *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 365-66, 370 (1997),
8 Hawaii’s ban on write-in ballots, *Burdick*, 504 U.S. at 438-39, and California’s rule
9 barring persons with certain political party affiliations from running as
10 independent candidates, *Storer v. Brown*, 415 U.S. 724, 733-34 (1974). These
11 restrictions constrained the political expression of citizens and candidates for
12 office in important ways, but, in each case, the Court held that the State’s
13 constitutional interest in regulating elections took precedence over the
14 individual’s right to free speech. Compared to such substantial restrictions,
15 Clinton County’s carefully drawn effort to prevent direct conflicts of interest on
16 its Board of Elections imposes a minimal burden on individuals in service of an
17 enormously important state aim.⁶

⁶ Castine also argues that, because Local Law No. 1 is purportedly invalid under New York state law, Clinton County cannot, consistent with the First

1 Defendants have met their burden under the *Pickering* balancing test to
2 show that, assuming Castine established a prima facie case of retaliation in
3 violation of the First Amendment, her removal from office was nonetheless
4 permissible. Consequently, Defendants were entitled to take adverse
5 employment actions against Castine to preserve the integrity of the Clinton
6 County Board of Elections and to enforce Local Law No. 1. We therefore affirm
7 the judgment of the district court as to this claim.⁷

8 As to the second claim on appeal — seeking a declaratory ruling that Local
9 Law No. 1 was invalid as a matter of law — the statute was not being enforced
10 against Castine when the district court rendered judgment (about two-and-a-half
11 years after her reinstatement to the Board of Elections). This timing raises a
12 substantial question whether that claim was (and/or is) moot. We therefore
13 vacate the judgment and remand to the district court to consider the question of
14 mootness in the first instance. Alternatively, on remand, the district court should
15 consider whether, simply as a matter of discretion, it would be preferable to

Amendment, enforce it. We disagree that the validity of a local ordinance under the U.S. Constitution depends, in the manner suggested by Castine, on its validity under state law. The First and Fourteenth Amendments of the U.S. Constitution do not, as a general matter, speak to the obligations of local governments to follow *state* laws.

⁷ The Supreme Court's recent opinion in *Lane v. Franks*, 573 U.S. ____ (2014), includes nothing that is in any way inconsistent with this analysis.

1 decline to exercise supplemental jurisdiction over this novel, complex matter
2 involving the interplay between state and local law, *see* 28 U.S.C. § 1367, and
3 dismiss the claim without prejudice, allowing Castine to bring the claim in the
4 courts of New York. Such a ruling would obviate the need to consider the
5 question of mootness.

6 **CONCLUSION**

7 For the foregoing reasons, the judgment of the district court is **AFFIRMED**
8 in part and **VACATED** in part and **REMANDED**.