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his actions. Second, collateral estoppel was inapplicable because the legal and factual issues decided in the criminal trial were not identical to those in the civil actions, and the City was not in privity with Giordano. The district court granted the City's motion and dismissed all claims brought against it. The plaintiffs appealed, arguing that the City should be held liable because Giordano was a final policymaker for the City, and was acting within his official policymaking capacity when he sexually abused the plaintiffs.

The U.S. Court of Appeals for the Second Circuit affirmed. Under *Monell v. Dep't of Social Servs.*, 436 U.S. 658 (1978), to prevail in a claim against a municipality under Section 1983 arising from the acts of a public official, a plaintiff had to prove, among other things, that an official policy of the municipality caused the constitutional injury. Where a plaintiff sought to hold a municipality liable for a single decision by a municipal "policymaker," he or she had to show that the official had final policymaking power with respect to the particular conduct being challenged. The fact that Giordano was the mayor in a "strong mayor" form of city government and was, as a result, the Chief Executive Officer of the City, was insufficient to satisfy these requirements. He acted entirely outside his official policymaking capacity when he misused his power to advance a purely personal agenda. His authority as mayor did not empower him to violate clearly established law, and he was not an official policymaker with respect to the area of policy that encompassed his tortious acts: decisions to "sexually abuse young children are not 'made for practical or legal reasons' and are not in any way related to the City's interests." At most, he could be said to have had "some enforcement power with respect to the crime of sexual abuse based on his authority over the police department." Given the foregoing findings, the court found it unnecessary to address the collateral estoppel issue. *Roe v. City of Waterbury*, 542 F. 3d 31 (2d Cir. 2008).

Personnel and Employment

Political Speech Rights

In 2004, Town of Stoughton officials decided against renewing the contract of the police chief, Cachopa. This decision was controversial and a local campaign resulted to recall the selectmen who had voted in favor of the decision. The plaintiff, Welsh, was a detective sergeant (the highest-ranking position in his division) in the police department. He decided not to participate in activities related to the recall and to remain neutral. Cachopa apparently interpreted this as a sign of betrayal. During the campaign, the police department began investigating allegations of misconduct by Cachopa. Welsh was asked by the-then acting police chief to assist in this investigation, and while doing so, Welsh was subjected to harassment by other officers (for example, he found a bullet in his mailbox). Ultimately, the recall campaign was successful and Cachopa resumed his position as police chief for a short time, before being placed on administrative leave for his previous misconduct. The new acting police chief, a Cachopa supporter, decided not to reappoint Welsh to his detective sergeant position, replacing him with an officer who had supported Cachopa. (Other officers who supported him were promoted as well.) Welsh filed a Section 1983 action against the Town, Cachopa, and others who had participated in the decision not to reappoint him. Welsh claimed retaliation in violation of his First Amendment rights based on the refusal to reappoint, and by subjecting him to a hostile work environment. The district court granted summary judgment for the defendants.

The U.S. Court of Appeals for the First Circuit affirmed in part and reversed and remanded in part. Reviewing the decision not to reappoint Welsh, the court held this did constitute a cognizable adverse employment action, based on *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), where the Supreme Court held that adverse actions short of outright dismissal or demotion, such as denials of a promotion or rehiring, could still constitute adverse employment actions. However, the court limited liability only to the officer directly having the authority to appoint. (Here, it was the acting police chief, not Cachopa.) The court also dismissed the claim against Cachopa for harassment, as Cachopa was not responsible for the harassment perpetrated by other officers (who were not named as defendants). According to the First Circuit, a supervisor who did not participate in harassment could only be held liable if, among other factors, the supervisor's "action or inaction was affirmatively linked to the behavior in the sense that it could be characterized as supervisory encouragement, condonation or acquiescence or gross negligence of the supervisor amounting to deliberate indifference." Welsh, in this case, failed to produce evidence that Cachopa's conduct constituted such encouragement or acquiescence. The court also addressed the claim that the defendants violated free speech and political affiliation rights. Pursuant to *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006), Welsh was required to show that he spoke on a matter of public concern. Welsh contended that the matter of public concern was the recall election, and that his silence constituted speech. The court agreed, but did not find an actionable violation of speech rights because Welsh did not produce evidence that he was ordered to endorse, support, or reject the recall campaign. The court, however, did find an actionable violation of his right to political affiliation, as Welsh produced evidence that officers who did not support the recall campaign were perceived as opposing it and were harassed. "[T]he freedom not to support a candidate or cause is integral to the freedom of association and freedom of political expression protected by the First Amendment." The case was remanded to the district court. *Welch v. Ciampa*, 542 F. 3d 927 (1st Cir. 2008).

Speech Rights—Working Conditions

In another employee speech-retaliation case, *Miller v. Clinton County*, 544 F. 3d 542 (3d Cir. 2008), Miller was employed as a probation officer in the Clinton County Probation Office. The employees had a collective bargaining agreement with the County.

Miller felt one of her supervisors, F., was ineffective and unprofessional (F. allegedly referred to probationers as "scum," saying they did not deserve the money that the office spent on them). Miller, who had a different philosophy with respect to the incarcerated, wrote a letter expressing her concern about F. and another worker to a judge overseeing the office. The letter referred to the "stressful conditions" under which she worked and stated, "I know that you are friends with both [co-workers] and you may not appreciate my candor but I believe that the time has come to explain my position to the court." The judge fired Miller immediately. She sued, claiming a protected interest in her continued employment, and alleging that the failure to provide her with adequate notice and an opportunity to respond was a violation of the Fourteenth Amendment's guarantee of due process. She also asserted that her expression was protected under the First Amendment's guarantee of free speech and that she had been improperly terminated for exercising her speech rights. The judge moved to dismiss Miller's claims as against him under Federal Rule of Civil Procedure 12(b)(6), and also claimed immunity from suit. The district court denied his motion (and refused to convert it to a summary judgment motion), as he had not established his entitlement to qualified immunity—the record did not support his claim that he had not violated Miller's clearly established constitutional rights. Further, it held that Miller's due process claim could not be dismissed at the pleading stage because she alleged that her employment was governed by the collective bargaining agreement.

On appeal, the U.S. Court of Appeals for the Third Circuit reversed and remanded, finding that Miller failed to establish that the defendant judge's conduct violated her constitutional rights. Therefore, the defendant was entitled to qualified immunity. "Based on our phased inquiry under [*Saucier v. Katz*, 533 U.S. 194, 201 (2001)], we conclude the district court erred in not dismissing Miller's complaint because her allegations do not establish either a violation of her right to free speech under the First Amendment, or a denial of due process." Dealing with the speech claims, the court held that Miller's statements (that the probation office was being poorly run and that her supervisors called clients "scum") "undoubtedly" referred to matters of public concern. However, the context in which the statements occurred established that the speech was not protected. The letter, which started with an indication that Miller could no longer tolerate the stressful working conditions, "focused upon her private grievances as an employee." By including the "attack on management and her supervisors, Miller's letter did manage to brush ever so gently against a matter of public concern...[but] that seemingly serendipitous encounter does not convert her personal grievance into protected speech." The district court also erred in not dismissing Miller's due process claim, as state law precluded local governments from employing workers on any term other than as at-will employees, unless explicit enabling legislation to the contrary existed. The State's Public Employee Relations Act, which allowed for collective bargaining between public employees and local governments, limited the matters that could be subjected to collective bargaining, and could not "undermine" the general rule that public workers were at-will employees. Accordingly, the collective bargaining agreement that Miller sought to rely on could not confer any property interest in her employment or elevate her to something other than an employee-at-will.

Town Attorney's Employment

Hesse, the plaintiff, worked as a town attorney for Jackson, Wyoming pursuant to a contract. The contract provided for a two-year term and an automatic renewal, unless notice of termination was given at least six months prior to the end of the term. Shortly before Hesse was to start on a new term, the town administrator and the town clerk had separate heated arguments with him, arising from Hesse questioning their various decisions. Because of these incidents, the town administrator and mayor contacted another lawyer to inquire about terminating Hesse's employment. Four weeks into the new contract term, the mayor told Hesse that unless Hesse resigned, he would be asking the town council to fire Hesse. The mayor offered to pay the benefits listed in the termination clause in the employment contract. Hesse resigned, collected the benefits, and sued the Town and the officials involved in his removal. The district court denied the summary judgment motion by the Town and local officials, including the officials' claim for qualified immunity, and the defendants appealed the ruling on qualified immunity.

The U.S. Court of Appeals for the Tenth Circuit began by reviewing the qualified immunity test in *Saucier v. Katz*, 533 U.S. 194, 201 (2001). The threshold question is whether the "facts alleged show the [official's] conduct violated a constitutional right;" if so, the second inquiry is to "determine whether that right was clearly established at the time of the alleged violation." To answer the threshold question, the court reviewed whether or not there was a constitutionally protected "legitimate expectation in continued employment." Under state law, a town attorney could be removed by a mayor, unless otherwise provided by ordinance. The local ordinance provided that the town attorney "shall be hired and may be removed by the mayor, by and with the advice and consent of the [council]." The court determined that neither state nor local law provided Hesse with a protected interest in continued employment. Next, the court reviewed the employment contract. This stated that "[n]othing in this agreement shall prevent, limit or otherwise interfere with the right of the Town Council to terminate the services of the Employee at any time, subject only to provisions set in Section 4...". (Section 4 provided for the benefits to be paid to Hesse if he was terminated without cause. These were the benefits that were accepted by the plaintiff before his resignation.) The court held that Hesse did not have a constitutionally-protected interest in continued public employment, and reversed and remanded the case back to the district court for further pro-

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