

FIRST AMENDMENT — FREEDOM OF SPEECH — COUNTY'S DISCHARGE OF PUBLIC EMPLOYEE FOR HER REPORT OF SEXUAL HARASSMENT VIOLATES EMPLOYEE'S RIGHT TO FREEDOM OF SPEECH — *Azzaro v. County of Allegheny*, 110 F.3d 968 (3d Cir. 1997).

The United States Court of Appeals for the Third Circuit recently held that a public employee's report, describing an instance of sexual harassment by a person acting under public authority, was constitutionally protected speech and, as such, precluded subsequent discharge in retaliation for the report. *Azzaro v. County of Allegheny*, 110 F.3d 968 (3d Cir. 1997). In so holding, the court reasoned that the discharge of public employees based on their speech violates the First Amendment when the speech relates to a matter of public concern and its value outweighs the government's interest in fulfilling its responsibilities in an efficient manner. *See id.* at 976 (citing *Connick v. Myers*, 461 U.S. 138 (1983)). The court concluded that the government's ability to discharge public employees on the basis of speech is limited to speech that does not have value to the process of self-governance. *See id.* at 977. While it is true that the *Azzaro* decision expands public content speech for public employees, such expansion is permissible because it enhances public officials' accountability to the electorate.

Beverly Azzaro and her husband were employees for the County of Allegheny. *See id.* at 970. In 1991, Azzaro went to see the executive assistant to the County Commissioner, Wayne Fusaro, about a verbal altercation involving her husband and other county employees. *See id.* During this meeting, Fusaro made sexual advances toward Azzaro. *See id.* Despite her initial reluctance to report the incident, Azzaro eventually told her supervisor, Tom Fox, while the two were having a conversation at a party. *See id.* at 971. Fox urged Azzaro to pursue a sexual harassment claim. *See id.* When she failed to report the incident, Fox told Joe Hohman, the director of the department in which Azzaro worked. *See id.* Hohman arranged for a meeting with County Commissioner Tom Foerster. *See id.* At this meeting, Hohman confronted Fusaro with the allegations of sexual harassment in front of Foerster and his assistant Kramer. *See id.* Just as the meeting unfolded, Azzaro reported the incident to Sal Sirabella who was the official responsible for sexual harassment reports. *See id.*

Azzaro alleged that shortly after she made the reports, Fusaro, acting under the authority of Foerster, initiated two instances of retaliation against her. *See id.* at 972. First, Fusaro established a committee to inspect the payroll of Azzaro's department in an attempt to identify employees who were disloyal to Foerster. *See id.* Azzaro alleged that this committee formulated a "hit list" of people whom the county would "retaliated against" as being anti-Foerster. *See id.* According to Azzaro, she was on this list. *See id.* The next instance began when George Braun replaced Hohman as the director of Azzaro's depart-

ment. *See id.* Braun, responding to a federal directive mandating budgetary cutbacks, immediately commenced the drafting of a reorganization proposal that not only eliminated Azzaro's department, but specifically named Azzaro and Fox as employees to be terminated. *See id.* Additionally, this same proposal called for the hiring of new employees and the increase of a number of employees' salaries. *See id.* at 972-73. Braun's proposal was endorsed by Commissioner Foerster and the County Salary Board. *See id.* at 973. Finally, no efforts were made to place Azzaro in another position within the county government. *See id.*

Azzaro filed a complaint in the United States District Court for the Western District of Pennsylvania that alleged: (1) retaliatory discharge against the County of Allegheny in violation of Title VII; (2) infringement of her First Amendment rights by all defendants in violation of 42 U.S.C. § 1983; and (3) violations of the Pennsylvania Human Rights Act. *See id.* Subsequently, the defendants filed a joint motion for summary judgment. *See id.* The district court granted the defendants' motion for both federal claims and refrained from exercising supplemental jurisdiction over Azzaro's state-law claim. *See id.* In granting summary judgment, the district court noted that there was no competent evidence to indicate that the defendants were aware of the alleged sexual harassment prior to the approval of the reorganization proposal. *See id.* (citing *Azzaro v. County of Allegheny*, No. 93-1589, slip op. at 19 (W.D. Pa. Mar. 31, 1995)). Therefore, the court concluded that Azzaro had failed to establish a causal connection between her report of sexual harassment and her discharge. *See id.* (citations omitted). Azzaro appealed the district court's grant of summary judgment and the Court of Appeals exercised plenary review. *See id.* The Court of Appeals reversed and remanded the district court's order finding that Azzaro had established sufficient evidence from which a reasonable factfinder could conclude that there was a causal connection between Azzaro's report and her subsequent discharge. *See id.* at 970. Further, the court found that Azzaro's report was constitutionally protected speech, thus, precluding discharge in retaliation for her report. *See id.* at 978. Accordingly, the Court of Appeals concluded that a genuine issue of material fact existed as to Azzaro's federal claims and, as such, found the district court's grant of summary judgment to be inappropriate. *See id.* at 975-981.

Writing for the majority, Judge Stapleton first addressed whether the defendants' conduct violated Azzaro's First Amendment right to freedom of speech. *See id.* at 975. Judge Stapleton began by stating that the first inquiry was to determine whether Azzaro's reports were constitutionally protected. *See id.* In considering this first factor, the court found that public employees' rights to freedom of speech are less expansive than those of ordinary citizens. *See id.* (citing *Connick v. Myers*, 461 U.S. 138 (1983)). However, the court added that public employees are given some First Amendment protection against adverse employment actions used in retaliation for expressive conduct. *See id.* at

976 (citing *Connick*, 461 U.S. at 143-44). Therefore, the court concluded that in order to receive constitutional protection, Azzaro's reports must have been related to a matter of public concern and their value must have outweighed the county's interest in fulfilling its reorganization objectives in an efficient manner. *See id.*

In delineating what constitutes public concern speech, the majority found that such speech must contribute to the interchange of political and social ideas. *See id.* at 977. Accordingly, the court held that the proper analysis is whether the speech is important to the process of self-government given the form, content and context in which the speech takes place. *See id.* Relying heavily on *Connick*, the court noted that expressions relating to matters of public concern are not limited to public communications. *See id.* The court reasoned that private communications are as valuable to effective self-government as public communications because such communications promote the dissemination of political and social ideas. *See id.* The court concluded that "if the content and circumstances of a private communication are such that the message conveyed would be relevant to the process of self-governance if disseminated to the community," the communication would relate to a matter of public concern. *Id.* at 978 (quoting *Connick*, 461 U.S. at 146-48). Additionally, the court concluded that a communication may relate to a matter of public concern if the public would find it relevant in evaluating the performance and fitness of a public official. *See id.* (citations omitted).

Following *Connick*, the majority found that Azzaro's reports were related to a matter of public concern. *See id.* Noting that sexual harassment is a form of gender discrimination, the majority reasoned that gender discrimination by a person acting under public authority, was as much a concern to the public as racial discrimination. *See id.* Further, the court found that Azzaro's reports made Fusaro's wrongful conduct public. *See id.* The content of such information, the court reasoned, would be relevant to public concern because it would aid the citizens in their evaluation of Fusaro's performance and fitness for office. *See id.* Since the majority found that these reports contributed to the dissemination of political and social ideas, Judge Stapleton concluded that the content of Azzaro's reports related to a matter of public concern. *See id.*

However, Judge Stapleton cautioned that the value of public content speech can be decreased by the circumstances in which it is used. *See id.* at 979. In making this determination, the court noted that Azzaro was reluctant to complain and only did so because she wanted to protect her job. *See id.* Although this could have negatively affected the value of her speech, the court reasoned that the electorate would not have rejected her complaint on the basis of her disposition. *See id.* Further, the court noted that a public employee's motive, although relevant, is not dispositive on the issue of whether a communication relates to a matter of public concern. *See id.* at 978. As a result, the majority found that the form and context of Azzaro's reports did not detract from their

value to the process of self-government. *See id.* at 979. Accordingly, the majority concluded that Azzaro's reports of sexual harassment addressed a matter of public concern. *See id.*

Judge Stapleton next sought to determine whether the value of Azzaro's reports of sexual harassment outweighed the county's interest in achieving reorganization in an efficient manner. *See id.* at 980. In applying the balancing test, the majority first looked to the weight of Azzaro's interest in speaking about a matter that related to public concern and the value that the citizens of Allegheny would derive from Azzaro's freedom to speak on such matters. *See id.* Although it admitted that the weight of Azzaro's personal interest was not that strong, the court found that there was substantial public interest in the reports because they contributed to the public's evaluation of the performance and fitness of elected officials. *See id.*

The majority balanced these interests against the county's interest in promoting efficiency of services through its employees. *See id.* According to the court, the governmental interests were negligible. *See id.* Judge Stapleton reasoned that the presence of a sexual harassment policy showed that Allegheny County expressly recognized that such complaints were "important to its ability to serve the public effectively and efficiently." *Id.* Further, the court found that Azzaro's reports would not have threatened governmental efficiency because she and Fusaro did not work in the same office or have an employment relationship of any form. *See id.* The court concluded that the value of Azzaro's reports of sexual harassment clearly outweighed the county's interests in efficient government. *See id.* Accordingly, Judge Stapleton held that Azzaro could not be discharged on the basis of her reports because the reports were protected under the First Amendment. *See id.* at 981.

Once the court had determined that Azzaro's reports were protected under the First Amendment, the court next determined whether Azzaro's reports were a motivating factor in her discharge or whether she would have been discharged for other reasons. *See id.* Judge Stapleton, addressing this issue in the context of Azzaro's Title VII claim for retaliatory discharge, focused the court's plenary review on Commissioner Foerster and his assistants. *See id.* at 973-74. Through this review, the court concluded that the district court failed to establish a causal connection between Azzaro's reports and her discharge because the district court had overlooked a substantial amount of direct and circumstantial evidence. *See id.* at 973.

The majority regarded the statements made by Hohman during the confrontation with Fusaro as valuable evidence because these statements bridged the inferential gap allowing the court to infer that Commissioner Forester and his assistants were aware of Azzaro's report. *See id.* According to the court, Hohman stated that Azzaro had gone to see Fusaro about a recent incident involving Azzaro's husband. *See id.* The majority found that this statement, combined with the fact that Fusaro and Kramer were familiar with the incident

involving Mr. Azzaro, was sufficient evidence to support an inference that both men knew that Azzaro had reported the sexual harassment. *See id.* Further, the court found that Fusaro's presence at the meeting and the fact that Fusaro and Kramer were close advisors to the Commissioner, made it possible for a jury to infer that Foerster was aware of Azzaro's allegations at some point before the reorganization. *See id.* Judge Stapleton next found enough evidence to establish an inference that Braun knew that Azzaro was being retaliated against by the defendants. *See id.* at 974. Noting that the evidence showed that Braun had conferred with Fusaro and Kramer on a regular basis, the court concluded that a jury could infer that Braun at least knew that Azzaro was a target of retaliation by the defendants. *See id.* Accordingly, the majority concluded that sufficient evidence existed to permit a reasonable jury to infer that, prior to reorganization, Commissioner Foerster and his assistants were aware that Azzaro was the one who had reported the sexual harassment. *See id.*

Judge Stapleton concluded that a causal connection was made between Azzaro's reports and her discharge based on evidence showing that these men actively sought to retaliate against Azzaro. *See id.* at 974-75. The court found that there was no evidence present to explain why Fusaro acted to have Azzaro placed on the "hit list" other than as a method of retaliation for her reports of sexual harassment. *Id.* at 974. Similarly, the court found that Braun's continued efforts to incorporate Azzaro's discharge in the proposal, despite his knowledge of the defendants' retaliatory motives, permitted an inference that Braun acted for no other reason than to procure the retaliatory discharge. *See id.* Additionally, the majority concluded that the reorganization proposal was a sham used to conceal the defendants' retaliation. *See id.* at 975. Noting that the proposal called for salary increases, new hires and was two years earlier than required by the budgetary calendar, the court concluded that Azzaro's discharge based on budgetary cutbacks was merely pretext. *See id.* Finally, the court found that Azzaro's discharge was unlike previous discharges by the county because the county had never eliminated an occupied, non-temporary position. *See id.* at 974. Judge Stapleton concluded that there was enough evidence to infer retaliatory discharge. *See id.* at 975. Accordingly, the majority concluded that a genuine issue of material fact existed as to both of Azzaro's federal claims and, as such, found the district court's grant of summary judgment to be inappropriate. *See id.* at 975-981.

Judge Becker, joined by Judges Scirica, Roth and Alito, joined with the majority, but wrote a separate concurring opinion. *See id.* at 981 (Becker, J., concurring). In an attempt to clarify the majority decision, Judge Becker warned that the court had not ruled that sexual harassment constitutes public concern speech *per se*. *See id.* at 981 (Becker, J., concurring). Judge Becker pointed out that the majority failed to express its opinion about complaints filed by public employees alleging an isolated incident of inappropriate conduct

against a non-supervisory co-worker. *See id.* By failing to express its opinion on this issue, Judge Becker argued, that the majority appeared to have implied that any conduct rising to the level of sexual harassment would be deemed public concern speech. *See id.* In an attempt to give this issue boundaries, Judge Becker introduced a number of factors that could cause sexual harassment complaints to fall short of public concern speech. *See id.*

Judge Rosenn joined with the majority and dissented in part, agreeing that summary judgment against Azzaro's Title VII claim was inappropriate because sufficient evidence existed permitting a reasonable factfinder to conclude that Allegheny County's conduct constituted retaliatory discharge. *See id.* at 981 (Rosenn, J., dissenting in part). Judge Rosenn, however, sharply criticized the majority for its expansion of public content speech for public employees. *See id.* at 982 (Rosenn, J., dissenting in part). Noting that the majority's ruling ran contrary to previous federal and Supreme Court decisions, Judge Rosenn found that such expansion would have the detrimental effect of elevating non-public personal and confidential conversation to the level of constitutionally protected speech. *See id.* Judge Rosenn reasoned that Azzaro's reports of sexual harassment constituted personal and confidential conversation that was not meant for the public. *See id.* at 983-86 (Rosenn, J., dissenting in part). Therefore, Judge Rosenn concluded that Azzaro's reports of sexual harassment were not matters of public concern worthy of First Amendment protection. *Id.* at 986 (Rosenn, J., dissenting in part).

Judge Rosenn began by restating the applicable law in a manner similar to that of the majority. *See id.* Judge Rosenn found that, although their First Amendment rights are more restricted than ordinary citizens, public employees do have a constitutional right to speak on matters of public concern. *See id.* Additionally, Judge Rosenn found, as the majority had, that speech pertaining to sexual harassment may relate to a matter of public concern when it has political and social value that is useful to the community. *See id.* at 983 (Rosenn, J., dissenting in part). However, Judge Rosenn deviated from the majority by focusing on the private nature of Azzaro's communications. *See id.*

Relying on the court of appeals cases that were given short shrift by Judge Stapleton, Judge Rosenn argued that the form, content and context of Azzaro's reports did not involve matters of public concern. *See id.* at 983-86 (Rosenn, J., dissenting in part) (citations omitted). According to Judge Rosenn, Azzaro's communications with Fox and Sirabella were not reports because Azzaro failed to assert actual complaints or file formal written reports. *See id.* at 984 (Rosenn, J., dissenting in part). In addition, Judge Rosenn stressed the fact that Azzaro's desire to keep her communication confidential was prevalent in the record. *See id.* at 983 (Rosenn, J., dissenting in part). As a result, Judge Rosenn concluded that the form of her communications took on a personal and confidential character. *See id.*

Further, Judge Rosenn found that the context of the communications was

not related to a matter of public concern. *See id.* Noting that the communication to Fox took place at a party four months after the alleged incident, Judge Rosenn was of the opinion that the timing and social setting of the communication were “unequivocally personal.” *Id.* Similarly, Judge Rosenn found Azzaro’s communications to Sirabella to be personal in nature because she went to see him for his advise on how to protect her job, not to voice a complaint. *See id.* at 983-84 (Rosenn, J., dissenting in part). Therefore, Judge Rosenn concluded that the context of Azzaro’s communications was personal in nature. *See id.*

Finally, Judge Rosenn found that, given the context in which the communications were made, Azzaro’s reports were devoid of political and social content because public concern was not one of her primary considerations. *See id.* at 984 (Rosenn, J., dissenting in part). Although Judge Rosenn’s focus on the significance of the primary purpose of Azzaro’s speech (i.e. motive) was in direct conflict with the majority’s interpretation of *Connick*, Judge Rosenn reasoned that Azzaro had neither attempted nor intended to publicly expose Fusaro’s actions. *See id.* Since Azzaro’s communications were “spoke[n] as an employee attempting to resolve her private dilemma,” Judge Rosenn concluded that the content of Azzaro’s reports of sexual harassment were personal and confidential communications. *Id.* (quoting *Callaway v. Hafeman*, 832 F.2d 414, 417 (7th Cir. 1987)). Accordingly, Judge Rosenn concluded that Azzaro’s reports of sexual harassment were not matters of public concern worthy of First Amendment protection. *See id.*

Analysis

The *Azzaro* decision reflects the court’s political friendly interpretation of the First Amendment. The decision expands constitutional protection of public content speech for public employees to the extent that such speech has value to the process of self-governance. Although the dissent strongly objects to the court’s decision, such expansion is necessary to enhance public officials’ accountability to the electorate. *See id.* at 982 (Rosenn, J., dissenting in part).

Political speech has long been held as one of the most important forms of speech. As Judge Stapleton explained, the First Amendment was “fashioned to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.” *Id.* at 976 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957) (citations omitted)). The expansion of public concern speech in *Azzaro* helps to enhance public officials accountability to the electorate because voting is integrally related to the First Amendment right to free speech. By enhancing public employees’ freedom of speech, the court is increasing the pool of political ideas with information that would otherwise be unavailable to ordinary citizens. Such information enhances accountability because voters are more aware of the actions of public officials and have the

means to make an informed vote.

In his dissent, Judge Rosenn criticizes the majority's expansion of public concern speech as promoting inefficiency and administrative difficulties in the public workplace. *See id.* at 982 (Rosenn, J., dissenting in part). While it is true that some inefficiency will likely occur as a result of *Azzaro*, there is no indication that the inefficiency will rise to the level that Judge Rosenn foresees. As an example, *Azzaro* contained no evidence to indicate that governmental inefficiency would result because *Azzaro* and *Fusaro* neither had an employment relationship nor worked in the same department. Additionally, as future cases are decided, public concern speech will become more clearly delineated providing governments with guidelines for dealing with public employees' expressions that relate to matters of public concern.

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