

Federal Court Dismisses Plaintiff's First Amendment Claim

Mark Thomas v. Town of Salisbury, 2017 WL 4374394 (D. Mass. 2017)

On September 30, 2017, United States Magistrate Judge Judy Dein granted defendants' Motion for Summary Judgment in an action defended by Pierce Davis & Perritano attorneys' Adam Simms and John J. Cloherty III.

The plaintiff, Mark Thomas, is a former police officer for the Town of Salisbury. In essence, Mr. Thomas claims that after he delivered a two-page memorandum to the Chairman of the Board of Selectmen, which contained a number of allegations of sexual harassment concerning the then-Acting Chief of Police, the Town Manager retaliated against Mr. Thomas by instituting a "flawed investigation" which "targeted" Thomas and ultimately led to his termination from the Salisbury Police Department.

Mr. Thomas filed a grievance and was later ordered reinstated by the Arbitrator. Mr. Thomas then filed suit claiming the Town of Salisbury, the Town Manager and a number of Salisbury police officers violated various of his civil rights. At the outset, Judge Dein dismissed most of Mr. Thomas's civil rights claims. See *Mark Thomas v. Town of Salisbury, et al.*, 134 F. Supp.3d (D. Mass. 2015).

At the conclusion of discovery, relying on the Supreme Court's decision in *Garcetti v. Ceballos*, the Town of Salisbury moved for summary judgment with respect to Mr. Thomas's First Amendment retaliation claim. Under *Garcetti*, to determine whether an adverse employment action violates a public employee's right of free speech, among other things, a plaintiff must establish that he was speaking as a "citizen" on a matter of public concern. The municipal employer can avoid liability if it can establish, instead, that the plaintiff's speech was part of his official duties and, hence, the employee was not speaking as a citizen.

Here, Judge Dein found that Mr. Thomas prepared and delivered his two-page memorandum in his capacity as a police officer and not as a private citizen. Judge Dein noted that Police Department regulations and policies call for police officers to monitor and report sexual harassment on the job. In addition, Mr. Thomas's letter to the Chairman stated that he was disclosing the alleged sexual harassment of the Chief of Police "as a certified sexual assault investigator." Considering the "totality of the circumstances," Judge Dein concluded that Mr. Thomas was not engaged in protected speech when he made his complaints about the former Police Chief to the Board of Selectmen. Judge Dein went on to hold that the Town Manager was entitled to qualified immunity because the contours of Mr. Thomas's free speech rights were not "clearly established" at the time he was terminated by the Town Manager.