UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BRIAN HUSSEY, Plaintiff, v. CITY OF CAMBRIDGE and BRANVILLE BARD, *individually and in his capacity as Commissioner of the Cambridge Police Department*, Defendants.	Civil Action No. 21-CV-11868-AK

MEMORANDUM AND ORDER

A. KELLEY, D.J.

Brian Hussey ("Hussey"), a police officer for the City of Cambridge Police Department ("CPD"), brings this action, pursuant to 42 U.S.C. § 1983, against the City of Cambridge (the "City") and Branville Bard ("Bard"), the previous Commissioner of the CPD, in his individual and official capacities, alleging that the defendants violated his First Amendment right to freedom of speech. The defendants filed a motion to dismiss [Dkt. 9], which Hussey opposes. For the reasons that follow, the defendants' motion to dismiss [Dkt. 9] is **GRANTED IN PART** and **DENIED IN PART**.

I. Factual and Procedural Background

Unless otherwise noted, the facts are recited as alleged in Hussey's complaint. [See Dkt. 1 ("Complaint")]. Hussey has worked as a police officer for the CPD for twenty-four years. [Id. at ¶ 1]. Hussey maintains a private Facebook page, which does not identify him as a police officer, where he occasionally posts personal and political comments or articles. [Id. at ¶ 9]. On

or about February 25, 2021, while off duty, Hussey posted an article titled "House Democrats Reintroduce Police Reform Bill Named in Honor of George Floyd," along with the comment, "This is what its [sic] come to 'honoring' a career criminal, a thief and druggie . . . the future of this country is bleak at best." [Id. at ¶¶ 10-11]. Hussey states that the motivation behind this post was his "concern[] as a private citizen that an important act of Congress would be named 'in honor' of someone who was reported to have a criminal record." [Id.]. Hussey took the post down approximately two hours after posting. [Id. at ¶ 12]. In March 2021, Bard informed Hussey that he was being placed on administrative leave because of the Facebook post. [Id. at ¶ 13]. Hussey was on administrative leave for two months before receiving a four-day suspension. [Id.]. Hussey claims that this punishment violated his First Amendment right to the freedom of speech and seeks monetary damages in addition to declaratory and injunctive relief. [Id. at ¶¶ 14-16].

The defendants moved to dismiss Hussey's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). [Dkt. 9]. Hussey opposed that motion. [Dkt. 13]. The Court held a motion hearing on September 26, 2022.[1]

II. Legal Standard

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint must allege sufficient facts to state a claim for relief that is "plausible on its face" and actionable as a matter of law. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl.

[1] Shortly after filing his opposition, Hussey moved to supplement and amend his complaint. [Dkt. 14]. In his proposed amended complaint, Hussey does not allege any new underlying facts related to the Facebook post or suspension. Instead, he adds claims that he was denied a promotion to sergeant in April 2022, after filing this suit, because of the discipline he received in response to the Facebook post. [Dkt. 14-1 at ¶ 18]. At the motion hearing on September 26, 2022, counsel informed the Court that Hussey had since been promoted to sergeant and Hussey's counsel therefore intended to withdraw the motion to amend the complaint. As such, the Court denied as moot Hussey's motion to amend. [See Dkt. 24].

Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Reading the complaint "as a whole," the Court must conduct a two-step, context-specific inquiry. García-Catalán v. United States, 734 F.3d 100, 103 (1st Cir. 2013). First, the Court must perform a close reading of the complaint to distinguish factual allegations from conclusory legal statements. Id. Factual allegations must be accepted as true, while legal conclusions are not entitled to credit. Id. A court may not disregard properly pleaded factual allegations even if actual proof of those facts is improbable. Ocasio-Hernández v. Fortuño-Burset, 640 F.3d 1, 12 (1st Cir. 2011). Second, the Court must determine whether the factual allegations present a "reasonable inference that the defendant is liable for the misconduct alleged." Haley v. City of Bos., 657 F.3d 39, 46 (1st Cir. 2011) (citation omitted). Dismissal is appropriate when the complaint fails to allege a "plausible entitlement to relief." Rodriguez-Ortiz v. Margo Caribe, Inc., 490 F.3d 92, 95 (1st Cir. 2007) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559 (2007)). When resolving a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court is generally limited to "the complaint, documents attached to it, and documents expressly incorporated into it," Foley v. Wells Fargo Bank, N.A., 772 F.3d 63, 71-72 (1st Cir. 2014), though the Court may also consider "matters of public record[] and other matters susceptible to judicial notice," Newton Covenant Church v. Great Am. Ins. Co., 956 F.3d 32, 35 (1st Cir. 2020).

III. Discussion

Hussey brings this action pursuant to 42 U.S.C. § 1983. Section 1983 provides that "[e]very person" acting "under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia" who subjects or causes to subject someone "to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" of the United States shall be liable to the injured party. 42 U.S.C. § 1983. An individual asserting a

Section 1983 claim must show that the challenged conduct is "attributable to a person acting under color of state law" and that the conduct was a "denial of rights secured by the Constitution or by federal law." Soto v. Flores, 103 F.3d 1056, 1061 (1st Cir. 1997); see Graham v. Connor, 490 U.S. 386, 393-94 (1989) (explaining that Section 1983 is "not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred" (citation omitted)). In this case, the defendants do not dispute that they were acting "under color of state law." Rather, they contend that the injuries alleged do not amount to a violation of Hussey's First Amendment rights because he was not engaged in protected speech.[2] In the alternative, they argue that Bard did not have final policymaking authority over the disciplinary action taken, and the City therefore cannot be held liable pursuant to Section 1983, and that Bard is entitled to qualified immunity, which "protects government officials . . . from suit and liability for monetary damages under [Section] 1983," as to the individual capacity claim against him. Acevedo-Garcia v. Vera-Monroig, 204 F.3d 1, 10 (1st Cir. 2000)). Hussey counters that he was engaged in protected speech and that Bard was the final policymaking authority as to officer discipline and is not entitled to qualified immunity. [Dkt. 13 at 1-4].

A. Protected Speech

The threshold question is whether Hussey has alleged facts sufficient to plead a First Amendment violation, which requires the speech at issue to be protected. Although public employees like Hussey "do not forfeit all of their First Amendment rights by undertaking public employment," the protection public employees enjoy "against speech-based reprisals is qualified." Decotiis v. Whittemore, 635 F.3d 22, 29 (1st Cir. 2011) (citing Mercado-Berrios v. Cancel-Alegria, 611 F.3d 18, 25-26 (1st Cir. 2010)). Government employees "often occupy

[2] The First Amendment was incorporated against the states by the Due Process Clause of the Fourteenth Amendment. See Grosjean v. Am. Press Co., 297 U.S. 233, 243 (1936).

trusted positions in society" and when they speak out "they can express views that contravene governmental policies or impair the proper performance of governmental functions." Garcetti v. Ceballos, 547 U.S. 410, 419 (2006); see Curran v. Cousins, 509 F.3d 36, 47 (1st Cir. 2007). Consequently, when a citizen "enters government service, the citizen by necessity must accept certain limitations on his or her freedom." Garcetti, 547 U.S at 418. The Court must apply a three-part test to determine whether a government employer has violated an employee's right to free speech by taking an adverse action against him, considering whether (1) the employee spoke as a citizen on "a matter of public concern"; (2) the government employer had an "adequate justification for treating the employee differently from any other member of the general public," that is, whether the interests of the employee and public "outweigh the government's interest in functioning efficiently"; and (3) whether the protected speech "was a substantial motivating factor in the adverse action" against the employee. Bruce v. Worcester Reg'l Transit Auth., 34 F.4th 129, 135, 138 (1st Cir. 2022); see also Borrás-Borrero v. Corporación del Fondo del Seguro del Estado, 958 F.3d 26, 34 (1st Cir. 2020) (citing Rosado-Quiñones v. Toledo, 528 F.3d 1, 15 (1st Cir. 2008)); Decotiis, 635 F.3d at 29.

The parties here do not dispute the first and third elements. Therefore, the Court's analysis will focus on the second element, often referred to as the "Pickering test": balancing the employee and the public's interests in the employee's speech against the "interest of the [government], as an employer, in promoting the efficiency of the public services it performs through its employees." Jordan v. Carter, 428 F.3d 67, 73 (1st Cir. 2005) (citing Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)). The resolution of this inquiry is a matter of law for the Court to decide, id., though it does require a "look at the facts of the case, including the nature of the employment and the context in which the employee spoke," Hayes v. Mass. Bay Transp.

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