

Court of Appeals, State of Michigan

ORDER

Theron E. Hughes v Arthur Timko

Docket No. 255229

LC No. 03-000598-NZ

David H. Sawyer
Presiding Judge

Michael J. Talbot

Stephen L. Borrello
Judges

On the Court's own motion, the principal opinion issued February 28, 2006, in this matter is corrected as follows:

The principal opinion is signed by Judge Stephen L. Borrello, with Judge David H. Sawyer concurring in result only.

In all other respects, the February 28, 2006 opinion remains unchanged.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

MAR 07 2006

Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

Theron E. Hughes,

Plaintiff-Appellant,

v

Arthur Timko,

Defendant-Appellee.

UNPUBLISHED
February 28, 2006

No. 255229
Washtenaw Circuit Court
LC No. 03-000598-NZ

Before: Sawyer, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting summary disposition in favor of defendant under MCR 2.116(C)(10). We reverse.

I. FACTS

This case arose after defendant, the general manager of WEMU-FM (WEMU), terminated plaintiff's employment as host of an evening radio show. WEMU is Eastern Michigan University's non-commercial public radio station and is a National Public Radio (NPR) affiliate. Plaintiff, whose on-air name was "Thayrone," was an outspoken radio personality who hosted a music program called The Bone Conduction Music Show (BCMS), which aired on WEMU every Sunday evening from 7:00 p.m. to 11:00 p.m., for about fifteen years.¹ Plaintiff described the BCMS as "your basic musical slug-fest consisting of roots rock, hip-shakin' soul music and the industrial-strength rhythm and blues." Plaintiff also infused his radio music show with a heavy dose of conservative political rhetoric.

In March 1976, WEMU adopted a statement of purpose. As part of its purpose, the station emphasized the importance of neutrality in its programming. Specifically, the station's purpose statement contained the following statements regarding neutrality:

¹ WEMU hired plaintiff in January 1984. Plaintiff voluntarily left WEMU in 1985 to work for a commercial radio station and was rehired by defendant in 1989. Plaintiff hosted the BCMS on WEMU from 1989 until his employment was terminated on about April 2, 2003.

If WEMU is to achieve [its] broad, long-range goals, it must create an open environment in which everyone in the community feels welcome and comfortable. WEMU must provide the basic services of news, time, weather, and companionship for which listeners tune to a radio station. It must avoid making any group feel unwelcome, discriminated against, or unfairly treated. At the same time, WEMU must make everyone who tunes in a little uncomfortable by exposing them to new ideas, to other people they might not otherwise meet, and to new forms of expression. WEMU is confident that listeners will choose to endure the uncomfortable for the sake of the stimulation that it can bring and in the knowledge that all groups, tastes, and ideas are fairly treated in the program service.

. . . The listeners' confidence will be maintained only if WEMU maintains the highest possible standards of accuracy, neutrality, integrity, and propriety. . . .

* * *

NEUTRALITY: WEMU and WEMU staff must maintain total neutrality in news and public affairs programs. . . . Indeed, WEMU should jealously guard its neutrality and, hence, its vitality as a place where every view and taste is respectfully heard. Further, by making WEMU open to all views and all publics without discrimination or favor, it can maintain neutrality and vitality.

1. WEMU as a broadcast station or WEMU staff members never express personal opinions or editorial views on the air.

On October 16, 2001, defendant sent an e-mail to radio station employees that essentially underscored the station's neutrality policy. The e-mail asserted that it was "inappropriate for any on-air staff member to express an opinion on matters of controversy." The e-mail specifically identified the United States' retaliation against terrorists as a matter of controversy: "For example, the current armed retaliation [sic] of the United States against terrorist targets is controversial. . . . Therefore, on-air staff will not offer their opinions of this action. The WEMU news department along with NPR are presenting these positions within the content of our news service. This is where the the [sic] issue will remain."

On March 26, 2003, defendant sent another e-mail to radio station employees informing them that WEMU was postponing its fundraiser until April 25, 2003. According to the e-mail, an important reason for postponing the fundraiser was the station's "focus on coverage of the war in Iraq." The e-mail announced a change that would require "hourly newscasts in ALL programming" in which such newscasts would fit, and specifically included plaintiff's show in a list of shows in which the hourly newscasts were to be run. Plaintiff asserted that he never received this e-mail.

Plaintiff's final BCMS show aired on WEMU on March 30, 2003. During that show, plaintiff did not run any hourly NPR newscasts. Furthermore, he stated on the air that he was not going to run the newscasts and questioned the accuracy of NPR's, as well as other news networks', coverage of the war in Iraq:

I see right here we are supposed to be running news during the program. But that's not going to happen. Ah, we know for a fact that if you want a current and accurate assessment of what's going on, you sure as hell ain't listening to us. [O]k, you sure as hell ain't listening to us. You're going to go over to Fox News where they're not bending it one way or the other. That is a complete and accurate assessment of what's going on and they tell you right up front. They say hey man, we're pro-Americans but we're not going to lie to you. If something bad's happening over there we're going to tell you as opposed to 90% of the other reprehensible news coverage out there that's basically French. . . . The real deal if you want to get it is over at Fox News, ok? It ain't happening on NPR and it certainly ain't happening on CNN and all those other news broadcast[s] going on And it really ain't happening on the BBC. Oh, Lordy have mercy it ain't happening on the BBC. . . .

* * *

When I said get over to the Fox News Network for your update on your news . . . don't say that I can't believe you're supporting Fox News. I get my news from. Well you know what man, it's all news ok[? G]o over C[N]N[,] NBC, MSNBC, I don't care where you go, get a big perspective on it. [O]k, don't just listen to the hammer heads to paint the picture that oh my God we made a mistake . . . we're gonna lose, we're gonna lose. [O]h, my God[.]

During plaintiff's March 30, 2003, show, plaintiff also repeatedly discussed the United States' military involvement in Iraq and expressed his favorable opinion on that subject:

Hey man we got a fund drive coming up, we were supposed to be fund driving this week but the valiant attempt of the coalition of the willing to liberate the Iraqi people from that insane, insane person over there that's dead by the way. I'm convinced that Saddam Hussein is dead. He's gotta be dead man. There's no way he survived the first strike. [W]e knew what the hell was going on. We'll see what happened, history will tell and it's going to be real current history by the way. But I think he's whacked. This whole thing about his bodyguard showing up [at] a press conference with the second in command. I think Saddam Hussein is walking the back streets crying, possibly room temperature[.] But any way because of that, because of that razzmatazz because of the war going on and uh because of the coalition of the willing had the cahonies [sic] to get up and do the right thing. After 18 attempts, 18 attempts at getting everybody else to come along with us for a year of playing around, screwing around, waiting a year too long to do it, losing the element of surprise but still nonetheless ready to do it and do it the right way. . . . The [postponement of the fund drive] will present some challenges but not half as much as the challenges as our brave men and women are facing over there doing the right thing. . . .

* * *

We're doing the right thing, ok? Get use[d] to it, deal with it. Them Iraqi's [sic] are over there thanking the Lord that we came over to save their ass. Saddam has

been sticking them in acid baths, ok[?] His sons are out of control, out of control, insane tyrants, man, ok[?] And we are doing them all a favor. . . .

* * *

Hey man, Bruce just dialed in from Australia. He says he wants to play a song for all the Australian boys supporting the US action in Iraq. Thank you hey thank you guys man. You got some common sense over there. The British and Australian[s] seem to know what time it is. I'm totally ashamed and astounded and amazed that the Canadians don't know what time it is. But anyway, Tony Blair knows what time it is

After plaintiff's March 30, 2003, show aired, a listener e-mailed WEMU to complain about plaintiff's on-air comments. On April 2, 2003, defendant called plaintiff on the telephone and informed him that WEMU was going to take his show off the air. Publicly, WEMU cited "creative differences" as the reason for plaintiff's termination. However, in a memorandum from defendant to Juanita Reed, EMU's Vice-President for University Relations, which was dated April 3, 2003, defendant stated that he terminated plaintiff's employment as host of the BCMS for two reasons: first, plaintiff violated the radio station's policy prohibiting employees from expressing their opinions on controversial subjects when he expressed his support for the United States' military involvement in Iraq; and second, plaintiff "denigrated" NPR news and failed to air six minute hourly NPR newscasts that WEMU had scheduled to provide its listeners with continual coverage of the war in Iraq.

Plaintiff filed suit against defendant, alleging that defendant's termination of his employment violated his First Amendment right to free speech in violation of 42 USC § 1983.² According to plaintiff, defendant terminated his employment, in substantial part, because of plaintiff's on-air comments expressing support for President George W. Bush and the war in Iraq and observing that NPR's coverage of the war in Iraq was biased. Plaintiff contended that his termination was unconstitutional because his on-air statements involved matters of public concern.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(10) on three grounds. First, defendant contended that plaintiff's speech was not constitutionally protected under *Pickering v Bd of Ed of Twp High School Dist 205, Will Co*, 391 US 563; 88 S Ct 1731; 20 L Ed 2d 811 (1968), because the state's interest in efficiency outweighed plaintiff's interest in speech. Second, defendant argued that even if plaintiff's speech was constitutionally protected, defendant could show that he would have terminated plaintiff's employment even if plaintiff had

² 42 USC § 1983 provides, in relevant part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress

not asserted any personal opinions on the air. Finally, defendant asserted that he had qualified immunity for his discretionary decision to terminate plaintiff's employment because the law regarding the constitutionality of terminating a public employee based on the employee's exercise of his First Amendment rights is not clearly established because such a determination can only be made by applying the balancing test articulated in *Pickering*, and this test is subtle, difficult to apply, and not well-defined.

The trial court granted defendant's motion for summary disposition. In granting the motion, the trial court held that although defendant conceded that plaintiff's speech concerned matters of public concern, defendant's interest in promoting the efficiency of the public service it performed outweighed plaintiff's interest in speaking on matters of public concern while broadcasting on WEMU. According to the trial court, plaintiff's refusal to air the newscasts constituted "meaningful interference with the performance of his job duties" and insubordination and justified defendant's termination of plaintiff's employment. The trial court also ruled that plaintiff's speech regarding the United States' involvement in Iraq "undermined the legitimate goals of the station to tread lightly upon . . . controversial issues" and violated WEMU's neutrality policy. Therefore, the trial court ruled that defendant prevailed in the *Pickering* balancing and that plaintiff's speech was not constitutionally protected. Because the trial court concluded that plaintiff's speech was not constitutionally protected, it did consider whether defendant would have terminated plaintiff's employment absent plaintiff's speech and it did not rule on defendant's claim that he was entitled to qualified immunity. After the trial court entered its order granting defendant's motion for summary disposition, plaintiff moved for reconsideration. The trial court denied the motion.

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's ruling on a motion for summary disposition. *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Id.* The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). MCR 2.116(G)(5); *id.* at 626. When "reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10)," this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538-539; 620 NW2d 836 (2001), quoting *Harts v Farmers Ins Exch*, 461 Mich 1, 5; 597 NW2d 47 (1999).

This Court also reviews questions of law, such as constitutional issues and the applicability of qualified immunity, de novo. *Mitchell v Forsyth*, 472 US 511, 528; 105 S Ct 2806; 86 L Ed 2d 411 (1985); *Bengston v Delta Co*, 266 Mich App 612, 617; 703 NW2d 122 (2005); *People v Geno*, 261 Mich App 624, 627; 683 NW2d 687 (2004).

III. ANALYSIS

A. First Amendment

Plaintiff argues that the trial court erred in holding that plaintiff's speech was not protected under the First Amendment, US Const, Am I, and in granting defendant's motion for

summary disposition.³ “The First Amendment ‘was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’” *Connick v Myers*, 461 US 138, 145; 103 S Ct 1684; 75 L Ed 2d 708 (1983) (citations omitted). “[S]peech on public issues occupies the “highest rung of the hierarchy of First Amendment values,” and is entitled to special protection.” *Id.* (citations omitted). The First Amendment’s guarantee of freedom of speech protects government employees from termination because of their speech on matters of public concern. See *id.* at 146. In *Pickering*, the United States Supreme Court established the test for determining whether the termination of a public employee violates the First Amendment; in *Connick*, the Supreme Court refined this test. To establish a First Amendment violation, a plaintiff must first show that he spoke about a matter that may “be fairly characterized as constituting speech on a matter of public concern.” *Id.* If the plaintiff’s speech addressed a matter of public concern, then the court must apply a balancing test to determine whether “the interests of the [employee], as a citizen, in commenting upon matters of public concern” outweighs “the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.” *Pickering, supra* at 568; see also *Connick, supra* at 149-150. If the first two prerequisites are met, the speech is protected, and the plaintiff must show that his speech was a substantial or motivating factor behind the adverse employment decision. *Bd of Co Comm’rs v Umbehr*, 518 US 668, 675; 116 S Ct 2342; 135 L Ed 2d 843 (1996); *McFall v Bednar*, 407 F3d 1081, 1088 (CA 10, 2005). If the plaintiff satisfies all these factors, the burden then shifts to the employer to show, by a preponderance of the evidence, that it would have reached the same decision in the absence of the protected speech. *McFall, supra* at 1088; *Belcher v City of McAlester, Oklahoma*, 324 F3d 1203, 1207 (CA 10, 2003). Whether speech involves a matter of public concern and whether the employer’s interest outweighs the employee’s interest in the *Pickering* balance are questions of law for the court. *McFall, supra* at 1088. Whether speech was a substantial motivating factor and whether the employer would have made the same employment decision in the absence of the speech are questions of fact for the jury. *Id.*

We first consider whether plaintiff’s speech addressed a matter of public concern.⁴ The speech at issue includes plaintiff’s comments about the United States’ involvement in Iraq and his unfavorable comments about NPR news. We conclude that plaintiff’s speech did address a matter of public concern.

“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, supra* at 147-148. One of the critical factors in determining whether speech concerns a public or private matter is whether it concerns a matter of public debate or whether it reflects

³ Although plaintiff’s complaint did not allege a violation of the Michigan Constitution, we observe that the Michigan Constitution also contains a freedom of speech guarantee, Const 1963, art 1, § 5, and that “[t]he rights of free speech under the Michigan and federal constitutions are coterminous.” *In re Contempt of Dudzinski*, 257 Mich App 96, 100; 667 NW2d 68 (2003).

⁴ In his brief on appeal, defendant concedes that plaintiff’s speech addressed a matter of public concern.

merely personal pique and internal employment issues. *Cooper v Johnson*, 590 F2d 559, 562 (CA 4, 1979). A public employee’s speech addresses a matter of public concern when it relates to a “matter of political, social, or other concern to the community[.]” *Connick, supra* at 146. “[P]ublic concern is something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public” *City of San Diego v Roe*, 543 US 77, 83-84; 125 S Ct 521; 160 L Ed 2d 410 (2004). “[M]atters of public concern . . . [are] typically matters concerning government policies that are of interest to the public at large” *Id.* at 80.

Applying these principles to plaintiff’s on-air statements, we conclude that plaintiff’s speech qualifies as a matter of public concern. Clearly, the American public is interested in and concerned about the military presence of the United States in another country. The policies of a president’s administration and the operations of the United States government and the United States military are unquestionably matters of public concern. See *Rankin v McPherson*, 483 US 378, 386; 107 S Ct 2891; 97 L Ed 2d 315 (1987). Similarly, because the issue where to obtain reliable and accurate news about contemporary events is a matter of social and political concern to the community, we conclude that plaintiff’s comments about NPR news also involved a matter of public concern. Viewing the facts in the light most favorable to plaintiff, he has established that his speech regarded matters of public concern and satisfied the first prong of the *Pickering* analysis.

Having concluded that plaintiff’s speech regarded matters of public concern, we must next determine whether plaintiff’s interest in free speech outweighs defendant’s interest in the efficient running of the radio station. *Pickering, supra* at 568; *Connick, supra* at 149-150. This determination requires a balancing of the parties’ respective interests. Because speech on public issues occupies the ““highest rung of the hierarchy of First Amendment values[.]”” plaintiff’s interest in speech is high “and is entitled to special protection.”⁵ *Connick, supra* at 145 (citations

⁵ The United Supreme Court has stated that “of all forms of communication, it is broadcasting that has received the most limited First Amendment protection.” *FCC v Pacifica Foundation*, 438 US 726, 748; 98 S Ct 3026; 57 L Ed 2d 1073 (1978). The rationale for its holding granting only limited First Amendment protection to speech made during broadcasting is the fact that “the broadcast media have established a uniquely pervasive presence in the lives of all Americans” and “[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual’s right to be left alone plainly outweighs the First Amendment rights of an intruder” and “prior warnings cannot completely protect the listener or viewer from unexpected program content.” *Id.* The Supreme Court’s conclusion was also based on the fact that “broadcasting is uniquely accessible to children.” *Id.* at 749. We do not believe that the limited First Amendment protection for broadcasting described in *FCC* applies to the facts of the instant case because the content of the speech involved in the instant case is completely different from the speech at issue in *FCC*. *FCC* involved patently offensive or indecent speech. Obscenity has been denied the protection of the First Amendment because its content is so offensive to contemporary moral standards. *Roth v United States*, 354 US 476; 77 S Ct 1304; 1 L Ed 2d 1498 (1957). Therefore, obscenity may be

(continued...)

omitted). At the same time, however, the government has more power to regulate speech when it is acting as an employer than when it is acting as a sovereign. *Umbehr, supra* at 675 (“The government’s interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer.” (citation omitted)). Courts therefore must give “greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restrictions on the speech of the public at large.” *Id.* (citations omitted).

Several factors are relevant in balancing the plaintiff’s interest in speaking on matters of public concern and the public employer’s interest in the effective functioning of its enterprise. These factors include: whether the statement impairs discipline by superiors or harmony among co-workers, whether the statement impedes the performance of the employee’s duties, whether the statement has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, whether the speech is communicated to the public or to his co-workers in private, whether the speech used authority derived from the employee’s role at work, and whether the statement interferes with the operation of the organization or undermines a legitimate goal or the mission of the organization. *Pickering, supra* at 570-573; *Rankin, supra* at 388-391; *McVey v Stacy*, 157 F3d 271, 278 (CA 4, 1998). Not all of these balancing factors are strongly implicated in this case. Defendant contends that he prevails in the *Pickering* balancing because plaintiff’s refusal to air the NPR newscasts directly interfered with plaintiff’s on-air responsibilities, plaintiff’s speech on controversial subjects undermined WEMU’s goal of providing a welcoming environment for all listeners and violated the station’s policy against its employees offering their personal opinions on controversial issues, plaintiff’s comments created disharmony among his co-workers, and plaintiff’s conduct placed defendant in an untenable position and destroyed plaintiff’s and defendant’s working relationship. In granting summary disposition in favor of defendant, the trial court concluded that defendant prevailed in the balancing of the *Pickering* factors. Although the trial court rejected defendant’s claim that plaintiff’s comments impaired harmony among plaintiff’s co-workers, it concluded that plaintiff’s refusal to air the NPR newscasts interfered with the performance of his job duties and that his speech interfered with and undermined WEMU’s goal to provide neutral and unbiased coverage on controversial issues. Addressing defendant’s claim that plaintiff’s conduct impaired defendant’s ability to discipline plaintiff, the trial court ruled that plaintiff’s refusal to air the NPR newscasts constituted insubordination, for which defendant had the right to discipline, or even terminate, plaintiff.

(...continued)

wholly prohibited. See *Miller v California*, 413 US 15; 93 S Ct 2607; 37 L Ed 2d 419 (1973). In contrast, the instant case involved political speech that was clearly a matter of public concern. Therefore, notwithstanding the fact that the speech at issue in the instant case was made during a radio broadcast, the content of the speech involved in the instant case warrants granting it substantially greater protection under the First Amendment than broadcasted speech that is patently offensive and indecent because “speech on public issues occupies the “highest rung of the hierarchy of First Amendment values.”” *Connick, supra* at 145 (citations omitted).

One of the *Pickering* factors that is strongly implicated in this case concerns whether plaintiff's refusal to air the NPR newscasts interfered with the performance of plaintiff's job duties. Our review of the trial court's decision and the record convinces us that the trial court failed to consider the evidence in a light most favorable to plaintiff when considering this factor. Plaintiff asserted in his deposition that defendant afforded plaintiff a great deal of flexibility with his radio show and that he and defendant had an understanding that the program logs did not apply to the BCMS. Plaintiff further asserted in his deposition that he thought it was a mistake when he saw that the program log for his March 30, 2003, show indicated that he was to run newscasts, that he did not receive the March 26, 2003, e-mail from defendant directing the running of hourly newscasts and was therefore unaware that he was supposed to run the newscasts, and that he never refused a verbal directive from defendant to run a newscast. Even if plaintiff's on-air comments on the night of his March 30, 2003, show reveal that plaintiff knew that the program log indicated that he was supposed to run the newscasts, a jury could conclude that plaintiff did not violate his on-air duties by failing to run the newscasts because viewing plaintiff's deposition statements in a light most favorable to plaintiff, plaintiff was not aware of the e-mail instructing that newscasts were to be run during the BCMS, plaintiff believed that he and defendant had an understanding that the program logs did not apply to him, and plaintiff believed that the inclusion of the newscasts in the program log for the BCMS was a mistake. Moreover, the trial court incorrectly asserted that plaintiff did not dispute defendant's assertion in his deposition that plaintiff refused to broadcast future newscasts. Our review of plaintiff's deposition reveals that plaintiff asserted that defendant never told plaintiff after the March 30, 2003, show that he wanted plaintiff to run the newscasts from that point forward. Viewing the evidence in a light most favorable to plaintiff, we conclude that there is a material question regarding whether defendant ordered plaintiff to run the newscasts and if he did, whether plaintiff refused to broadcast the newscasts. Therefore, the trial court erred in balancing this factor in favor of defendant.

Regarding the remaining factors, we disagree with the trial court's ultimate balancing of the *Pickering* factors and its conclusion that defendant's interests prevailed in that balancing. Contrary to the trial court's balancing, we conclude that the balancing factors weigh heavily in plaintiff's favor. The two remaining factors which the trial court resolved in defendant's favor are that plaintiff's speech interfered with and undermined WEMU's goal to provide neutral and unbiased coverage on controversial issues and that plaintiff's conduct impaired defendant's ability to discipline plaintiff. We find that whether plaintiff's conduct impaired defendant's ability to discipline plaintiff is not strongly implicated in this case. Even if it were, there is a genuine issue of material fact on this issue based on our conclusion that there is a genuine issue of material fact regarding whether defendant ordered plaintiff to run the newscasts and whether plaintiff refused the order. If defendant never made such an order and plaintiff never refused such an order, we fail to see how plaintiff's conduct impaired defendant's ability to discipline him. Furthermore, we hold that plaintiff's interest in speech outweighs defendant's interest in providing neutral coverage on issues that are controversial. We therefore disagree with the trial court's conclusion that, on balance, defendant's interest in running an efficient radio show outweighed plaintiff's interest in speaking. “[I]f an employee's speech substantially involve[s] matters of public concern, an employer may be required to make a particularly strong showing that the employee's speech interfered with workplace functioning before taking action.” *Cockrel v Shelby Co School Dist*, 270 F3d 1036, 1053 (CA 6, 2001), quoting *Leary v Daeschner*, 228 F3d 729, 737-738 (CA 6, 2000). See also *Connick, supra* at 152 (“We caution that a

stronger showing [on the part of a governmental employer] may be necessary if the employee's speech more substantially involved matters of public concern.”). Plaintiff's speech supporting the United States' involvement in Iraq⁶ substantially involved a matter of public concern; therefore, defendant was required to make a stronger showing that WEMU's interest in regulating plaintiff's speech outweighed plaintiff's interest in speaking. We hold that defendant's interest in its policy of remaining neutral on controversial issues was not sufficiently strong as to trump plaintiff's strong interest in speaking his opinion about the war in Iraq and the United States' involvement in that war. As we have previously observed, speech on public issues occupies the ““highest rung of the hierarchy of First Amendment values[;]”” therefore, plaintiff's interest in speaking about the United States' involvement in Iraq is high. *Connick, supra* at 145 (citations omitted). We find that the trial court erred in concluding that defendant prevailed in balancing the *Pickering* factors and conclude, to the contrary, that the *Pickering* balancing factors weigh heavily in plaintiff's favor. Viewing the evidence in a light most favorable to plaintiff, and mindful of the fact that defendant was required to make a stronger showing that WEMU's interest in regulating plaintiff's speech outweighed plaintiff's interest in speaking on a matter of substantial public concern, we conclude that defendant's interest in the efficient running of the radio station did not override plaintiff's high interest in speech.

Having concluded that plaintiff's speech concerned a matter of public concern and that plaintiff prevails in the *Pickering* balancing, we must next determine whether plaintiff has established an issue of fact regarding whether his speech was a substantial or motivating factor behind the adverse employment decision.⁷ In defendant's April 3, 2003, memorandum outlining the reasons for plaintiff's termination, defendant cited two reasons for plaintiff's termination: plaintiff's pro-war comments and plaintiff's failure to air the NPR news casts on his program. In

⁶ Although it should go without saying, we observe that if plaintiff's comments and opinions had been anti-war and critical of the United States government's policies and military involvement in Iraq, such anti-government and anti-war speech would be entitled just as much First Amendment protection as plaintiff's comments supporting the United States' involvement in Iraq. Indeed, the First Amendment ““was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people”” and is grounded in the principle that “debate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *New York Times Co v Sullivan*, 376 US 254, 269; 84 S Ct 710; 11 L Ed 2d 686 (1964), quoting *Roth, supra* at 484.

⁷ Defendant's termination of plaintiff's radio show and employment with WEMU constituted an “adverse employment action.” To be considered an adverse employment action in a First Amendment retaliation case, the complained-of action must involve an important condition of employment. *Stavropoulos v Firestone*, 361 F3d 610, 619 (CA 11, 2004). Important conditions of employment include discharges, demotions, refusals to hire or promote, reprimands, and any other conduct that alters the employee's compensation terms, conditions, or privileges of employment, deprives the employee of employment opportunities, or adversely affects the employee's status as an employee. *Id.*; *Gupta v Florida Bd of Regents*, 212 F3d 571, 587 (11 CA, 2000). Thus, if an employer's conduct affects an employee's position, that conduct constitutes an adverse employment action. *Stavropoulos, supra* at 620.

addition, statements that defendant made in his deposition also indicate that plaintiff's comments about the war were a substantial or motivating factor behind defendant's decision to terminate plaintiff's radio show. In his deposition, defendant asserted that he telephoned plaintiff on April 2, 2003, and asked plaintiff if he planned to run the news cast on the BCMS and if he intended to continue to comment on controversial subjects. According to defendant, plaintiff responded that he did not intend to run the news and that he would continue to make comments on controversial subjects, and defendant then told plaintiff that he "didn't have any choice but to terminate Bone Conduction from WEMU and his employment from WEMU." Defendant asserted that of the two reasons he cited for terminating plaintiff's show, plaintiff's failure to run the news casts was the "stronger" reason he terminated the show. Even if plaintiff's failure to run the news casts was the "stronger" of the two reasons defendant terminated plaintiff's show, defendant still articulated plaintiff's refusal to refrain from making comments about controversial subjects as a reason for plaintiff's termination both in the memorandum and in his deposition, and this is sufficient to create an issue of material fact regarding defendant's actual motivation in firing defendant. Such evidence was sufficient to establish a genuine issue of fact from which the jury could conclude that plaintiff's speech was a substantial or motivating factor for his termination. We therefore conclude that, viewing the evidence in a light most favorable to plaintiff, plaintiff has established an issue of fact regarding whether his speech was a substantial or motivating factor behind defendant's decision to terminate his employment.

Because plaintiff established an issue of material fact regarding the first three factors, defendant had the burden of showing, by a preponderance of the evidence, that he would have terminated plaintiff's radio show even in the absence of the protected speech. *McFall, supra* at 1088; *Belcher, supra* at 1207. Defendant asserts that he would have terminated plaintiff based on his refusal to air the news casts even if plaintiff had not made pro-war and anti-NPR comments. Although defendant would have been justified in terminating plaintiff if, in fact, plaintiff refused an order to broadcast hourly news casts, defendant's April 3, 2003, memorandum establishes an issue of material fact regarding whether defendant would have fired plaintiff even in the absence of plaintiff's protected speech. As we observed above, in defendant's April 3, 2003, memorandum outlining the reasons for plaintiff's termination, one of the reasons that defendant articulated for plaintiff's termination was plaintiff's pro-war comments. This memorandum establishes a genuine issue of material fact from which a reasonable jury could conclude that plaintiff would not have been terminated solely for failing to broadcast the hourly news casts because it explicitly lists plaintiff's speech as a reason for terminating plaintiff. In light of his statements in this memorandum, and his deposition testimony, which we detailed above, defendant cannot show that he would have terminated plaintiff even if plaintiff had not made the statements about the war in Iraq and NPR because it is impossible to make such a determination without further factual development of the record. "Summary judgment in favor of the party with the burden of persuasion . . . is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact." *Hunt v Cromartie*, 526 US 541, 553; 119 S Ct 1545; 143 L Ed 2d 731 (1999). Therefore, viewing the evidence in a light most favorable to plaintiff, defendant has failed to show that he would have terminated plaintiff's employment absent plaintiff's speech about the war in Iraq and NPR.

In sum, we conclude that plaintiff's speech concerned a matter of public concern and that plaintiff's interest in speaking outweighs defendant's interest in the efficient running of the radio

station, and that plaintiff established a genuine issue of material fact regarding whether his speech was a substantial or motivating factor in defendant's decision to terminate his employment. Furthermore, defendant failed to establish, by a preponderance of the evidence, that he would have terminated plaintiff even in the absence of the protected speech.

B. Qualified Immunity

Plaintiff next argues that defendant is not entitled to qualified immunity from plaintiff's claim for damages under 42 USC § 1983. Defendant raised the issue of qualified immunity below in moving for summary disposition, and plaintiff addressed the issue in its response to defendant's motion for summary disposition. However, in granting summary disposition in favor of defendant, the trial court did not address this issue because it was unnecessary to do so in light of its conclusion that plaintiff's speech was not constitutionally protected. Nevertheless, this Court may address an issue not decided by the trial court if the issue presents an issue of law concerning which the facts necessary for resolution have been presented. *Fluor Enterprises, Inc v Dep't of Treasury*, 265 Mich App 711, 723-724; 697 NW2d 539 (2005). "Whether an asserted federal right was clearly established at a particular time, so that a public official who allegedly violated the right has no qualified immunity from suit, presents a question of law" that is reviewed de novo. *Elder v Holloway*, 510 US 510, 516; 114 S Ct 1019; 127 L Ed 2d 344 (1994). Because the issue is one of law and the facts necessary for its resolution have been presented, we will address the qualified immunity issue.

The doctrine of qualified immunity shields government officials performing discretionary functions from liability for civil damages arising from 42 USC § 1983 claims brought against them in their individual capacities. *Harlow v Fitzgerald*, 457 US 800, 818; 102 S Ct 2727; 73 L Ed 2d 396 (1982). Qualified immunity ensures that before they are subjected to suit, governmental officials are on notice that their conduct is unlawful. *Saucier v Katz*, 533 US 194, 206; 121 S Ct 2151; 150 L Ed 2d 272 (2001). In *Saucier*, the Supreme Court established a two-part test to determine whether a governmental official is entitled to qualified immunity. First, we must determine whether the facts alleged, taken in the light most favorable to the party asserting the injury, demonstrate that the official's conduct violated a constitutional right. *Id.* at 201. Next, if we determine that the official's conduct violated a constitutional right, we must determine whether the right was "clearly established." *Id.* "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable offic[ial] that his conduct was unlawful in the situation he confronted." *Id.* at 202. If the official violated a constitutional right that was clearly established, the official is not entitled to qualified immunity. The plaintiff in a 42 USC § 1983 action attempting to overcome qualified immunity bears the burden of establishing that a reasonable official in the defendant's position could not have believed that his conduct was lawful. *Walsh v Taylor*, 263 Mich App 618, 636; 689 NW2d 506 (2004). See also *Davis v Scherer*, 468 US 183, 197; 104 S Ct 3012; 82 L Ed 2d 139 (1984).

We have already concluded that the facts, when considered in the light most favorable to plaintiff, demonstrate that defendant terminated plaintiff's employment in violation of plaintiff's First Amendment rights. The next inquiry is whether the law was clearly established so as to put defendant on notice that his behavior violated plaintiff's rights. A constitutional right is clearly established if its contours are "sufficiently clear that a reasonable official would understand that what he is doing violates that right," and, if in light of already existing law, the unlawfulness of

the conduct is “‘apparent.’” *Hope v Pelzer*, 536 US 730, 739; 122 S Ct 2508; 153 L Ed 2d 666 (2002), quoting *Anderson v Creighton*, 483 US 635, 640; 107 S Ct 3034; 97 L Ed 2d 523 (1987).

Defendant asserts that he is entitled to qualified immunity because evaluation of plaintiff’s claim against him requires application of the *Pickering* balancing test and, therefore, the relevant law was not clearly established. In *Pickering*, the Supreme Court itself recognized that a determination whether a public employee was terminated from her employment in violation of her First Amendment rights is a highly fact-specific analysis that does not lend itself to clear, bright line rules. The Supreme Court stated: “Because of the enormous variety of fact situations in which critical statements by . . . public employees may be thought by their superiors . . . to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.” *Pickering*, *supra* at 569. Recognizing the inherent difficulty of making such a determination, some federal circuits have held that when a *Pickering* balance is required, the defendant is entitled to qualified immunity because a defendant in a First Amendment lawsuit “will only rarely be on notice that his actions are unlawful” because the *Pickering* balancing requires “legal determinations that are intensely fact-specific and do not lend themselves to clear, bright-line rules” and it is therefore “nearly impossible for a reasonable person to predict how a court will weigh the myriad factors that inform an application of the *Pickering-Connick* test.” *Martin v Baugh*, 141 F3d 1417, 1420 (CA 11, 1998). See also *DiMeglio v Haines*, 45 F3d 790, 806-807 (CA 4, 1995); *Guercio v Brody*, 911 F2d 1179, 1183-1189 (CA 6, 1990); *Noyola v Texas Dep’t of Human Resources*, 846 F2d 1021, 1025 (CA 5, 1988); *Benson v Allphin*, 786 F2d 268, 276 (CA 7, 1986).

However, we would reject the reasoning of such decisions because those decisions effectively grant First Amendment defendants in 42 USC § 1483 cases a cloak of qualified immunity in every case in which a *Pickering* balancing is necessary to determine whether a governmental employer wrongfully terminated an employee based on constitutionally protected speech.⁸ We do not believe that such a broad grant of qualified immunity is appropriate. Furthermore, we observe that the above-cited cases were all decided before the United States

⁸ In *Kinney v Weaver*, 367 F3d 337, 371-372 n 41 (CA 5, 2004), the fifth circuit, in rejecting the notion that the law is by definition unclear when a *Pickering* analysis is required, stated:

Noyola [v Texas Dep’t of Human Resources], 846 F2d 1021 (CA 5, 1988), observed that, because of the balancing required in *Pickering* cases, “[t]here will rarely be a basis for *a priori* judgment that the termination or discipline of a public employee violated ‘clearly established’ constitutional rights.” We do not think that this remark can be taken to set forth a rule of law to the effect that qualified immunity is mandated in *Pickering* cases *Noyola*’s statement facially takes the form of a prediction that denials of qualified immunity will be “rare []” in the *Pickering* context. *Qua* prediction, it may not be an unreasonable one. Nonetheless, a number of this court’s *Pickering* cases have denied qualified immunity. [Citations omitted.]

Supreme Court rendered its opinion in *Hope*, which altered the analysis to be used to be determined if a defendant is entitled to qualified immunity and made it clear that government “officials can still be on notice that their conduct violates established law even in novel factual circumstances.” *Hope, supra* at 741. In *Hope*, the Supreme Court observed that “‘general statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful.’” *Id.* (citations omitted). Therefore, under *Hope*, a right can be clearly established even if the very action in question has not previously been held unlawful. *Id.* The effect of *Hope* was to reverse the “rigid gloss on the qualified immunity standard” and give “guidance for future decisions” on issues of qualified immunity in First Amendment cases. *Id.* at 739; *Akins v Fulton Co, Georgia*, 420 F3d 1293, 1307 (CA 11, 2005).

Since the Supreme Court decided *Hope*, at least two federal circuit courts have held that defendants in 42 USC § 1983 First Amendment wrongful termination cases had fair notice that the plaintiffs’ speech was protected and were therefore not entitled to qualified immunity. In *Akins*, which was a whistleblower case, the eleventh circuit held that the defendant in that case “was at least on notice of *Pickering* and *Connick*, which set forth the standard for protection of the speech of public employees[.]” and was also on notice of two eleventh circuit cases that held that the plaintiffs’ speech as whistleblowers was protected by the First Amendment. *Akins, supra* at 1308. The court therefore determined that the defendant was not entitled to qualified immunity. *Id.* at 1307-1308. Similarly in *Bennett v Hendrix*, 423 F3d 1247, 1255-1256 (CA 11, 2005), the eleventh circuit held that the defendants, who had been sued by the plaintiffs under 42 US § 1483 in part based on the defendants’ termination of the plaintiffs’ employment based on their exercise of their First Amendment rights, were not entitled to qualified immunity because the defendants “were on notice and had ‘fair warning’ that retaliating against the plaintiffs for their support of the 1998 referendum would violate the plaintiffs’ constitutional rights” because “the Supreme Court ha[s] long held that state officials may not retaliate against private citizens because of the exercise of their First Amendment Rights” and because the eleventh circuit “has held since at least 1988 that it is ‘settled law’ that the government may not retaliate against citizens for the exercise of First Amendment rights[.]” See also *Cook v Gwinnett Co School Dist*, 414 F3d 1313, 1320 (CA 11, 2005); *McFall, supra* at 1090. In addition, other federal circuit courts have held that where the *Pickering* balancing factors weigh heavily in favor of the employee, as they did in the instant case, the law is clearly established, and qualified immunity is therefore unavailable. *McGreevy v Stroup*, 413 F3d 359, 366-367 (CA 3, 2005); *Ceballos v Garcetti*, 361 F3d 1168, 1181 (CA 9, 2004); *Kinney v Weaver*, 367 F3d 337, 372 n 41 (CA 5, 2004).

We hold that at the time defendant terminated plaintiff’s employment, the law was clearly established so as to put defendant on notice that his behavior violated plaintiff’s rights. The law was clearly established because, given that plaintiff’s interest in speaking regarding matters of public concern occupies the highest rung of First Amendment values and defendant has failed to demonstrate a particularly strong showing that plaintiff’s speech interfered with workplace functioning, the *Pickering* balancing factors weigh heavily in plaintiff’s favor. *McGreevy, supra*; *Ceballos, supra*; *Kinney, supra*. In addition, defendant was also on notice that his behavior violated plaintiff’s rights because at the time defendant terminated plaintiff’s employment on April 2, 2003, the law was clearly established that a public employer could not

terminate an employee based on the employee's exercise of his First Amendment right to speak regarding matters of public concern. See *Rankin, supra*; *Connick, supra*; *Pickering, supra*. Because the law was clearly established, defendant was on notice and had fair warning that terminating plaintiff because of his speech would violate plaintiff's constitutional rights. Therefore, defendant is not entitled to qualified immunity.

Reversed.

I concur in result only.

/s/ David H. Sawyer

/s/ Stephen L. Borrello