STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1445

Kristine M. Holmgren,
Respondent

vs.

State of Minnesota, et al.,
Appellants.

Filed June 22, 2010
Affirmed
Ross, Judge

Scott County District Court
File No. 70-CV-07-21024

Stephen W. Cooper, Stacey R. Everson, The Cooper Law Firm Chartered, Minneapolis, Minnesota (for respondent)

Lori Swanson, Attorney General, Gary R. Cunningham, Assistant Attorney General, St. Paul, Minnesota (for appellants)

Considered and decided by Stauber, Presiding Judge; Stoneburner, Judge; and Ross, Judge.

U N P U B L I S H E D O P I N I O N

ROSS, Judge

Kristine Holmgren's employment with the Minnesota Department of Corrections ended after she raised questions critical of a new program being contemplated by the state prison where she was chaplain, a program that she believed would violate the

Constitution's Establishment Clause. Holmgren sued the prison's warden, arguing that he had allowed her employment to be terminated in retaliation for speaking against the program. The district court denied the warden's motion for summary judgment, and the state appeals, arguing that the warden is entitled to qualified immunity because terminating Holmgren for her speech did not violate her clearly established constitutional rights. Because terminating Holmgren's employment for raising nondisruptive questions about the constitutionality of the prison's religious program would violate her First Amendment rights, and because these rights were clearly established at the time of the termination, we affirm.

FACTS

We assume these facts to be true only for the purpose of addressing this qualified-immunity appeal. Kristine Holmgren was employed by the Minnesota Department of Corrections (DOC) as the religious coordinator of the DOC's Shakopee facility from January to June 2006. As religious coordinator, Holmgren was supposed to perform the duties of a traditional, non-denominational chaplain, overseeing religious activities and services for inmates. Among other things, Holmgren's job description indicated that she was to "administer and provide regular religious services so that the needs of the offenders for such services are responded to and their religious rights, as defined by the First Amendment to the United States Constitution, and applicable laws, are protected."

In February 2006, Holmgren learned that the InnerChange Freedom Initiative (IFI) program would be instituted at the Shakopee facility and funded by the state. Holmgren believed that the program's purpose was to convert inmates to Christianity using tax

dollars. Holmgren was aware that a similar IFI program was facing an Establishment Clause challenge in Iowa, and she was concerned that the DOC might be unconstitutionally establishing a religion in the Shakopee facility. Holmgren brought her concerns to Assistant Commissioner Erik Skon. Skon told Holmgren that her constitutional concerns were unfounded and that the program would be implemented despite the Iowa litigation. Skon also told Holmgren that she would be expected to implement the program and that it would be in her best interests to stop asking questions about it.

Holmgren persisted. In mid-June 2006, she met privately with Warden Fredric Hillengass and expressed concern that the Iowa version of the IFI program had been held unconstitutional in Iowa federal district court. Holmgren asked the warden how the Minnesota program differed from the Iowa program so as to be constitutional and whether other programs would be solicited to maintain religiously diverse programming for Shakopee inmates. The warden did not answer her questions. Also in June, an article about the IFI program appeared in the Star Tribune raising concerns similar to Holmgren's. DOC correspondence shows that department staff believed that this article was the result of Holmgren's contact with the media, a claim Holmgren denies.

At a meeting on June 23, Warden Hillengass informed staff that the IFI program would soon be instituted at Shakopee. During a question-and-answer period of the meeting, Holmgren again questioned the warden about the program. She asked about the credentials of the IFI staff and whether the DOC would be requesting proposals from other faith-based programs. It is not clear whether the warden sought to answer

Holmgren's questions at the meeting. Holmgren maintains that her questions or statements were not disruptive and that the only harm was embarrassment to the warden.

On June 30, Warden Hillengass told Holmgren that her employment was being terminated. The warden indicated that Holmgren had brought this on herself at least in part because of her questions or statements at the staff meeting, which had offended the warden and which he felt were "intended to provoke staff discussion" against the IFI program. He informed Holmgren that she could apply for a new, reclassified position. She did so, but she was not hired.

Holmgren sued the state, the warden, and the commissioner of corrections under 42 U.S.C. § 1983 (2006). She asserted, among other claims, that the warden fired her in violation of her First Amendment rights. The state moved for summary judgment, arguing that Holmgren's criticism of the IFI program was not protected speech because she had spoken pursuant to her duties as a state employee. The state also argued that qualified immunity shielded the warden and the commissioner from suit for the alleged First Amendment violations. The district court granted summary judgment to the commissioner because she was not involved in the decision to terminate Holmgren. But it denied the summary judgment motion as to the warden. The district court concluded that Holmgren's criticism of the IFI program did not arise from her employment duties and further concluded that her interest in speaking as a citizen on a matter of public concern outweighed the state's interest in an orderly workplace. The district court held that a factfinder must determine whether Holmgren was fired because of her protected speech and that the warden was not entitled to qualified immunity.

The state appeals.

D E C I S I O N

The state appeals from the district court's partial denial of its summary judgment motion on the basis of qualified immunity. "An order denying summary judgment on immunity grounds is immediately appealable." *Mumm v. Mornson*, 708 N.W.2d 475, 481 (Minn. 2006). In reviewing the denial of summary judgment, an appellate court determines whether there are genuine issues of material fact and whether the district court erred in applying the law. *Id.* We view the evidence in the light most favorable to the nonmoving party and resolve any doubts about the existence of a material fact against the moving party. *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993). "Immunity is a legal question that is reviewed de novo." *Mumm*, 708 N.W.2d at 481.

Qualified immunity is available to public officials defending claims under 42 U.S.C. § 1983. *Id.* at 483. The defense shields public officials from civil liability if "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738 (1982). We generally follow a two-step analysis to evaluate a qualified-immunity claim. We determine first whether the facts alleged are adequate to show a constitutional violation and second whether the right allegedly violated was clearly established in the factual context of the case. *Mumm*, 708 N.W.2d at 484; *but see Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009) (clarifying that the first step, while often beneficial, is not mandatory). We undertake both steps of the immunity analysis and hold

that the warden was not entitled to summary judgment on the basis of qualified immunity.

A. *The facts that Holmgren has alleged are sufficient to establish a First Amendment violation.*

The first issue is whether the facts Holmgren alleges are sufficient to demonstrate a First Amendment violation. A state may not discharge an employee on a basis that infringes her constitutionally protected interest in freedom of speech. *Rankin v. McPherson*, 483 U.S. 378, 383, 107 S. Ct. 2891, 2896 (1987). Although the record does not contain the complaint, it can be inferred from the district court's order that Holmgren alleges that she was dismissed in retaliation for criticizing the IFI program. Whether these alleged facts make out a First Amendment violation depends on whether Holmgren's criticisms of the IFI program were protected speech.

"[T]he First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern," free from employer discipline. *Garcetti v. Ceballos*, 547 U.S. 410, 417, 126 S. Ct. 1951, 1957 (2006). A public employee's speech is protected if three requirements are met. First, the employee must have spoken as a citizen rather than pursuant to her official employment duties. *Id.* at 423–24, 126 S. Ct. at 1961. Second, the employee's statements must "constitut[e] speech on a matter of public concern." *Rankin*, 483 U.S. at 384, 107 S. Ct. at 2897 (quotation omitted). Finally, the employee's interest as a citizen in commenting on matters of public concern must outweigh the state's interest, "as an employer, in promoting the efficiency of the public services it performs through its employees."

Pickering v. Bd. of Educ., 391 U.S. 563, 568, 88 S. Ct. 1731, 1734−35 (1968). Whether Holmgren meets the first requirement is a close question. On the disputed material facts to be resolved by a factfinder, Holmgren's speech may satisfy all three requirements. If so, firing her for this speech would constitute a First Amendment violation.

1. *Holmgren may have spoken as a citizen and not pursuant to her employment duties.*

The focus of the state's appeal is its argument that Holmgren's speech was not protected because she was speaking pursuant to her job duties. In order for speech to be pursuant to an employee's official duties, the speech must be something she "was employed to do." *Garcetti*, 547 U.S. at 421, 126 S. Ct. at 1960. In *Garcetti*, Ceballos, a prosecutor, was subjected to adverse employment actions after writing a memorandum criticizing a search-warrant affidavit. *Id.* at 413−15, 126 S. Ct. at 1955−56. Ceballos did not dispute that he had prepared the memorandum pursuant to his duties as a prosecutor. *Id.* at 421, 126 S. Ct. at 1960. The Supreme Court therefore held that his memorandum was not protected speech. *Id.*

By contrast, in *Lindsey v. City of Orrick*, the Eighth Circuit held that a public-works director who was sent by the city to attend a seminar on the state open-meetings law did not speak pursuant to his official duties when he thereafter questioned the city's compliance with the law at four different public meetings. 491 F.3d 892, 895−96, 898 (8th Cir. 2007). The city argued that the director's speech was not made as a citizen because his job required him to attend the public meetings where he voiced his concerns and because the city had paid for him to attend the seminar where he learned about the

open meetings law. *Id.* at 898. The court rejected this argument because, unlike in *Garcetti*, there was no evidence that the employee's job duties even arguably included open-meetings-law compliance. *Id.*

The state argues that Holmgren raised questions about the IFI program pursuant to her job duties as religious coordinator. It points to Holmgren's job description, which directed her to "administer and provide regular religious services so that the needs of the offenders for such services are responded to and their religious rights, as defined by the First Amendment to the United States Constitution, and applicable laws, are protected." Based on this language, the state contends that Holmgren's job duties included protecting the constitutional rights of inmates. The state also points to Warden Hillengass's affidavit, which states that "Holmgren's job required her to make recommendations regarding [the prison's] religious programming."

While Holmgren's job description does mention the First Amendment, the operative words in the description are "administer," "provide," and "religious services." The reference to the First Amendment is contained in a subordinate clause that indicates that the *purpose* of Holmgren's providing religious services was to ensure that the inmates' religious beliefs were protected. As the district court observed, the job description may arguably implicate the Free Exercise Clause, but it does not follow that Holmgren was required to uphold the Establishment Clause as part of her day-to-day duties. And while it may be true that one of Holmgren's duties was to make religious programming recommendations, Holmgren's questions were superfluous as programming recommendations. She had already brought her concerns about the IFI program to the

warden, and Assistant Commissioner Skon had made it clear to her that the program would be coming to the Shakopee prison regardless of what she thought about its constitutionality.

The state also argues that Holmgren was speaking as an employee because she did not express her concerns outside of the DOC or demonstrate any motive to introduce matters into a public forum. This fact is not dispositive. In *Garcetti*, the Supreme Court specifically stated that the fact that Ceballos expressed views concerning the subject matter of his job entirely within his office was not dispositive of whether he spoke as an employee. 547 U.S. at 420, 126 S. Ct. at 1959; *cf. Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008) ("[W]hen a public employee raises complaints or concerns up the chain of command at his workplace *about his job duties*, that speech is undertaken in the course of performing his job." (emphasis added)). The controlling factor in *Garcetti* was that the speech was made pursuant to the employee's official duties. 540 U.S. at 420, 126 S. Ct. at 1959–60. But Holmgren has, at the very least, raised a genuine factual issue as to whether her questions were made pursuant to her official duties. We therefore cannot grant summary judgment to the state on this basis.

2. *Holmgren's criticisms involved a matter of public concern.*

Any speech that is "fairly considered as relating to any matter of political, social, or other concern to the community" involves a matter of public concern. *Connick v. Myers*, 461 U.S. 138, 146, 103 S. Ct. 1684, 1690 (1983). "The inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Rankin*, 483 U.S. at 387, 107 S. Ct. at 2898. In determining

whether speech involves a matter of public concern, it is appropriate to look to Minnesota caselaw as well as the caselaw of other jurisdictions. *See Sexton v. Martin*, 210 F.3d 905, 910–11 (8th Cir. 2000) (examining both Eighth Circuit caselaw and the caselaw of other circuits on the question of public concern); *cf. Finch v. Wemlinger*, 361 N.W.2d 865, 871 (Minn. 1985) (examining cases from several federal circuits to determine whether the right of a state employee to speak on a matter of public concern was clearly established).

The subject of Holmgren's speech was the institution of a state-funded Christian congregation in a state prison in potential violation of the Establishment Clause. Many cases hold that illegal acts by government officials are a matter of public concern. *See, e.g.*, *McIntire v. State, Hous. Fin. Agency*, 458 N.W.2d 714, 717 (Minn. App. 1990) (holding that potentially fraudulent expenditures of public funds was matter of public concern), *review denied* (Minn. Sept. 28, 1990); *Sexton*, 210 F.3d at 911 (holding that city official's potentially illegal recording of private telephone conversations was matter of public concern); *Feldman v. Phila. Hous. Auth.*, 43 F.3d 823, 829 (3d Cir. 1994) ("Disclosing corruption, fraud, and illegality in a government agency is a matter of significant public concern."), *amended* (3d Cir. Jan. 23, 1995); *Hyland v. Wonder*, 972 F.2d 1129, 1137 (9th Cir. 1992) (holding that government "abuses, inefficiency, threats to public safety, potential civil rights violations, and incompetence of public law enforcement officials" were matters of public concern).

The state argues that Holmgren's speech did not involve a matter of public concern because it regarded internal management decisions and was intended to provoke a response from DOC administrators. For this proposition, the state cites *Crain v. Board*

of Police Commissioners, an Eighth Circuit case in which the court held that complaints that the police board's sick leave policy was unconstitutional did not involve a public concern because they attacked an internal management decision of the board. 920 F.2d 1402, 1411 (1990). But *Crain* is not comparable to this case because the concern here, while it does regard an internal programming decision of the DOC, also implicates an Establishment Clause violation that could infringe the constitutional rights of all Minnesotans. And taxpayers generally have standing to challenge government expenditures that violate the Establishment Clause. *See Flast v. Cohen*, 392 U.S. 83, 103, 88 S. Ct. 1942, 1954 (1968) (holding that taxpayers met standing requirements to challenge expenditures that allegedly violated the Establishment Clause).

The state also argues that the context of Holmgren's speech shows that it was not a matter of public concern because the speech occurred within the workplace and was directed to persons in the chain of command. The form and context of speech, as well as its content, are relevant to whether the speech involves a public concern. *McIntire*, 458 N.W.2d at 717 (citing *Connick*, 461 U.S. at 147−48, 103 S. Ct. at 1690). The state cites two Eighth Circuit cases in which the context of speech factored into that court's determination that the speech did not regard a matter of public concern. In *Sparr v. Ward*, a county employee wrote a memorandum to her superior, attempting to ingratiate herself with the superior while explaining why she felt she nonetheless could not support the superior's candidacy for county office. 306 F.3d 589, 591 & n.1 (8th Cir. 2002). Although the memorandum also mentioned office sexual-harassment issues, the court concluded that the memo was driven by the employee's self-interest in protecting her

employment "and not by her concern about matters of public concern." *Id.* at 594−95. And in *Buazard v. Meridith*, a police officer, at the request of his superior, prepared two statements about officers who had been fired and later refused to change his statements to correct alleged falsehoods. 172 F.3d 546, 547−48 (8th Cir. 1999). The court concluded that "the internal nature of the statements and [the officer's] role as employee in making the statements lead us to conclude that the speech was not a matter of public concern." *Id.* at 549.

Sparr and *Buazard* are both pre-*Garcetti* cases. Arguably, their context-of-speech analysis may now more properly be addressed within the *Garcetti* inquiry of whether the employee spoke pursuant to her employment duties. In any event, this case is distinguishable from *Sparr* and *Buazard*. Those cases concerned matters that did not have importance beyond the workplace or were motivated by self-interest. The political and social importance of Holmgren's criticisms makes them a matter of public concern despite the fact that Holmgren appears to have raised them exclusively within the workplace.

3. *Holmgren's right to speak about the IFI program outweighs the state's interest in an orderly workplace.*

The final issue in the employee-speech analysis is whether the employee's right to comment on a matter of public concern outweighs the state's interest in an orderly workplace. The analysis of whether an employee's interests outweigh her employer's is often referred to as "*Pickering* balancing." Factors to be considered in conducting *Pickering* balancing are

> (1) the need for harmony in the office or work place; (2) whether the government's responsibilities require a close working relationship to exist between the plaintiff and co-workers when the speech in question has caused or could cause the relationship to deteriorate; (3) the time, manner, and place of the speech; (4) the context in which the dispute arose; (5) the degree of public interest in the speech; and (6) whether the speech impeded the employee's ability to perform his or her duties.

McIntire, 458 N.W.2d at 717 (quotation omitted). The state must make a substantial showing that the employee's speech was disruptive before the speech may be punished. *Waters v. Churchill*, 511 U.S. 661, 674, 114 S. Ct. 1878, 1887 (1994). The more that an employee's speech involves matters of public concern, the more disruption the state must show to tip the scales in its favor. *Connick*, 461 U.S. at 152, 103 S. Ct. at 1692−93.

As we have already discussed, the degree of public interest in Holmgren's concerns is high because they arguably identify a potential Establishment Clause violation. We also have already discussed the context in which Holmgren raised her concerns, a factor that weighs against her because she raised them internally. As for the factors relating to workplace harmony and efficiency, the state has not argued that Holmgren's speech had any ill effect other than to cause the warden some workplace embarrassment. The state's deposition and affidavit testimony does not establish anything close to disruption as a result of Holmgren's speech. Warden Hillengass's affidavit states that Holmgren's questions "troubled me greatly" because "it appeared that she desired to embarrass me" and was attempting to "influence staff against these programs." He further states that "I concluded that her goal was to undermine me and the facility" and that "I believed Holmgren was not a positive influence at the institution."

The affidavit does not allege workplace disruption or disharmony, and there is also no allegation that the warden required a close working relationship with Holmgren. The *Pickering* balance weighs substantially in favor of protecting Holmgren's speech.

B. ***Caselaw clearly establishes Holmgren's First Amendment right not to be fired for raising potentially illegal conduct by government officials.***

Having concluded that Holmgren has alleged facts sufficient to establish a First Amendment violation, we address the second step in the qualified immunity analysis—whether the right at issue was clearly established at the time of the adverse employment action. "The operation of this standard . . . depends substantially upon the level of generality at which the relevant 'legal rule' is to be identified." *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S. Ct. 3034, 3038−39 (1987). For a right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Id.* at 640, 107 S. Ct. at 3039. "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." *Id.* (citation omitted). Whether the law regarding a right was clearly established at the relevant time is a legal question for this court. *Mumm*, 708 N.W.2d at 483–84.

In the context of First Amendment speech by public employees, the qualified immunity analysis "moves the fulcrum on which the decision turns," requiring that the *Pickering* balance favor the employee "to a degree that evidences a clearly established right." *McIntire*, 458 N.W.2d at 718. "Courts usually ascertain whether the claimed

violated right has been clearly established by comparing the facts of the case under consideration with other decided case facts." *Id.*

In *McIntire*, this court concluded that *Pickering* did not provide a clear standard by which public employers could judge the constitutionality of terminating employees for their speech and that, as of 1990, intervening caselaw had not clarified the standard. *See id.* We relied on *Finch v. Wemlinger*, a case in which the supreme court held that post-*Pickering* decisions had not sufficiently clarified the parameters of public employees' free-speech rights as of 1977, the year when employee Finch was fired. 361 N.W.2d at 871. The *Finch* court pointed out facts that distinguished that case from *Pickering*: in *Pickering*, unlike in *Finch*, there was no question of maintaining discipline or harmony among coworkers, nor was there a close working relationship calling for trust, confidence, and loyalty. *Id.* at 870−71. *Pickering* thus did not define an employee's free speech rights clearly enough to apply in *Finch*, and post-*Pickering* decisions had not provided sufficient guidance.

But in Holmgren's case, intervening decisions have clarified the parameters of public employees' free-speech rights enough that a reasonable public official should have known that firing Holmgren for raising concerns about a potentially unconstitutional program would violate her First Amendment rights, especially when the speech created no substantial disruption in the workplace. *See, e.g.*, *Johnson v. Ganim*, 342 F.3d 105, 112, 114–15 (2d Cir. 2003) (holding that city custodian's letter to mayor alleging "harassment, fear, intimidation, discrimination, demotion, transfer, favoritism, stealing overtime, and union busting" involved a matter of public concern, and that fact issue as to

whether the letter was disruptive precluded summary judgment); *Sexton*, 210 F.3d at 911–12 (holding that employee complaints regarding city's illegal recording of telephone calls involved matter of public concern, and city's assertion that complaints adversely affected department morale and created significant political problems was not sufficient disruption even to trigger *Pickering* balancing); *Hyland*, 972 F.2d at 1139−40 (holding that employee memorandum sent to judges that exposed "inept, inefficient, and potentially harmful administration of a governmental entity" addressed matters of public concern, and remanding for resolution of whether memorandum was sufficiently disruptive to justify employee's dismissal).

Even if intervening decisions had not established Holmgren's right not to be fired for posing nondisruptive questions to her supervisors about a potentially unconstitutional program, we conclude that *Pickering* applies with sufficient clarity to these facts to put the warden on notice that firing Holmgren for her speech would be illegal. *See United States v. Lanier*, 520 U.S. 259, 271, 117 S. Ct. 1219, 1227 (1997) ("[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and . . . a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful." (quotation, brackets, and citation omitted)); *Mumm*, 708 N.W.2d at 485 (holding that *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694 (1985), which "established the broad contours of the law regarding the constitutional use of deadly force," alone established impermissibility of deadly force in case under review).

The state argues that a reasonable official would not have been aware that terminating Holmgren would violate her constitutional rights. First, it argues, Holmgren's employment was at will. Second, the warden terminated her for insubordination; raising the concerns at the meeting was intended only to embarrass him. Third, Holmgren had always been outspoken in furtherance of her job duties. The state contends that Holmgren's speech could reasonably have been interpreted as a negative program recommendation made pursuant to her job duties, and there was no reason for the warden to parse Holmgren's job duties to ensure that her speech was pursuant to them.

All of these arguments fail. That Holmgren's employment was at will does not bear on the issue of whether firing her would violate her First Amendment rights. *See Rankin*, 483 U.S. at 383−84, 107 S. Ct. at 2896 (holding that a probationary employee who could have been discharged for any reason or no reason was entitled to reinstatement "if she was discharged for exercising her constitutional right to freedom of expression"). The state's next assertion—that the warden terminated Holmgren for insubordination—is also irrelevant except to the extent that it relates to workplace disruption, and we have already concluded that the state has alleged no significant disruption, at least in the context of this limited qualified-immunity question. That Holmgren had always been outspoken during her employment with the DOC also appears irrelevant.

The state's final argument—that the warden might have reasonably believed Holmgren's criticisms to be program recommendations pursuant to her employment duties—fails for reasons previously discussed. At least based on the disputed facts

viewed in Holmgren's favor for the purpose of addressing the state's qualified-immunity argument, Holmgren's job description required her only to administer and provide religious services for Shakopee inmates; it did not require her to prevent the facility from violating the Constitution by establishing religion through one of its programs. The warden testified that Holmgren's job duties included making recommendations on the prison's religious programming. But even if Holmgren's criticisms could be construed as "programming recommendations," her written job description mentions no duty to make programming recommendations, creating a fact issue concerning the extent of her duties and preventing summary judgment.

Affirmed.