

Memo

Date: July 13, 2006

To: Patricia E. Ryan, Executive Director

From: John P. Gause, Commission Counsel

Re: [REDACTED]

Barb has requested administrative dismissal of the above-referenced complaint because the complaint implicates Respondent's First Amendment rights. I agree that the case should be administratively dismissed, with reasoning as follows.

[REDACTED] alleges that [REDACTED] retaliated against her for filing a charge of discrimination with the Commission by serving her with a "Notice of Claim" pursuant to the Maine Tort Claims Act. The Notice is a statutory prerequisite to suit against governmental bodies in Maine. See 5 M.R.S.A. § 8107. In the Notice (labeled "Highly Confidential"), which was apparently served on [REDACTED], the City of [REDACTED] and the City's attorney, [REDACTED] makes a number of allegations of unlawful activity, including that [REDACTED] issued a defamatory complaint letter about [REDACTED] in order to thwart [REDACTED]'s efforts to improve morale, enforce a governmental Internal Affairs' policy, enforce union contracts, uphold police officers' constitutional rights, and impede an Action Plan developed to deal with [REDACTED]'s and the Police Chief's management difficulties; that the City's attorney violated a Maine Bar Rule (conflict of interest) in her handling of the matter; that the City failed to properly investigate [REDACTED]'s complaint letter; that the City violated [REDACTED]'s statutory right to attend executive sessions; that the City, through two police officers, conducted an inadequate investigation that resulted in false and defamatory conclusions about [REDACTED] that the City then disclosed the results of the investigation to the press in violation of Maine confidentiality law; that the City failed to assist in stopping the publication of the report; and that the City has not verified that it will indemnify [REDACTED] (presumably related to the other Commission complaints). She asserts claims for libel, slander, defamation, intentional infliction of emotional distress, due process, civil and civil service rights, and other violations.

The First Amendment guarantees the right "to petition the Government for a redress of grievances." U.S. Const. Amend. I. With respect to petitions relating to employment disputes, they are only protected if they address "matters of public concern." *Tang v. Department of Ederly Affairs*, 163 F.3d 7, 11-12 (1st Cir. 1998). "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147-148 (U.S. 1983). The First Amendment does not reach speech where "a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest. . . ." *Id.* at 147. If the speech is not inherently a matter of public concern, courts will look at "whether the community has in fact

manifested a legitimate concern in the internal workings of the particular agency or department of government, and, if so, whether the 'form' of the employee's expression suggests a subjective intent to contribute to any such public discourse." *Fabiano v. Hopkins*, 352 F.3d 447, 454 (1st Cir. 2003) (quoting *O'Connor v. Steeves*, 994 F.2d 905, 914 (1st Cir. 1993)).

Here, I think it is a close call whether [REDACTED] Notice of Claim addresses matters of public concern. On the one hand, she delineates the Notice "Highly Confidential," strongly suggesting that she wants it kept from the public discourse. In addition, aspects of the Notice certainly are concerned primarily with [REDACTED] personal interest, e.g., that the City did not conduct an investigation to clear her name. On the other hand, issues such as [REDACTED] alleged efforts to thwart the Internal Affairs investigation (if officers' constitutional rights were being violated, the City would be exposed to liability) and violations of the Maine Bar Rules by the City's attorney do seem to be inherently matters of public concern. See *Mullin v. Town of Fairhaven*, 284 F.3d 31, 39 (1st Cir. 2002) (whistleblowing activity is inherently a matter of public concern). Cf. *Denning v. Povich*, 2004 U.S. Dist. LEXIS 7733 (D. Me. 2004) (district attorney's repeated offensive characterization of female victims addressed a matter of public concern). Accordingly, I think we should conclude that [REDACTED] Notice of Claim was protected by the First Amendment.

If the Notice of Claim is protected by the First Amendment, [REDACTED] is immune from liability for filing it even if doing so would otherwise be unlawful retaliation under the MHRA. Cf. *Professional Real Estate Investors v. Columbia Pictures Indus.*, 508 U.S. 49, 56 (U.S. 1993) (antitrust case). The only exception to this immunity is if the Notice were a "sham," meaning "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits." *Id.* at 60. Here, we have no reason to believe that the Notice is "objectively baseless."

Accordingly, I would recommend administrative dismissal of this case based on a lack of jurisdiction. First, however, I think we should write to Complainant's attorney regarding the request for administrative dismissal and request a response.