20-2789

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNIFORMED FIRE OFFICERS ASSOCISTION, ET, AL.,

Plaintiffs-Appellants,

v.

BILL DE BLASIO, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE CITY OF NEW YORK, THE CITY OF NEW YORK, ET AL.,

Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

AMICUS BRIEF IN SUPPORT OF PLAINTIFFS-APPELLANTS

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STATEMENT OF INTEREST[1]

New York State Professional Fire Fighters Association, IAFF, AFL-CIO ("NYSPFFA") is a labor organization representing approximately 18,000 men and women working full-time as members of municipal fire departments and fire districts across New York State. NYSPFFA advocates on behalf of members who serve in 107 local unions, 41 counties and in the boroughs of New York City. NYSPFFA's member locals range in size from 9,000 to 5 members. NYSPFFA provides both legislative and legal advocacy for all its member locals in New York State and is, therefore, uniquely positioned to provide this Court with information about the larger implications of this appeal on professional Fire Fighters across the State who provide vital services to New York's citizens.

The Association has a substantial interest in the outcome of this appeal. The repeal of Civil Rights Law § 50-a[2] and the indiscriminate release of employment

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), NYSPFFA states that no party's counsel authored this brief in whole or in part; and no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than NYSPFFA and its members—contributed money that was intended to fund preparing or submitting this brief.

[2] The repeal of Civil Rights Law § 50-a applied to records of police and law enforcement personnel as well as "individuals employed as firefighters or firefighter/paramedics," although the justifications for repeal generally did not concern or apply to firefighters or paramedics. *See*, Sponsor Memo, N.Y. State Senate Bill S 8496 (2020) (focusing on law enforcement personnel and referencing "Police-involved killings by law enforcement officials who have had histories of misconduct complaints.")

disciplinary records directly affects NYSPFFA's members and implicates their constitutional due process rights under the Fourteenth Amendment to the United States Constitution. The records of Fire Fighter-members of the NYSPFFA previously subject to Civil Rights Law § 50-a may now be released and publicly disclosed. These records may include unsubstantiated allegations of misconduct, settlement agreements, and disciplinary charges for which Fire Fighter-members have been exonerated.

As its statewide membership will be affected by the Court's determination of this appeal, the Association has an interest in the controversy that is distinct from the parties and an interest in this litigation.

ARGUMENT

The Due Process Clause of the Fourteenth Amendment provides that no state shall "deprive any person of life, liberty, or property, without due process of law." To establish a violation of due process, a plaintiff must (1) identify a constitutionally protected interest of which she was deprived by state action; and (2) show that she did not receive the process that was constitutionally due. *Narumanchi v. Bd. of Trs. of Conn. State Univ.*, 850 F.2d 70, 72 (2d Cir. 1988). Once a plaintiff has established that a state deprived him of a constitutionally protected interest, a court "asks what process was due to that plaintiff, and inquires whether that constitutional minimum

was provided in the case under review." *Id.* (internal citations and quotation marks omitted).

"Due process is flexible and calls for such procedural protections as the particular situation demands." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (citation omitted). At the most fundamental level, due process ensures the right to be heard "at a meaningful time and in a meaningful manner." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970).

The process due in a specific situation, however, is determined by the three factor balancing test enunciated by the Supreme Court in *Mathews*: (1) the private interest affected; (2) the risk of erroneous deprivation through the procedure used and the probable value of additional or substitute procedures; and (3) the government's interest. *Mathews*, 424 U.S. at 335. Procedural due process, "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Gilbert v. Homar*, 520 U.S. 924, 930 (1997). Rather, it is "flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

I. THIS APPEAL IMPLICATES CONSTITUTIONALLY PROTECTED INTERESTS OF NYSPFFA MEMBERS

While "[a] person's interest in his or her good reputation alone, apart from a more tangible interest, is not a liberty or property interest sufficient to invoke the procedural protections of the Due Process Clause or create a cause of action under

[42 U.S.C.] § 1983," the loss of reputation may be the basis for a constitutional claim "if that loss is coupled with the deprivation of a more tangible interest." *Patterson v. City of Utica*, 370 F.3d 322, 329-30 (2d Cir. 2004). Such an action is referred to as a "stigma-plus" claim. *DiBlasio v. Novello*, 344 F.3d 292, 302 (2d Cir. 2003) (injury to one's reputation (the stigma) coupled with the deprivation of some tangible interest or property right (the plus), without adequate process). To prevail on a stigma-plus claim, a plaintiff must show "(1) the utterance of a statement sufficiently derogatory to injure his or her reputation, that is capable of being proved false, and that he or she claims is false, and (2) a material state-imposed burden or state-imposed alteration of the plaintiff's status or rights," *Vega v. Lantz*, 596 F.3d 77, 81 (2d Cir. 2010) (internal quotation marks omitted), such as the "loss of governmental employment or deprivation of a legal right or status, such as a loss of job opportunities." *See Abramson v. Pataki*, 278 F.3d 93, 103 (2d Cir. 2002). Importantly here, there is "*no rigid requirement [] that both the 'stigma' and the 'plus' must issue from the same government actor* or at the same time," but they must be "sufficiently proximate." *Velez v. Levy*, 401 F.3d 75, 89 (2d Cir. 2005) (emphasis added).

"Statements that 'denigrate the employee's competence as a professional and impugn the employee's professional reputation in such a fashion as to effectively put a significant roadblock in that employee's continued ability to practice his or her

profession'" will satisfy the "stigma" requirement. *Mudge v. Zugalla*, 939 F.3d 72, 81 (2d Cir. 2019) (quoting *Donato v. Plainview-Old Bethpage Cent. Sch. Dist.*, 96 F.3d 623, 630-31 (2d Cir. 1996)); *see also Huntley v. Cmty. Sch. Bd. of Brooklyn*, 543 F.2d 979, 985 (2d Cir. 1976) (impairment of future employment found where stigmatizing statements made it "unlikely that [the plaintiff] would ever have a chance to obtain another supervisory position in the public schools or elsewhere"), *cert. denied*, 430 U.S. 929 (1977); *O'Neill v. City of Auburn*, 23 F.3d 685, 692 (2d Cir. 1994) (holding that a government announcement that an employee is incompetent and can no longer carry out the functions of her or his job would place a considerable burden on that employee's ability to obtain future employment); *Behrend v. Klein*, 2006 BL 101406, 9 (E.D.N.Y. Sept. 25, 2006) (involving placement on an ineligibility list).

"Burdens that can satisfy the 'plus' prong under this doctrine include the deprivation of a plaintiff's property, and the termination of a plaintiff's government employment." *Sadallah v. City of Utica*, 383 F.3d 34, 38 (2d Cir. 2004) (citations omitted). Apart from termination of employment and loss of ability to obtain future employment as a Fire Fighter, many NYSPFFA members compete for promotional opportunities and the public release of false and stigmatizing information in an internet database would likely destroy any chance for selection and appointment. For example, to become a lieutenant, an applicant generally must take a civil service

exam, and the administering authority then ordinarily provides a ranked list of qualified individuals. When considering applicants, the applicant's candidacy will be irreparably tainted by the disclosure of stigmatizing information previously subject to the confidentiality provisions of Civil Rights Law § 50-a.

The unrestricted, wholesale, public disclosure and dissemination of all unsubstantiated and false allegations of misconduct, settlement agreements, and disciplinary charges for which NYSPFFA members have been exonerated will be undoubtedly stigmatizing to some NYSPFFA members and implicate protected liberty interests and—depending on the nature of the individual records released—may impair and impose a roadblock on obtaining employment as a Fire Fighter and destroy any chance at promotion, sufficient to satisfy a "stigma-plus" claim.

II. THE DUE PROCESS CONSIDERATIONS RAISED IN THIS APPEAL WEIGH IN FAVOR OF PLAINTIFFS-APPELLANTS

An indiscriminate document dump of all employment disciplinary records previously subject to Civil Rights Law § 50-a, including unsubstantiated allegations, otherwise confidential settlement agreements, and disciplinary charges for which employees have been exonerated does not satisfy the *Mathews* three-factor balancing test to determine what process is due. *Mathews*, 424 U.S. at 335. It does not allow affected employees to be heard "at a meaningful time and in a meaningful manner." *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970).

First, as explained forth above, NYSPFFA's Fire Fighter-members have a significant interest in the non-disclosure of stigmatizing and false information, which, regardless of the truth of the allegations (including circumstances where the Fire Fighter-member has been exonerated), could impose a roadblock to future employment in his profession and arbitrarily and unjustifiably foreclose promotional opportunities. Courts have opined that "we should not ignore that disciplinary investigations are just that: investigations into charges of misconduct that may or may not have merit. It may be the case that the public would not treat the mere fact of investigation as proof of misconduct...On the other hand, disclosure of the fact of disciplinary investigations may taint the reputation of a police officer if members of the public assume that where there is smoke, there is fire." *O'Malley v. Vill. of Oak Brook*, No. 07 C 1679, 2008 BL 374437, 2008 US Dist Lexis 8763 (N.D. Ill. Feb. 06, 2008).

Second, the probable value of additional or substitute procedures, such as further distinguishing between different types of disciplinary records, instead of unceremoniously dumping all records formerly subject to Civil Rights Law § 50-a, is substantial. Painting all records with the same brush will undoubtedly result in more and greater deprivations to NYSPFFA's Fire Fighter-members' constitutionally protected interests.

Third, although there is a strong government interest in transparency, and it is acknowledged that many records subject to Civil Service Law § 50-a have a distinct public character, as they may relate to performance of official duties as a Fire Fighter, the government's interests are significantly diminished as to certain records, such as investigations based on provably false allegations which ultimately result in an employee's exoneration, especially those related to off-duty conduct. Analogously, the Supreme Court has acknowledged that one of the reasons for maintaining the secrecy of grand jury proceedings is to "assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule." *Douglas Oil Co. of Cal. v. Petrol Stops Northwest*, 441 U.S. 211, 218-19 (1979); *see also United States v. Proctor & Gamble Co.*, 356 U.S. 677, 681-82 n. 6 (1958) (need to protect innocent accused from disclosure of the fact that he has been under investigation).

CONCLUSION

Due process is "flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The constitutionally protected interest (or even the existence thereof), and the process due with respect to the government's deprivation of that interest, depends on the content of the records disclosed themselves and the circumstances surrounding the disclosure and dissemination of such records, including government actions taken

by other actors at different times. The consequences of an indiscriminate release of all records formerly non-disclosable under Civil Rights Law § 50-a will inevitably include the violation of employees' and former employees' constitutionally protected interests without due process, depending on the circumstances, and invite claims under 42 U.S.C. § 1983 from those affected under a "stigma-plus" theory.

NYSPFFA respectfully requests the Court consider its arguments and give appropriate weight to the constitutional issues raised by this appeal, which implicate the constitutional rights of NYSPFFA's Fire Fighter-members across New York State.

September 11, 2020 Respectfully Submitted,

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/s/ Richard S. Corenthal
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Dated: September 11, 2020

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