UNITED STATES COMMISSION ON CIVIL RIGHTS

1331 PENNSYLVANIA AVENUE , NW, WASHINGTON, DC 20425 www.usccr.gov

December 3, 2015

Dear Mayor Reed:

I write as one member of the eight-member U.S. Commission on Civil Rights, and not on behalf of the Commission as a whole.[1] This letter is prompted by the City of Atlanta's dismissal of Fire Chief Kelvin Cochran.[2] If the facts are substantially as alleged in Chief Cochran's complaint, the City has violated Chief Cochran's constitutional rights. If that is the case, I urge you to reconsider the City's position.

As alleged in the complaint, the facts are as follows: Chief Cochran is a former U.S. Fire Administrator who at your request relinquished that position to serve as Fire Chief of the Atlanta Fire and Rescue Department (AFRD).[3] In addition to being an accomplished firefighter, Chief Cochran is a man of deep Christian faith who serves as a deacon at his church. His faith prompted him to write a religious book entitled *Who Told You That You Were Naked? Overcoming the Stronghold of Self-Condemnation*. Chief Cochran wrote this book while off-duty and after receiving permission from a City ethics official. Eventually it came to your attention that a few pages of the book supported traditional Christian teaching regarding sexual morality, specifically that sexual intercourse is only permissible within the confines of a marriage between one man and one woman. This aroused your ire and that of Councilmember Alex Wan. To be specific, you were not exercised about the book's disapproval of adultery and extramarital heterosexual intercourse generally. Rather, you stated, "I profoundly disagree with and am deeply disturbed by the sentiments expressed in the paperback regarding the LGBT community."[4]

After reading Chief Cochran's filings and the city's motion to dismiss, it is apparent that the city has chosen slender reeds with which to support its dismissal of Chief Cochran. It is remarkable to claim, as the City does, that religious beliefs are not a matter of public concern and therefore are unprotected by the First Amendment.[5] Furthermore, it strains credulity to believe that Chief Cochran was dismissed because he did not obtain written permission to exercise his First Amendment rights and instead relied on the oral permission of a City ethics official. If the lack of written permission were indeed the issue, even assuming such a requirement is compatible

[1] The U.S. Commission on Civil Rights was established, among other things, to "make appraisals of the laws and policies of the Federal Government with respect to . . . discrimination or denials of equal protection under the laws of the Constitution of the United States because of color, race, religion, sex, age, disability, or national origin, or in the administration of justice." 42 U.S.C. § 1975(a).
[2] Jason Riley, *Christian Belief Cost Kelvin Cochran His Job*, WALL ST. J., Nov. 10, 2015, http://www.wsj.com/articles/christian-belief-cost-kelvin-cochran-his-job-1447200885.
[3] Cochran v. City of Atlanta, No. 1:15-cv-00477-CAP, Verified Complaint (N.D. Ga. 2015), available at http://www.adfmedia.org/files/CochranComplaint.pdf.
[4] *Id.* at 18.
[5] Cochran v. City of Atlanta, No. 1:15-cv-00477-LMM, City Defendants' Motion to Dismiss and Incorporated Brief in Support, 7 (N.D. Ga. 2015), available at http://www.adfmedia.org/files/CochranMTD.pdf.

with the First Amendment it is a) unlikely that you would have fired a fire chief whom you had previously begged to return to Atlanta, rather than perhaps issuing a written warning; b) you would not have publicly expressed your disagreement with the substance of the book. This is similar to *Leonard v. City of Columbus*, where black police officers were fired for removing American flag patches from their uniforms to protest alleged racial discrimination by the police department. The City of Columbus attempted to distinguish these officers' dismissal from previous cases where officers were not disciplined for failing to wear a flag patch "on the basis that appellants stood up in front of the media and removed the flag patch, announcing they could not wear it because of injustice on the force. Such testimony only serves to emphasize that appellants were not punished for failing or refusing to wear the flag, they were punished for speaking."[6] In this case, your criticism of Chief Cochran's book makes it abundantly clear that his supposed violation of the ordinance is only a pretext, and that he is being retaliated against because of the content of his speech.

Chief Cochran has sustained an injury that potentially implicates the First Amendment.[7] "A public employee states a case for retaliation when the alleged employment action would likely chill the exercise of constitutionally protected speech. We have decided that, as a matter of law, important conditions of employment include discharges, demotions, refusals to hire or promote, and reprimands (citations omitted)."[8] Chief Cochran's discharge obviously falls within this list, and the motion to dismiss even *admits* that the City's intent is to chill speech with which it disagrees: "Plaintiff . . . admittedly published and distributed in the workplace a book containing moral judgments about certain groups of people . . . . the City of Atlanta is a governmental employer with heightened powers to restrict speech as necessary . . . ."[9]

The initial question is whether Chief Cochran's speech is protected in this particular case. The first step in determining whether a government employee's speech is protected is to determine whether the person was speaking as a citizen or an employee.[10] Under *Garcetti v. Ceballos*, Chief Cochran clearly was speaking as a citizen, not an employee. He did not write or distribute his book as part of his official duties, as writing a religious devotional book is not part of the mission of the Atlanta Fire Department.[11] Furthermore, state employees are not prohibited from

[6] Leonard v. City of Columbus, 705 F.2d 1299, 1306 (11th Cir. 1983).
[7] Rankin v. McPherson, 483 U.S. 378, 383 (1987)("It is clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech.").
[8] Akins v. Fulton County, Ga., 420 F.3d 1293, 1300 (11th Cir. 2005).
[9] Cochran v. City of Atlanta, No. 1:15-cv-00477-LMM, City Defendants' Motion to Dismiss and Incorporated Brief in Support, 9-10 (N.D. Ga. 2015), available at http://www.adfmedia.org/files/CochranMTD.pdf.
[10] *See* Garcetti v. Ceballos, 126 S.Ct. 1951, 1960 (2006); *see also* Boyce v. Andrew, 510 F.3d 1033 (11th Cir. 2007).
[11] Garcetti v. Ceballos, 126 S.Ct. 1951, 1960 (2006)("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes"); Boyce v. Andrew, 510 F.3d 1033, 1342 (11th Cir. 2007)("Following *Garcetti*, our circuit has modified the analysis of the first step of the *Pickering* test for analyzing alleged government employer retaliation to determine if an employee's speech has constitutional protection by deciding at the outset (1) if the government employee spoke as an employee or citizen and (2) if the speech addressed an issue relating to the mission of the government employer or a matter of public concern.").

expressing their thoughts to their coworkers.[12] This is unlike *Garcetti*, where a deputy district attorney drafted a controversial memo as part of his duties, or *Abdur-Rahman v. Walker*[13], where environmental compliance inspectors inspected sewer overflows and issued reports to their superiors regarding those overflows, or *Boyce v. Andrew*[14], where social services case managers complained internally to their supervisors that their workload was too heavy. Each of the three foregoing cases involved employee speech related to their work duties. Chief Cochran's speech does not.

The next step is to determine whether Chief Cochran's speech was on a matter of public concern. The Supreme Court recently wrote, interpreting *Garcetti*, "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.'"[15] Furthermore, the Court stated in *Snyder v. Phelps*, "messages may fall short of refined social or political commentary, [but] the issues they highlight – the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy – are matters of public import."[16]

Chief Cochran's speech regarding Christian life and sexual morality falls squarely within the Supreme Court's criteria for matters of public concern.[17] The morality of sexual behavior is one of the few matters of enduring interest in human society.[18] This is particularly the case given that there are decades worth of Supreme Court's decisions regarding same-sex relationships, most recently *Obergefell*[19], *Windsor*[20], *Lawrence*[21], *Romer*[22], and *Bowers*.[23] In the wake of these

[12] Rankin v. McPherson, 483 U.S. 378 (1987)(state employee who made derogatory remark about President Reagan to coworker protected by First Amendment).
[13] Abdur-Rahman v. Walker, 567 F.3d 1278 (11th Cir. 2009).
[14] Boyce v. Andrew, 510 F.3d 1333 (11th Cir. 2007).
[15] Lane v. Franks, 134 S.Ct. 2369, 2380 (2014), *quoting* Snyder v. Phelps, 131 S.Ct. 1207, 1216 (2011).
[16] Snyder v. Phelps, 131 S.Ct. 1207, 1217 (2011).
[17] Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 877 (1990).
> The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires. Thus, the First Amendment obviously excludes all "governmental regulation of religious *beliefs* as such. The government may not compel affirmation of religious belief, punish the expression of religious doctrines it believes to be false, impose special disabilities on the basis of religious views or religious status, or lend its power to one or the other side in controversies over religious authority or dogma (citations omitted).

[18] Reynolds v. U.S., 98 U.S. 145, 164-65 (1878).
> [F]rom the earliest history of England polygamy has been treated as an offense against society. . . . By the statute of 1 James I (c. 11), the offense, if committed in England or Wales, was made punishable in the civil courts, and the penalty was death. As this statute was limited in its operation to England and Wales, it was at a very early period re-enacted, generally with some modifications, in all the colonies.

[19] Obergefell v. Hodges, 135 S.Ct. 2584 (2015).
[20] U.S. v. Windsor, 133 S.Ct. 2675 (2013).
[21] Lawrence v. Texas, 539 U.S. 558 (2003).

decisions, there are murmurs that perhaps sexual arrangements widely viewed as immoral, such as polygamy, should not be viewed as such.[24]

After determining that Chief Cochran spoke as a citizen upon a matter of public interest, the court must weigh Chief Cochran's First Amendment rights against the City's interest in efficient administration.[25] Your motion to dismiss relies upon *Anderson v. Burke County*, an 11th Circuit case from 2001.[26] However, *Anderson* was decided before *Garcetti* and *Lane v. Franks* and therefore must be interpreted in light of the latter cases. Although the Eleventh Circuit initially found that Anderson's speech was on a matter of public concern, its determination when balancing the respective interests of the state and the employee that the speech was not of "great public concern" and therefore unprotected is suspect in the wake of *Lane v. Franks*. It is questionable whether the Eleventh Circuit even applied the *Pickering* balancing test properly, given that it first determined that the speech was of public concern, and then determined in the second step that "the questionnaire had far more to do with Plaintiff's grievances as an employee than with concerns of a public nature," that it was directed to a "limited audience," and that therefore it was not of "great public concern".[27] In view of the expansive definition of "public concern" articulated by the Court in *Lane,* it is unlikely that *Anderson's* crabbed view of "public concern" and expansive role for the state's regulation of speech is still correct, even if it was correct when decided.[28] In any case, Chief Cochran's book is more closely analogous to the teacher's statements in *Pickering*, "which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally."[29] The only evidence of disruption the City can muster is that one member of the AFRD complained to Councilmember Wan about Chief Cochran's book.[30] No one has alleged that Chief Cochran has discriminated against LGBT firefighters or, for that matter against heterosexual firefighters whose sexual behavior is contrary to Chief Cochran's orthodox Christian beliefs. No one has alleged that Chief Cochran requires dispatchers to ask if an emergency caller is LGBT before sending assistance. In short, the "disruption" put forth by the City consists of one AFRD member's disagreement with six pages of a self-published religious devotional book. This interest plainly is insufficient to justify muzzling Chief Cochran.[31]

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[22] Romer v. Evans, 517 U.S. 620 (1996).
[23] Bowers v. Hardwick, 478 U.S. 186 (1986).
[24] Brown v. Buhman, 947 F.Supp.2d 1170 (D. Utah 2013).
[25] Pickering v. Bd. of Ed. of Tp. High School Dist. 205, Will County, Ill., 391 U.S. 563, 568 (1968); Rankin v. McPherson, 483 U.S. 378, 388 (1987).
[26] Cochran v. City of Atlanta, No. 1:15-cv-00477-LMM, City Defendants' Motion to Dismiss and Incorporated Brief in Support, 9 (N.D. Ga. 2015), available at http://www.adfmedia.org/files/CochranMTD.pdf.
[27] Anderson v. Burke Cty, Ga., 239 F.3d 1216, 1221-22 (11th Cir. 2001).
[28] Lane v. Franks, 134 S.Ct. 2369, 2380 (2014), *quoting* Snyder v. Phelps, 131 S.Ct. 1207, 1216 (2011).
[29] Pickering v. Bd. of Ed. of Tp. High School Dist. 205, Will County, Ill., 391 U.S. 563, 572-73 (1968).
[30] Cochran v. City of Atlanta, No. 1:15-cv-00477-LMM, City Defendants' Motion to Dismiss and Incorporated Brief in Support, 9-10 (N.D. Ga. 2015), available at http://www.adfmedia.org/files/CochranMTD.pdf.
[31] Rankin v. McPherson, 483 U.S. 378, 388-89 (1987).

The City further contends that the fire department is a "paramilitary" organization whose members are subject to greater speech restrictions than other government employees. Even if that is the case, it still does not mean that the City has plenary power to forbid employees from engaging in speech that City officials dislike.[32] Rather, it means that the court may give extra weight to the government's interest when performing the *Pickering* balancing test.[33] In this case, it is hard to know what the City's interest can be in squelching Chief Cochran's speech. Unlike in *Anderson*, Chief Cochran's religious devotional book, although a matter of public concern, has nothing to do with the administration of the AFRD or the City of Atlanta. The City claims the book is "controversial" and contains "moral judgments about certain groups of people".[34] Apparently the irony eludes, for if making "moral judgments about certain groups of people" is now forbidden, Mayor Reed and Councilmember Wan must be prohibited from expressing their disagreement with the book, as that reflects *their* moral judgment about people who believe as Chief Cochran does. Furthermore, if knowing that someone holds views with which some people disagree threatens the cohesion of the AFRD, the people of Atlanta may wish to consider hiring some new firefighters. It is hard to imagine that people who wilt upon learning that a book they are under no obligation to read contains statements with which they disagree will have the intestinal fortitude to rush into burning buildings. It seems unlikely that the Atlanta Fire and Rescue Department is comprised of such fragile flowers. It is respectfully submitted that this is not a good-faith attempt to maintain morale and cohesion. It is simply a purge of the disfavored at the behest of the politically correct. That is unconstitutional and contrary to American ideals.

Sincerely,

Peter Kirsanow
Commissioner

[32] Rankin v. McPherson, 483 U.S. 378, 385 (1987)("Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech.").
[33] Anderson v. Burke Cty., Ga., 239 F.3d 1216, 1222 (11th Cir. 2001);
[34] Cochran v. City of Atlanta, No. 1:15-cv-00477-LMM, City Defendants' Motion to Dismiss and Incorporated Brief in Support, 9 (N.D. Ga. 2015), available at http://www.adfmedia.org/files/CochranMTD.pdf.