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Supreme Court of New Jersey

DOCKET NO. 086617

STATE OF NEW JERSEY, :	CRIMINAL ACTION
Plaintiff-Appellant, :	On Appeal as of Right Pursuant to Rule 2:2-1(a)(1) from a Final Judgment of the Superior Court of New Jersey, Appellate Division.
v. :	
CALVIN FAIR, :	Sat Below: Hon. Clarkson S. Fisher, Jr., P.J.A.D. Hon. Heidi Willis Currier, J.A.D. Hon. Patrick DeAlmeida, J.A.D.
Defendant-Respondent. :	

SUPPLEMENTAL BRIEF AND APPENDIX ON BEHALF OF THE ATTORNEY GENERAL OF NEW JERSEY AMICUS CURIAE

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July 24, 2023

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PRELIMINARY STATEMENT

In Counterman v. Colorado, the U.S. Supreme Court held that while the First Amendment does not allow a State to punish someone for making a threat without proving "some subjective understanding of the threatening nature of his statements," "a mental state of recklessness is sufficient." That is, "[t]he State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence." After all, in contrast to negligence, reckless acts represent "morally culpable conduct" that "involve [the] deliberate decision to endanger another." Because New Jersey's terroristic threats law comports with that exact standard by requiring at least recklessness, Counterman disposes of defendant's federal constitutional claim.

Article I, Paragraph Six of the New Jersey Constitution does not require a greater constitutional mens rea for threats. While this Court will diverge from the Federal Constitution if it identifies sound policy reasons, Counterman itself shows why the sound policy balance supports its middle-ground approach. As Justice Kagan explains for the majority, a recklessness mens rea balances the need to avoid chilling protected speech with the competing, powerful interest in "protecting against the profound harms, to both individuals and society, that attend true threats of violence." To require more than recklessness does little to prevent chill, as reckless speakers have "done more than make a bad mistake."

But requiring more than recklessness would impede the State's ability to protect residents from violent threats, including by taking civil actions to address threats at school or in domestic violence cases. It is thus no surprise that recklessness has long been deemed sufficient to sanction other kinds of unprotected speech—like defamation—that lie far closer to core political speech.

There are no other reasons to diverge from Counterman's approach. None of the separate opinions in Counterman (calling for both higher and lower mens rea) adopted any bright-line rule requiring purpose, and the concurrence's approach (advocating for recklessness in some cases and purpose in others) does not provide a sufficiently clear or administrable approach. There is no historical tradition in this State to support requiring purpose rather than recklessness. Nor do this Court's precedents suggest that more than recklessness is required. Rather, there is only the rule that this Court looks to the Supreme Court's free-speech cases in interpreting Article I, Paragraph Six.

Neither the State nor defendant got all that they wanted from Counterman. But that is the very nature of an opinion that seeks to balance interests on both sides. Requiring recklessness therefore captures "much of what is important on both sides of the scale": it allows courts to protect important speech that might be chilled, and it allows States to guard against violent threats that cause harm. It is the appropriate balance for the New Jersey Constitution as well.

STATEMENT OF PROCEDURAL HISTORY AND FACTS

The Attorney General relies on the Statement of Procedural History and Statement of Facts in the State's brief and the Statement of Procedural History and Facts in the Attorney General's amicus brief, adding only the following.

On June 27, 2023, the United States Supreme Court issued Counterman v. Colorado, 143 S. Ct. 2106 (2023), holding that the First Amendment "requires proof that the defendant had some subjective understanding of the threatening nature of his statements" but "that a mental state of recklessness is sufficient." Id. at 2111. In other words, "the State must show that the defendant consciously disregarded a substantial risk that his communications would be viewed as threatening violence," but "the State need not prove any more demanding form of subjective intent to threaten another." Id. at 2111-12.

On June 30, 2023, this Court requested that the parties and amici submit supplemental briefs addressing the Counterman decision.

ARGUMENT

THERE IS NO BASIS UNDER THE NEW JERSEY CONSTITUTION FOR THIS COURT TO DIVERGE FROM COUNTERMAN.

There is no basis to require a greater mens rea than recklessness for true threats under the New Jersey Constitution. Although our State Constitution of course "may provide greater protections than" the Federal Constitution, State v.

Stever, 107 N.J. 543, 556-57 (1987), this Court has explained that in many cases, such "[d]ivergent interpretations" will prove "unsatisfactory." State v. Hunt, 91 N.J. 338, 345 (1982). Because "some consistency and uniformity between the state and federal governments in certain areas of judicial administration is desirable," id. at 362-63 (Handler, J., concurring); see also Right to Choose v. Byrne, 91 N.J. 287, 301 (1982) (same), this Court has held that "such enhanced protections should be extended only when justified by '[s]ound policy reasons.'" Stever, 107 N.J. at 557 (quoting Hunt, 91 N.J. at 345); see also State v. Williams, 93 N.J. 39, 57-58 (1983) (similarly focusing on whether State's "strong public policy" calls for divergence). In addition to policy, courts in our State consider, inter alia, whether New Jersey's "constitutional history"; "legal traditions"; or "special state concerns" would justify the divergence. Williams, 93 N.J. at 57-58; Hunt, 91 N.J. at 364-67 (Handler, J., concurring).

Defendant "bears the burden" to show that the State Constitution imposes a greater mens rea than what Counterman demands, State v. Lenihan, 219 N.J. 251, 265 (2014), and has failed to do so. First, sound policy reasons undermine defendant's case: the Counterman majority's balance of the competing interests in protecting society from violent threats and in preventing a chilling effect fits this Court's constitutional traditions, including under Article I, Paragraph Six.

Second, no state tradition or precedent supports defendant's view that defendant must have a specific intent to threaten in all true-threat cases.

A. As the Counterman majority explains, there are no "sound policy reasons" to require a greater mens rea than recklessness for true threats.

For the reasons the Counterman majority provides, sound policy reasons cut squarely against defendant's request.

Justice Kagan's opinion carefully explains the balance the majority struck. The majority opinion starts by recognizing that "true threats" are a "historically unprotected category of communications." 143 S. Ct. at 2114 (citing Virginia v. Black, 538 U.S. 343, 359 (2003)). There are good reasons why: true threats—namely, "serious expressions conveying that a speaker means to commit an act of unlawful violence"—"subject individuals to fear of violence and to the many kinds of disruption that fear engenders." Ibid. (quoting Black, 538 U.S. at 359-60). The "existence of a threat" and harm it causes "depends not on the mental state of the author, but on what the statement conveys to the person on the other end." Ibid. (quoting Elonis v. United States, 575 U.S. 723, 733 (2015)). But even though speech constitutes a true threat and causes profound harm based on its objective content alone, the Court "still demand[ed] a subjective mental-state requirement shielding some true threats from liability." Ibid. The Court found that protection was necessary to address "chilling effects"—i.e., the risk that in restricting threats, a law can "have the potential to chill, or deter, speech outside

their boundaries." Ibid.; see also id. at 2116 (describing effects—including the speaker mistaking whether his statement is a threat—that can make an individual "swallow words that are in fact not true threats").

The Court then addressed *which* subjective intent would be best prevent that chilling effect while still allowing the State to effectively respond to threats. Having already required more than negligence, the Court considered the other three options: (1) purpose, "the most culpable level in the standard mental-state hierarchy," in which the person "consciously desires a result—so here, when he wants his words to be received as threats"; (2) knowledge, "though not often distinguished from purpose," in which the individual "is aware that a result is practically certain to follow—so here, when he knows to a practical certainty that others will take his words as threats"; and (3) recklessness, best described as the person's decision to act in ways that "consciously disregard a substantial and unjustifiable risk that the conduct will cause harm to another." Id. at 2117. As the Court explained, recklessness is no mere accident: it is "morally culpable conduct, involving a deliberate decision to endanger another." Ibid.

The Court persuasively explained why recklessness properly "balance[s]" the need to avoid chilling any protected speech with the "competing value[]" in "protecting against the profound harms, to both individuals and society, that attend true threats of violence." Ibid. As to the former, the majority explains,

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requiring that the State establish recklessness in a true-threats case significantly addresses the risk of chilling protected speech. Ibid. The reason is simple—a reckless actor has "done more than make a bad mistake"; he engaged in "morally culpable conduct." Id. at 2117-18; see also Model Penal Code § 2.02, cmt. 5, at 244 (Am. Law. Inst. 1985) (explaining if a criminal statute is silent as to intent, recklessness—but not negligence—can be appropriate for culpability); Voisine v. United States, 579 U.S. 686, 695 (2016) (agreeing reckless conduct is culpable). In the context of threats, this means the actor must have actually been "aware that others could regard his statements as threatening violence"—not merely that he should have been aware—and yet "deliver[ed] them anyway." Counterman, 143 S. Ct. at 2117. Requiring this culpable awareness dramatically reduces the risk of chill that would have come from sanctioning individuals who are genuinely *unaware* whether their statements would be threatening—the sort of person who might otherwise self-censor protected words. See id. at 2115.

That is especially so in this context, since "the speech on the other side of the true-threats boundary line" is not likely to be "central" to free speech. Id. at 2118. Both the U.S. Constitution and the New Jersey Constitution reflect our "profound . . . commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); see also, e.g., Warren Hosp. v. Does (1-10), 430 N.J. Super.

225, 230 (App. Div. 2013). But there is nothing about recklessly telling one's classmates that they will "make Columbine look childish," Major v. State, 800 S.E.2d 348, 350 (Ga. 2017), or discussing one's "hit list," State v. Trey M., 383 P.3d 474, 477 (Wash. 2016) (en banc), that advances an uninhibited, robust, and wide-open debate. See State v. Mrozinski, 971 N.W.2d 233, 244 (Minn. 2022) (noting "this type of speech has a corrosive effect on society because it allows bullies who espouse violence to intimidate others, potentially stifling public discourse."). Given the culpability of reckless conduct and the distance between threats and protected speech, mandating specific intent would have "diminishing returns for protected expression." Counterman, 143 S. Ct. at 2118.

While little is to be gained from demanding specific intent or knowledge, the Court correctly explained that there is much to be lost. Counterman rightly recognized an important "value" in "protecting against the profound harms, to both individuals and society, that attend true threats of violence." Id. at 2117; see also id. at 2114 (same, and discussing the "disruption that fear engenders"). In short, while the imposition of any subjective mens rea "necessarily impede[s] some true-threat prosecutions," requiring purpose or knowledge undermines the State's "capacity to counter true threats" in two "still greater" ways. Id. at 2118. For one, imposing a purpose or knowledge requirement "prevent[s] States from convicting morally culpable defendants"—again, those who knew full well that

their conduct could cause "a substantial and unjustifiable risk" of harm and acted anyway. Ibid. For another, requiring either purpose or knowledge makes it hard to sanction *anyone* for true threats because it becomes exceedingly for the "State to substantiate the needed inferences about mens rea (absent, as is usual, direct evidence)." Ibid. It is always difficult to "prove what the defendant thought," id. at 2115, but it is especially difficult to prove that someone made a true threat knowing it was "practically certain" that others would take his words as threats (knowledge) rather than merely knowing of the substantial and unjustifiable risk that others would do so (recklessness), see id. at 2114. Requiring purpose or knowledge thus means many threats go unaddressed.

This is unfortunately not abstract. As the Attorney General explained in his previous amicus brief, adopting a heightened mens rea standard is especially troubling because the Constitution's free speech protections limit imposition of civil consequences too. See (AGb11-12) (explaining the analysis does not vary based on whether the sanction is civil or criminal); Haughwout v. Tordenti, 211 A.3d 1, 9 (Conn. 2019) (noting, in context of student's civil suit challenging his expulsion for threats of gun violence, that "[b]ecause the true-threats doctrine has equal applicability in civil and criminal cases, case law from both contexts informs our inquiry"). And there are many examples where increasing the mens rea makes it harder to prove and to sanction genuinely culpable threats that cause

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profound fear and consequent disruption—from the threats of violence in school to the domestic violence context. See (AGb11-13) (discussing both problems); see also Counterman, 143 S. Ct. at 2140-41 (Barrett, J., dissenting) (explaining, without dispute from the majority, that whatever subjective mens rea is adopted for true threats applies to "threat victims who seek restraining orders to protect themselves from their harassers"; discipline for a student "'talking about taking a gun to school' to 'shoot everyone he hates'"; and civil actions against those who threaten force against someone who is "obtaining or providing reproductive health services" or to exercise their religious freedoms).

The stakes are therefore high in this State. Raising the constitutional floor from recklessness to specific intent (or to knowledge) under Article I, Paragraph Six, would apply to domestic violence restraining orders, see H.E.S. v. J.C.S., 175 N.J. 309, 314-15 (2003), gun seizures under New Jersey's "red flag law," N.J.S.A. 2C:58-24(b), see Matter of D.L.B., 468 N.J. Super. 397, 400 (App. Div. 2021), threats to release a person's sexually explicit imagery or nonconsensual pornography, see Matter of Adams, No. A-2618-20, 2022 WL 4295314, at *6 (App. Div. Sept. 19, 2022)[1]; N.J.S.A. 2A:58D-1, and expulsion of a student for threats of gun violence, see, e.g., Haughwout, 211 A.3d at 3, among others. That

[1] Pursuant to Rule 1:36-3, a copy of the opinion is appended to this brief. See (AGsa1-7).

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would protect little valuable free speech, for the reasons explained above, but it would greatly impede the State's ability to protect residents from the "fear of violence" and "disruption" that follow true threats. Counterman, 143 S. Ct. at 2114.

This balance is particularly appropriate given how both the U.S. and State Constitutions have handled the mens rea elements in other free-speech contexts. As Justice Kagan explained, when it comes to defamation, courts have long held that recklessness properly "accommodate[es] competing interests" if the claim is brought by a public official. Id. at 2118 (discussing "actual malice" standard in N.Y. Times v. Sullivan, which requires the public official to show the person who engaged in defamatory speech acted at least recklessly); see ibid. ("In the more than half-century in which that standard has governed, few have suggested that it needs to be higher—in other words, that still more First Amendment breathing space is required."). There is "no reason to offer greater insulation to threats than to defamation." Ibid. After all, the "societal interests in countering" threats are "at least as high" as in countering defamation, and on the other side of the ledger, concerns about chill in threats cases are "if anything, further from the First Amendment's central concerns than the chilled speech" in cases like N.Y. Times v. Sullivan that involve "truthful reputation-damaging statements about public officials and figures." Ibid.

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Nor do the other opinions in Counterman support the defendant either. As an initial matter, that two Justices concluded that the First Amendment requires no subjective-intent element at all, see id. at 2133 (Barrett, J., dissenting), while two would have gone further than the majority, see id. at 2120 (Sotomayor, J., concurring in part and concurring in judgment), suggests that the middle-ground majority really did adopt a "Goldilocks" approach that would be "just right" for New Jersey too. Id. at 2119 n.7 (majority op.).

More than that, none of the separate opinions help defendant. The dissent is, of course, inconsistent with defendant's approach: that the dissent held even recklessness to establish too large a "buffer zone for true threats," id. at 2140 (Barrett, J., dissenting), indicates that defendant's purpose requirement would undermine even more civil and criminal actions. But notably, the two-justice concurrence does not go as far as defendant either. That opinion did not adopt a blanket rule that purpose or knowledge are always required when threats are involved; rather, it distinguished cases "punishing single utterances based on the message conveyed" (a question it thought the Court should not reach, but which it believed would likely require a threat be "intentional" unless the speech falls within another First Amendment exception) from cases that involve "repeated, unwanted" communications (for which recklessness would suffice). Id. at 2119, 2121, 2132 (Sotomayor, J., concurring in part and concurring in judgment); see

id. at 2121 (agreeing recklessness was enough in Counterman's case because the speech involved "threatening statements made as part of a course of stalking"). In short, none of the opinions advanced defendant's categorical rule.

In any event, there is no basis to adopt the concurrence's approach in place of the Counterman majority's balance. For one, the concurrence's approach is less administrable. Not only would its adoption mean that the New Jersey and U.S. Constitutions diverge on mens rea, but it also might mean that the mens rea required in our State may diverge depending on whether threats were "repeated" or made in a "single utterance"; what conduct accompanied the true threats; or perhaps other unreached considerations. Id. at 2119, 2121, 2132. But given the concern about chilling protected speech, clarity is necessary—and that suggests the need for a single, bright-line approach like recklessness instead. For another, while the concurrence focuses on the risk of "overcriminalization," id. at 2131-32, its approach would (as noted above) hinder States' ability to guard against threats and their harms via civil sanctions too. Finally, although the concurrence focuses on the need to guard protected speech, id. at 2131, it gives short shrift to the ways in which intent undermines the other side of the balance by making it too difficult for States to address genuinely culpable conduct.

Counterman did not provide New Jersey or defendant with everything they wanted in this case. Instead, it struck a balance: it required the State to prove a

subjective mens rea, but it chose the one that "offers enough breathing space for protected speech, without sacrificing too many of the benefits of enforcing laws against true threats." Id. at 2119. And while, "[a]s with any balance, something is lost on both sides, . . . something more important is gained: Not 'having it all'—because that is impossible—but having much of what is important on both sides of the scale." Ibid. That same balance applies to New Jersey.

B. There are no other special state traditions or precedents that would require a greater mens rea than recklessness for true threats.

Neither New Jersey's historical traditions nor precedents justify cabining "true threats" to cases where the State can prove purpose or knowledge.

1. No historical traditions justify adopting defendant's specific-intent-to-threaten requirement.

As an initial matter, the historical evidence from across the Nation does not require a greater mens rea than recklessness. Although the concurring opinion cited one eighteenth-century English statute that contained a knowledge mens rea and several Reconstruction-era state laws that required *some* subjective mens rea, they did not uniformly require intent to threaten. See id. at 2126 (Sotomayor, J., concurring in part and concurring in judgment). And, as importantly, there is an equally (if not even more) well-established tradition of threat laws that "used an objective standard resembling Colorado's," meaning they did not require even recklessness. Id. at 2139 (Barrett, J., dissenting)

(citing Elonis, 575 U.S. at 760-65 (Thomas, J., dissenting)). That the history cuts both ways underscores the reasonableness of Counterman's middle-ground standard and its respect for the interests on both sides.

New Jersey's own historical traditions are even more clearly inconsistent with a heightened mens rea requirement beyond recklessness. As detailed in the Attorney General's amicus brief, (see AGb23-26), the State was one of a dozen at the Founding that passed threats statutes requiring only "general intent"—that is, knowledge of the offense's actus reus, not a specific intent regarding the fear it would cause. See Kansas v. Boettger, 140 S. Ct. 1956, 1957 (2020) (Thomas, J., dissenting from denial of cert.)). And long after it incorporated free-speech protections into the 1844 State Constitution, New Jersey continued to proscribe "[t]hreaten[ing] to take . . . the life of any person" without any court invalidating the law for lacking a specific-intent requirement. State v. Gibbs, 134 N.J.L. 366, 367 (1946) (quoting N.J.S. 2A:113-8).

That historical practice has persisted to the present. Actions by the New Jersey Legislature—the branch of government "collectively responsive to the popular will," De Vesa v. Dorsey, 134 N.J. 420, 449 (1993) (quoting Reynolds v. Sims, 377 U.S. 533, 565 (1964))—provides powerful evidence of the public attitudes and state historical tradition on this question. And the Legislature has spoken clearly here: recklessness has sufficed for terroristic threats since the

Legislature adopted Section 211.3 of the Model Penal Code in 1978. See Final Report of the N.J. Criminal Law Revision Commission, Vol. II, commentary to § 2C:12-3, at 180 (1971) (in advocating passage of N.J.S.A. 2C:12-3, stating that "in the case of terroristic threats there is no occasion to exempt from criminal liability on the ground of the actor's possibly benign ultimate purpose").[2] Thus, New Jersey history is consistent with Counterman and certainly does not justify deviating from it under Article I, Paragraph Six.

2. State precedents are also inconsistent with a constitutional specific-intent-to-threaten requirement.

Initially, while this Court has recognized that it can interpret New Jersey's Constitution in ways that deviate from the U.S. Constitution, it has rarely seen fit to do so in the free-speech context. To the contrary, this Court has repeatedly noted that our "State Constitution's free speech clause is generally interpreted as co-extensive with the First Amendment," and thus that "federal constitutional principles guide [this Court's] analysis." E & J Equities, Ltd. Liab. Co. v. Bd. of Adjustment of the Twp. of Franklin, 226 N.J. 549, 568 (2016); see also Karins v. City of Atlantic City, 152 N.J. 532, 547 (1998) (explaining this Court will "rely on federal constitutional principles in interpreting the free speech clause

[2] Nor is that an unusual mens rea in New Jersey. See, e.g., N.J.S.A. 2C:11-4 (manslaughter); N.J.S.A. 2C:11-5 (vehicular homicide); N.J.S.A. 2C:12-1 (assault); N.J.S.A. 2C:40-3 (hazing); N.J.S.A. 2C:24-7.1 (endangerment); N.J.S.A. 2C:21-4.3 (health care claims fraud); N.J.S.A. 2C:17-1 (arson).

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of the New Jersey Constitution"); Bell v. Stafford Township, 110 N.J. 384, 393 (1988) (same, as to commercial speech); Williams, 93 N.J. at 51. This Court has thus identified only a "few exceptions where the State Constitution provides greater protection." E & J Equities, 226 N.J. at 568.

Importantly, one of those exceptions—involving defamation—only serves to undermine defendant's argument.[3] As laid out above, Counterman expressly relied on the law of defamation to justify its selection of recklessness. See supra at 11; 143 S. Ct. at 2115-16, 2118 (explaining that N.Y. Times v. Sullivan requires a showing of "actual malice" in any defamation cases brought by public figures—which can be satisfied by showing that the speaker acted "with reckless disregard of whether [the statement] was false or not"). Notably, this Court's defamation precedents double down on the role recklessness plays—extending New York Times v. Sullivan's "actual malice" standard beyond cases involving public officials to statements regarding private citizens "in which the challenged

[3] The other exception has no relevance here. See E & J Equities, 226 N.J. at 568 (citing defamation and state-action as the two deviations). This Court has held that the New Jersey Constitution extends beyond the U.S. Constitution's limited approach to state-action (where the rights only apply to limit government action) and protects against "unreasonably restrictive or oppressive conduct on the part of private entities that have otherwise assumed a constitutional obligation not to abridge the individual exercise of such freedoms because of the public use of their property." State v. Schmid, 84 N.J. 535, 560 (1980). But that rule—which is concerned with *who* must respect free-speech guarantees, not what content or mens rea is implicated by those guarantees—is inapposite.

speech touches on matters of public concern." Senna v. Florimont, 196 N.J. 469, 485-86 (2008); W.J.A. v. D.A., 210 N.J. 229, 248 (2012); see also Durando v. Nutley Sun, 209 N.J. 235, 251 (2012) (noting that "[a]ctual malice is defined similarly under federal and state law" and emphasizing that it includes acting in reckless disregard of the truth of the statement).

That matters in two respects. First, as Counterman explained, it would be incongruous to require purpose for threats but recklessness for defamation under the U.S. Constitution. After all, the harms from true threats are "at least as high" as from defamation, and purportedly defamatory speech is substantially closer to core political speech than threats are. See supra at 11. But given that this Court has applied recklessness to even more instances of defamatory conduct, it would be especially strange to have this mismatch between defamation and true threats under Article I, Paragraph Six. Second, the reason this Court extended recklessness to public-concern speech (and not just public-official speech) looks notably like the reason Counterman applied recklessness to true threats cases as well: to balance competing constitutional interests. See Senna, 196 N.J. at 478 (recognizing the need for public-concern defamation to "balance two competing interests"—the "right of individuals to speak freely and fearlessly on issues of public concern in our participatory democracy" and the separate right "to enjoy their reputations unimpaired by false and defamatory attacks"—and finding that

New York Times v. Sullivan's standard achieved that goal). There is no reason why recklessness would be less appropriate for this balance.

Nor are there any precedents from this Court that would require the use of specific intent or knowledge instead. Although defendant previously turned to State v. Burkert, 231 N.J. 257 (2017), and State v. Pomianek, 221 N.J. 66 (2015), neither provide support. Burkert involved a statute, N.J.S.A. 2C:33-4(c), that in fact required the accused to have acted "with purpose to alarm or seriously annoy [a] person." 231 N.J. at 263. This Court had no need—and did not—construe the statute to require proof that an accused acted with specific intent, given that the Legislature already imposed that requirement. The case instead turned on the proper reading of "alarm or seriously annoy," terms that raised vagueness issues that are in no way implicated here. Id. at 278-85. That decision has no bearing on whether a recklessness mens rea properly balances the need to avoid chilling protected speech with the State's authority to guard against true threats.

Nor can Pomianek get defendant further. There, this Court considered the validity of one part of the bias-crime law, N.J.S.A. 2C:16-1(a)(3), that rendered a person guilty of "bias intimidation if the victim 'reasonably believed' that the defendant committed the offense on account of the victim's race" or other protected characteristic. 221 N.J. at 69 (quoting N.J.S.A. 2C:16-1(a)(3)). Said another way, that involved a different mens rea than any of the ones Counterman

considered: it turned liability on a victim's own personal beliefs about what the defendant's motivations were. Pomaniek, 221 N.J. at 87-88. That is a far cry from New Jersey's terroristic-threats statute, which does not turn on a victim's personal beliefs, but instead requires the communication objectively threaten and that the defendant "consciously disregard[ed] a substantial and unjustifiable risk" that it would be experienced as a threat. N.J.S.A. 2C:2-2(b)(3). Pomianek in no way suggests that a conventional recklessness mens rea is unlawful.

CONCLUSION

This Court should reverse and uphold the constitutionality of the reckless-disregard prong of the terroristic-threats statute.

Respectfully submitted,

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey, Appellate Division.

In the MATTER OF Czezre ADAMS, City of Newark, Police Department.

DOCKET NO. A-2618-20
|
Submitted September 13, 2022
|
Decided September 19, 2022

On appeal from the New Jersey Civil Service Commission, Docket No. 2020-1661.

Attorneys and Law Firms

Fusco & Macaluso, PC, attorneys for appellant Czezre Adams (Giovanna Giampa, on the brief).

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Matthew J. Platkin, Acting Attorney General, attorney for respondent New Jersey Civil Service Commission (Steven M. Gleeson, Deputy Attorney General, on the statement in lieu of brief).

Before Judges Geiger and Susswein.

Opinion

PER CURIAM

***1** Appellant Czezre Adams appeals from a final decision of the Civil Service Commission (CSC) upholding his removal from employment as a City of Newark Police Department (NPD) police officer. We affirm.

We take the following facts from the record. Adams began his employment as an NPD police officer in 2014. In May 2019, J.B. [1] contacted Adams through Adam's Twitter account. Adams directed J.B. to speak to him through his other Twitter account (the second account). Adams did not identify himself as a police officer on this second account. They agreed to meet at J.B.'s home later that evening. They engaged in a consensual sexual encounter and Adams took photographs and videos of the encounter with J.B.'s consent. The pictures and videos were then shared between the two, at J.B.'s request, on an application called WhatsApp. J.B. requested that Adams not post the videos on Twitter and Adams responded that he would not share the videos.

On June 4, 2019, J.B. saw the photographs and videos posted on Adam's second Twitter account. The posts did not include J.B.'s face but he knew it depicted him. J.B. sent Adams a message reiterating that he did not want the images posted or shared on Twitter and stated, "I expected you to respect what I asked this wasn't cool." Adams responded that he "completely forgot until I read our text" and said he deleted the posted images. J.B. then asked if Adams posted the photos or videos to OnlyFans [2] and Adams replied that he had not. J.B. asked Adams to "[p]lease delete everything from [his] phone."

In subsequent texts, J.B. explained that he was not looking to be shown engaging in such activities on Adams's social media account, but Adams responded that J.B. "came knocking at [his] door" and indicated that J.B. was the one that originally sought out Adams. J.B. testified that he broke off communication with Adams soon after.

J.B. monitored Adams's Twitter page and discovered that Adams had reposted videos of their sexual encounter. On September 12, 2019, J.B. reported Adams's page to Twitter, which responded by making the account unavailable for violating its social media policy.

On September 13, 2019, J.B. spoke with NPD Lieutenant Andy Rivera to file a Professional Standards complaint against Adams. J.B. claimed that Adams posted their sexual encounter without his permission. J.B. also contacted the Essex County Prosecutor's Office and spoke with an assistant prosecutor in the Special Victims Unit. J.B. was told that his allegations would not be pursued as a criminal matter and that he could file a civil complaint against Adams.

J.B. posted on his Twitter account that he was being harassed by a police officer who had videotaped their sexual encounter and published the videos online. J.B. testified that he knew that he was being recorded when he and Adams had sex. In response to J.B.'s tweets and reporting to Newark, Adams posted a series of tweets on his original Twitter page. Adams tweeted, "[J.B.], really didn't want to go down this route but

I thought the situation was dead, but clearly it's not, so ... here we go." Another tweet read: "Your clock is ticking. I sent you my warning." Adams continued to tag J.B. publicly in threatening and discouraging messages while tweeting directly or replying to other user's comments about the feud. Adams had the final say in the back and forth by posting, "so you want to keep these lies up after I gave you fair warning? I have nothing but time today. Just because you changed your settings [so that] only those following can see your posts don't mean I don't have what I need. Yes, I'm pulling up." Finally, Adams stated: "Now we can keep this going because I have time[,] or you can do what I asked and I'll let you have the little dignity you have left to stay intact."

***2** J.B. later learned of yet another Twitter account (the third account) that also had an image of the sexual encounter between Adams and J.B. The account included a link to an OnlyFans account that used the same name as the OnlyFans account that was on Adams's Twitter account before it was deactivated. J.B. explained that OnlyFans required payment to see the videos posted on that page and he did not sign up to view them.

Specific to Adams's ownership of an OnlyFans account, Lt. Rivera explained that having such a pay-per-view account is considered a form of outside employment. Police officers are forbidden from making any profit from outside employment unless it is disclosed to the Department. Adams did not submit an outside employment form for the JustKash account linked to him. Lt. Rivera further testified that police are held to a higher standard, and that they are not supposed to profit from sexually explicit videos or similar activities.

J.B. testified that he emailed Adams on October 24, 2019, stating that he was hurt by Adams posting the video and wanted to protect his privacy. Adams denies receiving the email. When the men later spoke, J.B. reiterated that he did not want to have intimate photos and videos posted on Twitter.

The NPD issued a Preliminary Notice of Disciplinary Action (PNDA) to Adams on October 8, 2019, which charged him with violating N.J.A.C. 4A:2-2.3(a)(6), Conduct Unbecoming a Public Employee, and the following NPD rules and regulations: Chapter 3:1.1, Conduct in Public and Private [3]; Chapter 4:2.6, Obscene, Immoral or Offensive Material [4]; Chapter 3:1.1, Conduct in Public and Private [5]; Chapter 18:25, Acts of Immorality [6]; Chapter 18:28, Misconduct Generally. [7] Adams was also charged with violating NPD General Order 15-02. [8]

***3** Adams pled not guilty at the November 13, 2019 departmental hearing and waived his right to have his case heard by the NPD's trial board. On December 3, 2019, the NPD upheld the charges levied against Adams and issued a Final Notice of Disciplinary Action (FNDA) terminating Adams's employment with the NPD effective November 13, 2019.

Adams appealed his removal to the CSC. The appeal was transferred to the Office of Administrative Law (OAL) as a contested case and assigned to an ALJ, who conducted a two-day hearing. The NPD called J.B. and Lt. Rivera as witnesses and Adams testified on his own behalf. Following the receipt of written submissions, the ALJ issued an initial decision on March 4, 2021, which upheld all charges except violation of NPD Rules and Regulations and Chapter 18:28 Misconduct Generally.

Four additional discipline appeals filed by Adams from major discipline issued by the NPD on November 13, 2019, were pending before the OAL. Those appeals, which involved unrelated charges, were from suspensions of fifteen days, forty-five days, ninety days, and thirty days, respectively.

The first suspension was for Adams's alleged conduct relating to a September 21, 2018 motor vehicle accident, involved identifying himself as a police officer, failure to maintain appropriate insurance, and providing false information during an investigation. The second suspension related to an October 31, 2018 incident during which Adams was rude to a 911 caller. The third suspension was for "unprofessional language with a caller and his failure to create an assistance assignment in the system" on November 25, 2018. The fourth suspension followed Adams's June 4, 2019 actions "in not following several orders and speaking in an unprofessional, profane manner."

The ALJ found J.B.'s testimony was "credible and persuasive concerning the multiple social media posts of the sexual encounter on Adams's ... Twitter account without [J.B.'s] consent and prior request not to do so." The ALJ noted that J.B. admitted that his tweet stating that he did not consent to the taping was "inaccurate," but he maintained "that he never agreed to Adams's use of their sexual pictures or videos on social media." J.B. also testified credibly that Adams's tweets suggested "physical violence" and that Adams called

him on October 7, 2019, "from an unknown caller number and threatened to sue J.B."

In contrast, the ALJ found Adams's testimony "that he did not post or use the images from the sexual encounter after June 4, 2019," was not credible. The ALJ found there was a link between the second Twitter account and Adams and that he posted images of the May 30, 2019 sexual encounter on June 4 and September 12, 2019, without J.B.'s consent. "However, the evidence did not establish that the Twitter account references or depicts Adams's employment as a police officer." In addition, the ALJ noted that Adams denied creating the third Twitter account, the photo associated with that account "does not reveal Adams's face or otherwise identify Adams[,]" and the NPD presented no other information or records "connecting Adams to the account." The ALJ therefore found that the evidence did not demonstrate that the third Twitter account "belong[ed] to Adams or that he earned money by posting images or videos from the May 30, 2019 sexual encounter."

***4** The ALJ concluded "that a preponderance of the credible evidence" showed that Adams violated NPD Rules 3.1-1, 4:2-6, 18:25, and Order 15-02 "by recording and later posting sexually explicit content on his social media account without [J.B.'s] consent on more than one occasion." She found Adams's actions "reflected irresponsible behavior on social media in violation of Order 15-02" and that "Adams violated N.J.A.C. 4A:2-2.3(a)(6) because Adams's conduct is incompatible with the high degree of integrity and respect expected of all police officers." Because the violations of Rules 3.1-1, 4:2-6, and 18:25 were upheld, the ALJ concluded that "Adams did not violate 18:28 for actions or conduct not covered by other rules or regulations."

Following the receipt of additional submissions regarding progressive discipline, the ALJ considered the appropriate level of discipline. Regarding the relevance of Adams's other disciplinary appeals, the ALJ recognized Adams incurred no prior discipline in the five years preceding the charges in this case and those involved in the other four pending appeals. However, "consideration of pending disciplinary appeals is appropriate in determining the penalty here." "Further, the pending appeals note significant offenses within a short period and include a maximum suspension of ninety days." Even so, "the nature of the offenses does not suggest a specific pattern of misconduct other than perhaps a disrespectful attitude."

While the misconduct occurred off-duty, the ALJ noted that Adams's conduct violated multiple rules, a departmental order, and a CSC regulation. In addition, Adams "showed a lack of respect for [J.B.'s] privacy and welfare." The ALJ nevertheless found the misconduct to be "mostly a private matter between two adults without sufficient evidence of a crime or direct involvement with Adams's position as a police officer."

The ALJ declined to bypass progressive discipline, found termination to be "unreasonably harsh," and reduced the penalty to a 180-day suspension. The NPD filed written exceptions to the initial decision.

The CSC "considered the ALJ's initial decision" and undertook "an independent evaluation of the record." On April 7, 2021, the CSC issued a final administrative action that adopted the findings of fact contained in the initial decision, rejected the ALJ's recommendation to modify the removal to a 180-day suspension, and upheld the removal.

The CSC recounted the charges, the ALJ's findings, and noted that its review of the appropriate penalty was de novo. The CSC decided that the "only appropriate penalty" was "removal from employment."

The CSC noted "that where the underlying conduct is of an egregious nature, the imposition of a penalty up to and including removal is appropriate, regardless of an individual's disciplinary history." That is so because "some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record." The CSC found that Adams's "actions are clearly sufficiently egregious to support the penalty of removal without consideration of progressive discipline."

The CSC concluded that the ALJ's comments regarding free speech were misplaced and irrelevant because J.B. did not consent to the posting of the video. It emphasized that the primary basis for the discipline was that Adams violated J.B.'s trust and right to privacy by posting the video on more than one occasion without J.B.'s consent. The CSC considered the repeated public posting of the video to be "wholly inappropriate" and "outrageous," and was exacerbated by Adams's other communications with J.B., which were deemed to be "actual or veiled threats." It found this conduct to be "the definition of conduct unbecoming a public employee[,]" and was "even more egregious" because police officers are held to a higher standard of conduct. The CSC explained that

police officers are special employees tasked with enforcing and upholding the law while exercising "good judgment in [their] relationship with the public." To that end, police officers "must present an image of personal integrity and dependability in order to have the respect of the public." It found that Adams "certainly violated [these] standards."

***5** The CSC further explained that even if progressive discipline did apply, the ALJ's analysis was flawed. The ALJ found that Adams had "no prior discipline ... in the nearly five years before the pending charges or charges in this case." The CSC disagreed, noting that Adams was hired in 2015 and had incurred four major disciplinary actions during the year preceding the current charges. Indeed, Adams was suspended for fifteen days in September 2018. He was thereafter suspended for thirty days, forty-five days, and ninety days before incurring the present charges.

In any event, the CSC concluded that "[a] [p]olice [o]fficer with four major disciplines in such a short time period cannot seriously expect that the fifth serious infraction that warrants major discipline would carry any penalty short of removal." The fact that the four prior major disciplinary actions involved dissimilar misconduct was not determinative. "More important [was] the fact that [Adams] had demonstrated a consistent pattern of misconduct that cannot be tolerated given the above standards imposed upon [p]olice [o]fficers." Therefore, even if Adams's "current infractions were not so egregious to support removal absent the application of progressive discipline, it would find that applying that standard, removal is the only appropriate penalty."

This appeal followed. Adams raises the following arguments:

POINT ONE

THIS HONORABLE COURT SHOULD REVERSE THE CIVIL SERVICE COMMISSION'S DECISION TO NOT ADOPT THE ALJ'S DECISION AND REMOVE APPELLANT, BECAUSE THE DECISION WAS MANIFESTLY MISTAKEN, ARBITRARY, CAPRICIOUS AND UNREASONABLE, AND NOT SUPPORTED BY THE RECORD, AS APPELLANT'S CONDUCT WAS NOT EGREGIOUS ENOUGH TO WARRANT TERMINATION.

POINT TWO

THIS HONORABLE COURT SHOULD REVERSE THE CIVIL SERVICE COMMISSION'S DECISION TO NOT ADOPT THE ALJ'S DECISION AND REMOVE APPELLANT, BECAUSE THE CITY OF NEWARK FAILED TO PROVE APPELLANT'S DISCIPLINE BY PREPONDERANCE OF THE EVIDENCE IN THE UNDERLYING HEARING.

POINT THREE

THIS HONORABLE COURT SHOULD REVERSE THE CIVIL SERVICE COMMISSION'S DECISION TO NOT ADOPT THE ALJ'S DECISION AND REMOVE APPELLANT, BECAUSE THE DECISION WAS MANIFESTLY MISTAKEN, ARBITRARY, CAPRICIOUS, IN FINDING THAT EVEN IF PROGRESSIVE DISCIPLINE WAS FOLLOWED, THERE WOULD BE SUFFICIENT PRIOR DISCIPLINE TO REMOVE THE APPELLANT.

When an employee appeals to the CSC from major disciplinary action, the appointing authority bears the burden of proof by a preponderance of the evidence, Atkinson v. Parsekian, 37 N.J. 143, 149 (1962).

Judicial review of final agency decisions is limited. Allstars Auto Grp., Inc. v. N.J. Motor Vehicle Comm'n, 234 N.J. 150, 157 (2018) (citing Russo v. Bd. of Trs., Police & Firemen's Ret. Sys., 206 N.J. 14, 27 (2011)). Decisions "made by an administrative agency entrusted to apply and enforce a statutory scheme" are reviewed "under an enhanced deferential standard." E. Bay Drywall, LLC v. Dep't of Lab. & Workforce Dev., ––– N.J. ––––, –––– (2022) (slip op. at 14) (citing Hargrove v. Sleepy's, LLC, 220 N.J. 289, 301-02 (2015)). "We are bound to defer to the agency's factual findings if those conclusions are supported by the record." Id. at –––– (slip op. at 14-15) (citing Carpet Remnant Warehouse, Inc. v. Dep't of Lab., 125 N.J. 567, 587 (1991)). We will not disturb the determination of the Commission absent a showing "that it was arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence, or that it violated legislative policies expressed or implicit in the civil service act." Zimmerman v. Sussex Cnty. Educ. Servs. Comm'n, 237 N.J. 465, 475 (2019) (quoting Campbell v. Dep't of Civ. Serv., 39 N.J. 556, 562 (1963)). "When an agency's decision meets those criteria, then a court owes substantial deference to the agency's expertise and superior knowledge of a particular field." In re Herrmann, 192 N.J. 19, 28 (2007). "Deference controls even if the court would have reached a different result in the first instance." Ibid.

***6** A reviewing court is not, however, "bound by [an] agency's interpretation of a statute or its determination of a strictly legal issue." Allstars, 234 N.J. at 158 (alteration in original) (quoting Div. of Youth & Fam. Servs. v. T.B., 207 N.J. 294, 302 (2011)). The party challenging the administrative action bears the burden of demonstrating that the agency's action was arbitrary, capricious, or unreasonable. Lavezzi v. State, 219 N.J. 163, 171 (2014).

Applying these principles, we affirm substantially for the reasons expressed by the CSC in its final decision. We add the following comments.

Our careful review of the record convinces us that the ALJ's credibility determinations were supported by substantial, credible evidence in the record, as were the ALJ's and CSC's determinations that Adams committed the disciplinary infractions for which his removal was sustained. The NPD satisfied its evidential burden of proving Adams committed the disciplinary infractions by a preponderance of the evidence. We are further convinced that the penalty of removal was warranted and not "so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness." In re Carter, 191 N.J. 474, 484 (2007) (quoting In re Polk, 90 N.J. 550, 578 (1982)).

Adams can hardly claim that the principle of progressive discipline should be applied to downgrade the penalty for his misconduct since Adams obviously did not have "a substantial record of employment that is largely or totally unblemished by significant disciplinary infractions." Herrmann, 192 N.J. at 33. Instead, his four prior major disciplinary actions during his relatively short tenure as a NPD police officer evidences "a consistent pattern of misconduct that cannot be tolerated given the ... [standards] imposed upon [p]olice [o]fficers." The CSC correctly concluded that Adams's extensive disciplinary record militated strongly in favor of a more serious penalty, not a lesser penalty.

Moreover, the theory of progressive discipline is not "a fixed and immutable rule to be followed without question. Instead, [our Supreme Court has] recognized that some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record." Carter, 191 N.J. at 484.

The CSC found that standing alone, the present charges were sufficiently egregious to warrant removal, regardless of Adam's prior disciplinary history. We agree. Adam's repeated misconduct, coupled with his threatening statements to J.B., fell far below the stricter standard of conduct to which police officers are held. See In re Phillips, 117 N.J. 567, 576-77 (1990) (explaining that police officers are held to a higher standard of conduct than other public employees); In re Att'y Gen. L. Enf't Directive Nos. 2002-5 & 2020-6, 465 N.J. Super. 111, 147 (App. Div. 2020) (same), aff'd as modified, 246 N.J. 462 (2021); Twp. of Moorestown v. Armstrong, 89 N.J. Super. 560, 566 (App. Div. 1965) (stating that "a police officer is a special kind of public employee" whose "primary duty is to enforce and uphold the law" and "to exercise tact, restraint and good judgment in his relationship with the public"). This higher standard of conduct applies to police officers even when off-duty. Phillips, 117 N.J. at 577; In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960).

***7** The seriousness of Adams's misconduct is reflected by the Legislature's enactment of N.J.S.A. 2C:14-9(c), which prohibits knowingly

> disclos[ing] any photograph, film, videotape, recording or any other reproduction of the image, taken in violation of [N.J.S.A. 2C:14-9(b)], of: (1) another person who is engaged in an act of sexual penetration or sexual contact; (2) another person whose intimate parts are exposed; or (3) another person's undergarment-clad intimate parts, unless that person has consented to such disclosure.

Violating N.J.S.A. 2C:14-9(c) is a third-degree crime.[9] "Every police officer has an inherent duty to obey the law." State v. Stevens, 203 N.J. Super. 59, 65 (Law Div. 2010). Indeed, "[t]he obligation to obey the criminal laws of this state ... is a responsibility imposed upon everyone in society." State v. Hupka, 407 N.J. Super. 489, 511 (App. Div. 2009), aff'd, 203 N.J. 222 (2010).

The fact that the Essex County Prosecutor's Office decided not to prosecute Adams for violating N.J.S.A. 2C:14-9 does not lessen the nature and seriousness of his misconduct. "Where the conduct of a public employee which forms the basis of disciplinary proceedings may also constitute a [crime], the absence of a conviction, whether by reason of nonprosecution

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or even acquittal, bars neither prosecution nor finding of guilt for misconduct in office in the disciplinary proceedings." Phillips, 117 N.J. at 575 (quoting Sabia v. City of Elizabeth, 132 N.J. Super. 6, 12 (App. Div. 1974)).

To the extent we have not specifically discussed any remaining arguments raised by Adams, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

All Citations

Not Reported in Atl. Rptr., 2022 WL 4295314

Footnotes

1 We refer to the victim by initials to protect his privacy. See R. 1:38-3(c)(12).

2 The Administrative Law Judge (ALJ) determined that "OnlyFans is a website where an individual creates a site, including videos, pictures, or other content. A user or subscriber would have to sign up for access and log into the website to view its full content."

3 Chapter 3:1.1 states: "Police officers in both private and public shall conduct themselves so as to avoid impugning the reputation of the Department. They shall maintain the dignity and integrity of their office through the exemplary obedience to all Rules and Regulations; the maintenance of respect for the welfare and rights of all citizens; the courteous and objective enforcement of laws without favor or prejudice, and the recognition that police service is a public trust requiring dedication to ideals and ethics of the highest degree."

4 Chapter 4:2.6 states: "Except in the discharge of police duty, police officers shall not knowingly write, print, copy, distribute, transport, store, or possess any writings, records, recordings, or pictures which contain obscene, immoral, offensive, or defamatory matter."

5 Chapter 3:1.1 states: "Police officers in both private and public shall conduct themselves so as to avoid impugning the reputation of the Department. They shall maintain the dignity and integrity of their office through the exemplary obedience to all Rules and Regulations; the maintenance of respect for the welfare and rights of all citizens; the courteous and objective enforcement of laws without favor or prejudice, and the recognition that police service is a public trust requiring dedication to ideals and ethics of the highest degree."

6 Chapter 18:25 states: "Division members shall not commit acts of immorality, indecency or lewdness."

7 Chapter 18:28 states: "Any violation or offense not properly chargeable against a Department member under any other Rules of Discipline shall be charged under Rule No. 18."

8 Order 15-02 states that in order to maintain "professionalism, honesty, and integrity," the NPD implemented "guidelines to address the conduct and the appearance of personnel, on and off duty, while utilizing social media outlets" to ensure members "use discretion in a manner to not discredit, defame, or disrespect the department." The order defines "speech" to include photographs and videos. The order provides that "members are not to engage or participate in speech containing obscene or sexually explicit language, images, acts, statements, or other forms of speech that ridicule, malign, disparage, or otherwise express bias against any race, religion, ethnicity, economic status, protected class, or social status of an individual." Finally, the order requires that members not engage in "speech involving themselves ... that would reflect behavior reasonably considered reckless or irresponsible."

9 We emphasize that the fact these were same sex sexual encounters has no bearing on the seriousness of the misconduct.

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