Fire Dep't v. Neese

OATH Index No. 520/26 (Feb. 25, 2026)

Petitioner failed to establish that respondent engaged in off-duty misconduct by posting offensive gender-based content on his personal Facebook account. ALJ recommends that the charges be dismissed.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
FIRE DEPARTMENT
Petitioner
- against -
JAMES NEESE
Respondent

REPORT AND RECOMMENDATION

MICHAEL D. TURILLI, *Administrative Law Judge*

Petitioner, the Fire Department ("FDNY" or the "Department"), brought this employee disciplinary proceeding against respondent, James Neese, under section 75 of the Civil Service Law. Petitioner alleged that respondent, an emergency medical technician ("EMT") in the Bureau of Emergency Medical Services ("EMS"), "openly posted, displayed, and otherwise disseminated" offensive gender-based content on his Facebook account.

A trial was held before me on December 11, 2025. The proceeding was held remotely via videoconference. Petitioner relied solely upon documentary evidence and respondent testified on his own behalf. Petitioner sought a 20-day suspension as a penalty for the alleged misconduct (Tr. 59). The record closed on January 23, 2026, following the submission of post-trial memoranda of law (ALJ Exs. 5, 6).

For the reasons set forth below, I find that petitioner failed to prove that respondent engaged in misconduct and recommend that the charges be dismissed.

ANALYSIS

The charges are based on respondent's display of four posts on his personal Facebook account in April 2023, which petitioner alleged contained gender-based content "likely to arouse hatred" (ALJ Ex. 1). Based on this alleged misconduct, petitioner charged respondent with violating its Social Media Policy, Equal Employment Opportunity ("EEO") Policy, and Code of Conduct (*Id.*). It was undisputed that respondent posted the content to his personal Facebook account while off duty (Tr. 8, 19). Petitioner argued that respondent's statements would have violated the EEO Policy "if they were posted or stated verbally in the workplace," and respondent's "online activity is treated according to the same standard" under the Social Media Policy (ALJ Ex. 5 at 3). Respondent denied the charges and maintained that his off-duty speech had no connection to the workplace and was protected under the First Amendment (Tr. 16, 19-20; ALJ Ex. 6 at 1-2, 5-6).

Petitioner has the burden of proving the charges by a preponderance of the credible evidence. *See Dep't of Correction v. Hall*, OATH Index No. 400/08 at 2 (Oct. 18, 2007), *adopted*, Comm'r Dec. (Nov. 5, 2007), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 08-33-SA (May 30, 2008). Preponderance has been defined as "the burden of persuading the triers of fact that the existence of the fact is more probable than its non-existence." *Prince, Richardson on Evidence* § 3-206 (Lexis 2008). "If the evidence is equally balanced, or if it leaves the [trier of fact] in such doubt as to be unable to decide the controversy either way, judgment must be given against the party upon whom the burden of proof rests." *Id.*; *see Rinaldi & Sons, Inc. v. Wells Fargo Alarm Service, Inc.*, 39 N.Y.2d 191, 196 (1976).

The material facts in this case were undisputed. Respondent created a Facebook account in July 2008 (Pet. Ex. 3). Petitioner introduced several screenshots from respondent's Facebook account as it existed in May 2023 (Pet. Ex. 1-8; Tr. 6). Respondent's Facebook profile showed his name, an anime image of a man, and a photograph of him together with a woman and a dog (Pet. Ex. 1). The "Details" of respondent's Facebook profile showed that he was employed as a "QA Administrator at FedEx," had worked and studied at the College of Staten Island, lived in Staten Island, and was engaged at the time (Pet. Ex. 3). His profile did not refer to the FDNY or EMS or list his occupation as an EMT (*Id.*). Respondent had 434 followers on Facebook (Pet. Ex. 1).

On April 29, 2022, respondent posted a comment on his Facebook account regarding a transgender clone stormtrooper character in a new Star Wars novel (Pet. Ex. 5). Respondent shared a post from "Talking Like Yoda Because A Legendary Geek You Are," which stated, "A clone in new novel Queens Hope, the individuality of clones extends to trans people too, making Omega not the only female clone," and included a picture of a stormtrooper with long braided hair and holding her helmet and blaster (*Id.*). Respondent commented:

> Somebody hasn't watched clone wars or bad batch I see…… The clones detested the Bad Batch, and any clone that deviated too far from the standard template. They encouraged individuality…. But they would have absolutely DRAGGED this clone through the mud. No[t] to mention the Kaminoans would have seen this clone as a combat ineffective defect (The only reason the bad batch existed was cause their defects were useful in combat)[.]

(*Id.*). Respondent's post had two "likes" and eight comments (*Id.*). In response to one person's comment regarding "twitter mobs demand[ing] that disney SHOULD make this a 'thing,'" respondent replied that "Disney's recent action regarding the rainbow coalition and the twitter mob tell me that they probably wanna just let sleeping dogs lie" (*Id.*). Respondent "liked" another person's comment that stated: "It doesn't matter because WE'VE GOT DIVERSITYYYYYYYYYY!!!!!! (*Id.*)." Respondent "liked" another person's comment that stated: "can't exist lol they would have euthanized and destroyed the body as an imperfection" (*Id.*).

On July 5, 2022, respondent shared another person's post on his Facebook account (Pet. Ex. 6). The shared post stated: "Chinese third graders are learning multi-variable calculus. Our third graders are being taught that 'men can have babies.' This will not end well…" (*Id.*). Respondent did not include any of his own comments in the post (*Id.*). Four people "liked" respondent's post, one person commented on it, and one person shared it (*Id.*).

On August 5, 2022, respondent shared another person's post on his Facebook account (Pet. Ex. 7). The shared post stated: "What is a recession? They don't know. What is a woman? They don't know. But they're absolutely sure that shot number 5 will do the trick" (*Id.*). Following the last line of text, there was a picture of a syringe (*Id.*). Respondent did not include any of his own comments in the post (*Id.*). Three people "liked" respondent's post, and one person shared it (*Id.*).

On August 17, 2022, respondent shared a post from "Military Style Assault Smirk" on his Facebook account (Pet. Ex. 8). The shared post showed drawings of a man in a cowboy hat and

another man in an "I ♥ NY" hat (*Id.*). The man in the cowboy hat stated: "Drove my F-350 to the gun store and bought another AR while open carrying a sword. Got some good BBQ, went home, and saw a groomer across the street get arrested for child abuse" (*Id.*). The other man responded: "[M]y pistol permit was denied again after they saw me misgender someone on Facebook. Got some disgusting New York pizza before taking the subway home. Then my 6 year old son told me his teacher is trans and now he is trans" (*Id.*). Respondent did not include any of his own comments in the post (*Id.*). One person "liked" respondent's post, and one person shared it (*Id.*).

On November 22, 2022, respondent posted a photograph of himself on his Facebook account (Pet. Ex. 4). The photograph showed respondent from the shoulders up and depicted his face and disheveled hair (*Id.*). Respondent wore an unzipped dark blue jacket and appeared to be seated in a vehicle next to the passenger side window (*Id.*). Outside of the window was a large red and white object (*Id.*). The back compartment of the vehicle was visible behind respondent's face and had a small window along the side and red equipment inside (*Id.*). No FDNY or EMS insignia was visible in the photograph (*Id.*).

On May 4, 2023, the Department's Bureau of Investigations and Trials interviewed respondent and EMT Thomas DeRienzo with respect to an unrelated EEO matter and inquired regarding respondent's Facebook account (Pet. Exs. 9, 10). During his interview, respondent admitted that the photograph posted on his Facebook account on November 22, 2022 was taken in the front passenger seat of an FDNY vehicle at EMS Station 7 (Pet. Ex. 9 at 24-25). Respondent also admitted to sharing the four posts on his Facebook account on April 29, July 5, August 5, and August 17, 2022 (*Id.* at 26, 35-41). With respect to his Star Wars comments, he explained that the transgender clone "would not be allowed to exist" "in the context of the [Star Wars] universe and the context of the [Star Wars] lore," and that the post expressed his "personal opinion" that the media "care[s] more about diversity and inclusion than they do about a good storytelling," which he noted was "a rather big discussion online at the moment" (*Id.* at 28, 31). With respect to the post with the picture of a syringe, respondent stated that "[t]his meme was entirely based around politicians" (*Id.* at 38). With respect to why he shared the two other memes, he opined that "gender ideology" and transgender issues should not be taught to "small children," but rather "should be discussed in a more mature setting, such as college or high school" (*Id.* at 36, 41-42). During his interview, EMT DeRienzo stated that he worked with respondent at EMS Station 7 for

approximately a year (Pet. Ex. 10 at 8-9). He recalled that respondent sent him a "friend request" on Facebook at the end of April 2023, but he did not accept it (*Id.* at 29-30).

At trial, respondent testified that he has been employed as an EMT since 2018 and was assigned to EMS Station 7 in Manhattan until April 15, 2023 (Tr. 23, 46). He recalled being provided with the Department's Social Media Policy and EEO Policy as part of his training at the academy (Tr. 24). Respondent was aware "[i]n a general sense" of the requirements of the Social Media Policy and knew that it was a "common practice" for employees to "not have their Facebook associated with the FDNY" and not "post about it" (*Id.*). In 2022 and 2023, he had a Facebook account and posted on it "fairly regularly, if not daily, then at least every other day" (Tr. 24, 27). He used his Facebook account to connect with friends and discuss topics such as pop culture and politics (Tr. 27). Respondent never listed the FDNY as his employer on his Facebook profile and only displayed his prior employment with FedEx (*Id.*).

Respondent admitted that the photograph posted on November 22, 2022 was taken inside an EMS Gator at Station 7 before he started his tour of duty (Tr. 25). He described the Gator as a small, "non-standard" FDNY vehicle similar to a golf cart that they used to respond to 911 calls within Times Square (*Id.*). The same type of vehicle was used outside of the FDNY, and respondent had seen it elsewhere in the city (Tr. 26). He posted the photograph to share a "bad hair day," which he thought looked "silly," and he made sure that the FDNY shield on his shoulder was not visible in the photograph and that "nothing in [the] photo had anything directly related to the FDNY" (Tr. 25-26).

Respondent admitted that he posted comments to his Facebook account on April 29, 2022 regarding an official Star Wars novel that had recently been released by Disney and Lucasfilm and featured a transgender clone stormtrooper (Tr. 28, 40, 42). He testified that his description of the clone as a "combat ineffective defect" was part of a "deep lore" discussion with other "Star Wars nerds" regarding the inconsistency between the character in the novel and the clones in the fictional Star Wars universe, and used the terminology of the Star Wars universe, wherein imperfect clones of the male bounty hunter Jango Fett were seen as defective and not effective warriors (Tr. 11, 28, 41, 48). He further testified that his comments related to the media's "political agendas" of prioritizing "diversity and just checking boxes" over "the quality of the story and the consistency of the narrative" (Tr. 29). Respondent admitted that he shared other people's Facebook posts on July 5, August 5, and August 17, 2022 (Tr. 29-32). He did not create the content, or necessarily

agree with everything in the posts, but shared the memes because they related to social issues that interested him, and he found them to be "amusing" (Tr. 30-33). He shared one of the memes because he believed that teaching "gender theory" to young children was "inappropriate," and shared another one of the posts because it addressed the COVID vaccine mandate, which was "controversial" at the time (Tr. 30-31). He testified that "[n]one of [his] posts were ever meant as a threat or statement of violence . . . [and] were just personal opinions based on modern political issues" (Tr. 32).

Respondent did not send these Facebook posts to his co-workers at the FDNY (Tr. 33). The posts on his Facebook page came to the FDNY's attention during an unrelated EEO investigation (Tr. 34). At the time of the investigation, his Facebook account was open to the public, and his posts could be seen by anyone on the internet who searched for him (Tr. 38). The EEO investigators were able to view his Facebook page without asking respondent for permission (Tr. 38-39). Around the same time as the EEO investigation, respondent sent a "friend request" to EMT DeRienzo (Tr. 39). Neither EMT DeRienzo nor anyone else who worked at EMS Station 7 ever said anything to him about these posts or his other Facebook activity (Tr. 47). Respondent and EMT DeRienzo had worked as partners from mid-2022 until April 15, 2023, when respondent stopped working at EMS Station 7 (Tr. 39, 44, 46, 51). Respondent did not recall exactly when he made the "friend request" but knew that it was after he had started at the firefighter academy on April 17, 2023, and they were no longer working together (Tr. 39, 44-47). Shortly thereafter, respondent was informed that his offer to become a firefighter had been rescinded and that he would be placed on restricted duty while the investigation was pending (Tr. 35, 45).

Off-Duty Misconduct

Offensive comments or jokes that are based on gender and made by an employee in the context of the workplace may constitute misconduct. *See Dep't of Social Services (Human Resources Admin.) v. Holmes*, OATH Index No. 1979/25 at 12-14 (Nov. 12, 2025) (finding that employee's persistent and unwelcome gender-based texts to a co-worker constituted sexual harassment); *Dep't of Education v. Vereen*, OATH Index No. 1643/24 at 12-14 (May 31, 2024), *adopted*, Chancellor Dec. (July 2, 2024) (finding that employee's "offensive, gender-based remarks" made to another employee in the school lounge constituted sexual harassment); *Triborough Bridge & Tunnel Auth. v. Vella*, OATH Index No. 227/22 at 23 (Feb. 10, 2022),

modified on penalty, Pres. Dec. (Mar. 22, 2022) (finding that supervisor's frequent use of demeaning, gender-based phrase, even if communicated to his subordinates as a form of joking, constituted sexual harassment). Petitioner's Code of Conduct specifically prohibits EMS employees from engaging in "practices or activities that discriminate against others with regard to . . . gender [or] gender identity/expression . . . in the course of performing their duties," and petitioner's EEO Policy makes clear that "[d]iscrimination, harassment, intimidation, ridicule, or insult based on membership in a protected group," including gender or gender identity, is prohibited (ALJ Exs. 2, 4).

A civil service employee's off-duty conduct, however, may constitute misconduct under section 75 of the Civil Service Law "only upon a showing that there is a nexus between the misconduct and respondent's employment." *Fire Dep't v. Gallimore*, OATH Index No. 1782/14 at 4 (June 25, 2014); *see Dep't of Correction v. DeMaitre*, OATH Index No. 1907/14 at 2 (Sept. 29, 2014), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2014-1427 (Feb. 18, 2015); *Fire Dep't v. Rozenblyum*, OATH Index No. 1738/03 at 3 (Jan. 21, 2004), *modified on penalty*, Comm'r Dec. (Dec. 21, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD05-53-SA (Aug. 26, 2005). Indeed, petitioner's Social Media Policy, which applies to personal use of social media on applications such as Facebook, specifies that FDNY employees "are accountable for off duty conduct when it could *reasonably be expected* to be disruptive of the workplace or agency operations, or bring the agency into disrepute" (ALJ Ex. 3) (emphasis added). The Social Media Policy further states that "[e]mployees participating in social media are subject to all applicable Department and City policies even when using social media while off duty or not at work," and "Department and/or City policy prohibits engaging in conduct tending to bring the City or the FDNY into disrepute, including engaging in harassing or discriminatory conduct" (*Id.*). When read together, the Social Media Policy and the EEO Policy prohibit off-duty "harassment" on social media, which is defined as "[u]nwelcome verbal or physical conduct with the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment" (ALJ Exs. 3, 4).

In the context of off-duty conduct on social media, this tribunal has found employees to have engaged in misconduct where they made offensive statements about co-workers on social media, or they made offensive statements on social media platforms where they identified themselves as City employees. *See Dep't of Sanitation v. J.L.*, OATH Index No. 2302/22 at 25-

26 (Sept. 13, 2022), *adopted*, Comm'r Dec. (Mar. 3, 2023) (finding that employee violated the agency's social media policy and engaged in misconduct by posting racially insensitive and inflammatory content on his Facebook page, which identified him as a Department employee); *Dep't of Finance v. Persaud*, OATH Index No. 900/21 at 5 (Nov. 12, 2021), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2021-0866 (Mar. 10, 2022) (finding that employee violated the agency's social media policy and engaged in misconduct by posting a derogatory comment about a group of people based on their national origin on his Facebook page, which identified him as a City employee); *Dep't of Social Services (Human Resources Admin.) v. Miles*, OATH Index No. 1432/20 at 15 (Dec. 10, 2020), *aff'd*, NYC Civ. Serv. Comm'n Case No. 2021-0126 (Aug. 19, 2021) (finding that employee violated the agency's social media policy and engaged in misconduct by using profanity and racial epithets in describing his co-workers on Instagram).

Similarly, a sufficient nexus has been found with respect to an employee's abusive or offensive off-duty speech when directed toward a co-worker or presented to a member of the public while having identified themself as a public employee. *See Dep't of Sanitation v. Anonymous*, OATH Index No. 525/24 at 30-31 (Sept. 9, 2024), *adopted*, Comm'r Dec. (Oct. 4, 2024), *appeal dismissed*, NYC Civ. Serv. Comm'n Case No. 2024-0677 (May 23, 2025) (finding nexus between respondent's public employment and his "obscene and racist comments" to a Department of Sanitation supervisor and police officers at a police precinct, where he repeatedly identified himself as a city employee during the incident); *Fire Dep't v. Patterson*, OATH Index No. 1069/02 at 5 (Sept. 20, 2002) (finding nexus between respondent's public employment and his off-duty use of profane language on a questionnaire submitted to FEMA as part of a voluntary terrorism response course, in which "he identified himself as a representative of the New York City Fire Department, and as an Operations Bureau Lieutenant within that organization"); *Dep't of Correction v. Johnson*, OATH Index No. 1177/99 at 4-5 (July 16, 1999) (finding nexus between respondent's public employment and her verbally abusive conduct toward a police officer where she identified herself as a peace officer during the off-duty dispute).

The evidence was insufficient to establish a nexus between respondent's off-duty conduct on Facebook and his employment as an EMT. Petitioner did not prove that respondent communicated with, or about, any FDNY employee when he posted the comments and memes on his Facebook account in 2022. The specific content of the four Facebook posts did not reference the EMS or FDNY and did not directly relate to his employment with the FDNY. Petitioner alleged

as part of the charges that respondent "connected to at least one co-worker via [his] Facebook account, and sent a request to connect to at least one other member" (ALJ Ex. 1). However, there was no evidence that respondent was "friends" with any current or former FDNY employee on Facebook, that he directed the Facebook posts toward any co-worker, or that any co-worker at EMS Station 7 ever viewed the Facebook posts. Respondent's unaccepted "friend request" to his former EMS partner in late April 2023, when the posts were still displayed on his Facebook account, did not establish a sufficient "link" between respondent's social media activity and the workplace, as argued by petitioner (Tr. 13). Petitioner did not call EMT DeRienzo to testify at trial and offered no evidence that EMT DeRienzo ever viewed respondent's Facebook account. Although petitioner claimed that respondent's conduct violated the EEO Policy (ALJ Ex. 5 at 1), there was no evidence that respondent's posts had the purpose or effect of interfering with another individual's work performance at the FDNY or creating a hostile work environment for an individual at the FDNY.

Moreover, respondent did not identify himself as an employee of the FDNY on his Facebook account. Respondent's profile did not list the FDNY or EMS as his employer and did not reference his position as an EMT. Rather, respondent publicly displayed his employment as a "QA Administrator" for FedEx, and there was no evidence that respondent posted about his employment with the FDNY. It was undisputed that respondent took a photograph of himself inside an EMS vehicle parked outside of his assigned EMS station and posted it to his Facebook account on November 22, 2022. Petitioner argued that respondent's employment with the FDNY was "easily discernible" from the photograph (Tr. 9). I disagree. Nothing in the photograph identified respondent as an EMT employed by the FDNY. No FDNY insignia was visible on respondent's clothing or inside the vehicle. The exterior of the vehicle, which may have shown the type of vehicle and any insignias, markings, emergency lights, or sirens on the vehicle, was not depicted. The inside appeared to be that of a non-descript commercial vehicle with a back compartment adjacent to a passenger cab. An object in the back compartment was red, but not discernible as particular piece of equipment used by an EMT, such as a gurney. A large object seen through the passenger side window was red and white but was not discernible as a vehicle and no insignias, emergency lights, or sirens were visible on it. It would be speculative to find that respondent identified himself as an EMT based on the photograph. Viewing the single photograph in the context of respondent's overall Facebook account, any suspicion regarding

respondent's employment based on the photograph is substantially outweighed by his public display of current employment with FedEx and the lack of any posts about the FDNY or his work as an EMT.

To be clear, respondent's Facebook posts were insensitive to transgender people and respondent intended to share and disseminate these messages with over 400 "friends" on an account that was open to the public. However, respondent did not identify himself as an FDNY employee on his personal Facebook account, and there was no evidence that any of his co-workers viewed or were likely to have viewed the posts. Thus, the evidence failed to establish that respondent should have reasonably expected the Facebook posts to be disruptive of the workplace or publicly associated with the FDNY. In that important respect, this case is different than *Fire Dep't v. Steiner*, wherein this tribunal found a sufficient nexus between two firefighters' employment and their off-duty participation in a racist parade float, "despite the fact that respondents were not readily identifiable and did not display symbols representing the Department." OATH Index Nos. 559/99 & 560/99 at 7 (Oct. 16, 1998), *rev'd sub nom Locurto v. Giuliani*, 269 F.Supp.2d 368 (S.D.N.Y. 2003), *rev'd*, 447 F.3d 159 (2d Cir. 2006). There, this tribunal held that the firefighters intended to publicize their "provocative" message and "should have anticipated being recognized," "being associated with the Department," and "the possibility of wider publicity," where they participated in a public Labor Day parade in a "close-knit community where [they] lived and were known as firefighters" and reenacted a lynching while wearing blackface in front of a video camera. *Id.* at 7-8. Respondent's online activity was nowhere near as provocative or as public, and there was no evidence that anyone who viewed the posts, except for the Department's EEO investigators who sought them out, knew that respondent had any connection to the FDNY.

Accordingly, petitioner failed to prove that respondent's Facebook posts constituted off-duty misconduct, and the charges are not sustained. *See Gallimore*, OATH 1782/14 at 5 (dismissing misconduct charge related to EMT's off-duty assault of his wife for lack of nexus to his employment).

First Amendment

Even if there were a sufficient nexus between respondent's off-duty conduct and his employment as an EMT, respondent cannot be disciplined for his speech that was protected under

the First Amendment. It is well established that public employees do not give up their First Amendment rights by virtue of their government employment. *Pickering v. Bd. of Education*, 391 U.S. 563, 568 (1968). When evaluating whether a public employer can impose discipline for an employee's speech, the first question is whether the employee spoke as a citizen on a matter of public concern. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). If the answer is no, there is no First Amendment issue; if the answer is yes, the burden shifts to the employer to demonstrate that potential workplace disruption outweighs the value of the speech. *Id.* Matters of public concern relate to "any matter of political, social, or other concern to the community," or "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) (citations 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. Meyers*, 461 U.S. 138, 147-48 (1983). Whether a statement is inappropriate or controversial "is irrelevant to the question whether it deals with a matter of public concern." *Rankin v. McPherson*, 483 U.S. 378, 387 (1987).

It was undisputed that respondent was speaking as a private citizen, and not pursuant to his official duties as an EMT, on his personal Facebook account. Petitioner argued that respondent's posts were "jokes targeting a protected class of individuals" and did "not amount to discussion of consequential issues of public concern" (ALJ Ex. 5 at 4). I disagree. All four of respondent's posts on social media touched upon issues of gender identity, and two of the memes specifically related to teaching gender identity to children in school. These are matters of public concern. *See Mule v. Dep't of Educ.*, 797 F.Supp. 3d 9, 37-38 (E.D.N.Y. 2025) (finding that messages posted to a school principal's anonymous Twitter account regarding the teaching of "gay rights" and "crazy LGBTQ stuff" in public schools addressed a matter of public concern); *Bloch v. Bouchey*, 2023 U.S. Dist. LEXIS 231661 at *64 (D. Vt. Dec. 28, 2023) (finding that "[g]ender identity and the participation of transgender athletes in athletic competitions" are matters of public concern); *see also Janus v. AFSCME, Council 31*, 585 U.S. 878, 913-14 (2018) (sexual orientation and gender identity are "sensitive political topics" and "matters of profound 'value and concern to the public'") (citation omitted). Respondent's critique of the new Star Wars novel also related to the media's focus on diversity, which is another matter of public concern. *See Fire Dep't v. Patterson*, OATH Index No. 217/89 at 11 (Aug. 21, 1989), *adopted*, Comm'r Dec. (Sept. 8, 1989) (finding that employee's expression of his views on affirmative action related to a matter of public concern).

That the three memes attempted to use humor to address these subjects does not negate the sociopolitical nature of their commentary. *See Noble v. Cincinnati & Hamilton Cnty. Pub. Lib.*, 112 F.4th 373, 381 (6th Cir. 2024) (finding that a meme posted by public library security guard on his personal Facebook page, which communicated his opposition to the Black Lives Matter protests in "an insensitive manner," constituted speech on a matter of public concern); *Hernandez v. City of Phoenix*, 43 F.4th 966, 978 (9th Cir. 2022) (finding that memes posted by a police officer on his personal Facebook profile, which "sought to denigrate or mock" Muslims, constituted speech on matters of public concern); *cf. J.L.*, OATH 2302/22 at 16, 23 (finding racist meme posted by respondent on a "White Lives Matter" Facebook group with an image of a wheelchair-bound African American Barbie doll "shot by police," which respondent found funny, not to be a matter of public concern).

As a justification for imposing discipline on respondent's speech, petitioner argued that the "problematic content" in respondent's Facebook posts created the potential for a hostile work environment for co-workers with different gender identities exposed to the posts (Tr. 10-14; ALJ Ex. 5 at 5-6). Indeed, given their demeaning content, it is likely that co-workers within the FDNY would have found at least some of respondent's posts to be offensive and unwelcome. Petitioner, however, failed to demonstrate any actual or potential workplace disruption because there was no evidence that any of respondent's co-workers saw or were likely to have seen his Facebook posts. *Cf. Dep't of Environmental Protection v. Kanvin*, OATH Index No. 062/22 at 5-6 (Feb. 4, 2022), *adopted*, Comm'r Dec. (July 20, 2022) (finding that environmental police officer's threat to file a civil lawsuit against his co-workers for cooperating with an EEO investigation was not protected under the First Amendment given that "the potential workplace disruption outweighed the value of the speech"); *Fire Dep't v. Buttaro*, OATH Index No. 2430/14 at 17-20 (Jan. 13, 2015) (finding that offensive t-shirts, which related to changes to applicant testing standards to increase minority employment in the FDNY, worn by a firefighter in the firehouse while on and off duty, were not protected under the First Amendment since his conduct created a hostile work environment for at least one Black firefighter and had the potential to create a hostile work environment for newly hired Black firefighters).

As set forth above, there was no evidence that respondent directed the Facebook posts toward any co-worker, was "friends" with any current or former FDNY employee on Facebook, or that any co-worker, including EMT DeRienzo, ever viewed the Facebook posts. There was no

evidence that any co-worker made a complaint or otherwise reacted to the posts. Petitioner also presented no evidence that respondent previously made insensitive or offensive remarks based on gender identity at work.[1] The fact that respondent's Facebook account was open to the public, without more, was insufficient to establish the potential for a hostile work environment.

To the extent petitioner argued that respondent's posts had the potential to disrupt agency operations by impairing the public perception of the EMS, the evidence failed to support this additional justification for discipline (ALJ Ex. 1 at Charge 5; ALJ Ex. 5 at 5-6). As stated by the United States Court of Appeals for the Second Circuit, "[w]here a Government employee's job quintessentially involves public contact, the Government may take into account the public's perception of that employee's expressive acts in determining whether those acts are disruptive to the Government's operations" and "the Government may legitimately respond to a reasonable prediction of disruption." *Locurto*, 447 F.3d at 179. As an EMT, respondent was responsible for providing emergency medical care services directly to the public, and petitioner has a significant interest in avoiding a public perception that the transgender community might not receive adequate emergency medical care from its EMTs. Moreover, "once speech is posted on the internet, the speaker has virtually no control over its distribution, creating the possibility that it will reach a far broader audience far more quickly than speech disseminated in other ways." *Hussey v. City of Cambridge*, 149 F.4th 57, 72 (1st Cir. 2025).

Petitioner, however, failed to demonstrate sufficient potential disruption to the public perception of the EMS from respondent's Facebook posts in April 2023. *Cf. Locurto*, 447 F.3d at 182-83 (holding that the City's reasonable concerns for the potential community perception of police officers and firefighters as racist, following the employees' participation in a racist float in a public parade that generated extensive media attention, outweighed their expressive interests and justified their discipline); *J.L.*, OATH 2302/22 at 15-16, 24-25 (finding that sanitation worker's racially insensitive and inflammatory Facebook posts, which identified him as an employee of the agency and led to an anonymous 311 complaint, were not protected under the First Amendment where they had "potential to negatively impact" how the Department of Sanitation was viewed by the community, including the predominantly African American community where respondent

[1] Petitioner alleged in the charges that respondent had expressed discriminatory "opinions or insults" based on gender and other protected categories to co-workers at EMS Station 7 on several occasions in the past, thereby making it "likely" that exposing his co-workers to the four Facebook posts would be prejudicial to the good order and discipline of the Department (ALJ Ex. 1). No evidence was presented in support of this allegation.

worked). There was no evidence that respondent's posts were ever disseminated beyond his more than 400 "friends" on Facebook, and the record showed that only a handful of those "friends" ever reacted to the posts by, for example, liking them. There was no evidence that any member of the public complained about respondent's Facebook posts or that respondent's association with the FDNY was ever publicized. There was no evidence that the four posts caused any disruption to agency operations in the eight to 12 months between their initial publication and April 2023, when they were still displayed on respondent's publicly accessible Facebook account and found by the Department during an unrelated EEO investigation. At that time, there were hundreds of other posts on respondent's Facebook timeline and no clear identification of respondent as an employee of the FDNY on his profile.

In sum, petitioner presented insufficient evidence of the potential for respondent's display of four posts on his personal Facebook account to disrupt the workplace to warrant the imposition of discipline for his speech on matters of public concern. *See Dep't of Correction v. Sanchez*, OATH Index No. 1095/96 at 4 (Mar. 29, 1996) (finding that an employee was not subject to discipline based on his speech regarding a matter of public concern where the agency "made no showing that the speech . . . was likely to be disruptive of the performance of a government function"); *see also Noble*, 112 F.4th at 384 (finding insensitive meme posted on an employee's personal Facebook account to be protected speech where there was no evidence that "any member of the public beyond a few Facebook friends saw the meme" and the employer therefore "could not reasonably anticipate any public backlash against the meme that would disrupt its operations").

FINDINGS AND CONCLUSIONS

1. Petitioner failed to establish that respondent engaged in misconduct by displaying offensive gender-based content on his Facebook account in April 2023, in violation of the Department's EEO Policy, Social Media Policy, or Code of Conduct.

2. Respondent's speech on his Facebook account was protected under the First Amendment.

RECOMMENDATION

I recommend that the charges be dismissed.

Michael D. Turilli
Administrative Law Judge

February 25, 2026

SUBMITTED TO:

LILLIAN BONSIGNORE
Commissioner

APPEARANCES:

BRIAN MCDONALD, ESQ.
Attorney for Petitioner

MICHAEL COVIELLO, ESQ.
Attorney for Respondent