# STATE OF MICHIGAN

# COURT OF APPEALS

BEVERLY GARVIN,

Plaintiff-Appellee,

v

DETROIT BOARD OF EDUCATION, a/k/a DETROIT PUBLIC SCHOOLS DISTRICT, a/k/a DETROIT PUBLIC SCHOOLS, MARY ANDERSON, LAURI WASHINGTON, ROSA JACKSON, and DEBRA WILLIAMS,

Defendants-Appellants.

UNPUBLISHED
February 26, 2013

No. 298838
Wayne Circuit Court
LC No. 08-120224-NO

Before: MURPHY, C.J., and O'CONNELL and WHITBECK, JJ.

PER CURIAM.

Following a jury trial, a $750,000 judgment was entered in favor of plaintiff in this employment retaliation action that was pursued on the basis of the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq.*, and the First Amendment of the United States Constitution through the conduit of 42 USC 1983. Defendants appeal as of right. We reverse and remand for (1) entry of an order of dismissal on the CRA claim with respect to all defendants,[1] and (2) for a new trial on the § 1983-First Amendment claim with respect to the individual defendants, but for entry of an order of dismissal in regard to the entity defendants.

## I. BASIC FACTS

In plaintiff's complaint, she alleged that young male students had targeted young female students and forced them to perform fellatio and other acts of sexual degradation at a public middle school where plaintiff was employed as a teacher. Plaintiff further alleged that she

[1] Plaintiff, by using the acronym "a/k/a," captioned her complaint as if the Detroit Public School District, the Detroit Board of Education, and the Detroit Public Schools are all one in the same entity; they are not, as the school board and school district are distinct legal entities. See MCL 380.3(3) and MCL 380.6(1). We shall refer to these defendants as the "entity defendants" for purposes of this opinion.

reported "the sexual assaults . . . to proper school authorities, who, apparently and unfortunately, did not want to be 'hassled' by such matters, so they declined to take specific and definitive action[.]" According to the complaint, plaintiff, in the face of defendants' apathy, "reported the sexual assaults to non-school public officials, including, but not by way of limitation, Child Protective Services [(CPS)]." As part of the CRA claim in count I of the complaint, plaintiff asserted that the civil rights of the young female victims to enjoy public schools and places of accommodation were violated through "the sexual assaults of the boy . . . perpetrators and by the apathy of the public school officials in not taking measures to protect the girls." Plaintiff claimed that as a result of her conduct in opposing the violations, she was subjected to adverse employment actions taken by defendants, including the eventual termination of her employment. Plaintiff sought damages under the CRA for defendants' wrongful conduct in harassing, disciplining, and firing plaintiff because of "her efforts to prevent the young school girls from being sexually assaulted."

In count II of the complaint, plaintiff alleged that she was engaged in protected activity under the First Amendment when she raised matters of public concern by way of petitioning defendants and other public agencies to take proper action to protect the young female students and voiced opposition to sexual assaults and gender harassment and discrimination. Plaintiff, in making a claim for damages under 42 USC 1983 as to count II, contended that defendants violated her First Amendment rights by terminating her employment in retaliation for exercising those rights.

Defendants filed a motion for summary disposition with respect to both of plaintiff's causes of action, raising numerous arguments in support of dismissal. The trial court denied the motion without explanation.

At trial, plaintiff testified that in October 2004, one of her female fourth-grade students, LT, was crying upon returning to the classroom following recess. LT informed plaintiff that a male student, CS, "had forced her to suck his private." Plaintiff sent LT, accompanied by another student, to see defendant Rosa Jackson, the principal,[2] with respect to the incident. According to plaintiff, LT later returned to the classroom, and cried for the remainder of the school day. Plaintiff told LT's older sister that LT would explain to her what transpired on the playground during recess, and plaintiff directed LT's sister to then tell their parents what happened and to have their parents return to the school to meet with principal Jackson. LT's father came to the school later that day with his daughters, but Jackson had already left for the day. Plaintiff was angry because she thought that LT and another fourth-grade girl involved in the incident[3] should have received medical attention that day and that the police should have been called. Plaintiff asserted that the police were never called and that no medical attention was ever given to LT or the other girl. We do note, in connection with the playground incident, that there was evidence that an "undesirable incident report" was prepared by a public safety officer assigned to the school, which characterized the incident as being a CSC. However, a formal

[2] Jackson died prior to trial.

[3] Plaintiff stated that both girls "were attacked on the playground."

police report on the matter was never filed. There was evidence that Jackson prepared a memorandum concerning the incident about a month after it occurred and copied the memo to the Department of Public Safety and Security.

In an administrative hearing report that was admitted into evidence and partially read at trial by defendant Mary Anderson,[4] it was indicated that some students, ostensibly including LT, reported to Jackson that two boys asked the students for oral sex on the playground during recess. The report provided that Jackson had arranged for a meeting with the parents of all those concerned, which plaintiff also attended. Jackson decided to "move[] one of the boys [CS] and suspend[] the other," which satisfied the girls' parents according to Jackson. Plaintiff claimed that CS was "moved" by promoting him to the fifth grade a few weeks after the incident, as it was determined that he was too big for the fourth grade. As reflected in the hearing report and Anderson's testimony, plaintiff was not satisfied with the school's response to the incident and questioned Jackson in front of the parents and staff. According to Jackson's account, plaintiff was openly insubordinate and disrespectful to Jackson and told Jackson that the male students should have been removed from the building. The report further provided that plaintiff urged a parent of one of the girls to contact the police despite resolution of the issue and that the parent confirmed her satisfaction with Jackson's decision, telling plaintiff that she wanted the matter left alone. According to the report, plaintiff also stopped one of the boys in the hall and told him that he should not be in the school, upsetting the boy, and plaintiff later refused to meet with the boy's mother.

The record contains an account of the playground incident as described by LT in a handwritten statement, which was read into the record by witnesses. LT indicated that CS and another boy cornered her and forcibly pulled her to the side, touched her in a sexually inappropriate manner,[5] and dropped their pants and began "humping" her. She further claimed that CS pulled up her dress, that the other boy tried to pull down her panties, that both boys put their hands down her panties, and that both boys attempted to force her to engage in fellatio but were interrupted by another girl who came upon the scene, causing the boys to leave.

[4] Anderson was employed by the Detroit Public Schools (DPS) in the Division of Human Resources, Employee Relations, and she conducted plaintiff's disciplinary hearing on June 7, 2005.

[5] LT stated that the male student accompanying CS "put his hand on [her] butt."

By way of the hearing report and Anderson's testimony, it was indicated that plaintiff contacted the office of DPS's associate superintendant and complained that Jackson did not document the playground incident. Plaintiff herself testified that she documented what had occurred on the playground and the school's response and that she gave her documentation to the office of DPS's superintendent, Dr. Kenneth Stephen Burnley.[6] The lower court record contains a document titled, "ISSUES OF CONCERN SUBMITTED BY MS. BEVERLY GARVIN," which apparently was the documentation provided to Burnley's office by plaintiff. In the document, plaintiff spoke of the "criminal sexual act" committed by the two male students, the trauma suffered by the female victims and their precarious emotional states, the school's failure to call parents and the police when the incident was disclosed, the failure to provide counseling and medical care for the girls, and the failure of Jackson to appropriately address and respond to the matter. Plaintiff closed the letter by recommending "that this incident of criminal sexual conduct be revisited[.]" Plaintiff's testimony, along with the hearing report, as testified to by Anderson, established that plaintiff, in addition to her communications with the superintendant's office, also contacted CPS by phone on November 22, 2004, to report the sexual assault. Plaintiff did not contact the police or medical personnel in regard to the assault.

Plaintiff testified that after she contacted the superintendant's office and CPS, Jackson complained to her that plaintiff "was getting into too much trouble," that Jackson "had handled the situation," and that plaintiff "needed to back off." Plaintiff asserted that "it was just downhill for me after that." According to plaintiff, on Jackson's order, plaintiff was removed from her teaching duties and forced to sit in the teachers' lounge all day. This occurred approximately one or two weeks after Jackson found out that plaintiff had reported the playground incident to the superintendent and CPS. Plaintiff was told to have no contact with students. She was then put on administrative leave for five months, commencing on December 4, 2004. Plaintiff remained on administrative leave until May 2005, when she was reassigned to another school. After the summer of 2005, during which the disciplinary hearing was conducted, plaintiff was reassigned to yet another school while awaiting the disciplinary ruling.

Plaintiff received a termination letter on September 29, 2005. Anderson had recommended a five-day suspension, not termination, for violation of various work rules. Defendant Lauri Washington, who was the Executive Director of Employee Relations, had assigned the hearing to Anderson. Washington testified that she signed off on Anderson's report and agreed with the imposition of a short suspension. However, defendant Debra Williams, who

[6] The lower court record contains a letter from plaintiff to Burnley, wherein she stated that she had previously attempted to talk with him about the "criminal sexual act" that occurred at the school and which was "mishandled" by Jackson. The letter also provided that Burnley had referred plaintiff to an executive assistant who listened to her concerns. The letter closed by asking Burnley to intervene in the matter, with plaintiff stating, "I am not the guilty party, but a concerned dedicated teacher that seeks justice on what happened to two of my female students and am seemingly being ignored." It is unclear from the record provided to us on appeal whether the letter was admitted into evidence at trial.

was DPS's Chief Human Resources Officer, decided that termination was the proper course of action.[7]

Defendants' position was that plaintiff incurred adverse employment actions and was ultimately terminated because of insubordination, violation of work rules, and unprofessional conduct arising out of numerous incidents, and not because she contacted CPS or complained about the adequacy of the response to the playground assault. Plaintiff filed a complaint with the United States Equal Employment Opportunity Commission (EEOC), alleging that she had been discriminated and retaliated against based on her age and religion. The EEOC dismissed the matter because it was unable to conclude that plaintiff's religion and age were factors in the decision to terminate her employment. Plaintiff also pursued a grievance under the collective bargaining agreement (CBA) between the teachers' union and DPS. The grievance was heard by an arbitrator, and the arbitrator found that just cause for termination had not been established. Plaintiff was awarded $52,513 for two and one-half years' pay. Subsequently, plaintiff initiated

[7] We note that there were several events, aside from plaintiff's response to the playground assault, that played a role in the disciplinary proceedings, most notably the incident on September 29, 2004, in which plaintiff brought a large number of hysterical female students from her eighth-grade math class down to Jackson's office because several claimed that they had been raped. Plaintiff had raised the subject of sexual behavior and rape in the all-girl math class. The hearing report indicated that Jackson had stated that plaintiff voiced her "dislike for men" to the class and "endangered the students' emotional well-being by igniting them and asking the students whether they had been raped." Plaintiff testified that she had a "mother-daughter discussion" with the female students after becoming concerned by their aberrant behavior, which discussion included plaintiff recalling her days as a hospital chaplain where she witnessed cases of abuse that at times resulted in death. Plaintiff further explained, "And when I told them that, they began to tell me about what they were experiencing as foster care kids, what they had experienced as far as sexual abuse. And then the class just got out of control." According to the hearing report, Jackson checked "the girls for any visible signs of rape and discovered during questioning that five of the girls had experienced some form of rape . . . years ago." Jackson contacted the police, CPS, and parents. It appears that, for the most part, the rapes that had occurred were already being addressed by the authorities and through counseling prior to plaintiff's discussion with her students. During the incident, plaintiff's minister came to the school on plaintiff's request in order to assist in dealing with the rapes, much to the consternation of Jackson. Even though Jackson had already contacted CPS concerning the situation, plaintiff later contacted CPS on her own in regard to one of the rape victims. As to that victim, plaintiff was of the belief that sexual assaults were ongoing, but CPS informed her that the victim had been removed from the home where the abuser resided. There was conflicting evidence regarding whether plaintiff repeatedly contacted the family of that girl, seeking information about the assaults and living arrangements; plaintiff claimed that only one call was made. The hearing report reflected that the girl's mother asked Jackson to stop plaintiff from calling the home. There was also evidence that plaintiff spoke to several of the girls about their rapes on subsequent occasions despite being told not to engage in such conversations and that the assaults had been thoroughly investigated and resolved.

the action presently before this panel. We note that, even though there were a number of events that caused friction between plaintiff and Jackson (see footnote 7), the two causes of action alleged by plaintiff were ultimately predicated on the playground incident, defendants' response to the incident, plaintiff's conduct and words in reaction to defendants' alleged inadequate response, and measures taken by defendants purportedly in retaliation for plaintiff's reaction.

The first question on the jury verdict form provided, "Did Defendants retaliate against Beverly Garvin in violation of the State of Michigan's []CRA laws *or* under the First Amendment of the U.S. Constitution?" (Emphasis added.) The jury responded, "yes." The jury proceeded to award plaintiff damages amounting to $750,000, including $490,000 in punitive damages, against *all* defendants. The verdict form did not distinguish whether the punitive damages were based on the § 1983-First Amendment claim, which, as discussed *infra*, was the only claim that could potentially support a punitive damages award. Indeed, as reflected in the initial jury question on the verdict form, we have absolutely no way to determine whether the jury found liability on the basis of the CRA claim, the § 1983-First Amendment claim, or on both claims. It is possible that the jury just reached a liability conclusion on one of the claims and skipped consideration of the other claim, and it is also possible that the jury found liability on one claim and found no cause of action on the other claim. A judgment was subsequently entered on the verdict against all defendants in the amount of $750,000.

## II. RETALIATION UNDER THE CIVIL RIGHTS ACT

### A. OVERVIEW

We first find that, as to the retaliation claim under the CRA, the trial court erred in denying defendants' motion for summary disposition under MCR 2.116(C)(10) and their motion for a directed verdict.[8] We review de novo a trial court's ruling on a motion for summary disposition as well as its ruling on a motion for a directed verdict. *Diamond v Witherspoon*, 265 Mich App 673, 680-681; 696 NW2d 770 (2005). A motion brought by a defendant pursuant to MCR 2.116(C)(10) tests the factual sufficiency of a plaintiff's cause of action. *Id.* at 681. A trial court is required to consider the documentary evidence in a light most favorable to the nonmoving party. *Id.* "If the proffered evidence fails to establish that a disputed material issue of fact remains for trial, summary disposition is properly granted to the party so entitled as a matter of law." *Id.* A directed verdict is properly granted when no factual question exists upon which reasonable jurors could differ. *Id.* "The appellate court reviews all the evidence presented up to the time of the directed verdict motion, considers that evidence in the light most favorable to the nonmoving party, and determines whether a question of fact existed." *Id.* at 681-682.

[8] We note that plaintiff's brief on appeal challenges this Court's jurisdiction. This Court, however, has already rejected plaintiff's jurisdictional argument by denying her motion to dismiss, which raised the same grounds now asserted. *Garvin v Detroit Bd of Ed*, unpublished order of the Court of Appeals, entered July 21, 2010 (Docket No. 298838). Accordingly, we adhere to this Court's previous order concluding that plaintiff's jurisdictional challenge lacks merit.

As part of the CRA, MCL 37.2701(a) provides that "a person shall not . . . [r]etaliate . . . against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under [the CRA]." In order to establish a prima facie case of retaliation under MCL 37.2701(a), a plaintiff must show that: (1) the plaintiff engaged in a protected activity; (2) the plaintiff's participation in the protected activity was known by the defendant; (3) the defendant took an employment action that was adverse to the plaintiff; and that (4) there was a causal connection between the protected activity and the adverse employment action. *Garg v Macomb Co Community Mental Health Servs*, 472 Mich 263, 273; 696 NW2d 646 (2005); *Meyer v City of Center Line*, 242 Mich App 560, 568-569; 619 NW2d 182 (2000); *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997). A party "cannot prevail on a claim of retaliation in violation of the CRA without establishing that [the party] engaged in activity protected under the act." *Barrett v Kirtland Community College*, 245 Mich App 306, 318; 628 NW2d 63 (2001). Opposing a violation of the CRA, which serves as the basis of plaintiff's claim here, constitutes protected activity under MCL 37.2701(a). *Id.* To the extent that plaintiff is also claiming that the protected activity involved simply making a charge against defendants that they violated the CRA, making a "charge" under the CRA also constitutes protected activity. *Id.* An "employee's charge must clearly convey to an objective employer that the employee is raising the specter of a claim of unlawful discrimination pursuant to the CRA." *Id.* at 319; see also *McLemore v Detroit Receiving Hosp & Univ Med Ctr*, 196 Mich App 391, 396; 493 NW2d 441 (1992). For purposes of making a charge under the CRA, a plaintiff "must do more than generally assert unfair treatment." *Barrett*, 245 Mich App at 319. Accordingly, for plaintiff to have succeeded on her retaliation claim under the CRA, she was required to establish that she engaged in a protected activity, which necessarily meant that plaintiff had to demonstrate that she "opposed a violation" of the CRA or that she made a "charge" under the CRA. We conclude that plaintiff failed to present evidence sufficient to create a question or genuine issue of material fact with respect to showing an underlying violation of the CRA *and* as to showing that she made a charge under the CRA.

Plaintiff contends that the underlying violations of the CRA that she opposed were the male students' sexual assault against the female students[9] *and* the inadequate response and punishment doled out by defendants in addressing the sexual assault that effectively left the female students unprotected, both of which bases, according to plaintiff, reflected gender discrimination and harassment. Amongst myriad arguments presented by defendants on appeal, including several wholly lacking in merit, such as the legally-inaccurate assertion that plaintiff had to establish that she herself was a member of a protected class, defendants do maintain that plaintiff failed to present any evidence that she opposed a violation of the CRA, where there was no proof of any underlying discrimination.

[9] The evidence established that a sexual assault took place, and there was no evidence that contradicted LT's version of events. Accordingly, for the remainder of this opinion, we shall refer to the playground incident as having involved a sexual assault.

## B. SEXUAL CONDUCT AS A VIOLATION OF THE CIVIL RIGHTS ACT

We first find that the sexual assault, in and of itself, did not constitute a violation of the CRA. MCL 37.2102(1) provides that "[t]he opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status as prohibited by this act, is recognized and declared to be a civil right." The male and female students involved in the sexual assault did not have, among or between themselves, an employer-employee relationship, a relationship based on real property or housing interests, an educational facility-student relationship, or any other relationship that would trigger the CRA. And although DPS and LT had an educational facility-student relationship, the assault was not committed by an employee or agent of the school, nor is there any argument that defendants failed to take preventative measures prior to the sexual assault that allowed the assault to occur in the first place.[10] While LT, through a next friend, could certainly pursue an intentional tort claim against the males involved in the assault, there would be no basis for her to commence a CRA suit against DPS.

## C. INADEQUATE RESPONSE

In regard to the alleged inadequate response by defendants in handling the sexual assault when the matter was presented to them, plaintiff relies on MCL 37.2402(a), claiming that defendants violated this particular provision in the CRA and then terminated plaintiff when she opposed the violation. MCL 37.2402(a) provides that "[a]n educational institution shall not . . . [d]iscriminate against an individual in the full utilization of or benefit from the institution, or the services, activities, or programs provided by the institution because of religion, race, color, national origin, or sex." Plaintiff's theory is that female student LT was discriminated against on the basis of her gender relative to the utilization or benefit of school services where defendants' response to the sexual assault against LT by male students was woefully inadequate. Assuming that defendants' response to the assault was inadequate in that defendants, for example, should have filed a formal police report, sought medical attention for LT, or expelled CS and the other male student, the problem with plaintiff's argument is that it is ultimately predicated solely on the simple fact that male students assaulted a female student. There is an absolute dearth of evidence, direct or circumstantial, suggesting that defendants' response to the sexual assault, or lack thereof, was motivated by discriminatory animus based on gender or any other recognized protected class, as opposed to general apathy. There is nothing in the record that would suggest that greater punishment would have been exacted or employed had the assault victim been male and not female. The evidence does not give rise to even a reasonable inference of discrimination.

[10] We are not stating that these scenarios would necessarily support a CRA claim against DPS, but they come much closer to supporting a claim than the student-on-student sexual assault. See *Hamed v Wayne Co*, 490 Mich 1; 803 NW2d 237 (2011) (addressing an employer county's vicarious liability under the CRA for an employee deputy's sexual assault against an inmate and rejecting such liability where the criminal act was unforeseeable).

In *Fonseca v Michigan State Univ*, 214 Mich App 28; 542 NW2d 273 (1995), the plaintiff claimed, in part, that MSU refused to grant her admission to a doctoral program because of her gender, thereby violating MCL 37.2402. *Id*. at 29. This Court, in affirming the trial court's order granting summary disposition in favor of MSU on the claim, ruled:

> [The plaintiff] failed to develop any facts to support her conjecture that her sex made a difference in MSU's decision. And, although a hunch or intuition may, in reality, be correct, the law requires more if a plaintiff is to avoid summary disposition. A plaintiff who claims a decision was discriminatorily motivated must produce some facts from which a factfinder could reasonably infer unlawful motivation. [*Fonseca*, 214 Mich App at 31.]

The same is true in the case at bar; plaintiff's claim of discrimination by defendants against LT, which plaintiff asserts she opposed for purposes of the CRA retaliation count, is based on conjecture and speculation. Even were we to assume that the circumstances gave rise to an inference of unlawful discrimination, defendants articulated a nondiscriminatory reason for the level of their response to the assault, i.e., that after disclosure and discussion of the incident at a full meeting with the participants and their parents, it was agreed by all that moving one of the males and suspending the other was adequate punishment under the circumstances. And plaintiff failed to present any evidence that the reason was a pretext for unlawful discrimination. *Hazle v Ford Motor Co*, 464 Mich 456, 462-467; 628 NW2d 515 (2001) (applying the burden-shifting framework established in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 [1973]). In sum, we conclude as a matter of law that plaintiff failed to create a genuine issue of material fact in regard to showing an underlying violation of the CRA.

D. A "CHARGE" UNDER THE CIVIL RIGHTS ACT

Moreover, plaintiff failed to show that she made a "charge" under the CRA by raising the specter of a claim of unlawful discrimination when she reported the sexual assault to CPS, when she communicated her displeasure to the superintendant or his associates, or when she voiced any dismay about the situation. *Barrett*, 245 Mich App at 319. There is no evidence whatsoever that plaintiff reported to CPS anything other than the fact that a sexual assault occurred on the playground. There is no evidence that she communicated to CPS that defendants were discriminating against LT on the basis of gender, nor are we prepared to imply that the report to CPS, in and of itself, raised the specter of discrimination. Furthermore, although she voiced much criticism over how the matter was handled, there is no evidence that plaintiff's contact with the superintendant's office involved her expressing concerns of a discriminatory nature premised on gender; again, the specter of discrimination was not raised. Additionally, as to any other persons to whom plaintiff complained, including Jackson, there is no evidence that plaintiff mentioned anything about discrimination or discriminatory practices. Rather, the gist of all of plaintiff's communications was a general assertion of unfair treatment, which does not suffice for making a charge under the CRA. *Barrett*, 245 Mich App at 319. The mere fact that the victim was female and the putative offender was male cannot support a conclusion that plaintiff was making a charge of gender discrimination.

## E. CONCLUSION

The CRA retaliation claim fails as a matter of law because plaintiff failed to produce any evidence showing that she was engaged in a protected activity. We would also note that there was no evidence that after the assault and the alleged inadequate response by defendants, LT or the other girl remained at risk and were unable to fully enjoy the full utilization of or benefit from the educational institution—the public middle school—because of the manner in which defendants addressed the assault. Given our ruling with respect to the CRA retaliation claim, all other appellate arguments posed by defendants in association with that claim are rendered moot.

# III. § 1983—FIRST AMENDMENT CLAIM

## A. OVERVIEW

We now turn to the § 1983-First Amendment count. We initially explain that if we were to conclude that the § 1983-First Amendment claim failed as a matter of law, which we do not, defendants would have been, of course, entitled to dismissal of the entire action. On the other hand, a conclusion that the § 1983-First Amendment claim was properly sent to the jury for resolution, which conclusion we do reach as to the individual defendants, does not mean that we can sustain the judgment as to liability. This is because of the verdict form and the manner in which the two retaliation claims, as alluded to above, were molded into a single question, which leaves us with an inability to discern whether the jury even addressed the § 1983-First Amendment claim. Because we hold that the individual defendants were not entitled to summary dismissal or a directed verdict on the § 1983-First Amendment claim, we can only remand the case for a retrial on said claim. Problems with the punitive damage instructions and award, which, for reasons discussed below, could only be predicated on the § 1983-First Amendment claim, also dictate a retrial on the constitutional claim as to the individual defendants.

Defendants argue that plaintiff's speech in response to defendants' handling of the sexual assault did not constitute constitutionally protected speech for purposes of the § 1983-First Amendment claim.[11] The First Amendment of the United States Constitution provides, in part, that "Congress shall make no law . . . abridging the freedom of speech. . . ." "The protections provided by the First Amendment . . . have been extended to the states by the Fourteenth Amendment." *J & J Constr Co v Bricklayers & Allied Craftsmen, Local 1*, 468 Mich 722, 729; 664 NW2d 728 (2003). "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . ., subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . ." 42 USC 1983. "To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution

[11] We address this issue in the context of deciding whether defendants were entitled to summary disposition or a directed verdict on the § 1983-First Amendment claim, but our discussion is also intended to more clearly define matters and provide guidance for purposes of remand and the new trial.

and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *West v Atkins*, 487 US 42, 48; 108 S Ct 2250; 101 L Ed 2d 40 (1988); see also *Flagg Bros, Inc v Brooks*, 436 US 149, 155; 98 S Ct 1729; 56 L Ed 2d 185 (1978).

## B. PRELIMINARY MATTERS

Before examining the substance of a First Amendment claim brought under 42 USC 1983, we initially find it necessary to discuss some preliminary matters. We begin by rejecting defendants' argument that they were not acting under color of state law with respect to the actions taken against plaintiff. In executing the disciplinary process and punishing plaintiff for her conduct, the individual defendants were clearly acting within their official capacities and exercising responsibilities pursuant to, and as authorized by, state law; therefore, they were acting under color of state law. See MCL 380.1 *et seq.* (The Michigan Revised School Code); *West*, 487 US at 49-50 ("It is firmly established that a defendant in a § 1983 suit acts under color of state law when he abuses the position given to him by the State. Thus, generally, a public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law." (citation omitted)).

As to the next preliminary matter, we briefly address the doctrine of qualified immunity as applicable to discretionary functions. In *Pearson v Callahan*, 555 US 223, 231-232; 129 S Ct 808; 172 L Ed 2d 565 (2009), the United States Supreme Court observed:

> The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate *clearly established statutory or constitutional rights of which a reasonable person would have known*. Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. The protection of qualified immunity applies regardless of whether the government official's error is a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact. . . .
>
> Because qualified immunity is an immunity from suit rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial. Indeed, we have made clear that the driving force behind creation of the qualified immunity doctrine was a desire to ensure that insubstantial claims against government officials [will] be resolved prior to discovery. [Citations and internal quotation marks omitted; second ellipsis and alteration in original; emphasis added.]

Defendants have not pursued an argument on the basis of qualified immunity as outlined above in *Pearson*, and it is waived for purposes of remand.[12] Moreover, and perhaps this explains why defendants did and do not argue qualified immunity, "[i]t is *clearly established* that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech." *Rankin v McPherson*, 483 US 378, 383; 107 S Ct 2891; 97 L Ed 2d 315 (1987) (emphasis added); see also *Connick v Myers*, 461 US 138, 142; 103 S Ct 1684; 75 L Ed 2d 708 (1983) ("For at least 15 years, it has been settled that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.").

As to another preliminary issue, although not argued by defendants, we conclude that the law requires dismissal of the entity defendants because they cannot be held liable as a matter of law under § 1983 given the basis upon which plaintiff sought to hold them liable.[13] In *Mt Healthy City Sch Dist Bd of Ed v Doyle*, 429 US 274, 279; 97 S Ct 568; 50 L Ed 2d 471 (1977), the United States Supreme Court left for another day "the . . . question of whether a school district is a person for purposes of § 1983[.]" In *Monell v New York City Dep't of Social Services*, 436 US 658, 663; 98 S Ct 2018; 56 L Ed 2d 611 (1978), the United States Supreme Court answered the question as to school districts and units of local government generally, holding that municipalities are not wholly immune from suits under 42 USC 1983. The *Monell* Court ruled that Congress "intend[ed] municipalities and other local government units to be included among those persons to whom § 1983 applie[d]." *Id.* at 690. The Court held that a local governing body could be "sued directly under § 1983 for monetary, declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.* Section 1983 actions were deemed permissible when an official policy or a governmental custom was responsible for a deprivation of constitutional rights. *Id.* at 690-691. "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.* at 691. The Court also concluded "that a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Id.* The *Monell* Court stated that § 1983 could not be "read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor." *Id.* at 692.

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[12] We also note that defendants did not raise the defense of qualified immunity in their answers and affirmative defenses; therefore, the defense was waived. *Guider v Smith*, 431 Mich 559, 573; 431 NW2d 810 (1988) ("[T]he failure to plead qualified immunity in the answer results in a waiver of the defense[.]"); MCR 2.111(F)(2) and (3).

[13] This Court has the discretion to address a controlling legal issue despite the failure of the parties to raise or properly frame the issue, especially where the parties ignore constitutional mandates, statutory commandments, or established precedent. *Mack v Detroit*, 467 Mich 186, 207-208; 649 NW2d 47 (2002).

In *Boggerty v Wilson*, 160 Mich App 514, 523; 408 NW2d 809 (1987), this Court, citing *Monell* in part, stated:

> A plaintiff may establish municipal liability for deprivations of a federal constitutionally protected interest if he can show the existence of a policy or custom and a sufficient causal link between the policy or custom and the constitutional deprivation. *Monell's* proscription of vicarious liability on a respondeat superior theory makes plain that the policy or custom requirement was intended to prevent the imposition of municipal liability under circumstances where no wrong could be ascribed to municipal decisionmakers. [Citations, ellipsis, and internal quotation marks omitted.]

Here, plaintiff never alleged or argued that the entity defendants were liable on the § 1983-First Amendment claim because of a policy or custom. Rather, as reflected in the complaint, plaintiff clearly pursued the entity defendants on the basis of vicarious liability under the doctrine of respondeat superior. Accordingly, we must dismiss the § 1983-First Amendment action against the entity defendants.

As a final preliminary matter, we note that the Eleventh Amendment bars parties from bringing § 1983 lawsuits seeking money damages against states or state agencies, as well as state employees if sued in their official, and not individual, capacities. *Will v Michigan Dep't of State Police*, 491 US 58, 66-67; 109 S Ct 2304; 105 L Ed 2d 45 (1989); *Rodgers v Banks*, 344 F3d 587, 594 (CA 6, 2003). Our Supreme Court, in different contexts, has stated that school districts in Michigan qualify as state agencies. *Jones v Grand Ledge Pub Schs*, 349 Mich 1, 6; 84 NW2d 327 (1957); *Child Welfare Society of Flint v Kennedy Sch Dist*, 220 Mich 290, 296; 189 NW 1002 (1922); *Attorney Gen v Lowrey*, 131 Mich 639, 644; 92 NW 289 (1902), aff'd 199 US 233 (1905). However, given that we have already held that the entity defendants are entitled to dismissal of the constitutional claim under *Monell*, it is unnecessary for us to decide whether they are state agencies or arms of the state entitled to dismissal under the Eleventh Amendment and *Will* for purposes of 42 USC 1983. And while the individual defendants here were *acting* in their official capacities as authorized by state law when taking disciplinary measures (see color-of-state-law discussion *ante*), plaintiff clearly *sued* them in their individual capacities, where plaintiff's complaint indisputably sought to hold them personally liable for compensatory and punitive damages. See *Moore v City of Harriman*, 272 F3d 769, 772-773 (CA 6, 2001).

## C. ELEMENTS OF A CLAIM

Moving forward, in order to establish a claim for relief pursuant to 42 USC 1983 with respect to a First Amendment retaliation action, a plaintiff must show that: (1) the plaintiff participated in protected conduct; (2) "an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct;" and that (3) there is a causal connection between the first two elements, whereby the adverse action was motivated in substantial part by the desire to punish the plaintiff for exercising a constitutional

right. *King v Zamiara*, 680 F3d 686, 694-695 (CA 6, 2012).[14] If a plaintiff establishes these elements, the burden of persuasion shifts to the defendant to show, by a preponderance of the evidence, that it would have made the same decision even had the plaintiff not engaged in the protected conduct. *Id.* at 694.

The principles alluded to in *King* are consistent with the following passage from *Mt Healthy*, 429 US at 287, wherein the Supreme Court stated:

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor" or to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

The United States Supreme Court has made it abundantly clear that a public employee does not surrender all of his or her First Amendment rights by reason of the individual's employment; rather, "the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Garcetti v Ceballos*, 547 US 410, 417; 126 S Ct 1951; 164 L Ed 2d 689 (2006). In *Garcetti*, the Court explained:

> [There are] two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. 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. This consideration reflects the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations. [*Id.* at 418 (citations omitted).]

In regard to the inquiry whether a public employee was speaking as a citizen on a matter of public concern, the *Garcetti* Court held that when a public employee makes a statement pursuant to an "official duty," the employee is not speaking as a citizen for purposes of the First

[14] "[C]ausation in retaliatory claims may really be considered a two-part inquiry: A plaintiff must show both (1) that the adverse action was proximately caused by an individual defendant's acts, [and] also (2) that the individual taking those acts was 'motivated in substantial part by a desire to punish an individual for exercise of a constitutional right[.]'" *King*, 680 F3d at 695.

Amendment, and the Constitution does not insulate the communication from discipline meted out by the employer. *Id.* at 421. "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen[,]" as opposed to speech on a matter of public concern that has no official or professional significance tied to particular employment duties, which is protected. *Id.* at 421-422. The *Garcetti* case involved a "calendar deputy" district attorney who wrote a disposition memorandum that recommended the dismissal of a criminal prosecution because of alleged police misconduct, and who filed a § 1983 action against the county and his supervisors, claiming that he was subjected to adverse employment actions for engaging in protected speech, i.e., drafting the memorandum. *Id*. at 413-414. The Court rejected the district attorney's claim, given that he wrote the "disposition memo because that is part of what he, as a calendar deputy, was employed to do." *Id.* at 421. Importantly, however, the mere fact that speech regards or involves the general subject matter of a public employee's employment is nondispositive, given that "[t]he First Amendment protects some expressions related to the speaker's job." *Id.* at 421. When a public employee speaks on a matter that is merely related to the employee's profession, he or she is a member of the community most likely to have an informed and definite opinion and must be permitted to speak freely absent fear of retaliation. *Id.*

In regard to the second inquiry concerning whether the government had an adequate justification for limiting speech, a balancing of interests is performed by a court whereupon consideration is given to "the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion[,]" as weighed against the need of a government employer to have "a significant degree of control over their employees' words and actions[,] without [which] there would be little chance for the efficient provision of public services." *Id.* at 418-419. The Supreme Court noted that governmental agencies could not function properly if every employment decision became a question of constitutional magnitude and if expressed views contravened policies or impaired the performance of the government. *Id.* at 419. An employee retains prospective constitutional protection for contributions to the civic discourse, but the protection does not invest the employee with a right to perform a job however the employee sees fit. *Id.* at 422. On the other hand, "[s]o long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Id.* at 419. Decisions by the United States Supreme Court "have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concern and to respect the need of government employers attempting to perform their important public functions." *Id.* at 420.

## D. APPLYING THE STANDARDS

With respect to the first element of a First Amendment retaliation action brought by a public employee under 42 USC 1983, which element requires proof that the plaintiff engaged in protected conduct (speech), we glean from *Garcetti* that three sub-elements must be shown: (1) the speech pertained to a matter of public concern; (2) the employee spoke as a citizen and not as an employee pursuant to an official duty; and (3) the societal interests advanced by the speech

outweighed the governmental interests in operating efficiently and effectively.[15] "The inquiry into the protected status of speech is one of law, not fact." *Connick*, 461 US at 148 n 7; see also *Hopkins v City of Midland*, 158 Mich App 361, 382; 404 NW2d 744 (1987).[16] Accordingly, we shall proceed with the inquiry as a matter of law.

We first address whether plaintiff's speech involved a matter of public concern. With respect to what constitutes a matter of public concern, the Sixth Circuit of the United States Court of Appeals has stated:

> Generally, an employee speaking as a citizen is speaking on a matter of public concern when that speech can be fairly considered as relating to any matter of political, social, or other concern to the community. Another consideration is whether the speech involves a subject of general interest and of value and concern to the public. [*Mosholder v Barnhardt*, 679 F3d 443, 449 (CA 6, 2012) (internal quotation marks and citations omitted).]

Speech entails a matter of public concern when the speech involves issues for which information is needed to enable members of society to make informed decisions regarding their government's operation. *Banks v Wolfe Co Bd of Ed*, 330 F3d 888, 893 (CA 6, 2003). Bringing to light potential or actual wrongdoing or a breach of the public trust are generally matters of public concern. *Connick*, 461 US at 148. "By contrast, a public employee's speech dealing with 'matters only of personal interest' is generally not afforded constitutional protection." *Banks*, 330 F3d at 893, quoting *Connick*, 461 US at 147. "Whether an employee's speech addresses a matter of public concern is determined by the content, form and context of the given statement as revealed by the whole record." *Hopkins*, 158 Mich App at 382; see also *Farhat v Jopke*, 370 F3d 580, 589 (CA 6, 2004).

Here, we conclude that plaintiff's speech, i.e., the report to CPS about the sexual assault, the communications to the superintendant and his associates, and the expressions of dismay to others by plaintiff, addressed matters of public concern.[17] A sexual assault against a student by

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[15] We recognize that the *Garcetti* Court spoke in terms of two inquiries, but we find it helpful to bifurcate the first inquiry as part of the analysis and individually address whether an employee spoke as a citizen and whether the speech pertained to a matter of public concern.

[16] We surmise that if underlying facts are at issue that are pertinent to the determination whether the speech is of protected status, a trier of fact would have to resolve the factual dispute. Here, there is no such factual dispute. It is undisputed that the sexual assault occurred, that plaintiff contacted CPS, that she expressed her concerns to the superintendant's office, and that plaintiff conveyed her dismay to Jackson and others regarding the handling of the incident. Additionally, there are no relevant factual disputes concerning the nature of plaintiff's official duties as a teacher.

[17] First Amendment protection for expressions made by a public employee can extend to communications made in the workplace to other employees and supervisors. *Garcetti*, 547 US at at 420-421; *Connick*, 461 US at 146 ("First Amendment protection applies when a public

other students on a public middle-school playground and the extent and adequacy of the measures taken by public school officials in response to the assault certainly involve and bear on matters of social concern to the community, potential breach of the public trust, general public interest, and entail matters upon which information is needed to enable members of society to make informed decisions regarding school leadership and operations. The sexual assault and the school's response did not pertain to matters that were only of personal concern to plaintiff; most members of society would be concerned about sexual assaults taking place on school playgrounds and the adequacy of a school's response to such an assault. Even defendant Mary Anderson, DPS's hearing officer, acknowledged that a sexual assault on school grounds is a matter of public concern.

We next address whether plaintiff spoke as a citizen and not as an employee pursuant to an official duty. Plaintiff did testify that it was her understanding that she was required to contact CPS if any student reported to her that he or she was sexually assaulted. Plaintiff believed that she could lose her job if she failed to make a CPS report relative to the sexual assault. In regard to plaintiff's speech in general relative to the assault, although plaintiff testified that her religious beliefs and history as a chaplain played a role in motivating her to speak, she did state that it was ultimately her position as a teacher that compelled her to take action and speak out on the subject. We emphasize, however, that, as alluded to above, there is a distinction between speech that is made pursuant to a public employee's official duties, which is not protected under the First Amendment, and speech that relates to the speaker's job but that is not formally required by any official duty, which is constitutionally protected. *Garcetti*, 547 US at 421. Stated otherwise, simply because plaintiff envisioned her role as a teacher as encompassing a self-imposed obligation to speak out against a perceived failure to adequately address the sexual assault does not mean that she was acting pursuant to an *official* duty.

With respect to the CPS report, despite plaintiff's belief that she had an official duty to contact CPS in regard to the sexual assault, it is essentially undisputed that no such duty existed. A teacher's duty under MCL 722.623 to report "child abuse" to CPS extends only to such abuse as defined by statute, i.e., abuse, sexual or otherwise, "by a parent, a legal guardian, or any other person responsible for the child's health or welfare or by a teacher, teacher's aide, or a member of the clergy." MCL 722.622(f). In *People v Beardsley*, 263 Mich App 408, 416; 688 NW2d 304 (2004), this Court held that the reporting requirement in MCL 722.623 applies only "when the suspected perpetrator is a parent, legal guardian, teacher, teacher's aide, or other person responsible for the child's health and welfare." "Had the Legislature intended that sexual contact between unrelated children be subject to the reporting requirement, it could have expressly so provided." *Id*. at 414. Here, the sexual assault was committed by minor male students, and therefore the statutory reporting requirement did not apply. Indeed, defendant Lauri Washington, DPS's Executive Director of Employee Relations, testified, "I have myself called child protective services regarding a student-on-student incident in a building, and we were told that that is a school-related matter and reporting it is not mandatory." Accordingly, plaintiff did

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employee arranges to communicate privately with his employer rather than to express his views publicly."); *Ulrich v City and Co of San Francisco*, 308 F3d 968, 979 (CA 9, 2002) (complaints to staff and superiors rather than to the general public are not removed from the realm of public concern).

not have an official duty to contact CPS and was in fact acting as a citizen in regard to a subject matter that merely related to her job as a teacher.

With respect to communications to the superintendant's office, there was no argument or evidence whatsoever that plaintiff had a duty, official or otherwise, to reveal the occurrence of the sexual assault to the superintendant, which had already been disclosed to school officials, nor was there a duty by plaintiff to express her concerns to the superintendant about the adequacy of the school's response to the assault. Accordingly, plaintiff was speaking as a citizen on a matter related to her job as a teacher and not as an employee pursuant to any official duty.

With respect to other speech engaged in by plaintiff that was critical of or dealt with the handling of the sexual assault, such as communications to Jackson, school staff, and parents, plaintiff was not voicing her thoughts and opinions pursuant to any duty connected with her job as a teacher. While she may have believed that a teacher had an obligation to speak out under the circumstances, it was a self-imposed obligation consistent with plaintiff's beliefs as to the role of a teacher in society, not an obligation required by her official job duties. Once again, the simple fact that the speech related to her position as a teacher did not deprive her of First Amendment protections.

Finally, we address whether the societal interests advanced by plaintiff's speech outweighed the governmental interests in operating efficiently and effectively. We initially note that the United States Supreme Court in *Waters v Churchill*, 511 US 661, 673; 114 S Ct 1878; 128 L Ed 2d 686 (1994), stated that it has given "substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern[.]" We conclude that with respect to most of plaintiff's speech, the societal interests advanced by plaintiff in revealing the sexual assault on the playground and in voicing concern about the adequacy of the school's response outweighed any of defendants' interests in operating efficiently and effectively or in avoiding disruption, actual or reasonably predicted. Pointing out a sexual assault committed against a four-grade student and calling for an appropriate response to the assault no doubt advances societal interests of the highest order.[18] Moreover, as to the CPS report, we fail to see how plaintiff's conduct in calling CPS one time relative to the assault interfered with defendants' ability to operate efficiently and effectively, especially where the contact with CPS concerned a matter that did not require CPS to take any action, as opposed to a case involving an adult perpetrator. There is no indication in the record that school operations

[18] To be clear, we are not ruling one way or the other regarding whether defendants responded adequately and appropriately to the sexual assault. That issue is not pertinent to the analysis. Plaintiff's speech reflected her opinion that the response was inadequate, and there is no evidence that her actions in speaking out were not based on genuine concerns for the children's well-being, regardless of whether they were objectively valid concerns. As noted in *Waters*, 511 US at 672, "'[u]nder the First Amendment there is no such thing as a false idea[.]'" (Citation omitted.) Even if defendants acted entirely within reason and the law on final investigation, societal interests would still be advanced by speech that demanded close examination and careful scrutiny of a subject matter as potentially damaging to a child's life as sexual assault.

were negatively affected or disrupted by plaintiff's phone call to CPS. Rather, if anything, it was perhaps an annoyance to defendants, and protected First Amendment speech often has a tendency to annoy someone, but that does not suffice to halt the protection.

In regard to the communications made by plaintiff to the superintendant's office or his assistant, we again fail to see how plaintiff's simple act of pointing out the assault and voicing disapproval to those higher in the chain of command interfered with defendants' ability to operate efficiently and effectively. School operations were not negatively affected nor disrupted by plaintiff's speech.

With respect to plaintiff's speech directed at Jackson, staff, and parents, we do believe that some of the speech was disruptive and interfered with DPS's ability to operate efficiently and effectively. We find nothing problematic or damaging to school operations in plaintiff voicing disapproval about the manner in which Jackson addressed the sexual assault when done in an environment and atmosphere conducive to an orderly exchange of differing views and opinions, but not when done in an inappropriate venue and in a disruptive, insubordinate, and disorderly manner that impaired efficient and effective school operations. The *Waters* Court noted that a public employer could, consistent with the First Amendment, prohibit its employees from being "rude to customers." *Waters*, 511 US at 673. There was evidence that in the meeting regarding the assault, plaintiff defiantly, disruptively, and disrespectfully confronted and challenged Jackson, the school's principal, in front of staff and the parents whose children were involved in the assault after the decision was reached on how to proceed. Applying the balancing test as to such speech and under those circumstances, we must conclude that plaintiff's First Amendment rights and societal interests succumbed to DPS's interests in operating efficiently, effectively, and in a non-disruptive manner. At that juncture, instead of raising havoc at the meeting and turning it into a chaotic situation, other avenues of discourse remained available to plaintiff in which she could voice her disapproval and exercise her First Amendment rights, and indeed she later took such steps by contacting the superintendant's office and CPS. The hearing report also mentioned that plaintiff expressed her "dissatisfaction" at staff meetings with regard to the manner in which Jackson handled the playground incident, with plaintiff stating that Jackson should have removed the two male students from the school. There was no evidence that plaintiff expressed her views and concerns at the staff meetings in a disruptive, insubordinate, or disorderly manner, and in the context of internal school staff meetings, we fail to see how school operations would have been disrupted or impaired by plaintiff simply voicing "dissatisfaction" with the response to the sexual assault. Applying the balancing test leads us to the conclusion that societal interests outweighed the school's interests in connection with plaintiff's speech at staff meetings relative to the assault. Finally, there was evidence that plaintiff urged one parent to call the police. This act may have been disruptive and impaired the school's ability to operate efficiently and effectively, where the parent had already been involved in the meeting about the assault and had fully agreed with the resolution, and where plaintiff's act made it appear that the school was not consistent or firm in its position. There is no indication that the parent was unaware of the nature of the sexual assault prior to plaintiff's phone call. While a close call, we conclude that the balancing test weighs in favor of defendants on this issue. Had the parent not been involved in the meeting or not been aware of what transpired on the playground, we would likely rule differently on this issue.

In sum, we hold that plaintiff's speech in calling CPS to report the assault, in communicating with the superintendant's office to express her displeasure, and in voicing dissatisfaction at staff meetings, all constituted protected speech as a matter of law for purposes of plaintiff's § 1983-First Amendment claim. Defendants do not raise any appellate arguments on the issue of causation, and questions of fact relative to causation did exist. The constitutional claim was properly left to the jury for resolution; however, given the unusual posture of this case, the nature of the verdict form, and our ruling on the CRA claim, we simply cannot allow the judgment of liability to stand, where we can only speculate as to whether the jury even addressed the § 1983-First Amendment claim. Moreover, remand for a new trial on the § 1983-First Amendment claim is also mandated because the jury was not properly instructed on punitive damages and because the verdict form on punitive damages was improper.

## E. "FALSE SPEECH"

Before addressing the issues concerning punitive damages, we shall briefly touch on the issue of false speech. In *Pickering v Bd of Ed of Twp High Sch Dist 205, Will Co, Illinois*, 391 US 563, 574; 88 S Ct 1731; 20 L Ed 2d 811 (1968), the United States Supreme Court stated that, "absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment." Here, to the extent that any of plaintiff's speech identified above could be characterized as false, we conclude as a matter of law that plaintiff did not knowingly or recklessly make any false statements.[19] Accordingly, any presumed "falsity" relative to the speech is not an issue to be considered by the jury on remand because it is irrelevant under *Pickering*. Our ruling is consistent with that part of the trial court's jury instructions, where the court instructed "that the [p]laintiff did not intentionally or recklessly make a false statement in reporting the suspected illegal activity. The First Amendment was violated by the [p]laintiff's subsequent treatment even if the statements made by the [p]laintiff were not true." On remand, the court should again instruct the jury that, assuming the jury believes that plaintiff's speech included falsehoods, it cannot serve as a basis to reject her constitutional claim, given that she did not do so knowingly or recklessly as a matter of law.

## F. PUNITIVE DAMAGES

With respect to punitive damages, they are not available in Michigan unless expressly authorized by the Legislature. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 765; 685 NW2d 391 (2004). The CRA does not authorize punitive damages. *Id.* However, in *Janda v Detroit*, 175 Mich App 120, 129; 437 NW2d 326 (1989), this Court addressed punitive damages in the context of a § 1983 action, stating:

> The United States Supreme Court has held that punitive damages for deprivation of civil rights may be awarded when the defendant willfully and

[19] Assuming that plaintiff's references to *two* female victims in her speech were inaccurate, with the inaccuracies being known to plaintiff or made recklessly, we fail to see how the matter would prejudice defendants if not permitted to point out the issue to jurors.

> intentionally violates another's civil rights or when the defendant acts with reckless or callous indifference to the federally protected rights of others. Damages for deprivation of a federal right are governed by federal standards. Thus, punitive damages may be awarded under 42 USC 1983 even where they would not normally be recoverable under the local law in the state where the violation occurred. [Citations omitted.]

"[A] jury may be permitted to assess punitive damages in an action under § 1983 when the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." *Smith v Wade*, 461 US 30, 56; 103 S Ct 1625; 75 L Ed 2d 632 (1983). The jury may award punitive damages if the defendant's conduct "is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards." *Id*. at 54. "The purpose of punitive damages is to punish the defendant for his willful or malicious conduct and to deter others from similar behavior," and "such damages may be awarded only on a showing of the requisite intent." *Memphis Community Sch Dist v Stachura*, 477 US 299, 307 n 9; 106 S Ct 2537; 91 L Ed 2d 249 (1986).

Here, the jury awarded plaintiff $490,000 in punitive damages, but we do not know whether the jury even found liability on the § 1983-First Amendment claim; the only claim that could support a punitive damage award. And even if we assumed a finding of liability on the constitutional claim, the verdict form did not reflect whether the punitive damages were awarded for the CRA claim, which would not have been permissible, or the § 1983-First Amendment claim alone. Instead, the jury merely found that defendants retaliated against plaintiff, and it then awarded plaintiff, along with $260,000 in past and future compensatory damages, $490,000 in punitive damages. Moreover, the trial court failed to instruct the jury regarding the applicable law governing an award of punitive damages under 42 USC 1983. In accordance with *Smith*, 461 US at 56, the trial court should have instructed the jury that it could award punitive damages only if it found liability on the constitutional claim *and additionally* found that the conduct that violated the First Amendment resulted from an evil motive or intent or involved reckless or callous indifference to plaintiff's federally protected rights. The trial court thus failed to instruct the jury regarding the applicable law. *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 626-627; 792 NW2d 344 (2010).

"New trials limited to damages are disfavored, and normally ordered only when liability is clear." *Burns v Detroit*, 468 Mich 881, 881; 658 NW2d 468 (2003) (citations omitted). As discussed above, liability is not clear, and a new trial on the § 1983-First Amendment claim is necessary with respect to the individual defendants.

## IV. DEFENDANTS' OTHER CLAIMS OF ERROR

### A. INSTRUCTIONAL ERROR

We next address arguments posed by defendants that either need resolution at this juncture or beg for guidance to avoid errors in the new trial. Defendants raise various claims of error with respect to the trial court's instructions, in addition to those regarding punitive damages, that have been rendered moot by our ruling, because even if the instructions concerning the § 1983-First Amendment claim were in error and required reversal, the result

would be the same; a new trial. However, because the same issues regarding the instructions are likely to arise and recur on remand, because our substantive analysis of the § 1983-First Amendment claim above necessarily impacts the manner on how to instruct the jury, and because we think it wise to give some direction for the benefit of the parties and trial court, we shall address the proper manner in which to instruct the jury on remand relative to the constitutional claim.

As set forth earlier in this opinion, in order to establish a claim for relief pursuant to 42 USC 1983 with respect to a First Amendment retaliation action, a plaintiff must show that: (1) the plaintiff participated in protected conduct; (2) "an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct;" and that (3) there is a causal connection between the first two elements, whereby the adverse action was motivated in substantial part by the desire to punish the plaintiff for exercising a constitutional right. *King*, 680 F3d at 694-695. We have already concluded as a matter of law that plaintiff was engaged in protected conduct or speech, *as identified with particularity above*, where there is no dispute as to any underlying facts bearing on the issue. Furthermore, there is no genuine issue of material fact that plaintiff was subjected to adverse employment actions, including termination, which would certainly deter a person of ordinary firmness from continuing to engage in the protected speech. These findings are akin to granting partial summary disposition in favor of plaintiff. A jury, however, must resolve in the new trial whether the adverse employment actions were proximately caused by an individual defendant's act and whether the individual defendant was motivated in substantial part by the desire to punish plaintiff for engaging in the protected speech. *Id.* at 695. And if these two prongs of causation are established, the jury must still determine whether an individual defendant proved, by a preponderance of the evidence, that she would have made the same decision even had plaintiff not engaged in the protected speech. *Id.* at 694; see also *Mt Healthy*, 429 US at 287.

Accordingly, with respect to instructing the jury on remand as to the § 1983-First Amendment claim, the trial court shall instruct the jurors that the plaintiff engaged in protected speech when she called CPS to report the sexual assault, when she communicated with the superintendant's office to express her displeasure, and when she voiced dissatisfaction at staff meetings. The trial court shall also instruct the jury that plaintiff was subjected to adverse employment actions by defendants, culminating in termination of her job as a teacher. Next, the trial court shall instruct the jury that it must determine whether plaintiff proved, by a preponderance of the evidence, that the adverse employment actions were proximately caused by an individual defendant's act and whether the individual defendant was motivated in substantial part by the desire to punish plaintiff for engaging in the protected speech. For purposes of the instructions and verdict form, each individual defendant must be considered separately relative to

the causation issue.[20] The trial court is also to instruct the jury that, if it finds that plaintiff has established the causation elements discussed above as to a particular defendant, the jury must still determine whether the individual defendant proved, by a preponderance of the evidence, that she would have made the same decision even had plaintiff not engaged in the protected speech, which, if established, relieves the defendant from liability. With respect to the request for punitive damages, we direct the court to instruct the jury consistent with our discussion above. Further, as to the instructions and verdict form, each individual defendant must be considered separately relative to damages.

Given the nature of the causation issue, it will be necessary to introduce the evidence regarding the various forms of the protected speech, the sexual assault, and all of the events that transpired between plaintiff and defendants, such as the incident that occurred on September 29, 2004, when plaintiff took many of her eighth-grade female math students down to Jackson's office. With the trial court's approval, the parties can utilize stipulations of fact if they desire. If matters arise that were not contemplated in this opinion, the trial court is directed to rule on such matters as guided by the principles and analytical framework set forth in this opinion.

Next, defendants argue that the trial court erred in instructing the jury when it referenced plaintiff "exposing illegal activity." The reference pertained to the sexual assault, which was indeed illegal. On remand, the trial court can reference "illegal activity" in the instructions, but it must make clear that the illegal activity was the sexual assault.

Defendants also argue that the trial court erred in basing its instructions on standard civil jury instructions that govern a claim under the Whistleblowers' Protection Act (WPA), MCL 15.361 *et seq*. In reviewing defendants' argument, it is clear that the argument relates to the court using WPA instructions in relationship to plaintiff's CRA retaliation claim. Given our holding dismissing the CRA claim, defendants' argument is not only moot, it will also not be an issue that arises again on remand relative to the § 1983-First Amendment claim.

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[20] For purposes of guidance on remand, we note the following passage from *King*, 680 F3d at 695, which principles shall be conveyed to the jury:

> Causation in the constitutional sense is no different from causation in the common law sense. An officer may therefore be liable under § 1983 for the natural consequences of his actions. This includes liability for acts giving rise to the ultimate harm, even if the harm is executed by someone else. . . . [A] person who sets in motion an adverse action can be liable for retaliation for the reasonably foreseeable consequences of his actions. . . .
>
> Motive is often very difficult to prove with direct evidence in retaliation cases. Circumstantial evidence may therefore acceptably be the only means of establishing the connection between a defendant's actions and the plaintiff's protected conduct. We have previously considered the temporal proximity between protected conduct and retaliatory acts as creating an inference of retaliatory motive. [Citations and internal quotation marks omitted.]

## B. MCL 722.623

Defendants further argue that the trial court erred in taking judicial notice of MCL 722.623 and in reading part of the statute to the jury. As discussed earlier, MCL 722.623 requires a teacher to report "child abuse" to CPS when the abuse was inflicted by certain adults. The trial court was required to take judicial notice of the statute under MRE 202(b). *American Cas Co v Costello*, 174 Mich App 1, 8; 435 NW2d 760 (1989). For purposes of remand, and unless the parties agree to exclude any reference to MCL 722.623 and its principles, we direct the trial court to simply instruct the jury that Michigan statutory law requires a teacher to report child sexual abuse to CPS when an adult is the offender, such as with the incident involving the eighth-grade girls, but it does not require a teacher to report abuse when the offender is another child, such as with the sexual assault on the playground.

## C. COLLATERAL ESTOPPEL

Defendants additionally argue that plaintiff's claims are barred under the doctrine of collateral estoppel in light of the arbitration proceeding on plaintiff's grievance that was filed pursuant to the CBA. "Collateral estoppel, or issue preclusion, precludes relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). "For collateral estoppel to apply, the issues must be identical, and not merely similar." *Horn v Dep't of Corrections*, 216 Mich App 58, 62; 548 NW2d 660 (1996) (internal quotation marks, alteration, and citation omitted). Here, collateral estoppel does not apply because the issues are not identical. In ruling on plaintiff's grievance, the arbitrator did not decide the issues in dispute relative to the § 1983-First Amendment retaliation claim; rather, the arbitrator merely decided that just cause for termination did not exist under the CBA. Moreover, this Court has held that an arbitration of a grievance pursuant to a CBA does not collaterally estop a civil rights retaliatory discharge claim filed in court. *Arslanian v Oakwood United Hosps, Inc (On Remand)*, 240 Mich App 540, 541-542, 550, 552; 618 NW2d 380 (2000); see also *McDonald v City of West Branch, Michigan*, 466 US 284, 292; 104 S Ct 1799; 80 L Ed 2d 302 (1984) (ruling that it is not proper to invoke res judicata or collateral estoppel in a § 1983 action based on an earlier arbitration proceeding brought pursuant to the terms of a CBA).

## D. WHISTLEBLOWER PROTECTION ACT CLAIM

Next, defendants argue that plaintiff, in reality, filed a WPA claim and that this claim is barred by the 90-day limitation period applicable to such a claim under MCL 15.363(1). Plaintiff did not file a WPA claim, and the § 1983-First Amendment claim is a distinct and recognized cause of action that finds support in the record. Defendants make no argument that the statute of limitations governing a § 1983 action elapsed.

## E. TIME FOR EXAMINING WITNESSES

Finally, defendants argue that the trial court abused its discretion in limiting the time for examining witnesses. For purposes of remand, we provide the following guidelines for the trial court to abide by if it again decides to set time limits. MRE 611(a) provides:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Placing time limits on the examination of witnesses is a discretionary decision by the trial court, but the decision must be consistent with the parameters set forth in MRE 611(a). *Barksdale v Bert's Marketplace*, 289 Mich App 652, 655-657; 797 NW2d 700 (2010). A trial court abuses its discretion when it imposes utterly arbitrary time limitations that are unrelated to the nature and complexity of a given case or the length of time consumed by the testimony of other witnesses. *Id.* at 657. We direct the trial court to abide by these principles on remand, explaining any time constraints in relationship to the factors enunciated in MRE 611(a).[21]

## V. CONCLUSION

In conclusion, we reverse and remand for: (1) entry of an order of dismissal on the CRA claim with respect to all defendants; and (2) for a new trial on the § 1983-First Amendment claim with respect to the individual defendants, but for entry of an order of dismissal in regard to the entity defendants.

Reversed and remanded for proceedings consistent with this opinion. None of the parties having fully prevailed on appeal, we decline to award taxable costs under MCR 7.219. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ William C. Whitbeck

[21] In *Barksdale*, 289 Mich App at 657, this Court, in reversing and remanding for a new trial, found that the "trial court entirely failed to explain how the severely restrictive time parameter it selected" was consistent and complied with MRE 611(a).