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No. 19-1416

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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DEBORAH S. HUNT, Clerk

LORI MERTINS, **Plaintiff-Appellant,** v. CITY OF MOUNT CLEMENS et al., **Defendants-Appellees.**	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN **OPINION**

BEFORE: NORRIS, MOORE, and DONALD, Circuit Judges.

KAREN NELSON MOORE, Circuit Judge. As an accounting technician working for the City of Mount Clemens Finance Department, Lori Mertins discovered that the City routinely was overbilling residents for their water utilities. She claims that her superiors knew about it and covered it up. After Mertins confronted her superiors, they purportedly denied her a promotion and began a campaign of harassment that lasted more than five years and resulted in Mertins taking permanent medical leave. Mertins brought this action against her superiors, the City Manager, and the City of Mount Clemens for First Amendment retaliation. She sued the individual Defendants for intentional infliction of emotional distress. The district court granted summary judgment for Defendants on both claims. We **AFFIRM** in part and **REVERSE** in part the district court's grant of summary judgment and **REMAND** for further proceedings consistent with this opinion.

I. BACKGROUND

While working for the City of Mount Clemens Finance Department, Mertins discovered that residents were being overbilled for water utilities. *See* R. 29-2 (Mertins Dep. Tr. at 33) (Page ID #288). In her role as an "Accounting Technician I," R. 1 (Compl. at 4, ¶ 19) (Page ID #4), Mertins was responsible for general billing, accounts payable, and water and sewer utility billing. R. 29-2 (Mertins Dep. Tr. at 33, 36) (Page ID #288, 291). Her superiors were Finance Director Marilyn D'Luge and Assistant to the Finance Director Laura Wille.

In late 2009, Mertins discovered that the water utility accounting software was set to include a fixed zero for low side water meters, "so when a read pulls in it automatically pulls the read in with a zero at the end of it." *Id.* at 38–40 (Page ID #292–95). The fixed zero for low side meters led to inaccurate meter reads that resulted in overbilling. *Id.* at 39–42 (Page ID #294–97). On November 4, 2009, Mertins discovered that a youth home had been overbilled by $400,000—the largest discrepancy she had encountered yet. *Id.* at 42, 54 (Page ID #297, 309). After she reported it to Wille and D'Luge, they told her to hand over the accounts to Wille for any necessary adjustments, but Mertins refused and, instead, corrected the accounts herself. *Id.* at 51–55 (Page ID #306–10). On November 5, 2009, Mertins received a write-up for disobeying a direct order. *Id.* at 54 (Page ID #309). That same month, Mertins was denied a promotion that she claims D'Luge had promised her in May. *Id.* at 53, 58 (Page ID #308, 313); *see also* R. 29-5 (Promotion Denial) (Page ID #404). The initial reprimand for correcting the accounts kicked off an onslaught of harassment and reprimands from Wille and D'Luge, including a write-up for adjusting the thermostat. *See* R. 29-2 (Mertins Dep. Tr. at 57–114) (Page ID #312–69); R. 29-8 (Wille Dep. Tr. at 107–08) (Page ID #438).

At some point, Mertins conducted a full audit of the water billing. She learned that the overbilling issue started back in 2003 or 2004 and that Wille and D'Luge had attempted to cover it up. R. 29-2 (Mertins Dep. Tr. at 43–48) (Page ID #298–303). Mertins told her superiors that she would go to the City Manager if they did it again. *Id.* at 46–47 (Page ID #301–02). In response, D'Luge assured Mertins that they would give back the money owed, and they ultimately did in fact credit the accounts. *Id.* at 47, 51–52 (Page ID #302, 306–07).

Mertins complained to her union about the abuse that she received from Wille and D'Luge and successfully grieved multiple write-ups and refusals to pay her for work she did related to the audit. *See, e.g.*, *id.* at 55–58, 69–70, 95, 101–02 (Page ID #310–13, 324–25, 350, 356–57). Sometime in 2010, Mertins informed the FBI of the overbilling and her superiors' attempt to cover it up. *Id.* at 131 (Page ID #386). She did not tell D'Luge, Wille, or the City Manager that she had talked to the FBI. *Id.* She also spoke to, and lodged a complaint with, the local prosecutor's office sometime in 2011. *Id.* at 135 (Page ID #390). From 2010 to 2011, harassment from Wille and D'Luge continued. *See id.* at 66–80 (Page ID #321–35).

In 2012, Mertins talked to the FBI for a second time about the overbilling. *Id.* at 131 (Page ID #386). She then met with the City Commissioners to tell them that she had reported D'Luge's and Wille's misconduct to the FBI. *Id.* at 133–34 (Page ID #388–89). She never told the City Manager, D'Luge, or Wille that she had talked to the FBI. *Id.* However, she believes that one of the commissioners told the Mayor and the City Manager. *Id.* at 134–35 (Page ID #389–90). Harassment from Wille and D'Luge persisted with more reprimands for minor or made-up mistakes, and Mertins again was denied a promotion. *See id.* at 74, 83–85, 99–113 (Page ID #329, 338–40, 354–68).

On October 27, 2015, Mertins received a notice to attend a Loudermill Disciplinary Interview scheduled for that very same day. R. 27-4 (Mertins Discovery Responses at 9) (Page ID #164). She was not provided notice of the reason for the hearing. *Id.* Ultimately, the hearing did not take place because it made Mertins so stressed out that she had to go to the hospital for health complications. R. 29-2 (Mertins Dep. Tr. at 115–17) (Page ID #370–72). The City later told her that the notice was "a mistake." *Id.* After that, Mertins went on medical leave under the Family Medical Leave Act (FMLA) to recover from the harassment's effect on her health. *Id.* at 116 (Page ID #371). But when she returned to work on January 20, 2016, the harassment started up again. *Id.* As a result, she resumed medical leave on February 26, 2016. *Id.*; R. 27-4 (Mertins Discovery Responses at 10) (Page ID #165).

From December 2015 through May 2016, Mertins claims that she was harassed by the City Manager, Steve Brown. R. 27-4 (Mertins Discovery Responses at 10) (Page ID #165). On December 14, 2015, Brown emailed her to tell her that she was required to submit a doctor's note in order to return to work without restrictions. *Id.* Twice, Brown updated Mertins on how much time she had run through on her FMLA leave. *Id.* Finally, on May 3, 2016, Brown ordered Mertins to return to work by May 11, 2016. *Id.* Mertins claims that these statements violate the Americans with Disabilities Act and were acts of retaliation. *Id.* On March 7, 2016, the City denied her Worker's Compensation claim. *Id.* The City then cancelled her benefits. R. 29-2 (Mertins Dep. Tr. at 123) (Page ID #378). Mertins never did return to work. *See id.* at 116 (Page ID #371).

Mertins brought this action for First Amendment retaliation against all Defendants and for intentional infliction of emotional distress against the individual Defendants. R. 1 (Compl.) (Page ID #1). She brings her First Amendment claim under 42 U.S.C. § 1983, *id.* at 7–8, ¶¶ 34–38 (Page ID #7–8), and she brings her intentional infliction of emotional distress claim under Michigan tort law, *id.* at 8–9, ¶¶ 39–44 (Page ID #8–9). Defendants moved for summary judgment on both claims and prevailed below. *See Mertins v. City of Mount Clemens*, No. 16-12827, 2019 WL 1294144 (E.D. Mich. Mar. 21, 2019). We have jurisdiction over Mertins's timely appeal.

II. DISCUSSION

We review de novo a district court's grant of summary judgment. *Mayhew v. Town of Smyrna*, 856 F.3d 456, 461 (6th Cir. 2017). "A grant of summary judgment will be upheld only where no genuine dispute of material fact exists and the moving party is entitled to judgment as a matter of law." *Jackson v. VHS Detroit Receiving Hosp., Inc.*, 814 F.3d 769, 775 (6th Cir. 2016); *see also* FED. R. CIV. P. 56(a). "[T]he dispute about a material fact is 'genuine' . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "The district court, and this Court in its review of the district court, must view the facts and any inferences reasonably drawn from them in the light most favorable to the party against whom judgment was entered." *Kalamazoo Acquisitions, L.L.C. v. Westfield Ins. Co.*, 395 F.3d 338, 342 (6th Cir. 2005).

A. First Amendment Retaliation

Mertins alleges that Defendants retaliated against her for exercising her First Amendment right to freedom of speech. "We employ a burden-shifting framework to determine whether an

employee has established a claim of First Amendment retaliation. . . . To establish a prima facie case, the employee must demonstrate that:

> (1) the employee was engaged in constitutionally protected speech or conduct;
> (2) the employee was subjected to an adverse employment action that would deter a person of ordinary firmness from continuing to engage in that speech or conduct; and
> (3) the protected speech was a substantial or motivating factor for the adverse employment action.

Barrow v. City of Hillview, 775 F. App'x 801, 810 (6th Cir. 2019) (citing *Benison v. Ross*, 765 F.3d 649, 658 (6th Cir. 2014)). "If the employee establishes a prima facie case, the burden then shifts to the employer to demonstrate by a preponderance of the evidence that the employment decision would have been the same absent the protected conduct." *Dye v. Office of the Racing Comm'n*, 702 F.3d 286, 294 (6th Cir. 2012) (quotations omitted) (quoting *Eckerman v. Tenn. Dep't of Safety*, 636 F.3d 202, 208 (6th Cir. 2010)). There is no question that the harassment from Wille and D'Luge constitutes adverse employment action that would deter an ordinary person from speaking. The only real issues are whether Mertins engaged in protected speech and whether she can establish causation.

To determine whether an employee engaged in constitutionally protected speech, we must decide whether the employee's speech "addressed a matter of public concern." *Buddenberg v. Weisdack*, 939 F.3d 732, 739 (6th Cir. 2019). "Speech involves matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Lane v. Franks*, 573 U.S. 228, 241 (2014) (citation and quotations omitted). "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 v. Myers*, 461 U.S. 138, 147–48 (1983). As the Supreme Court stated in *Lane*, 573 U.S. at 241, "allegations of public corruption 'are exactly the type of statements that demand strong First Amendment protections.'" *Mayhew*, 856 F.3d at 468 (quoting *Handy-Clay v. City of Memphis*, 695 F.3d 531, 543 (6th Cir. 2012)).

Mertins's statements regarding the water utility overbilling problem and Wille's and D'Luge's attempt to cover it up address a matter of public concern. City residents have an interest in learning that they are losing money as a result of City employees' misconduct and would find such information of value and concern. That Mertins was harassed by her superiors after the fact does not turn her speech into an employment dispute. Moreover, Mertins is not required, as the defendants argue, to prove any illegality on the part of the City or the individual defendants. Conduct does not have to be illegal for it to be a matter of public concern. *Mayhew*, 856 F.3d at 469. And even if the allegations prove to be untrue, the public still has an interest in hearing the accusation. *See See v. City of Elyria*, 502 F.3d 484, 495 (6th Cir. 2007). The City's practice of overbilling its residents, and its attempt to cover it up, are of political and financial concern to the community.

We also must decide whether the plaintiff spoke "as a private citizen or as an employee pursuant to her official duties." *Buddenberg*, 939 F.3d at 739; *see also Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). After *Lane*, employee speech is a "narrow" category of speech that includes only statements "made in furtherance of the ordinary responsibilities of [one's] employment." *Boulton v. Swanson*, 795 F.3d 526, 534 (6th Cir. 2015). The "mere fact" that the speech "relates to public employment or concerns information learned in the course of public employment" "does

not transform that speech into employee—rather than citizen—speech." *Lane*, 573 U.S. at 239–40. Instead, "[t]he critical question . . . is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Id.* at 240. In applying that standard, this court has described the assessment as a question of "who, where, what, when, why, and how." *Mayhew*, 856 F.3d at 464. Although "[s]peech outside the chain of command," *Buddenberg*, 939 F.3d at 740, and speech outside the workplace, *Barrow*, 775 F. App'x at 812, are indicia of private citizen speech, that the plaintiff "expressed [her] views inside [her] office, rather than publicly, is not dispositive," *Garcetti*, 547 U.S. at 420.

Mertins's speech to her union, the local prosecutors, the FBI, and the City Commissioners clearly are instances of private citizen speech. *See Elyria*, 502 F.3d at 493 (speaking to the FBI about corruption in the police department is constitutionally protected activity); *Boulton*, 795 F.3d at 534 ("[S]peech in connection with union activities is speech 'as a citizen' for the purposes of the First Amendment."). But genuine issues of material fact remain with respect to Mertins's statements to Wille and D'Luge and her performance of the audit. We therefore are unable to decide as a matter of law whether those instances of speech are protected.

Mertins claims that Wille and D'Luge forbade her from conducting an audit of the accounts and correcting instances of overbilling, but Defendants claim that D'Luge in fact directed Mertins to conduct the audit. Summary judgment is not proper so long as that fact remains in dispute. It is not even clear from the record whether auditing the accounts for fraud or systematic errors *generally* fell within Mertins's ordinary job responsibilities. Without answers to these questions, we cannot proceed. *See Lane*, 573 U.S. at 240 ("The critical question . . . is whether the speech at issue is itself *ordinarily* within the scope of an employee's duties, not whether it merely *concerns*

those duties." (emphasis added)); *see, e.g.*, *Mayhew*, 856 F.3d at 464–65 (plaintiff spoke as a public employee when he reported violations of water-testing regulations because his "entire function at the plant was to ensure water-testing standards were in compliance with federal and state regulatory mandates"); *Barrow*, 775 F. App'x at 813 (plaintiffs spoke as private citizens because, among other things, reporting public corruption to outside authorities like the FBI was not part of their ordinary job responsibilities).

We further note that the district court improperly applied case law predating *Lane* by asking whether Mertins's speech "owes its existence to [her] professional responsibilities." *See Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 544 (6th Cir. 2007) (quoting *Garcetti*, 547 U.S. at 421); *Mertins v. City of Mount Clemens*, 2019 WL 1294144, at *3. If the district court has another opportunity to consider these questions on remand, it should apply the framework described in *Lane*. The district court also should analyze causation with respect to Mertins's statements to Wille and D'Luge, her performance of the audit, her statements to her union, and her statements to the local prosecutors—not just her statements to the FBI and the City Commissioners. *See Mertins v. City of Mount Clemens*, 2019 WL 1294144, at *3 ("The closest that Plaintiff gets to *Lane* protection is her unsworn statements to law enforcement. The flaw in this is that she testified that she did not tell anyone in the City's administration about those tips. She told the City Commissioners about her tip to the FBI in 2012, but she does not know if they told any of her supervisors, and, indeed, Plaintiff alleges retaliation beginning in 2009, not 2012." (citations omitted)).

Mertins's First Amendment retaliation claim either is not ripe for summary judgment or is not appropriate for summary judgment. Whatever the case may be, we reverse the district court's grant of summary judgment and remand for further proceedings consistent with this opinion.[1]

B. Intentional Infliction of Emotional Distress

Summary judgment was, however, appropriate with respect to Mertins's claims of intentional infliction of emotional distress.

Michigan has adopted the definition of intentional infliction of emotional distress found in the RESTATEMENT (SECOND) OF TORTS § 46: "One who [1] by extreme and outrageous conduct [2] intentionally or recklessly [3] causes [4] severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." *Rosenberg v. Rosenberg Bros. Special Account*, 351 N.W.2d 563, 567 (Mich. Ct. App. 1984); *Charest v. Citi Inv. Grp. Corp.*, No. 330775, 2017 WL 2212110, at *4 (Mich. Ct. App. May 18, 2017). "The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." RESTATEMENT (SECOND) OF TORTS § 46 cmt. d; *see also Rosenberg*, 351 N.W.2d at 567–68.

In Mertins's case, the individual Defendants' conduct was not sufficiently extreme or outrageous to support a claim of intentional infliction of emotional distress. We have not found a case—and Mertins has not pointed to one—that would permit her case to go forward on these facts. We agree with the district court that the individual Defendants are entitled to summary judgment with respect to these claims.

[1]We refrain from deciding the issues of qualified immunity and *Monell* liability until the district court has addressed them.

III. CONCLUSION

We **AFFIRM** in part and **REVERSE** in part the district court's grant of summary judgment and **REMAND** for further proceedings consistent with this opinion.