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LEGAL ADVISORY: *Spaulding v. Natick*, CA No. 2018-01115 (Mass. Super. 11/21/18)

The *Natick* case involves two parents' allegations that the Natick School Committee, the Chair, and the Superintendent (collectively, "Natick") violated their constitutional and statutory rights over the course of three School Committee meetings. *Spaulding v. Town of Natick Sch. Committee*, Civ. A. No. 2018-01115 (Mass. Super. Nov. 21, 2018). The Court concluded that portions of the School Committee's policy relative to public participation in School Committee meetings violated the free speech rights of Article 16 of the Massachusetts Declaration of Rights on its face and that the defendants violated the plaintiffs' free speech rights by silencing them during three School Committee meetings.

A. Factual and Procedural Background

Natick had adopted a standard public comment policy, based on the Massachusetts Association of School Committees' ("MASC") model. Among the provisions of that policy, speakers were allowed three minutes to speak but "[i]mproper conduct and remarks," including "[d]efamatory or abusive remarks" were not allowed and would result in the Chair terminating the person's comments. *Natick* at 2. The policy also stated that the committee would "not hear personal complaints of school personnel nor against any member of the school's community." *Id.* at 3. "Public Speak" was held during the first 15 minutes of School Committee meetings. *Id.*

At the January 8, 2018 meeting, one of the plaintiffs, Spaulding, presented herself for Public Speak and introduced herself as "the mother of a child that was mercilessly bullied into suicide here in Natick." *Natick* at 4. The Chair interrupted the parent, they engaged in some discussion, and ultimately the meeting was suspended and the police were called to escort the speaker from the building.

The following month, at a February 5, 2018 School Committee meeting, the other plaintiff, Sutter, presented herself for Public Speak and indicated that her family "moved out of Natick 'as a result of the retaliation and retribution [her family] received at the hands of the Natick Public Schools.'" *Natick* at 7. The Chair cut her off and reiterated that Public Speak "is not for personnel issues or talking about individual students." *Id.* (internal quotations omitted). Again,

there was some back and forth and the public speaker referenced the way Spaulding was treated during the prior meeting. The Chair suspended the meeting.

The third meeting at issue occurred on March 12, 2018. Sutter again presented herself for Public Speak. In response to a question, she indicated that she had been a long-time resident of Natick but no longer resided there. Sutter again referred to “retaliation and retribution,” at which point the Chair interrupted and warned against defamatory statements. She was allowed to continue speaking.

Thereafter, Natick sent an email to the community referring to the recent incidents during Public Speak and the policy to avoid “defamation, abusive remarks, or personal statements about children and personnel.” *Id.* at 11.

Spaulding and Sutter sued Natick, alleging that certain portions of the Participation Policy and certain of Natick’s actions relative to the Public Speak incidents were unconstitutional and violated Article 16 of the Massachusetts Declaration of Rights. The parties filed cross-motions for summary judgment and the judge found that Natick’s Participation Policy violated free speech rights on its face and as applied to the plaintiffs. The parties later settled the case, which settlement included, among other things, a revised Participation Policy.

B. Public Speak is a Designated Public Forum

Because this case involves free speech rights on government property, the Superior Court began by doing a public forum analysis. For First Amendment cases, which are largely analogous to Article 16 cases, the U.S. Supreme Court has developed three categories of public forums. *Id.* at 15-16. The amount and type of regulation of speech on public property depends on the type of forum. *Id.* The three types of forums are: (1) traditional public forums, such as parks and public streets, (2) designated public forums, “which the government has opened for use by the public as a place to assemble or debate,” and (3) limited public forums, which are “limited to use by certain groups or dedicated solely to the discussion of certain subjects.” *Id.* at 16-17, quoting *Roman v. Trustees of Tufts Coll.*, 461 Mass. 707, 714 (2012) (internal quotations omitted).

Here, the Court concluded that Public Speak is a “designated public forum,” “which the [School Committee] has opened for use by the public as a place to assemble’ and discuss School Committee-related topics.” *Id.* at 17, quoting *Roman*, 461 Mass. at 714. Because the Public Speak portion of the meeting is a designated public forum, “the government may impose reasonable time, place, and manner restrictions on the exercise of free speech rights, but any such restriction must be narrowly tailored to serve a compelling government interest.” *Id.*, quoting *Roman*, 461 Mass. at 714.

C. Certain Language in Participation Policy Unconstitutional on Its Face

Having established the appropriate standard for analyzing the free speech claims, the *Natick* Court considered the language of the Participation Policy at issue, namely, the provisions prohibiting “personal complaints” and “defamatory or abusive” comments.

1. Personal Complaints

First, the Court found the prohibition against personal complaints against members of the school community to be an improper content-based restriction. Such content-based restrictions must be narrowly tailored to serve the government entity's interest in conducting its business. *Id.* at 21. Although the Court found that a blanket prohibition on personal complaints does not satisfy that standard, the Court also ruled that it would be constitutional "to the extent it prohibits speech outside the scope of the School Committee's responsibilities." *Id.*

The ruling that a School Committee can prohibit speech outside the scope of its responsibilities is important because it provides a basis to prohibit many comments about individual students and staff. As the *Natick* Court explained, the School Committee could use that limitation to foreclose complaints about a teacher's performance or a student's behavior because those issues are outside of the scope of the School Committee's responsibilities. To be clear, however, a public speaker would still be permitted to voice concerns about the Superintendent's performance, the budget, or school operations on the whole, which topics are within the scope of the School Committee's responsibility. *Id.*; *see also*, G.L. c. 71, § 37 (delineating the School Committee's responsibilities). As long as the comment is on a topic within the purview of the School Committee, the speaker cannot be prevented from identifying individuals. *Id.* at 21-22 ("the School Committee cannot prohibit the speaker from identifying the party involved").

In reaching that conclusion, the *Natick* Court minimized the School Committee's right to protect its community members' privacy, at least in relation to free speech rights. Specifically, the Court ruled "[a]ny interest the School Committee has in protecting the privacy of members of the school community,¹ including school personnel, must 'give way' to the constitutional right the public has under art. 16 that '[t]he right of free speech shall not be abridged.'" *Id.* at 22.

The Court also addressed policy language permitting speakers to make "objective criticisms of the school operations and programs as concern them." *Id.* The Court ruled that "[w]hile requiring that criticisms be 'based on externally verifiable phenomena' is not improper, prohibiting subjective comments – to the extent the issues 'concern' the speaker – is improper." *Id.*

2. Defamatory or Abusive Remarks

Another portion of the policy at issue is the prohibition on defamatory remarks.² The Court found that prohibition unconstitutional, as well. As the Court explained, "[u]ntil speech is adjudicated defamatory, [...] it is entitled to constitutional protection." *Id.* at 23. Thus, to the extent the Participation Policy only prohibited statements that had been adjudicated to be

¹ In a footnote, the Court added that the policy did not prevent speakers from identifying their own children and the plaintiffs did not argue that the speaker should be permitted to identify other children.

² Whether a communication is defamatory depends on "whether, in the circumstances, the [communication] discredits the plaintiff in the minds of any considerable and respectable segment in the community." *Id.* at 23, quoting *HipSaver, Inc. v. Kiel*, 464 Mass. 517, 530 n.13 (2013). If a public official or public figure is alleging defamation, he must prove that the defamatory statement was made with knowledge that the statement was false or made with reckless disregard of whether the statement was false. *Id.*

defamatory, it would be constitutional. To the extent, however, the policy prohibits comments that *might be* defamatory, it would be unconstitutional. *Id.* at 23-24.

As the Court noted in a footnote, however, speakers are not entitled to make statements they know to be false during Public Speak because speech loses its protection if the defendant knew it was false, had no reason to believe it was true, or “recklessly published the information unnecessarily, unreasonably, or excessively.” *Id.* at 24 n.21; quoting *Sklar v. Beth Israel Deaconess Med. Ctr.*, 59 Mass. App. Ct. 550, 558 (2003).

3. Improper and Abusive Remarks

The plaintiffs also challenged the Participation Policy’s prohibition on improper and abusive remarks on the grounds that they were not defined and, therefore, provided Natick with “unbridled discretion.” *Id.* at 24.

The Court explained that free speech jurisprudence has specified certain narrow categories of speech that are not protected. Those include threats, “fighting words,” and obscenities. The “improper and abusive remarks” language is broader than those three categories and, therefore was not narrowly tailored enough to pass constitutional muster. *Id.* at 24-25.

D. Participation Policy Unconstitutional as Applied to Plaintiffs

In addition to challenging the language of the Participation Policy, the plaintiffs also challenged how Natick applied the policy to the two speakers over the course of the three meetings. The Court granted summary judgment in favor of the plaintiffs.

With respect to the first two meetings, the committee Chair cut off the speakers before they could explain the nature of their complaints. Had their complaints been based on issues outside of the scope of the School Committee’s responsibilities, the School Committee could have stopped the comments as outside the scope of Public Speak. Had the complaints been about subjects within the School Committee’s purview, however, such as a systematic problem or issue with the Superintendent, then the speakers should have been permitted to speak, even if the comments were critical of Natick. Because the Chair cut the speakers off before they had a chance to explain, Natick’s application of the Participation Policy in those instances was unconstitutional. *Id.* at 25-28.

With respect to the third meeting, the Chair permitted the speaker to speak but put too much restriction on her by stating that the speaker could not discuss individuals or make defamatory statements. Again, the public speaker should have been permitted to make statements, even derogatory ones, about the Superintendent or operations or policies within the School Committee’s purview. *Id.* at 28.

E. Order and Settlement

Based on the above, the Superior Court granted plaintiffs’ request for declaratory relief and declared:

1. The Participation Policy violates Article 16 of the Declaration of Rights “by failing to define the terms ‘improper’ and ‘abusive’ as referring to obscenities (or vulgarities), threats, and fighting words (or remarks likely to provide a violent reaction); and by failing expressly to limit ‘defamatory’ remarks as remarks that have been adjudicated defamatory.”
2. Limiting criticisms to “objective” criticisms violates Article 16 of the Declaration of Rights but limiting “criticism, complaints, and comments, ‘personal’ and otherwise, during Public Speak to matters within the school Committee’s scope of responsibility” is constitutional.
3. The March 16, 2018 email did not violate Article 16 itself, but only to the extent it was consistent with the unconstitutional portions of the Participation Policy.
4. The defendants violated plaintiffs’ free speech rights by silencing them during the three School Committee meetings at issue.

Id. at 28. Accordingly, the Court granted summary judgment in favor of the plaintiffs and denied defendants’ motion for summary judgment.

After the summary judgment ruling, a handful of claims remained and the parties reached a settlement. Pursuant to the settlement agreement, Natick agreed to revise its Public Participation Policy, afford the plaintiffs an opportunity to speak at a public meeting, circulate a letter to the community informing them of the settlement and apologizing for its conduct, have a free speech training, and pay \$40,000 in attorney fees. Information on the settlement, including a link to the revised Participation Policy is available at the ACLU’s website:
<https://www.aclum.org/en/cases/spaulding-v-natick-school-committee>.

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