
**Federal Court Report**

**Dismissal of Employee’s Discrimination and Retaliation Claims Affirmed**

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An employee's sex discrimination and retaliation claims did not withstand her government employer's nondiscriminatory, legitimate reasons for the disciplinary action. The plaintiff's First Amendment claim for retaliation failed because the plaintiff's interests as a private citizen did not outweigh those of her employer's.

The plaintiff is a private first class with the U.S. Capitol Police, although she previously held the position of sergeant until she was demoted. The events leading up to her demotion form the factual background of the appeal.

In May 2014, after unsuccessfully applying for a position with an intelligence section, the plaintiff, who is white, filed an internal complaint asserting that she was not selected due to her race. Around the same time, the plaintiff commented to a co-worker that a female employee was able to transfer to a favorable position due to a romantic relationship with her supervisor. The female employee learned of the plaintiff's comment and filed a complaint. In the course of the investigation, the plaintiff admitted she had made the statement and served a two-day suspension without pay in September 2015.

In a separate event in January 2015, the plaintiff responded to a report of an unsecured firearm found in the men's bathroom at the U.S. Capitol Visitor Center. The plaintiff photographed the firearm for the investigation and later sent the photo to a reporter. The photograph soon thereafter appeared in two news articles highlighting the January event and criticizing the government employer's practices. The Capitol Police's media policy strictly prohibits employees from speaking publicly or releasing information related to employee or administrative cases or investigations.

Through an investigation, the plaintiff eventually admitted to leaking the photograph, saying she had spoken out as a matter of public concern. She remained on administrative leave throughout the investigation. The government employer considered the plaintiff's disciplinary history and the severity of her offenses and, after much deliberation, demoted the plaintiff from sergeant to private first class.

The plaintiff first exhausted her administrative remedies and then filed a lawsuit against her employer based on the Congressional Accountability Act, asserting unlawful gender discrimination, retaliation for her internal race-discrimination complaint and retaliation under the First Amendment. The Congressional Accountability Act applies the protections of Title VII of the Civil Rights Act of 1964 to covered legislative employees, and therefore prohibits discrimination and retaliation.

The U.S. Court of Appeals for the D.C. Circuit affirmed the lower court's ruling that the government employer did not engage in discriminatory or retaliatory conduct for its disciplinary acts, and the plaintiff failed to present any evidence of pretext. The appellate court determined that the plaintiff's arguments to show pretext based on purported comparator evidence and procedural irregularities were not sufficient to defeat the employer's legitimate, nondiscriminatory reason for placing her on leave—that is, for violating the employer's rules.

The court emphasized that any comparator must be similarly situated to the plaintiff in all the relevant aspects of her employment situation, taking into account the purported comparator's job duties, whether they were disciplined by the same supervisor and the similarity of their offenses.

The court ruled that the plaintiff's First Amendment retaliation claim also failed because the plaintiff could not meet the second factor of the four-factor test: that the government employer's interest in promoting the efficiency of the public service it performed—security—outweighed the plaintiff's interests as a citizen in commenting upon matters of public concern. Due to the often-sensitive nature of the information that the law enforcement officers handled and considering the employer's media and confidentiality policies, the court found that the employer had a crucial interest in ensuring its law enforcement officers safeguarded sensitive information. The court noted that it was a close call between the plaintiff's interests in reporting a matter of public concern and the employer's interests. But it also recognized that the plaintiff had a higher responsibility as a supervisor to uphold the mission and policies of the Capitol Police as they pertain to confidentiality and trust. Additionally, the court found that it was appropriate to grant the employer a wide degree of deference in its decisions because close working relationships are essential to fulfilling public responsibilities.

*Breiterman v. U.S. Capitol Police*, D.C. Cir., No. 20-5295 (Oct. 15, 2021).

**Professional Pointer:** Comparator evidence must be nearly identical to that of the complaining party: To be similarly situated requires all the relevant aspects of employment to match that of the complaining party, considering job duties, the individual meting out discipline and the similarity of the offenses. Further, both private and public employers should carefully consider their media and confidentiality policies—and how the policies support their overall operations—to ensure the protection of any sensitive work-related information.

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