PETER ANTONELLIS VS. DEPARTMENT OF ELDER AFFAIRS & ANOTHER[1]

Docket:	19-P-475
Dates:	April 7, 2020 - August 17, 2020
Present:	Meade, Massing, & Desmond, JJ.
County:	Suffolk
Keywords:	Constitutional Law, Freedom of speech and press. Public Employment, Termination. Practice, Civil, Summary judgment.

Civil action commenced in the Superior Court Department on February 13, 2015.

The case was heard by Michael D. Ricciuti, J., on a motion for summary judgment.

The case was submitted on briefs.

Joseph L. Sulman & Andrea L. Haas for the plaintiff.

Anne M. McLaughlin, Assistant Attorney General, for the defendants.

DESMOND, J. Peter Antonellis commenced this action, alleging that Ann Hartstein, the former Secretary of the Department of Elder Affairs (agency or EOEA), terminated him for speaking out publicly about elder endangerment in assisted living residences (ALRs).[2] He appeals from a summary judgment dismissing his Federal civil rights claim against Hartstein individually (count I), and his claim under the Massachusetts public employee whistleblower statute against EOEA (count II).[3] We affirm.

1. Background. From the same record as the motion judge, we set forth the facts in the light most favorable to Antonellis.[4] See Welch v. Barach, 84 Mass. App. Ct. 113, 118-119 (2013).

In March, 2000, Antonellis, an attorney, accepted a position at EOEA as an assistant general counsel. In 2006, at Antonellis's request, EOEA transferred him to

the position of program coordinator II (also known as a certification specialist) in the assisted living unit.[5] There is no "compliance officer" position at EOEA.

In 2009, Antonellis began raising concerns to his supervisors about EOEA's administration and oversight of ALRs. Between 2010 and 2014, he regularly voiced these concerns to both supervisors and colleagues.

Pursuant to EOEA's 2011 "public records protocol," all EOEA employees were required to send public record requests to the legal department for handling.[6] EOEA protocol also called for staff to refer "press inquiries [and] communication issues" to Martina Jackson, the EOEA communications director. Antonellis understood that personal information about residents of ALRs could not be disclosed without the consent of the resident or the resident's representative. See G. L. c. 66A, the Fair Information Practices Act (FIPA).[7]

In 2012, at EOEA's request, the Providence Cliff House (PCH) in Athol submitted an application for certification. Antonellis conducted several site visits in connection with the application. Following EOEA's denial of PCH's application and its request to waive certain certification requirements, PCH exercised its right to an informal appeal hearing.

On March 6, 2013, Antonellis was scheduled to make a presentation as part of a webinar on EOEA's new electronic incident reporting system. Shortly before the webinar, Antonellis left the office without informing his immediate supervisor, Duamarius Stukes, and went to the State House. There, he requested a joint meeting with Governor Deval Patrick and John Polanowicz, the Secretary of the Executive Office of Health and Human Services (EOHHS), to discuss his concerns about elder endangerment. After filling out a request form, he went home for the day without informing anyone at EOEA. On the following day, Antonellis went directly from his home to Pocasset to conduct an ALR site visit. He did not tell anyone at EOEA his whereabouts ahead of time. For this conduct, he subsequently received a one-day suspension without pay.[8]

When Hartstein discovered that Antonellis went over her head with his concerns, she was disappointed. Stan Eichner, EOEA's general counsel, directed Antonellis to articulate his concerns in writing, and to give the assignment "top priority." On March 19, 2013, Antonellis provided Eichner with a lengthy

memorandum, claiming that the lack of incident reporting standards, poor management, and understaffing were endangering the health, safety, and welfare of ALR residents. Antonellis attached thirty exhibits to his memorandum, including e-mails and incident reports. He sent a copy to Secretary Polanowicz. On June 27, 2013, Hartstein informed Antonellis that Eichner had determined that Antonellis's "perceptions" were unsubstantiated and that she concurred with Eichner's findings.[9]

In December, 2013, Colman Herman, a reporter for CommonWealth Magazine, submitted a public records request to EOEA. At Stukes's direction Antonellis assisted with the response. When Antonellis learned from an internal e-mail months later that some of Herman's request was still pending, he reached out to Herman, beginning in August, 2014.[10] He did not tell management what he was doing. Thereafter, Antonellis met and spoke with Herman several times about his concerns regarding PCH and his objections to EOEA's practices. Without notice to his supervisors or management, Antonellis provided Herman with copies of EOEA documents, including his March 19, 2013 memorandum (and some of the attached exhibits), and his February 7 and February 14, 2013 site visit reports to Stukes detailing the shortcomings of PCH. In addition to Herman, Antonellis also spoke multiple times about his objections to EOEA's practices with Boston Globe health reporter, Kay Lazar, and gave her a copy of his March 19, 2013 memorandum.

Antonellis also worked on PCH's second application for certification, which was denied by EOEA on September 12, 2014.[11] On the same day, CommonWealth Magazine published an article by Herman entitled, "Oversight questions raised on Elder Affairs." Herman quoted "compliance officer" Antonellis as well as Antonellis's March 19, 2013 memorandum warning that the safety of elders was at risk due to poor management at EOEA.[12]

Apprised of the article, Hartstein was again disappointed that Antonellis did not first bring his concerns to her. She informed the EOEA human resources liaison that she wanted to "possibly discipline" Antonellis.

On September 21, 2014, the Boston Globe published an article written by Lazar entitled, "Elder advocates raise concerns on assisted living." Lazar reported that elders in ALRs were "in harm's way too often" and that EOEA was "ill-equipped to protect the increasingly frail residents." Lazar reported that Antonellis, a "key

staffer" and "compliance officer," had indicated that the agency had just "two ombudsmen to handle the thousands of complaints that pour in each year involving [ALR]s."[13] Antonellis was also quoted as stating that although "most elders and their families think this is a regulated industry . . . we don't have the staff to regulate it"; he had "repeatedly alerted his superiors that reports of serious incidents at facilities are languishing for weeks or months at the agency, and that no one seems to be analyzing them for patterns that may point to larger issues"; and "[u]nless the facilities know that we are scrutinizing what happens, they don't have to be too concerned about the system they use to keep residents safe." As reported in the article, EOEA spokeswoman, Martina Jackson, disputed Antonellis's assessment.[14] The article quoted Hartstein stating that although EOEA's regulations needed "some retooling" to ensure safety, and updates were in progress, there was no need to replace the residential model used to regulate ALRs with the medical model championed by Antonellis and others.

On September 23, 2014, CommonWealth Magazine published a related article by Herman entitled, "Elder Affairs lets Athol facility remain open." Focusing on PCH, a subject of his public records request that remained outstanding, Herman quoted Antonellis, "a compliance officer at Elder Affairs who has been critical of the agency's oversight functions" as stating, "I think that right at the outset Providence Cliff should have been given 90 days to shut down and a plan developed to relocate the residents. . . . [I]nstead, the matter has dragged on for 2 1/2 years and we're still dealing with it, it has been a huge waste of our limited resources." Antonellis admitted that he made the statement to Herman. The article repeated the quotes from Antonellis's March 19, 2013 memorandum about poor management endangering ALR residents and the reference to EOEA's incident reporting program as "nothing more than a hollow and dangerous facade." It also repeated Antonellis's criticisms about EOEA's failures to keep track of the injuries and abuse sustained by seniors at ALRs and to analyze the data.

The article quoted from the stale PCH site reports. First, the article noted that in his February 2013 report to Stukes, the director of the assisted living program at Elder Affairs, Antonellis had "called attention to [PCH] having units with inadequate square footage, unlockable doors and windows, and poor ventilation." Herman reported that Antonellis also wrote in that report that "[r]esidents are occupying units that do not currently appear to meet minimum

requirements of the [S]tate sanitation code regarding bathrooms." Herman also listed many other sanitary code violations that PCH had been cited for "[a]t various times." Nothing was said about the correction of all these problems. The article reported that Antonellis directly asked Stukes in an e-mail, "How much longer will you allow [PCH] to continue to operate without the needed certificate?" and "Will you require [the owner] to move out a number of the residents?" The article quoted a statement by Antonellis that he had "noted that a number of the residents were wheelchair-dependent, one of whom was seemingly incoherent." According to Antonellis, Stukes failed to respond and permitted PCH to continue to operate "as an uncertified [ALR] under dangerous conditions." Around this time, Antonellis's access to his telephone and the Internet at EOEA were blocked.

After reading the article, the son of one of PCH's residents immediately concluded that Antonellis's statement referred to his mother, who had suffered a series of minor strokes.[15] He indicated that neither he nor his mother, to his knowledge, had given permission to Herman or to Antonellis authorizing them to describe her in the article. At PCH's appeal hearing, the son publicly noted his displeasure at the release of the information as well as the terminology used to describe her.

CommonWealth Magazine published a third article by Herman on September 26, 2014, focusing exclusively on Antonellis, who was described as a "compliance officer" and EOEA's "biggest critic." Titled "A critic from within," the article summarized portions of the earlier articles, noting that Antonellis had "shared internal emails and documents with CommonWealth that indicate Elder Affairs let an Athol facility operate an [ALR] even though it wasn't certified and it was unsafe." Herman reported that in Antonellis's view, "assisted living doesn't belong under the domain of Elder Affairs, . . . [and that] the responsibility for regulating assisted living needs [to] be moved into the Department of Public Health, which has the skills in place to regulate health and medical programs such as assisted living." Antonellis reiterated his beliefs during a meeting with senior management. PCH's appeal hearing occurred four days later. Although Antonellis had been scheduled to attend, Stukes excused his absence.

In Hartstein's view, Antonellis interfered with PCH's appeal and made statements to the press that were detrimental to the residents of PCH and to the agency.[16]

On October 8, 2014, Emily Rooney of WGBH interviewed Antonellis and Herman on her show. On October 14, Antonellis was placed on paid administrative leave, pending an investigation into his conduct. He was expressly warned that if he "attempted to interfere with or undermine the agency's ability to conduct the investigation," he would be "subject to immediate discipline up to and including termination." EOHHS assigned Sheila Anderson, a labor relations specialist at EOHHS, to investigate the allegations; she was instructed to give the assignment her "utmost priority" and to complete it "as quickly as possible." On October 16, Anderson interviewed Antonellis. Another labor relations specialist, Carrie McCoy, was present and took notes. During the interview, Antonellis expressly denied providing any EOEA documents to Herman. Rhett Cavicchi, the director of labor relations, edited Anderson's draft report. He added language, made a number of comments, and suggested adding a final paragraph summarizing how Antonellis's actions violated the agency's policies. The draft was circulated to upper management at EOHHS and EOEA, including Hartstein. On October 23, Anderson provided Hartstein with a final investigation report.

Christopher Groll, a labor relations specialist and Hartstein's designated hearing officer, conducted a show cause hearing on November 3 and 6 to determine whether Antonellis should be disciplined. Antonellis was represented by counsel, and testified at that hearing along with Anderson and McCoy. Twenty-eight exhibits were submitted in evidence by the parties. Groll found Antonellis largely untruthful, credited EOEA's six allegations against him, and concluded that "disciplinary action[,] up to and including termination is appropriate and should be imposed in this matter."[17] On November 26, 2014, Hartstein adopted Groll's findings, which demonstrated to her that he had engaged in "egregiously inappropriate and unprofessional behavior." Concluding that Antonellis's conduct "undermined the efficacy and integrity of the agency," and that "EOEA no longer has the requisite trust and confidence in [his] ability to carry out [his] job duties in an appropriate and professional manner," Hartstein terminated him.

2. Discussion. We review a grant of summary judgment de novo, Yee v. Massachusetts State Police, 481 Mass. 290, 294 (2019), in order to determine

whether all material facts have been established and the moving party is entitled to judgment as matter of law,[18] see Mass. R. Civ. P. 56 (c), as amended, 436 Mass. 1404 (2002).

a. 42 U.S.C. § 1983 (§ 1983). We analyze § 1983 claims arising from violations of First Amendment to the United States Constitution rights under a three-part test. See Pereira v. Commissioner of Social Servs., 432 Mass. 251, 257 & n.15 (2000). See also Decotiis v. Whittemore, 635 F.3d 22, 29-30 (1st Cir. 2011). The threshold inquiry for the court is whether the employee spoke "as a citizen upon matters of public concern." Connick v. Myers, 461 U.S. 138, 147 (1983). If the court reaches that conclusion, the court next balances the interest of the employee speaking out as a citizen on matters of public concern and "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Board of Educ., 391 U.S. 563, 568 (1968) (Pickering test).[19] See Decotiis, supra at 35 (describing Pickering test as attempt to "balance the value of an employee's speech -- both the employee's own interests and the public's interest in the information the employee seeks to impart -- against the employer's legitimate government interest in preventing unnecessary disruptions and inefficiencies in carrying out its public service mission" [quotation and citation omitted]). If the interests of the employee and the public outweigh those of the employer, the speech is deemed constitutionally protected, and the parties proceed to the third step of the test.

The third step requires the employee to proffer sufficient evidence that would permit a reasonable jury to find that the protected speech was "a substantial or motivating factor behind the adverse employment action." Guilloty Perez v. Pierluisi, 339 F.3d 43, 55 (1st Cir. 2003). If the employee satisfies that initial burden, the burden of persuasion shifts to the employer to prove, by a preponderance of the evidence, that it would have taken the same action regardless of the protected speech. See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (Mt. Healthy defense). This showing by an employer defeats the employee's § 1983 claim. See Decotiis, 635 F.3d at 30.

The first two parts of the analysis are questions of law that are subject to de novo review. See Davignon v. Hodgson, 524 F.3d 91, 100-101 (1st Cir. 2008). Although causation is generally a question of fact for the jury, the burden-shifting, Mt. Healthy defense may be determined as matter of law by the court at

the summary judgment stage. See, e.g., Guilloty Perez, 339 F.3d at 56; Torres-Rosado v. Rotger-Sabat, 335 F.3d 1, 13-14 (1st Cir. 2003); Lewis v. Boston, 321 F.3d 207, 219-220 (1st Cir. 2003).

In his carefully considered memorandum, the motion judge recognized the difficulties courts have encountered in addressing the first step of the part one analysis: whether the employee spoke in a private capacity.[20] See Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) (holding that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline"). Applying the holding and guiding principles of Garcetti, as construed by the First Circuit, see Mercado-Berrios v. Cancel-Alegria, 611 F.3d 18, 26-27 (1st Cir. 2010), the judge concluded that some, but not all of Antonellis's speech was expressed as a citizen. One example the judge gave of speech that fell on the protected side of the line was Antonellis's criticism of EOEA's failure to properly analyze the data it collected on falls by residents of ALRs. After concluding that the matter was the subject of legitimate news interest, the judge decided that he did not need to go any further for summary judgment purposes. See Garcetti, supra at 425 ("Exposing governmental inefficiency and misconduct is a matter of considerable significance"). On appeal, Hartstein has not challenged Antonellis's satisfaction of the first step of the analysis. We turn to the second step.

In assessing whether the speech should be protected, the subject matter of Antonellis's disclosures -- his whistleblowing about EOEA's alleged inadequacies -- weigh heavily in his favor. See Guilloty Perez, 339 F.3d at 53, and cases cited. As Antonellis demonstrated, he made a number of statements to the media about important matters of great public concern. There was significant public interest in his speech. "[T]he stronger the First Amendment interests in the speech, the stronger the justification the employer must have." Curran v. Cousins, 509 F.3d 36, 48 (1st Cir. 2007), citing Connick, 461 U.S. at 150.

On the other side of the balance, government employers have "legitimate interest[s] in the effective and efficient fulfillment of [their] responsibilities to the public, including promot[ing] efficiency and integrity in the discharge of official duties, and maintain[ing] proper discipline in public service" (quotations and citation omitted). Lane v. Franks, 573 U.S. 228, 242 (2014). Factors relevant to the

disruption inquiry include whether the employee's statements "directly went to impairing discipline by superiors, disrupting harmony and creating friction in working relationships, undermining confidence in the administration, . . . and interfering with the regular operation of the enterprise." Curran, 509 F.3d at 50. See Rankin v. McPherson, 483 U.S. 378, 388 (1987) ("Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong [S]tate interest"). "In general, government interests outweigh First Amendment rights when employee speech prevents efficient provision of government services or disrupts the workplace." Torres-Rosado, 335 F.3d at 13.

Here, we conclude that Hartstein made the strong showing of justification for terminating Antonellis necessary to overcome Antonellis's First Amendment rights. First, Antonellis made prejudicial statements to the media about PCH during the pendency of its appeal that impacted EOEA's ability to perform its appellate function. Antonellis's statements about the long history of code violations at PCH may have helped make his point about EOEA's lax oversight and neglect, but absent full disclosure about PCH's clearance by the local board of health, the statements were misleading to the public. Second, his opinionated views about the medical model of regulation potentially impeded his ability to perform his job duties in the future. Third, one could reasonably conclude that in violation of FIPA, he disclosed personal data identifying a resident of an ALR to the media without permission, upsetting the family.[21] See Lane, 573 U.S. at 242 ("false or erroneous" statements or unnecessary disclosure of "any sensitive, confidential, or privileged information" may tip balance on employer's side). His action potentially subjected the data holder, EOEA, to exemplary damages, "even if the data subject sustained no actual damages." Torres v. Attorney Gen., 391 Mass. 1, 13 (1984). Fourth, we have no doubt that Antonellis's decision to name and depict Stukes as an incompetent and uncaring director damaged their relationship beyond repair. Fifth, his disclosures tended to undermine public confidence in the agency and potentially jeopardized EOEA's ability to perform its core mission.[22] Finally, although some of Antonellis's concerns and objections to his employer's practices may have been valid, he maximized the potential disruption by expressing them to a wide audience using injudicious language.[23] See O'Connor v. Steeves, 994 F.2d 905, 917 n.10 (1st Cir.), cert. denied sub. nom. Nahant v. O'Connor, 510 U.S. 1024 (1993) (broad dissemination of "disclosures [that] have

the potential to disrupt the employing agency or department" weighs in favor of employer). Antonellis could have conveyed his message in a far less disruptive manner. Most of this potential disruption to EOEA's operations was attributable to Antonellis's speech.[24] These factors tilted the scale on Hartstein's side. Because the interests of the employer outweighed those of the employee and the public, Antonellis's speech was not constitutionally protected under the Pickering test.

Even were we to rule that Antonellis prevailed on the Pickering test, we conclude that Hartstein established a Mt. Healthy defense as matter of law. There is no need to repeat the evidence of potential disruption. We add only that Antonellis engaged in unprotected conduct by sharing internal e-mails and documents with the media without authority and in violation of his employer's protocol. See Sanchez-Lopez v. Fuentes-Pujols, 375 F.3d 121, 131 (1st Cir. 2004) (evidence that defendant has regular practice of imposing sanctions for particular violations indicates that defendant would have imposed some sanctions even in absence of protected speech). He had a previous formal warning on file, and he was not forthright with investigators. As supported by the findings of the independent hearing officer, Hartstein demonstrated that "even if an improper motive played a part [in the decision], the adverse action would have been taken for legitimate reasons." Broderick v. Evans, 570 F.3d 68, 73 (1st Cir. 2009).

Antonellis's arguments regarding the unfairness of the predeprivation process are not persuasive. Although he claims that "several factual mistakes" in Anderson's final investigative report "infected" the hearing officer's decision, he failed to be more specific. At the show cause hearing, he was given the opportunity to present evidence, testify, and to cross-examine the witnesses against him. On this record, he has not demonstrated that the hearing was unfair or that the hearing officer relied on a "biased" investigation.

Finally, we agree with the motion judge that even if there are material facts in dispute with regard to causation, Hartstein was entitled to qualified immunity as matter of law. See Cristo v. Evangelidis, 90 Mass. App. Ct. 585, 589-590 (2016). A hearing officer found an abundance of just cause to support Antonellis's termination. The charges against Antonellis sustained by the hearing officer were serious, including his violation of EOEA's public records request protocol, his disclosure of the personal data of an ALR resident, and perhaps most troubling of all, his blatant misrepresentation to investigators.[25] When Antonellis was placed

on paid leave, he was warned about the consequence of that type of misconduct. The hearing officer expressly rejected Antonellis's First Amendment defenses. Given the information available to Hartstein and the difficulties involved in applying the governing three-part test, a reasonable official standing in Hartstein's shoes could well have believed that the termination would not violate Antonellis's First Amendment rights.[26] See Clancy v. McCabe, 441 Mass. 311, 317, 322-323 (2004). See also Wagner v. Holyoke, 404 F.3d 504, 509 (1st Cir. 2005). Qualified immunity attached in Hartstein's favor.

b. General Laws c. 149, § 185 (b) (3).[27] Antonellis unquestionably engaged in protected activity under the statute by objecting to EOEA's practices that he reasonably believed posed a risk to elder health and safety. See Trychon v. Massachusetts Bay Transp. Auth., 90 Mass. App. Ct. 250, 255 (2016) (three elements of whistleblower claim are "[1] the employee engaged in a protected activity; [2] participation in that activity played a substantial or motivating part in the retaliatory action; and [3] damages resulted"). Beginning in 2009, Antonellis regularly complained about many of his employer's practices. He continued to express his objections internally through September, 2014. Notwithstanding this protected activity, we conclude that Antonellis's whistleblower claim, similar to his § 1983 claim, failed as matter of law on the element of causation. No jury could reasonably find on this record that Antonellis's internal objections were a "substantial or motivating" factor in his November, 2014 termination.[28] Id. In addition, Hartstein met her burden under Mt. Healthy of demonstrating independent and legitimate reasons that justified her termination decision, notwithstanding Antonellis's prior protected conduct. Id.

Judgment affirmed.

footnotes

[1] Ann Hartstein, individually and in her official capacity as the Secretary of Elder Affairs.

[2] Antonellis named the Department of Elder Affairs, which oversees all ALRs in Massachusetts, as a defendant. See G. L. c. 19A, § 1. Because the parties refer to the department as the "Executive Office of Elder Affairs" or "EOEA," for convenience, we do as well.

[3] Antonellis's civil rights claims against EOEA and Hartstein in her official capacity, and his whistleblower claim against Hartstein were dismissed before the summary judgment ruling, and are not in issue in this appeal.

[4] Antonellis has not challenged the judge's order allowing, in part, the defendants' motion to strike, predicated upon his noncompliance with Rule 9A(b)(5) of the Rules of the Superior Court (2018). See Sullivan v. Liberty Mut. Ins. Co., 444 Mass. 34, 46 n.18 (2005). Accordingly, we do not consider facts struck by the judge as improperly disputed or unsupported by the summary judgment materials.

[5] As a certification specialist, Antonellis was involved in the initial certification and recertification process of ALRs. His job duties included conducting site visits and inspections for statutory and regulatory compliance, making and documenting findings, drafting corrective action plans and helping to implement them, identifying responsive documents to public records requests, and preparing the documents for response.

[6] Staff were expected to gather all documents responsive to the request and send them to the legal department, which would decide what materials would be turned over, the necessity of redactions, if any, and the cost associated with the request. During his time as an assistant general counsel, Antonellis was involved in this process, forwarding materials to the general counsel for his review.

[7] Under FIPA, it is unlawful for a State agency to "allow any other agency or individual not employed by [it] to have access to personal data unless such access is authorized by statute or regulations . . . or is approved by the data subject whose personal data are sought." G. L. c. 66A, § 2 (c). The Legislature broadly defined personal data to mean "any information concerning an individual which, because of name, identifying number, mark or description can be readily associated with a particular individual; provided, however, that such information is not contained in a public record, as defined in [G. L. c. 4, § 7, cl. 26]." G. L. c. 66A, § 1.

[8] The sanction was negotiated down to a formal warning.

[9] Shortly thereafter, an EOEA hearing officer rejected PCH's appeal, but gave it "leave to reapply" once all requirements of State and Federal law were met. She

encouraged PCH to continue making improvements. EOEA allowed PCH to continue to operate as an uncertified ALR.

[10] EOEA did not complete its response until November, 2014.

[11] Antonellis e-mailed a copy of the denial letter to the owner of PCH on the same day. PCH again exercised the right to appeal the decision. On August 4, 2014, the owner had reported to Antonellis that the one remaining violation of the State sanitary code had been corrected, and forwarded the letter from the local board of health clearing PCH.

[12] Antonellis stated, "[T]he agency does almost no analysis of the data it is gathering . . . [and] cannot say how many people have fallen down, wandered off, been abused, or exploited" and he reported that "there are no procedures in place on how to handle incident reports as they come in." He further stated that two ombudsmen in Boston were "not sufficient to tend to the needs of all the people who are living in [ALRs] spread throughout . . . the [S]tate." Herman reported that in his memorandum, Antonellis had called EOEA's incident reporting system "nothing more than a hollow and dangerous facade."

[13] In fact, the ombudsman program received less than 200 complaints that year. Antonellis claimed to have been misquoted and that he was "possibly" referring to thousands of incident reports.

[14] Jackson had explained to Lazar before the article was published that Antonellis was not a compliance officer.

[15] There were a limited number of seniors residing at PCH at the time.

[16] Hartstein testified that Antonellis "was appearing to say that it was an unsafe residence . . . to be in, which was very upsetting to the residents who were living there at the time"; and further that EOEA "did not have adequate oversight ability, which would be very detrimental both to the [a]gency's reputation and to residents who lived [there]."

[17] The hearing officer found, inter alia, that Antonellis (1) knowingly violated EOEA's protocols by sharing information, and EOEA e-mails and documents, with the media; (2) violated G. L. c. 66 by providing information to the media containing

personal data identifying an ALR resident; (3) made "knowingly incomplete" and prejudicial statements about an ALR while its appeal was pending, thereby undermining the ability of EOEA "to appear neutral and fulfill its appellate responsibilities"; (4) made statements to the media that he clearly knew misstated the facts and disparaged the reputation of EOEA; (5) falsely identified himself to the media as a compliance specialist, lending "an air of added credibility to his claims against EOEA and PCH"; and (6) was "not truthful and forthcoming during the course of [the] investigation."

[18] In cases alleging First Amendment violations, appellate courts are also required to perform an independent examination of the entire record to ensure that "the judgment does not constitute a forbidden intrusion on the field of free speech" (citation omitted). Pereira v. Commissioner of Social Servs., 432 Mass. 251, 258 (2000).

[19] The United States Supreme Court subsequently clarified the Pickering test. See Lane v. Franks, 573 U.S. 228, 242 (2014), quoting Garcetti v. Ceballos, 547 U.S. 410, 418 (2006) ("if an employee speaks as a citizen on a matter of public concern, the question is whether the government had 'an adequate justification for treating the employee differently from any other member of the public' based on the government's needs as an employer").

[20] As the judge noted, the first step of the analysis has two subparts: whether the individual spoke as a citizen vis-à-vis employee and whether the subject of the speech was a matter of public concern. See DeCotiis, 635 F.3d at 30-35.

[21] Whether Antonellis's disclosure of information about the resident violated FIPA was a question of law here, and not an issue of the fact for the jury. See Torres v. Attorney Gen., 391 Mass. 1, 3 (1984). We agree with the judge's interpretation of the statute that a violation occurred.

[22] We acknowledge that the same argument could potentially be made in any whistleblower case. What separates this case from a garden-variety one is the extent of the derogation of the employer (and Antonellis's egregious misconduct). If Antonellis had his way, all of EOEA's public duties to ALRs would have been removed, leaving no mission to fulfill.

[23] We note that at least two additional related articles quoting Antonellis were published on October 14 and 15. Anderson concluded that Antonellis made false or misleading statements in those articles demonstrating that Antonellis placed EOEA in a false light.

[24] As the defendants note, "[p]ublic employers need not allege or show that an employee's speech actually disrupted the workplace, and substantial weight has been given 'to government employers' reasonable predictions of disruptions.'" Diaz-Bigio v. Santini, 652 F.3d 45, 53-54 (1st Cir. 2011), quoting Waters v. Churchill, 511 U.S. 661, 673 (1994). Indeed, the United States Supreme Court has recognized that the purported "danger" posed by public disclosures is "mostly speculative." Waters, supra. No jury issue regarding potential or actual disclosure was presented here.

[25] Lying in the course of an investigation in and of itself was arguably a terminable offense.

[26] We note that to the extent that Antonellis argues that any reasonable official would have known it was unconstitutional to enforce a media "pre-clearance" policy that unlawfully restricted employee speech, he did not raise a prior restraint claim during the predeprivation proceedings or in this action.

[27] In his complaint, Antonellis did not specify under which statutory section he was proceeding. At summary judgment, he clarified that his claim was brought under the objections clause. See G. L. c. 149, § 185 (b) (3).

[28] We agree with the judge's ruling that objections to the media are not protected conduct covered by G. L. c. 149, § 185 (b) (3). We decline Antonellis's request for what appears to be an advisory opinion on the question whether an external objection would be entitled to statutory protection under § 185 (b) (3) as long as "the decision-maker was made aware of the objection and the adverse action was caused by the objection" (emphasis omitted). See Answer of the Justices, 444 Mass. 1201, 1203 (2005).