IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
TWENTIETH JUDICIAL DISTRICT, DAVIDSON COUNTY

JOSHUA LIPSCOMB, Plaintiff, v. NASHVILLE FIRE DEPARTMENT, a Department of the METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, Defendant.	)	No. 22-0501-I

ORDER GRANTING MOTION FOR TEMPORARY INJUNCTION

Plaintiff Joshua Lipscomb filed his initial complaint on April 11, 2022, and a first amended complaint on May 5, 2022. Plaintiff filed a *Motion for [Temporary] Injunction Against NFD's Defamation and Derogatory Notices Policies* on August 18, 2022, pursuant to Rule 65.04 of the Tennessee Rules of Civil Procedure. The Court specially set the motion for hearing, along with two other pending motions, on September 14, 2022. Defendant opposes the motion for temporary injunction. Participating in the hearing were Attorneys Tricia R. Herzfeld, Anthony A. Orlandi, and Abby R. Rubenfeld, representing Plaintiff, and Metropolitan Assistant Attorneys John K. Whitaker and John W. Ayers, representing Defendant Nashville Fire Department, a Department of the Metropolitan Government of Nashville and Davidson County ("Fire Department").

This case involves a dispute between a firefighter and his employer, the Nashville Fire Department, over disciplinary action taken against him. Lipscomb also is a comedian who performs under the stage name "Josh Black." Lipscomb uses his stage name on social media to engage in online discussions, including "political discourse." Josh Black's social media accounts do not identify him as Joshua Lipscomb or as a Nashville firefighter. Lipscomb brings this action seeking declaratory judgments under Tenn. Code Ann. § 29-14-102 and § 1-3-121 and seeking

redress for violations of his constitutional rights under 42 U.S.C. § 1983. A more detailed description of Lipscomb's claims is set forth in the Court's separate order on Defendant's *Partial Motion to Dismiss.*

I. FINDINGS OF FACT

At this preliminary stage of the proceedings, the Court makes the following findings of fact on Plaintiff's motion for temporary injunction, as required under Tenn. R. Civ. P. 65.04(6), based on the allegations of the first amended complaint, motion for temporary injunction, declarations and exhibits, response, and arguments of counsel.

Joshua Lipscomb is employed by the Nashville Fire Department as a firefighter. He has been employed since 2017.

Lipscomb also is a comedian who uses the stage name "Josh Black." He posts on social media using his stage name to engage in online discussions, including "political discourse." He does not identify himself as Joshua Lipscomb or as a Nashville firefighter on his social media accounts.

On February 2, 2022, while off duty and using his Josh Black Twitter account, Lipscomb expressed opinions and criticized action taken by the Metropolitan Council in voting to approve a license plate reader pilot project that he believed would be harmful to members of the black community and other communities of color.[1]

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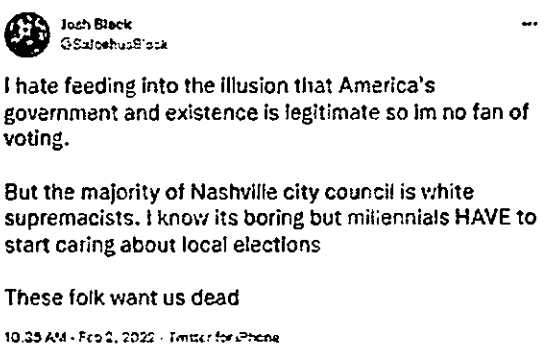
[1] The following is Josh Black's February 2, 2022 tweet as set forth in the first amended complaint:


Josh Black
@JoshuaBlack

I hate feeding into the illusion that America's government and existence is legitimate so im no fan of voting.

But the majority of Nashville city council is white supremacists. I know its boring but millennials HAVE to start caring about local elections

These folk want us dead

10:35 AM · Feb 2, 2022 · Twitter for iPhone

On February 22, 2022, the Fire Department notified Lipscomb in writing that a disciplinary meeting was scheduled for February 28, 2022, relating to his February 2 tweet.

The disciplinary hearing was held on March 10, 2022, before a 3-person panel, at which Lipscomb appeared and had an opportunity to speak. The panel made a recommendation to the Fire Department Chief, the contents of which were not disclosed to Lipscomb.

On March 18, 2022, the Chief suspended Lipscomb without pay for 16 days for violations of the Fire Department's policies.

On April 14, 2022, the Fire Department charged Lipscomb with violating the Fire Department's sick leave policy and for failing to provide a doctor's note to excuse a prior absence from work on March 18, 2022.

A second disciplinary hearing was held before a 3-person panel during which Lipscomb appeared and had the opportunity to speak. The panel made a recommendation to the Chief, the contents of which were not disclosed to Lipscomb.

On May 2, 2022, the Chief suspended Lipscomb without pay for an additional 11 days.

Lipscomb challenges the March and May 2022 disciplinary suspensions without pay as unconstitutional retaliation for exercising his free speech rights under both the federal and state constitutions.

Among other claims asserted in the first amended complaint, Lipscomb challenges Fire Department policies under which he was disciplined as facially unconstitutional. He now seeks a temporary injunction against the Fire Department's enforcement of two of those policies during the pendency of this case. The first is a "Defamation" policy that prohibits employees from "unjustly" criticizing, ridiculing or otherwise defaming any person or agency of the Metropolitan Government. The second is a "Derogatory Notices" policy that prohibits employees from posting or circulating notices of a "derogatory nature."

II. TEMPORARY INJUNCTION STANDARDS

Under Rule 65.01, an injunction "may restrict or mandatorily direct the doing of an act." Under Rule 65.04 of the Tennessee Rules of Civil Procedure, "[a] temporary injunction may be granted during the pendency of an action if it is clearly shown by verified complaint, affidavit or other evidence that the movant's rights are being or will be violated by an adverse party and the movant will suffer immediate and irreparable injury, loss or damage pending a final judgment in the action, or that the acts or omissions of the adverse party will tend to render such final judgment ineffectual." Tenn. R. Civ. P. 65.04(2). The standard for determining whether injunctive relief is appropriate, requires a court to consider the well-known four-factor test: "(1) the threat of irreparable harm to plaintiff if the injunction is not granted; (2) the balance between this harm and the injury that granting the injunction would inflict on the defendant; (3) the probability that plaintiff will succeed on the merits; and (4) the public interest." *Fisher v. Hargett*, 604 S.W.3d 381, 394 (Tenn. 2020) (internal quotation omitted); *Gentry v. McCain*, 329 S.W.3d 786, 792 (Tenn. Ct. App. 2010). All factors are to be considered, and no single factor is controlling. The grant or denial of a request for temporary injunction is discretionary with the trial court. *Fisher*, 604 S.W.3d at 395.

III. ANALYSIS

The first amendment of the United States Constitution guarantees protection of a person's right of free speech. The Tennessee Constitution guarantees the same right. Regulations or policies that infringe constitutional rights may be challenged as facially unconstitutional on the grounds they are vague and overbroad. In Count I of Lipscomb's first amended complaint, he challenges several Fire Department policies as vague and overbroad and facially unconstitutional

under both the federal and state constitutions.[2] He contends that off-duty tweets sent by him from his "Josh Black" Twitter account, without identifying himself as a Nashville firefighter, are constitutionally protected political speech by a private citizen on matters of public concern. He alleges the disciplinary action taken by the Fire Department regarding his social media posts violates his constitutional free speech rights. He further alleges facial challenges to four of the Fire Department's policies, and now seeks temporary injunctive relief restricting enforcement of two of those policies as follows:

> OPG 1.24 ("Defamation"): Employees shall not unjustly criticize, ridicule, or otherwise defame any person or agency of the Metropolitan Government.
>
> OPG 1.24("Derogatory Notices"): Employees shall not post or circulate notices of a derogatory nature.

Pltf. First Am. Complt. ¶ 16; Lipscomb Decl. Ex. 1. Lipscomb contends he has a likelihood of success on the merits and, because his constitutional rights are being violated, the harm is immediate and irreparable.

The Fire Department responds that Lipscomb's request for temporary injunctive relief should be barred under the doctrine of laches, and under the Rule 65 temporary injunction factors of failure to show irreparable injury, failure to show likelihood of success on the merits, and balance of harms.

A. Doctrine of Laches

The Fire Department argues Lipscomb's request for temporary injunctive relief is not warranted under the doctrine of laches because Lipscomb unreasonably delayed in pursuing his equitable rights to the prejudice of the Fire Department. *See Memphis A. Phillip Randolph Inst. v.*

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[2] Defendant separately filed a motion for partial dismissal of the first amended complaint, including dismissal of Lipscomb's claims challenging the Fire Department's defamation and derogatory notices policies as vague and overbroad. The Court notes that a motion to dismiss is subject to a different standard under Rule 12.02(6) from a motion for temporary injunction under Rule 65.04.

Hargett, 473 F. Supp. 3d 789, 792 (M.D. Tenn. 2020); *A.S. v. Lee,* No. 3:21-cv-00600, 2021 WL 3421182, *2. The issues of unreasonable delay and prejudice to support the defense of laches depend on the facts of each case, and the decision whether to apply laches is within the court's discretion. *Hargett*, 473 F. Supp. 3d at 792; *Lee*, 2021 WL 3421182, at *2. As discussed by Judge Richardson in his law review article cited in both the *Hargett* and *Lee* decisions, factors to be considered include the nature and cause of the delay, nature of the relief requested, extent of defendant's knowledge that the claim would be asserted, prejudice to defendant if the claim is allowed, length of delay, and opportunity of plaintiff to have acted sooner. *Hargett*, 473 F. Supp. 3d at 792; *Lee*, 2021 WL 3421182, at *2.

The Fire Department submits that Lipscomb challenged the defamation and derogatory notices policies in his complaint filed on April 11, 2022, but waited four months, until August, to seek a temporary injunction. The Fire Department further submits that Lipscomb was aware of the Fire Department policies since beginning his employment in 2017, and he separately was disciplined under certain policies in November 2020. The Fire Department claims Lipscomb's delay is unreasonable and should preclude Lipscomb's request for injunctive relief.

In response, Lipscomb argues that laches is an affirmative defense on which the Fire Department bears the burden of proof. Lipscomb maintains the issues of unreasonable delay and prejudice to the Fire Department have not been shown.

Reviewing the factors as identified in *Hargett* and *Lee*, both of which are federal district court cases in which injunctive relief was sought under the Federal Rules of Civil Procedure, the Court cannot conclude that Lipscomb unreasonably delayed in seeking injunctive relief for alleged first amendment violations based on the Fire Department's policies. A firefighter and employee of the Fire Department should not reasonably be expected to take on constitutional litigation against his employer unless and until the employer's policy is applied against him and he is

subjected to discipline for reasons he believes infringe his constitutional rights. Further, the Court finds the Fire Department has not demonstrated prejudice caused by the four-month delay between the filing of this lawsuit and applying for injunctive relief, which is limited to restraining the enforcement of two of the six policies being challenged. The Court respectfully declines to apply the doctrine of laches under these circumstances.

B. Likelihood of Success on the Merits

Lipscomb submits he has a likelihood of success on the merits that the Fire Department's "defamation" and "derogatory notices" policies are vague and overbroad and, therefore, facially unconstitutional. The Fire Department contends Lipscomb cannot show a likelihood of success on the merits because both policies are valid and facially constitutional under *Watts v. Civil Serv. Bd. For Columbia,* 606 S.W.2d 274 (Tenn. 1980) (applying the standard in *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568 (1968)).

Public employers may restrict their employees' speech where the restrictions appropriately balance the interests of the employees in speaking on matters of public concern and the governmental interest in efficiently providing public services without disruption. *Id.* at 281 (quoting *Pickering*, 391 U.S. at 568)). Such restrictions, however, must be narrowly tailored and cannot be unreasonably vague or overbroad. A speech restriction is vague where persons "of ordinary intelligence must guess at its meaning." *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971). A speech restriction may also be vague if its lack of definiteness permits arbitrary or discriminatory enforcement. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). A restriction is overbroad where it "prohibits a substantial amount of protected speech both in an absolute sense and relative to [its] plainly legitimate sweep," and "will significantly compromise" the free speech rights of not only the plaintiff, but of parties not before the court. *Speet v. Schutte*, 726 F.3d 867, 873 (6th Cir. 2013). A first amendment facial challenge based on overbreadth provides "an

exception to [the] normal rule regarding the standards for facial challenges," in that the plaintiff need only show the restriction is unconstitutional in a "substantial number" of instances, rather than in all instances. *Id.* at 872.

The Fire Department's "defamation" policy directs that "employees shall not unjustly criticize, ridicule, or otherwise defame" any person or agency of Metro Government. The Fire Department argues that courts have upheld similar policies directed to preventing employees from engaging in public criticism regarding matters that could disrupt government operations, citing cases such as *Boulton v. Swanson*, 795 F.3d 526, 536 (6th Cir. 2015) (governmental interest in promoting order within a law enforcement agency outweighed employees' interest in free speech). But the policies discussed in *Boulton* restricted public criticism of "orders given by superior officers" which were "detrimental to the police department." *Id.* (citing *Brown v. City of Trenton*, 867 F.2d 318 (6th Cir. 1989)). Here, the Fire Department's "defamation" policy bar all "unjust" criticism or ridicule of any person or Metro agency, for any reason, seeming to invite arbitrary enforcement of the restriction depending upon who is being criticized and who is meting out the discipline based on what he or she might consider as "unjust," and which may or may not be considered as "unjust" by another person.

The Fire Department's "derogatory" notice policy restricts posting or circulating notices of a "derogatory nature." The policy applies, presumably, to "derogatory notices" about any person, agency, or entity, posted at anytime, anywhere, and by a Fire Department employee acting in any capacity, even as a private citizen. Even if the Fire Department could legitimately restrict employees from posting certain derogatory comments or notices about the Department, superiors, or fellow firefighters, the policy as written prohibits "a substantial amount of protected free speech." *See Speet,* 726 F.3d at 872.

The Court finds the "defamation" policy is vague and its lack of definiteness lends itself to subject to arbitrary enforcement. The "derogatory notices" policy is overbroad and seems to prohibit protected speech, even under the *Pickering* standard. Neither policy defines its terms or provides guidance as to the meaning of the terms used. Neither policy is limited to speech in the course of the Fire Department employee's duties or directed at fellow Fire Department employees or supervisors that might harm the Fire Department's operations and services to the public. At this preliminary stage of the proceedings, the Court finds Lipscomb has demonstrated a likelihood of success on the merits of his facial challenges to the Fire Department's "defamation" and "derogatory notices" policies.

C. Immediate and Irreparable Injury

Lipscomb asserts that the loss of first amendments rights, even for limited periods of time, constitutes irreparable injury for purposes of temporary injunctive relief. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976) (citation omitted). In *Elrod*, the Supreme Court held preliminary injunctive relief properly was granted by the Court of Appeals where there was a probability of success on the merits and the constitutional injury was both threatened and occurring at the time of the motion for relief. *Id.* at 374. Those same factors apply here. Because Lipscomb has a likelihood of success on the merits as to his facial challenges to two of the Fire Department's policies, at this early stage of the proceedings, Lipscomb's constitutional injury is threatened and occurring at this time. Thus, this factor weighs in favor of granting temporary injunctive relief.

D. Balance of Harms

Lipscomb contends that the balance of harm favors him as the party who is seeking to enjoin restrictions that infringe his first amendment rights of free speech. The Fire Department responds, on the other hand, that it will suffer harm if prevented from continuing to implement the defamation and derogatory notice policies. If the Fire Department's two policies are facially

unconstitutional, there will be no harm in enjoining their enforcement during the pendency of the litigation. The balance of harm factor weighs in favor of granting the injunctive relief.

E. Public Interest

The public interest is served by preventing the violation of a party's constitutional rights. Conversely, the public interest is served by allowing the Fire Department to enforce policies that best serve the public. The Court finds this factor is neutral on the application for injunctive relief.

IV. CONCLUSION

The Court concludes for the reasons discussed above that Lipscomb has shown the temporary injunction factors weigh in favor of granting the injunctive relief he requests during the pendency of this action regarding the two Fire Department policies that are the subject of Lipscomb's motion – the "defamation" policy and the "derogatory notices" policy.

It is, accordingly, ORDERED that Plaintiff's *Motion for Temporary Injunction* against the enforcement of the Nashville Fire Department's "Defamation" and "Derogatory Notices" policies is hereby GRANTED, and the Nashville Fire Department is hereby restrained and enjoined from enforcing the Department's "Defamation" and "Derogatory Notices" policies during the pendency of this action, unless modified or dissolved on motion, or a permanent injunction is granted or denied, pursuant to Rule 65.04 of the Tennessee Rules of Civil Procedure.

It is further ORDERED that the injunctive relief awarded herein will become effective upon Plaintiff posting an injunction bond in the amount of $2,000, under Rule 65.05 of the Tennessee Rules of Civil Procedure.

All other matters are reserved.

Patricia Head Moskal

PATRICIA HEAD MOSKAL
CHANCELLOR, PART I

ISSUED this 14 day of October, 2022 at 2:25 p.m.

MARIA M. SALAS, Clerk & Master

By: _____
Deputy Clerk & Master

cc:

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