In the case of *Shaw v. Town of Garner*, Plaintiff brought a wrongful termination action against Defendant Town and town officials.

First Amendment Protection for DEI Advocacy?

By James C. Kozlowski, J.D., Ph.D.

In recent years, NRPA has surveyed park and recreation leaders to gain a better understanding of their agencies' efforts surrounding diversity, equity and inclusion (DEI) practices. In the *Diversity, Equity and Inclusion in Parks and Recreation* report (tinyurl.com/yc5j6s8v), NRPA noted the following:

> *One challenge — and strength — within most communities is difference: in race, ethnicity, gender identity, religion, socioeconomic status, age, language, or physical or mental abilities and skills. Differences "meet" on the playground; park and recreation professionals operate at the intersection of those differences.*

To address this challenge, the *Diversity, Equity and Inclusion in Parks and Recreation* report developed an inventory of park and recreation agency DEI activities, including professional development opportunities provided to staff, and the challenges organizations face in their efforts to promote DEI practices. In addition, the report highlighted the following findings from the national survey of park and recreation leaders:

- Nearly 2 in 3 park and recreation agencies have established formal DEI activities or plan to establish them in the immediate future.
- Ninety-two percent of park and recreation agencies offer DEI education and resources to their staff.
- Six in 7 park and recreation leaders agree that park and recreation inequity is a problem nationally.
- Agencies' DEI staff leaders include directors, senior leadership, dedicated staff, human resources employees and program staff.
- More than 9 in 10 park and recreation leaders agree that it is important to address park and recreation inequities.

Diversity and Equity Training

In the case of *Shaw v. Town of Garner*, 2024 U.S. Dist. LEXIS 164646

(W.Dist. N.C. 9/12/2024), Plaintiff brought a wrongful termination action against Defendant Town and town officials (the Town). In her lawsuit, Plaintiff claimed her advocacy for DEI training prompted her employment termination and constituted retaliation by the Town in violation of the First Amendment, as well as race and sex discrimination.

In about July 2020, to encourage a safe working environment for all of her employees, Plaintiff asked for department volunteers to help develop a Parks, Recreation and Cultural Resources (PRCR) diversity and equity training committee. The committee was comprised of department volunteers who developed the activities and materials to share with the entire department. The training sessions occurred during the time of racial unrest in the United States and during the coronavirus (COVID-19) pandemic.

Plaintiff felt the importance of preparing her department for the changing needs of serving a diverse community, particularly since the Town offered no training or opportunities for employees to discuss the changing racial dynamics taking place across the country.

At that time, protests were occurring across the country for racial equity after George Floyd's death, and new COVID-19 protocols and practices were being established, altering service delivery for park and recreation agencies across the country. Diversity and equity trainings began occurring instantly across the country in public, private and educational settings.

Plaintiff, a national leader in the park and recreation field, attended such training sessions and believed it was important enough to share this information with department staff responsible for delivering in-person and virtual services to the general public. Plaintiff met with managers in the PRCR department to discuss their interest in conducting an equity session with department staff.

Plaintiff knew that social equity was a major pillar and focus within the park and recreation profession nationally and statewide. Plaintiff shared this with her entire department and subsequently formed a team of diverse department staff to coordinate the project. The group continued to meet to develop a session, which was sent out to staff when finalized.

Plaintiff communicated the following concern about equity in parks and recreation, which was not limited to intradepartmental matters:

> *Per the Diversity, Equity and Inclusion (DEI) in Parks and Recreation publication by the National Recreation and Park Association, virtually every park and recreation agency across the nation had activities and policies that promote DEI outcomes, and agencies also have established DEI practices that shape how they interact with their communities.*

Accordingly, Plaintiff communicated to her employees that DEI is not only relevant to employment, but also to the community that the PRCR serves. Plaintiff was concerned for DEI on all of these levels and sought to communicate this to her staff and management.

On August 4, 2020, Plaintiff emailed information about the training to her department. The next day, Plaintiff learned from her assistant director that discussions within PRCR had indicated some staff were uncomfortable with the equity session because "they did not want to talk about race at work."

Plaintiff then met with the assistant town manager, who indicated complaints had been received from staff of all races about the equity training session. Plaintiff was interrupted when she began to explain the equity training session and was told to "cancel the meeting." Plaintiff expressed her disappointment with the lack of trust in her and the confusion that would be created by the last-minute cancellation.

On August 6, 2020, Plaintiff shared her concern with town officials regarding the cancellation of the equity training session. In particular, Plaintiff was concerned that she "had not been notified or given an opportunity to address specific staff concerns prior to the decision being made to cancel the session." In addition, Plaintiff requested a meeting with the assistant town manager, the planning committee and staff to "discuss concerns about the training." No one responded to Plaintiff's request nor did anyone "provide any opportunity for follow-up between management or staff."

On August 18, 2020, town officials did agree to "support using a State association's training." Six days later, Plaintiff was called to a meeting with the town manager who shared that "he had received complaints from staff about PRCR department leadership." In response, the town manager told

Plaintiff's "proposed amended allegations state a claim" under the First Amendment, in the opinion of the federal district court.

Plaintiff he had "hired a consultant to conduct an investigation with department staff about workplace environment, policies and procedures." Plaintiff and the town manager then "discussed the need for building staff back up and providing training on improving communication, building trust, diversity and equity."

On October 28, 2020, the town manager met with Plaintiff and a newly hired attorney for the Town. At the meeting, the town manager terminated Plaintiff's employment with the Town, effective immediately, on the basis of the following:

a. Inappropriate personal conduct, demonstrated inefficiency or incompetence in the performance of her duties;
b. Inappropriate personal conduct, discourteous treatment of the public or other employees;
c. Inappropriate personal conduct, failure to carry out supervisory responsibilities including failure to enforce Town policies concerning cash handling and use of credit cards;
d. Detrimental personal conduct, the functioning of the Town may be or has been impaired;
e. Detrimental personal conduct, public confidence in government is likely to be undermined; and
f. Detrimental personal conduct, falsification of records to grant special privilege through manipulation of performance evaluation scores.

In her lawsuit, Plaintiff sought back pay, reinstatement or front pay, liquidated and compensatory damages, as well as interest, fees and costs. On April 23, 2024, the federal district court dismissed Plaintiff's claims for "failure to state a claim upon which relief can be granted." In response, Plaintiff petitioned the court to allow her to amend her complaint and reconsider her claims.

First Amendment Retaliation

In the opinion of the federal district court, Plaintiff's "proposed amended allegations state a claim" under the First Amendment. In so doing, the court referenced the following legal standards bearing on Plaintiff's First Amendment retaliation claim:

> *[A] plaintiff must show that (1) she spoke as a citizen on a matter of public concern, rather than as an employee on a matter of personal interest; (2) the employee's interest in her expression outweighed the employer's interest in providing effective and efficient services to the public; and (3) the employee's speech was a substantial factor in the adverse employment action.*

In the proposed amended complaint, the court found Plaintiff had indeed alleged new facts "sufficient to give rise of an inference that she spoke on a matter of public concern, rather than

as an employee on a matter of personal interest." As described by the court, Plaintiff had alleged she was "preparing her department for the changing needs of serving a diverse community, particularly since the town offered no training or opportunities for employees to discuss the changing racial dynamics taking place across the country."

Citing "protests, occurring across the country for racial equity," Plaintiff had further alleged that "diversity and equity trainings began occurring instantly across the country in public, private and educational settings." Having "personally attended such training sessions," Plaintiff had suggested sharing "this information with department staff responsible for delivering in-person and virtual services to the general public":

> *She allegedly communicated to them her concerns about equity in the town and nationwide, and "that social equity was a major pillar and focus in the parks and recreation profession nationally and statewide." She identified national publications promoting Diversity, Equity and Inclusion best practices in how agencies interact with their communities, and plaintiff allegedly communicated this to her staff and management.*

The federal district court found these facts were "not alleged in the original complaint," but gave rise in the requested amended complaint to an inference that her "speech involved a matter of public concern" that affected "the social, political, or general well-being of the community."

As characterized by the court, Plaintiff's allegations in the amended complaint established the plausibility that "the public or the community is likely to be truly concerned with or interested in the particular expression" by Plaintiff. Accordingly, in the opinion of the court, Plaintiff's allegations were "not essentially a private matter between employer and employee." In making this determination, the federal district court cited precedent from the U.S. Supreme Court which had recognized the "right to protest racial discrimination, a matter inherently of public concern, is not forfeited by an employee's choice of a private forum."

Having found that Plaintiff was speaking "as a citizen on a matter of public concern, rather than as an employee on a matter of personal interest," the federal district court held Plaintiff had established the first element in her First Amendment claim in her amended complaint.

Having found that Plaintiff was speaking "as a citizen on a matter of public concern, rather than as an employee on a matter of personal interest," the federal district court held Plaintiff had established the first element in her First Amendment claim in her amended complaint.

Employee Interest in Expression

Proceeding to address the required "second element" in Plaintiff's First Amendment claim, the federal district court then considered whether "the employee's interest in her expression outweighed the employer's interest in providing effective and efficient services to the public." In so doing, the court noted "the government's burden in justifying a particular discharge varies depending upon the nature of the employee's expression."

In this particular instance, the court found Plaintiff had asserted "the town terminated her" for "attempting to provide her staff with diversity and equity train-

Plaintiff's proposed amended complaint included new allegations to remedy the deficiencies in her race and sex discrimination claims.

ing which was a matter of public concern." In the opinion of the federal district court, Plaintiff's complaint permitted "an inference that her interests outweighed the town's alleged interest in terminating Plaintiff allegedly for her expressions about such diversity and equity training."

Adverse Employment Factor

Having found that Plaintiff's amended complaint satisfied the required second element of her First Amendment claim, the federal district court determined "the same allegations support the third element, that her speech was a substantial factor in the adverse employment action":

> *Further, this third element is supported by the timing between plaintiff's alleged communications regarding her "concerns about equity" in July 2020, her emails to the department about training in August 2020, and…cancellation of the training and commencement of an investigation into plaintiff that same month, culminating in plaintiff's termination in October 2020.*

The federal district court, therefore, held Plaintiff had "alleged facts in her proposed amended complaint" to state her First Amendment claim.

Race and Sex Discrimination

Plaintiff's proposed amended complaint also included new allegations to remedy the deficiencies in her race and sex discrimination claims. In particular, in her original complaint, the federal district court noted Plaintiff had not alleged a "plausible basis for believing others were actually similarly situated and that any impropriety was comparable to the acts the plaintiff was alleged to have committed."

In the opinion of the court, in her amended complaint, Plaintiff had alleged a reasonable basis for believing she was "similarly situated to other supervisory and management personnel" for "specific acts of impropriety" in violation of town policies allegedly violated by Plaintiff but resulted in "less severe disciplinary action." In addition, Plaintiff alleged "other women in supervisory positions have left their employment with the town due to similar unfair treatment."

Moreover, Plaintiff alleged "the town retained white, male and/or female employees despite allegations of similar misbehavior."

Plaintiff's amended complaint also included new allegations concerning retention of one white employee, despite "her 'rude, disrespectful, inconsiderate, dismissive, and unprofessional' interactions within Plaintiff's department." Similarly, Plaintiff alleged "one white male supervisory town employee used derogatory language towards black male employees," and two other employees had

"problems with management of black male employees" while "another white male employee was confrontational" toward Plaintiff.

In addition to being "allegedly rebuffed" for her "expressions of concern regarding diversity and equity training," Plaintiff had also claimed she felt "pressured to sign" an "affidavit to address public concerns about the Sons of Confederate Veterans and the Town's Christmas parade."

Based upon these new allegations in the amended complaint, the federal district court found Plaintiff had plausibly shown she "was treated differently from others who were similarly situated and that the unequal treatment was the result of discriminatory animus."

Accordingly, the federal district court held "Plaintiff's proposed amended complaint states a claim for race and sex discrimination under federal civil rights law." 42 U.S.C. §§ 1981 and 1983.2.

Conclusion

The federal district court, therefore, granted Plaintiff's request to file an amended complaint to continue to pursue her claims against Defendant Town. In so doing, the court held the allegations in the amended complaint were sufficient, if proven in further trial proceedings, to establish Plaintiff's claims that the Town's decision to terminate her employment was in retaliation for her advocacy of DEI training in violation of the First Amendment as well as race and sex discrimination.

SEE ALSO: *"Director Fired After Critical E-Mail," James C. Kozlowski,* Parks & Recreation, *February 2008, Vol. 43, Iss. 2, tinyurl.com/yc26juad* (***Author's Note:*** *Judgment in favor of the city affirmed on appeal; see appellate opinion attached to article); "Unconstitutional Retaliation Against Employee's Free Speech?," James C. Kozlowski,* Parks & Recreation, *March 2001, Vol. 36, Iss. 3, tinyurl.com/eza8xs35.*

James C. Kozlowski, J.D., Ph.D., is an Attorney and Emeritus Associate Professor in the School of Sport, Recreation and Tourism Management at George Mason University (jkozlows@gmu.edu). Law review articles archive (1982 to present): mason.gmu.edu/~jkozlows/lawarts/artlist.htm.