IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

TAYLOR BIRO,

Plaintiff,

v. **Case No. 4:22-cv-442-AW-MAF**

CITY OF TALLAHASSEE,

Defendant.

_____/

ORDER GRANTING MOTION TO DISMISS

To improve relations between its police department and the community, the City of Tallahassee established a Citizen Police Review Board. ECF No. 1 (Compl.) ¶ 8. The City Commission appointed Plaintiff Taylor Biro to serve as one of the Board's nine members. *Id.* But after Biro showed up at public meetings with an "abolish police" sticker on her cup, the City Commission voted to remove her. *Id.* ¶¶ 9-12. That led to this lawsuit, in which Biro contends her removal violated the First Amendment.

The City moved to dismiss. ECF No. 4 (MTD). It argues that Biro cannot state a claim because the City is entitled to remove board members for speech that undermines the City's interest in maintaining an unbiased Review Board. *Id.* at 27. After a hearing, and having carefully considered the parties' arguments, I conclude Biro has not plausibly alleged a First Amendment retaliation claim.

I.

As an initial matter, I address some disagreement about what matters I should consider at this stage. On a motion to dismiss, all well-pleaded allegations are accepted as true and viewed in a light most favorable to the plaintiff. *Franklin v. Curry*, 738 F.3d 1246, 1248 (11th Cir. 2013). So, for example, I accept as true the allegation that the removal was because of Biro's sticker. (At the hearing, the City indicated it may contest this fact later, but for now, I accept it as true.)

The City also attached several exhibits to its motion. Ordinarily, courts consider only the complaint's allegations in evaluating a motion to dismiss. *See St. George v. Pinellas County*, 285 F.3d 1334, 1337 (11th Cir. 2002). Courts may consider attachments to a motion to dismiss, though, if they are central to a plaintiff's claim and undisputed. *Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002). Courts may also take judicial notice of official government records. *See Dimanche v. Brown*, 783 F.3d 1204, 1213 n.1 (11th Cir. 2015) (citing Fed. R. Evid. 201(b)(2); *Terrebonne v. Blackburn*, 646 F.2d 997, 1000 n.4 (5th Cir. 1981)). Here, it is not clear that any of the cited attachments are central to Biro's claim, but certain of them are appropriately considered as government records. Moreover, Biro's counsel explicitly stated at the hearing that she has no objection to my considering at this stage exhibits 1-4 and 6. I will consider only those attachments and not the others, as I decline to convert the motion to one for summary judgment.

II.

As a general matter, "public employees cannot be removed simply for exercising their constitutional rights." *McKinley v. Kaplan*, 262 F.3d 1146, 1149 (11th Cir. 2001) (citing *McMullen v. Carson*, 754 F.2d 936, 938 (11th Cir. 1985)). But a public entity has "interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." *Id.* (quoting *Pickering v. Bd. of Ed. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968)). As a result, "a public employee's right to freedom of speech is not absolute." *Id.*

In *Pickering*, the Supreme Court provided a four-part test for determining whether a public employer violated the First Amendment in acting against an employee based on her speech:

> First, we consider whether the employee's speech can be characterized as speech on a matter of public concern. If so, we weigh the employee's First Amendment interest against the government's interest in promoting the efficiency of the public services it performs through its employees. Should the employee prevail on the balancing test, we determine whether the speech played a substantial part in the government's decision to discharge the employee. Finally, if the speech was a substantial motivating factor in the decision, we decide whether the government has shown by a preponderance of the evidence that it would have discharged the employee regardless of the protected conduct.

Id. (note and citations omitted). Here, the City concedes Biro's "abolish police" message was speech on a matter of public concern, and it concedes (for now) that

the speech caused Biro's removal. So the issue is whether Biro has alleged facts plausibly supporting a conclusion that the balancing of interests would favor her.[1] I conclude she has not.

The *Pickering* balancing prong involves several factors: "(1) whether the speech at issue impedes the government's ability to perform its duties efficiently, (2) the manner, time and place of the speech, and (3) the context within which the speech was made." *Martinez v. City of Opa-Locka*, 971 F.2d 708, 712 (11th Cir. 1992) (quoting *Bryson v. City of Waycross*, 888 F.2d 1562, 1567 (11th Cir. 1989) (emphasis removed)).

Before turning to the *Pickering* analysis, I will address the City's argument that I need not do so. (The City's alternative argument is that it prevails under *Pickering*.) Relying heavily on the Ninth Circuit's decision in *Lathus v. City of Huntington Beach*, 56 F.4th 1238 (9th Cir. 2023), the City argues that no *Pickering* balancing is necessary—that its decision to remove Biro is subject to no First Amendment scrutiny at all. MTD at 18-23. But the Eleventh Circuit rejected a similar argument in *McKinley*. There, the County argued that the plaintiff's removal should be analyzed under the "*Elrod-Branti* line of cases" applicable to political

[1] The standard here is well settled. On a motion to dismiss, "[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

patronage dismissals. *McKinley*, 262 F.3d 1146, 1149 n.4. The court explained that it was "primarily concerned with [the plaintiff's] speech . . . , not her political affiliation or beliefs," so the "case [was] more properly analyzed under the case-by-case balancing approach required by *Pickering*." *Id.* Here, Biro's political affiliation or beliefs are not the issue. Instead, her claim is that her removal was based solely on her speech. *Pickering* therefore applies.

Both sides point to factors that play no role in the *Pickering* analysis. For example, the City repeatedly notes that Biro's position was unpaid, but that makes no difference. In *McKinley*, the Eleventh Circuit considered a First Amendment retaliation claim like Biro's. The court noted that the plaintiff "served as a voluntary, unpaid member of the Miami-Dade County Film, Print, and Broadcast Advisory Board," yet it went on to apply a straightforward *Pickering* analysis. 262 F.3d at 1147, 1150; *see also Mullin v. Town of Fairhaven*, 284 F.3d 31, 37 n.7 (1st Cir. 2002) ("We are aware that the Board, acting as an appointing body, is not a 'public employer' in a literal sense. We see no reason, however, why First Amendment jurisprudence in the public-employer context should not apply with equal force to the Board's removal of appointed, unpaid public officials."); *Andersen v. McCotter*, 100 F.3d 723, 727 (10th Cir. 1996) ("Defendants argue that volunteers are not entitled to First Amendment protection under *Pickering*. We disagree. The exercise of free speech rights is not dependent upon the receipt of a full-time salary.");

Versarge v. Township of Clinton, 984 F.2d 1359, 1364 (3d Cir. 1993) ("In *Pickering*, the Supreme Court stated that government employees 'may [not] constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest . . . .' We believe that similar First Amendment concerns would apply in a volunteer context." (quoting *Pickering*)). In short, the government has no more right to remove an unpaid volunteer for her speech than a paid employee.[2]

Biro makes her own irrelevant assertions, noting, for example, that she served on the Review Board for years without incident. ECF No. 9 at 3. But a spotless disciplinary record has no bearing on whether an employee can be removed for her speech. Biro also points out that she had brought the "abolish police" cup to several meetings before the City decided to terminate her. But either the City could constitutionally terminate Biro for the sticker or it couldn't; Biro cites no authority suggesting it could waive its right by not terminating her immediately.[3]

Turning now to factors that do matter under *Pickering*. The City first argues that Biro's speech impeded the City's goal of fostering cooperation between the

[2] The City's insistence that Biro's volunteer status matters relates to its resisting *Pickering* balancing.

[3] To the extent Biro is arguing that the termination was really for some other basis—and the City's basing it on her speech was pretext—she has not pleaded that or otherwise developed any argument.

community and police "by both eroding trust in the Board as a neutral and objective body and distracting the Board from its important work to address her personal conduct." *Id.* at 29. "The *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick v. Myers*, 461 U.S. 138, 150 (1983). Here, the City's goal in creating the Review Board was "[t]o enhance trust between the Tallahassee Police Department [] and the community by creating an unbiased panel of volunteers" to make policy recommendations. ECF No. 4-3 at 3 (mission statement). It should go without saying that having a Review Board member espouse an "abolish police" message could undermine that goal.

At the very least, the City has wide discretion in determining whether Biro's speech undermined its mission—and what to do about it. *Anderson v. Burke County*, 239 F.3d 1216, 1221 (11th Cir. 2001) (citing *Johnson v. Clifton*, 74 F.3d 1087, 1092 (11th Cir. 1996)). The City's discretion "includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency." *Connick*, 461 U.S. at 151 (quoting *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974) (Powell, J., concurring)).

Biro argues that her speech never actually caused any problems. But this is no answer because "[t]he government's legitimate interest in avoiding disruption does not require proof of actual disruption. . . . Reasonable possibility of adverse harm is all that is required." *Moss v. City of Pembroke Pines*, 782 F.3d 613, 622 (11th Cir. 2015) (citation omitted); *see also id.* ("Plaintiff's argument that the City failed to show that Plaintiff's speech had any actual negative impact on the fire department is irrelevant."). In sum, the first factor (whether the speech impedes the City's ability to efficiently carry out its duties) strongly favors the City.

The time, place, and manner of Biro's speech weigh in the City's favor too. Unlike in *Rankin v. McPherson*, 483 U.S. 378, 389 (1987), where the employee made "her remark . . . in a private conversation with another employee," Biro brought her "abolish police" cup to Review Board meetings open to the public. ECF No. 4-3 at 5. Her speech ran the risk of publicly "discredit[ing]" the Review Board's functioning as an unbiased advisory group. *Cf. Rankin*, 483 U.S. at 389 (explaining that because the employee's speech occurred privately, there was no "danger that [she] had discredited the office").

The context favors the City too. For one, the speech was from someone with a public-facing role, which is "a factor that . . . tips the *Pickering* balance in favor of the government as an employer." *McKinley*, 262 F.3d at 1150 (citations omitted). As

noted above, the fact that meetings are open to the public meant anyone in attendance could see Biro's anti-police message on full display. *Cf. Rankin*, 483 U.S. at 389.

Furthermore, the fact that Biro had a policymaking role makes particularly important the City's "strong interest in staffing [its] offices with employees that they fully trust." *McKinley*, 262 F.3d at 1150; *see* ECF No. 4-3 at 7-8. The role "required her to serve in an advisory capacity with input on policy issues," which "is a factor that . . . gives the [City] a greater interest in removing her based on her speech." *McKinley*, 262 F.3d at 1150; *cf. Rankin*, 483 U.S. at 390-91 ("The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee's role entails. Where, as here, an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal.").

Finally, because Biro was an appointed board member, the City Commission could remove her for speech inconsistent with its interests as the appointing authority. *See McKinley*, 262 F.3d at 1150-51 (explaining that "the fact that [the plaintiff] served as an appointed representative of the County and Commissioner Kaplan, and she failed to support their interests" is "[p]erhaps more important" to the analysis "than [her] policy influence or public contact").

Again, the City's purpose in creating the Review Board was "[t]o enhance trust between the Tallahassee Police Department [] and the community by creating an *unbiased* panel of volunteers" to make policy recommendations. ECF No. 4-3 at 3 (emphasis added). So when Biro brought a cup with an antipolice expression on it to Review Board meetings, she spoke in a manner inconsistent with the City's interest in maintaining an unbiased Review Board.[4]

Considering all the relevant factors, I conclude that the *Pickering* balancing favors the City. The facts alleged, viewed in a light most favorable to Biro, do not support a plausible First Amendment claim. *Cf. Bell Atlantic Corp. v. Twombly*, 550

[4] Citing no legal authority, Biro insists that she was not, in fact, a political appointee. She acknowledged that the City Commission (a political body) appointed her, but she considers political appointees to be only those appointed by individual commissioners. The Review Board comprises five members "appointed individually by each member of the City Commission" and four members that the City Commission appoints. ECF No. 4-1 at 2. In Biro's view, then, the Review Board comprises five *political* appointees and four "other" appointees. This argument does not get far, nor does Biro's effort to distinguish *McKinley* on this basis. It is true that the *McKinley* plaintiff was appointed by an individual County Commissioner, but nothing in *McKinley* suggests there are separate analyses for those appointed by one and those appointed by several. In fact, *McKinley* found *Rash-Aldridge v. Ramirez*, 96 F.3d 117 (5th Cir. 1996), "instructive," and *Rash-Aldridge* involved a city council member "appointed to a seat allocated to the city council." 262 F.3d at 1151 (citing *Rash-Aldridge*, 96 F.3d at 119). For purposes of the analysis, what matters is that the employee was appointed to a position and the employee's speech was contrary to the interests of the appointing authority. Biro may be correct that she "is not the 'public face' of any particular council person," ECF No. 9 at 12, but that only means she is the "public face" of the City Commission as a whole.

U.S. 544, 570 (2007) ("Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.").

Biro indicated at the hearing that she has additional facts she could allege, and she sought leave to amend if the court dismissed. Based on the analysis above, it appears unlikely she can succeed in stating a plausible claim, but she will nonetheless have an opportunity to try.

CONCLUSION

The motion to dismiss (ECF No. 4) is GRANTED, and the Complaint (ECF No. 1) is DISMISSED. Biro may file an amended complaint within fourteen days.

SO ORDERED on March 13, 2023.

s/ *Allen Winsor*
United States District Judge