

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 25-00222

PRESENT: WHALEN, P.J., CURRAN, OGDEN, GREENWOOD, AND HANNAH, JJ.

ALFRED P. MONTEGARI, PLAINTIFF-RESPONDENT,

V

MEMORANDUM AND ORDER

MARK J. MILLER, DANIEL F. MARTUSCELLO, III,
AND ANTHONY J. ANNUCCI, DEFENDANTS-APPELLANTS.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (DOUGLAS E. WAGNER OF
COUNSEL), FOR DEFENDANTS-APPELLANTS.

BOSMAN LAW, LLC, BLOSSVALE (A.J. BOSMAN OF COUNSEL), AND BERGSTEIN &
ULLRICH, NEW PALTZ, FOR PLAINTIFF-RESPONDENT.

Appeal from a judgment of the Supreme Court, Oneida County
(William F. Ramseier, J.), entered January 3, 2025. The judgment
awarded plaintiff money damages.

It is hereby ORDERED that the judgment so appealed from is
unanimously affirmed without costs.

Memorandum: As alleged in the complaint, at the relevant time,
plaintiff was a Captain of the New York State Department of
Corrections and Community Supervision and a Deputy Chief of the Sex
Crimes Unit (SCU) of the Office of Special Investigations. Defendant
Mark J. Miller was also a Deputy Chief, and defendants Daniel F.
Martuscello, III and Anthony J. Annucci were plaintiff's supervisors.
When plaintiff became the Deputy Chief, he reported overtime abuses
and failure to properly investigate allegations concerning sex crimes
and/or harassment. Plaintiff alleged that he was thereafter subjected
to adverse retaliatory and unlawful actions, including an
administrative suspension, disciplinary charges based on false and
manufactured charges, and a disciplinary suspension. After a Civil
Service Law § 75 hearing, a hearing officer found that plaintiff was
responsible for speeding on the Thruway, but otherwise found that all
remaining charges were not sustained. Although the Hearing Officer
recommended that plaintiff be restored to his position of Deputy Chief
of the SCU, Annucci reassigned plaintiff to the Southport Correctional
Facility, more than three hours away from plaintiff's residence.

After motion practice, the matter proceeded to trial and a jury
considered the following three causes of action: (1) deprivation of
plaintiff's 14th Amendment right to equal protection pursuant to 42
USC § 1983 (equal protection); (2) retaliation in violation of the
First Amendment pursuant to 42 USC § 1983 (retaliation); and (3)

tortious interference with business relations (tortious interference). The jury rendered a verdict finding for plaintiff against all three defendants on the equal protection cause of action and against Miller and Martuscello on the retaliation and tortious interference causes of action. The jury awarded plaintiff \$500,000 in damages for pain, suffering, and emotional distress, harm to reputation, and loss of enjoyment of life, and Supreme Court awarded plaintiff \$185,392 in attorneys' fees; the jury did not award plaintiff any damages for lost wages and benefits. Defendants now appeal from the ensuing judgment.

Defendants first contend that the court erred in denying that part of their CPLR 3211 motion seeking to dismiss the equal protection cause of action. We reject that contention. Defendants contend that, pursuant to *Engquist v Oregon Dept. of Agric.* (553 US 591, 594 [2008]), a class-of-one equal protection claim is unavailable in the public employment context, and an equal protection claim based on selective enforcement, such as alleged by plaintiff, is likewise barred. We note that the Second Circuit has left open that question (see *Hu v City of New York*, 927 F3d 81, 100 n 5 [2d Cir 2019]) and that there is a split of authority in the district courts, as the parties here recognize (see *Alaei v State Univ. of New York at Albany*, 2024 WL 2941735, *15 [ND NY, June 11, 2024, No. 1:21-cv-00377 (BKS/TWD)]). We are persuaded by the reasoning in *Airday v City of New York* (2020 WL 4015770, *2-6 [SD NY, July 16, 2020, No. 14-CV-8065 (VEC)]) that selective-enforcement claims survive after *Engquist*.

Defendants' further contention that, even if selective-enforcement claims survived *Engquist*, they are entitled to qualified immunity under 42 USC § 1983, is not preserved for our review (see generally *Ciesinski v Town of Aurora*, 202 AD2d 984, 985 [4th Dept 1994]) and, in any event, is without merit. Public officials may invoke qualified immunity under 42 USC § 1983 unless, inter alia, the unlawfulness of their conduct was clearly established at the time (see generally *Mahoney v City of Albany*, 211 AD3d 1408, 1409-1410 [3d Dept 2022]). Here, malice-based selective-enforcement claims premised on the violation of equal protection were recognized at the time of defendants' actions (see generally *LeClair v Saunders*, 627 F2d 606, 609-610 [2d Cir 1980], cert denied 450 US 959 [1981]), and thus defendants were aware of the purported unlawfulness of their conduct.

Defendants next contend that, with respect to the equal protection cause of action, plaintiff failed to identify a materially similar comparator whom defendants treated differently and defendants are therefore entitled to a directed verdict on that cause of action. Defendants' contention is not preserved for our review inasmuch as they did not raise that issue in their motion for a directed verdict (see *Volino v Long Is. R.R. Co.*, 83 AD3d 693, 693 [2d Dept 2011]).

Defendants contend that the court erred in denying that part of their CPLR 3211 motion seeking to dismiss the retaliation cause of action because plaintiff's speech was not protected inasmuch as it was speech he made as an employee, not as a citizen. We reject that contention. To establish a claim for retaliation under the First Amendment, a plaintiff "must demonstrate that (1) [their] speech

addressed a matter of public concern, (2) [they] suffered an adverse employment action, and (3) a causal connection existed between the speech and the adverse employment action, so that it can be said that [their] speech was a motivating factor in the determination" (*Matter of Paladino v Board of Educ. for the City of Buffalo, Pub. Sch. Dist.*, 183 AD3d 1043, 1050 [3d Dept 2020] [internal quotation marks omitted]). "[W]hen 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" (*Garcetti v Ceballos*, 547 US 410, 421 [2006]). Here, defendants rely on evidence at the trial in support of their contention that the complaint failed to state a cause of action. On a motion to dismiss for failure to state a cause of action, however, we must "accept the facts alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]), and thus the evidence at trial is not relevant to whether the complaint states a cause of action.

Defendants further contend with respect to the retaliation cause of action that the court should have entered a directed verdict in Martuscello's favor because the evidence at trial failed to demonstrate that he was aware of the relevant speech. Even assuming, arguendo, that there was insufficient proof in the record that Martuscello was aware of plaintiff's speech (*see generally Vendetti v Zywiak*, 191 AD3d 1268, 1272 [4th Dept 2021], *lv denied* 37 NY3d 914 [2021], *appeal dismissed* 37 NY3d 933 [2021]), there is no basis to modify the judgment against Martuscello with respect to the award of damages. The jury awarded plaintiff a set amount of damages against Martuscello for both the equal protection and retaliation causes of action without separating the damages between those two causes of action.

We agree with defendants that the court lacked subject matter jurisdiction over the tortious interference cause of action. "Generally, actions against State officers acting in their official capacity in the exercise of governmental functions are deemed to be, in essence, claims against the State and, therefore, suable only in the Court of Claims" (*Morell v Balasubramanian*, 70 NY2d 297, 300 [1987]). Inasmuch as Miller and Martuscello were acting within the scope of their authority in conducting an investigation into a complaint filed by a civilian, the State was the real party in interest and the tortious interference cause of action should have been brought as a claim in the Court of Claims (*see Monreal v New York State Dept. of Health*, 38 AD3d 1118, 1119 [3d Dept 2007]; *see generally Gore v Kuhlman*, 217 AD2d 890, 890-891 [3d Dept 1995]; *Tri-Delta Aggregates v Goodell*, 188 AD2d 1051, 1051 [4th Dept 1992], *lv denied* 82 NY2d 653 [1993]). However, inasmuch as the jury did not award any damages with respect to the tortious interference cause of action, there is no need to modify the judgment. In light of our determination, there is no need to address defendants' remaining contention with respect to the tortious interference cause of action.

Finally, we reject defendants' contention that the matter should be remitted to recalculate the award of attorneys' fees (see generally *Farrar v Hobby*, 506 US 103, 109 [1992]).