UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FOR ONLINE PUBLICATION ONLY

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ROBERT CHARLES REULAND,

Plaintiff,

- against -

MEMORANDUM AND ORDER
01 CV 5661 (JG)

CHARLES J. HYNES, individually and in his capacity as District Attorney for the County of Kings, New York,

Defendant.

- X

APPEARANCES:

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JOHN GLEESON, United States District Judge:

Plaintiff Robert Charles Reuland, a former Assistant District Attorney in Kings County, New York, brings this civil rights suit under 42 U.S.C. § 1983 against defendant Charles J. Hynes, the Kings County District Attorney,[1] seeking damages and equitable relief. Reuland

[1] Originally, Reuland's suit also included as a defendant Amy Feinstein, individually and in her capacity as Hynes's First Assistant District Attorney. Reuland recently voluntarily dismissed all of his claims against Feinstein.

claims that Hynes demoted and discharged him in violation of his First Amendment rights. Hynes now moves for summary judgment, arguing that (1) Reuland's speech was not a matter of public concern, (2) Reuland cannot establish a causal connection between his speech and Hynes's decision to discharge him, and (3) he is entitled to qualified immunity. Alternatively, Hynes seeks partial summary judgment on the issue of back pay. For the following reasons, the motion is denied.

BACKGROUND

The facts of this case, viewed in the light most favorable to Reuland, are as follows. During the summer of 1998, while he was employed as an Assistant District Attorney in the "Red Zone" of the Kings County District Attorney's Office,[2] Reuland began writing *Hollowpoint*,[3] a novel about a prosecutor employed in that District Attorney's Office and his investigation and prosecution of a homicide.[4] In March 2000, Reuland secured a $500,000 contract, dated May 22, 2000, with Random House, Inc. ("Random House"), to publish *Hollowpoint* and a second, unwritten novel. Under this contract, Reuland would receive premium payments if either or both of the books appeared on *The New York Times* hardcover bestseller list.[5]

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[2] The Red Zone was one of the office's general trial bureaus, and was responsible for prosecuting certain offenses within a particular section of Brooklyn. At all relevant times, Hynes was the District Attorney of Kings County.

[3] *Hollowpoint* is exhibit CC to the Declaration of Eamonn F. Foley.

[4] Though Reuland sometimes worked on *Hollowpoint* at the office, he did not do so during office hours.

[5] Aside from securing contracts to publish *Hollowpoint* in various languages around the world, Reuland also optioned the television and movie rights to the novel in a July 26, 2001 agreement with Mirage Enterprises, Inc.

In May 2000, a position opened in the Homicide Bureau ("Homicide"). Reuland, very interested in the post, sought the advice of his supervisor and friend, Sheryl Anania. Anania recommended that Reuland speak with Hynes directly regarding his desire to be assigned to Homicide. Reuland requested a meeting with Hynes, which occurred on May 31, 2000. During this meeting, the two discussed, among other things, the upcoming publication of *Hollowpoint*. Reuland told Hynes that the book was a fictionalized account of a prosecutor in a fictionalized Kings County District Attorney's Office. He also said that nothing in the novel would hurt the office. Hynes responded that he had also published a book, which had met with only mild success, and that he was seeking a publisher for a current manuscript he had written. As to the promotion, Hynes told Reuland that he would look into it. He promoted Reuland to Homicide within the week.

In January and/or February 2001, advance copies of *Hollowpoint* were distributed by Reuland and Random House, a number of which were read by members of Hynes's office, though Hynes himself did not read the book. The reaction among Reuland's colleagues and supervisors was generally favorable. Sometime in that same two-month period, and in connection with the presale publicity of *Hollowpoint*, Reuland was interviewed by *New York* magazine as part of a collection of profiles of lawyers in New York City. Reuland's profile was entitled, "The Novelist." The interview was published in the February 26, 2001 edition of the magazine and quoted Reuland as saying, "Brooklyn is the best place to be a homicide prosecutor . . . . We've got more dead bodies per square inch than anyplace else." (Foley Decl. Ex. P.)

Within days, Amy Feinstein, Hynes's First Assistant District Attorney, told Reuland that Hynes and several local politicians were upset by the article,[6] though she believed that Reuland had meant no harm by his remark. Hynes, through Feinstein, directed Reuland to write a letter to the editor of *New York* magazine to set the record straight. Specifically, Reuland was told to write that Brooklyn did not literally have more dead bodies per square inch than anywhere else and that, in fact, crime rates in the borough were at an historic low. Reuland did so, and the letter was reviewed and edited by Feinstein and Hynes before it was sent. The letter, published in the April 2, 2001 issue of *New York*, read as follows:

> Thanks to Cameron Stracher for making the most of a rather dull subject: New York's "young legal guns," a category in which I was included ["Raising the Bar," February 26]. While Mr. Stracher correctly quotes me as referring to Brooklyn, where I live and work as a homicide prosecutor, as having "more dead bodies per square inch than anyplace else," this was not intended to be, nor is it, literally true. In fact, Brooklyn's murder rate has declined more than 66 percent over the past decade. Even with the remarkable reduction, the loss of life remains high and still keeps a homicide prosecutor busy—the point of my hyperbolic remark.

(Foley Decl. Ex. R (alteration in original).)

On March 9, 2001, Hynes met with Reuland alone in Hynes's office. Hynes began the meeting by describing the increase in crime Brooklyn had experienced during Hynes's adolescence and early adulthood. This increase in crime, Hynes said, was the reason he had run for District Attorney. Hynes described Reuland's comments to *New York* magazine as "hurtful" because Hynes had promised the borough's residents that he would reduce crime, and he had succeeded in doing so. (Reuland Dep. at 220.) Reuland responded as follows:

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[6] One such politician identified in the record was then-New York State Senator Marty Markowitz, who wrote Reuland a letter regarding the *New York* magazine quote. (Foley Decl. Ex. Q.)

> I said that, um, I could appreciate everything that—that you're saying, um, but from my—from my perspective as a homicide prosecutor, as somebody who has spent the last few years dealing with families of homicide victims, victims of violent crime, going out literally to their homes, to their neighborhoods, speaking with them, their supervisors, their families, speaking for them, on trial. Um, from my perspective there's—there's a fair amount of work to be done. And, you know, I was concerned. And this was the motivating factors [sic] behind my remark.

(*Id.* at 220-21.)

At that point, Hynes became angry and Reuland tried to defuse the situation, telling him:

> [L]ook, no, it wasn't like that. I was—I was explaining why I love being a homicide prosecutor. You can do things in this job that you can't do in any other job. You can make a difference. . . . I was saying, you know, I'd rather be in this—in this job than in any other job in the legal profession. I would rather be in this office than any other prosecutor's office.

(*Id.* at 222-23.) Hynes responded that Reuland should not be talking to the press or outsiders about office business. Hynes also said, "You sat there, you sat there in—in a chair and you told me that nothing in that book was going to hurt the office." (*Id.* at 224.) Hynes then asked Reuland whether he had sought the promotion to Homicide only to better promote *Hollowpoint*. Though Reuland denied this, Hynes expressed his disbelief[7] and informed Reuland that he was being transferred to the "Orange Zone."[8] When, the next day, Reuland refused to accept the transfer, Hynes informed Reuland, through an intermediary, that Reuland would either accept the transfer or submit his resignation.

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[7] Hynes conceded in his deposition that he had no evidence upon which to base his disbelief. (Hynes Dep. at 28.)

[8] The Orange Zone is equivalent, in terms of type of work, to the Red Zone, where Reuland began his career as a prosecutor. The two zones cover different areas of Brooklyn.

After about four months in the Orange Zone,[9] Reuland requested, in a memorandum to Feinstein dated July 16, 2001, transfer back to Homicide.[10] When Feinstein informed Hynes of the memorandum, Hynes told her that Reuland was not going back to Homicide; rather, "it was time for him to go." (Feinstein Dep. at 15.) Feinstein therefore demanded Reuland's immediate resignation, and his employment was terminated on July 20, 2001.

DISCUSSION

A. The Rule 56 Standard

Under Rule 56 of the Federal Rules of Civil Procedure, the moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The substantive law governing the case identifies the facts that are material, and "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S.

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[9] The events of these four months are sharply contested. For his part, Reuland claims that he was treated poorly and humiliated while in the Orange Zone. Hynes claims that Reuland's attitude and work product were unsatisfactory. For purposes of this motion, I assume Reuland's version of events to be true, but need not set forth Reuland's specific factual allegations regarding this period of time in order to decide Hynes's motion.

[10] In his Rule 56.1 statement, Hynes emphasizes that Anania, upon being made aware of the July 16, 2001 memorandum, contacted Feinstein by phone and informed her that Reuland's performance in the Orange Zone had been unsatisfactory. Anania's and Feinstein's deposition testimony differs as to the specifics of what was said during that conversation. (*Compare* Anania Dep. at 38-42 (detailing the list of problems with Reuland's performance that she had described to Feinstein during their phone conversation), *with* Feinstein Dep. at 17 (describing Anania's evaluation as briefer and more general).) It is unclear whether Reuland disputes what was said during that conversation, or the fact that the conversation occurred at all. (*See* Pl.'s Resp. to Def.'s R. 56.1 Statement at 28-29.) Therefore, for purposes of this motion, I assume that the conversation occurred, though what was said is disputed; I must resolve the conflict between Anania's and Feinstein's deposition testimony on this point in Reuland's favor.

242, 248 (1986). Summary judgment is warranted only if "the evidence is such that a reasonable jury could not return a verdict for the nonmoving party." *Id.*

Moreover, "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quotation marks omitted); *see also, e.g., Michalski v. Home Depot, Inc.*, 225 F.3d 113, 116 (2d Cir. 2000) ("[W]e . . . view [the facts] in the light most favorable to, and draw inferences in favor of, the non-moving party . . . ." (quotation marks omitted)). Once the moving party has met its burden, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts . . . . [T]he non-moving party must come forward with 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 586-87 (quoting Fed. R. Civ. P. 56(e)).

B. First Amendment Retaliation

The First Amendment to the United States Constitution provides, inter alia, that "Congress shall make no law . . . abridging the freedom of speech." "The mere fact of government employment does not result in the evisceration of an employee's First Amendment rights." *Johnson v. Ganim*, 342 F.3d 105, 112 (2d Cir. 2003); *see also, e.g., Connick v. Myers*, 461 U.S. 138 (1983) ("[A] public employee does not relinquish First Amendment rights to comment on matters of public interest by virtue of government employment." (citing *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968))). "Few values are more carefully and thoroughly protected than the citizen's right to speak his mind on matters of public concern without interference by the government," *Johnson*, 342 F.3d at 112 (quotation marks omitted), and therefore "'[v]igilance is necessary to ensure that public employers do not use authority over employees to silence

discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech,'" *Lewis v. Cowen*, 165 F.3d 154, 161 (2d Cir. 1999) (quoting *Rankin v. McPherson*, 483 U.S. 378, 384 (1987)).

On the other hand, the Supreme Court has also recognized that "the state has an interest as an employer in regulating speech by employees so as to promote the efficiency of public services performed by its employees." *Morris v. Lindau*, 196 F.3d 102, 109 (2d Cir. 1999) (citing *Connick*, 461 U.S. at 140). In determining whether an adverse employment action based on a government employee's speech was a constitutional violation in a given case, the court "must balance 'the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Id.* at 109-10 (quoting *Pickering*, 391 U.S. at 568).

However, a court will not engage in this balancing test unless the plaintiff first demonstrates by a preponderance of the evidence that "(1) the speech at issue was made as a citizen on matters of public concern rather than as an employee on matters of personal interest; (2) he or she suffered an adverse employment action; and (3) the speech was at least a substantial or motivating factor in the adverse employment action." *Johnson*, 342 F.3d at 112 (quotation marks, citations, and alteration omitted); *see also, e.g.*, *Morris*, 196 F.3d at 110 (citing *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)). "If a plaintiff establishes these three factors, the defendant has the opportunity to show by a preponderance of the evidence that it would have taken the same adverse employment action 'even in the absence

of the protected conduct.'" *Id.* (quoting *Mount Healthy*, 429 U.S. at 287). I address each element below.

1. Matters of Public Concern

"Speech by a public employee is on a matter of public concern if it relates 'to any matter of political, social, or other concern to the community.'" *Johnson*, 342 F.3d at 112 (quoting *Connick*, 461 U.S. at 146). When the speech at issue cannot fairly be considered as relating to any of these matters, "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment." *Connick*, 461 U.S. at 146; *see also id.* (noting that *Pickering* and its progeny's repeated use of the "public concern" language reflects "the common sense realization that government offices could not function if every employment decision became a constitutional matter"). "'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.'" *Johnson*, 342 F.3d at 112 (quoting *Connick*, 461 U.S. at 147-48). This determination, though necessarily somewhat fact-intensive, is a question of law, not fact. *E.g.*, *id.*

Here, Reuland claims that he was fired based on three instances of speech: (1) his novel *Hollowpoint*; (2) the statement he made to *New York* magazine; and (3) the statements he made to Hynes during the private meeting between the two on March 9, 2001. I address each instance of speech separately below.

a. *Hollowpoint*

In moving for summary judgment, Hynes argues that (1) Reuland has never contended in this lawsuit that *Hollowpoint* relates to a matter of public concern, and in fact

disavowed that argument during oral argument in the Second Circuit,[11] and (2) in any event, it does not. Reuland responds that he never disavowed such an argument, and that the novel—by providing "a direct view into the inner workings of the criminal justice system with respect to the investigation and prosecution of the most heinous of crimes"—relates to various matters of public concern. (Pl.'s Mem. Law Opp'n Defs.' Mot. Summ. J. at 10-11.) This response, however, is not the focus of Reuland's argument. Rather, Reuland urges me to hold that the novel is protected speech regardless of whether it relates to a matter of public concern.

i. Need *Hollowpoint* Be a Matter of Public Concern?

In *Eberhardt v. O'Malley*, upon which Reuland relies for this argument, Judge Posner, writing for the court, distinguished the case of a government-employee novelist from the case of a government employee "grousing about a raise." 17 F.3d 1023, 1027 (7th Cir. 1994). Though a novel may not receive as much protection as *The Federalist* papers, Judge Posner wrote, "the difference would be pertinent only to assessing the government's asserted justification for suppressing or discouraging the work." *Id.* at 1026. Based on this reasoning, Reuland argues that he need not establish that *Hollowpoint* contains speech addressing matters of public concern.

Eberhardt, however, was written before the Supreme Court's decision in *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995) ("*NTEU*"), and the Second Circuit's decision in *Melzer v. Board of Education*, 336 F.3d 185 (2d Cir. 2003). Both decisions cast doubt on the viability of *Eberhardt*, especially in this circuit.

[11] Hynes brought an interlocutory appeal from my denial of his motion to dismiss on qualified immunity grounds. *See Reuland v. Hynes*, 53 Fed. Appx. 594 (2d Cir. 2002).

In *NTEU*, the Supreme Court struck down a federal law prohibiting federal employees from accepting any compensation for making speeches or writing articles, "even when neither the subject of the speech or article nor the person or group paying for it has any connection with the employee's official duties." 513 U.S. at 457. The Court emphasized this disconnect:

> With few exceptions, the content of respondents' messages has nothing to do with their jobs and does not even arguably have any adverse impact on the efficiency of the offices in which they work. They do not address audiences composed of co-workers or supervisors; instead, they write or speak for segments of the general public. Neither the character of the authors, the subject matter of their expression, the effect of the content of their expression on their official duties, nor the kind of audiences they address has any relevance to their employment.

Id. at 465.

Despite the absence of a connection between the *NTEU* plaintiffs' speech and their work as government employees, the Court applied *Pickering* and held that the speech fell "within the protected category of citizen comment on matters of public concern." *Id.* at 466. *But see id.* at 480 (O'Connor, J., concurring in the judgment in part and dissenting in part) ("In contrast to some of our prior decisions, this case presents no threshold question whether the speech is of public, or merely private, concern. Respondents challenge the ban as it applies to off-hour speech bearing no nexus to Government employment—speech that by definition does not relate to 'internal office affairs' or the employee's status as an employee."). The Court found that the plaintiffs' speeches and articles addressed a matter of public concern as they "were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their government employment." *Id.* at 466.

The plaintiff school teacher in *Melzer v. Board of Education* claimed that he was fired in retaliation for his membership in the North American Man/Boy Love Association. 336 F.3d 185, 188-89 (2d Cir. 2003). The court recognized that this claim diverged from the *Pickering* line of cases—"which ordinarily applies in situations involving speech directed at an employer, made at the place of employment or directly concerning the employer in some way"—in that Melzer's termination stemmed "not from something done in the workplace, but from First Amendment activities occurring outside the workplace and largely unconnected to it."[12] *Id.* at 193-94. The court therefore looked to *NTEU* for guidance:

> The [*NTEU*] Court instructed that although the situation fell outside the typical paradigm, the goal of striking an appropriate balance between employee and government interests is activated whenever the government seeks to regulate employees' protected speech, regardless of where it occurs or how closely it is related to work. Attenuation of time, place, or content of speech from the workplace is ultimately accounted for in the balancing part of the process, but those factors will not absolutely preclude government regulation.

Id. at 194. The court therefore held that use of the *Pickering* balancing test was appropriate. *Id.* at 195-96.

In sum, it is questionable whether *Eberhardt* remains good law after *NTEU*. However, I need not resolve that question, as it is not the law in this circuit. *Melzer* makes clear that *Pickering* applies in situations where the speech at issue occurs outside the workplace and is largely unconnected to it. I therefore proceed to address Hynes's contentions within that framework.

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[12] The other distinction the court noted was that Melzer's activity was not a specific instance of speech, but rather "an associational activity of which speech was an essential component." *Melzer*, 336 F.3d at 194.

ii. Is *Hollowpoint* a Matter of Public Concern?[13]

Before addressing Hynes's contention that Reuland's motivation in writing *Hollowpoint* precludes a finding that it addresses matters of public concern, *see infra* Part B.1.a.iii, I must determine in the first instance whether the book's subject matter itself addresses such matters. Reuland argues that *Hollowpoint* addresses various matters of public concern, such as the inner workings of a District Attorney's Office, how prosecutors build and prove cases, and the role of grand juries, to name a few.

As discussed above, the *NTEU* Court found that the plaintiffs' speeches and articles in that case addressed matters of public concern because they "were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their government employment." 513 U.S. at 466. Though *Hollowpoint*'s content was related to Reuland's employment, that does not take it outside the protections of the First Amendment. Indeed, in the context of this case, the fact that Reuland's speech related to his employment works in his favor, as "'[g]overnment employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions.'" *Harman v. City of New York*, 140 F.3d 111, 119 (2d Cir. 1998) (quoting *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion)). In other words, Reuland's position as a prosecutor

[13] In affirming the denial of Hynes's motion to dismiss, the Second Circuit noted that Reuland had "explicitly disavowed" the argument that *Hollowpoint* pertains to a matter of public concern. *Reuland*, 53 Fed. Appx. at 595. The court invited me to "consider the relevance *vel non* of the record to date, including the oral argument before this Court, in further proceedings." *Id.* at 596. When I asked Reuland's counsel to explain her position, she claimed that her associate—who argued in the court of appeals—was arguing only that the Second Circuit did not need to reach the question of public concern, and was not disavowing that *Hollowpoint* was, in fact, a matter of public concern. Hynes does not press the point here. (*See* Def. Reply. Mem. at 3 (characterizing the contention that *Hollowpoint* addressed a matter of public concern as Reuland's "fall-back argument," rather than as an abandoned one).) On balance, and having listened to a recording of the oral argument, I conclude that Reuland's appellate counsel's ill-conceived (and seemingly total) reliance on *Eberhardt* should not preclude Reuland from arguing that *Hollowpoint* addresses matters of public concern.

enhanced the value of his speech, as he was well-situated to describe, in a fictionalized account or otherwise, the workings of the criminal justice system. In any event, the relationship of time, place, or content of the speech to the workplace "is ultimately accounted for in the balancing part of the process." *Melzer*, 336 F.3d at 194. In short, the subject matter of *Hollowpoint* relates in various respects to matters of public concern.

iii. Motivation

Hynes next contends that *Hollowpoint* does not relate to matters of public concern because Reuland's motivation in writing it was purely financial. Hynes is correct that in deciding whether speech addresses a matter of public concern, courts must focus on motive and "attempt to determine whether the speech was calculated to redress personal grievances or whether it had a broader public purpose." *Lewis v. Cowen*, 165 F.3d 154, 163-64 (2d Cir. 1999); *see also Blum v. Schlegel*, 18 F.3d 1005, 1012 (2d Cir. 1994) ("It is true that the fact that an employee's speech touches on matters of public concern will not render that speech protected where the employee's motive for the speech is private and personal."); *Cahill v. O'Donnell*, 75 F. Supp. 2d 264, 272 (S.D.N.Y. 1999) ("The fundamental question is whether the employee is seeking to vindicate personal interests or bring to light a matter of political, social, or other concern to the community.").

The Second Circuit has held that the mere fact that a government employee takes a personal interest in the subject matter of the speech at issue does not remove it from the protection of the First Amendment, nor should it. *Johnson v. Ganim*, 342 F.3d 105, 114 (2d Cir. 2003). "Mixed motivations are involved in most actions we perform every day; we will not hold plaintiffs to herculean standards of purity of thought and speech." *Id.* (quotation marks and

alterations omitted); *see also Blum*, 18 F.3d at 1012 ("Virtually every citizen has a personal interest in matters of public concern; after all, each citizen is a member of the public and is, in some way, impacted by the resolution of societal problems."). In *White Plains Towing Corp. v. Patterson*, a case upon which Hynes relies, the Second Circuit formulated the test this way:

> Even as to an issue that could arguably be viewed as a matter of public concern, if the employee has raised the issue *solely* in order to further his own employment interest, his First Amendment right to comment on that issue is entitled to little weight in the balancing analysis.

991 F.2d 1049, 1059 (2d Cir. 1993) (emphasis added). In that case, the Second Circuit affirmed the district court's finding of public concern despite the fact that the record "strongly suggest[ed]" that the plaintiff spoke "solely to obtain additional towing referrals." *Id.* at 1060.

Moreover, the more a public employee's speech is removed from the workplace, the more difficult it will be for defendants to defeat First Amendment claims on grounds that the speech is akin to (to use Judge Posner's phrase) grousing about a raise. Indeed, I have doubts that the private motivation relied on by Hynes—the desire to sell a book—could ever extinguish a claim where the book itself was written, at least in part, to air matters of public concern. *See NTEU*, 513 U.S. at 466 ("Respondents' expressive activities in this case fall within the protected category of citizen comment on matters of public concern . . . . The speeches and articles for which they received compensation in the past were addressed to a public audience, were made outside the workplace, and involved content largely unrelated to their government employment."); *id.* at 480 (O'Connor, J., concurring in the judgment in part and dissenting in part) ("In contrast to some of our prior decisions, this case presents no threshold question whether the speech is of public, or merely private, concern. Respondents challenge the ban as it

applies to off-hour speech bearing no nexus to Government employment—speech that by definition does not relate to 'internal office affairs' or the employee's status as an employee.")

At any rate, it suffices to say here that I cannot, at the very least, rule as a matter of law that *Hollowpoint* does *not* address matters of public concern. It is a fair inference from Reuland's contentions that he wrote *Hollowpoint* to, among other things, educate the public about the inner workings of a prosecutor's office and the various stages of, and players in, criminal investigations and prosecutions. If Hynes can prevail on this issue at all, a question I need not address now, it will only be if he prevails at trial on his contrary assertion about Reuland's motivation.[14]

In sum, whether a particular instance of speech is a matter of public concern is a question of law for the court to decide. *E.g.*, *Johnson*, 342 F.3d at 112. I deny Hynes's request for summary judgment on that issue with respect to *Hollowpoint*. Mindful of *Lewis v. Cohen*'s instruction that I "attempt to determine" the motivation of the speaker, 165 F.3d 154, 163-64 (2d Cir. 1999), I will hear argument at trial on the question whether the dispute as to Reuland's motivation should be submitted to the jury. *See Gorman-Bakos v. Cornell Coop. Extension*, 252 F.3d 545, 557-58 (2d Cir. 2001) (holding that, where "[b]oth sides' arguments rest heavily on the proper characterization of plaintiffs' speech and defendants' motives," the court should wait to come to its legal conclusions until after the factfinder has resolved the factual disputes); *cf. Frank*

[14] Even then Hynes may not prevail. Perhaps because of the parties' focus on *Eberhardt* and the argument that the novel need not constitute speech on matters of public concern to fall within the First Amendment's protections, they have failed to argue the narrower question of what role, if any, motivation plays in analyzing whether speech unrelated to a government employee's work is a matter of public concern. A close reading of *NTEU* leaves me with doubts as to whether motivation has any role as to such speech. I need not decide that question now—indeed, it is not properly before me—but it may rear its head in Rule 50 motions at trial.

v. Relin, 1 F.3d 1317, 1329 (2d Cir. 1993) (holding that summary judgment is inappropriate where the employer's motivation for the adverse employment action is in dispute).

b. The Statements to *New York* Magazine

Hynes contends that Reuland's quote in *New York* magazine—that Brooklyn has "more dead bodies per square inch than anyplace else" (Foley Decl. Ex. P)—does not relate to a matter of public concern, as Reuland's motivation in making it was the promotion of *Hollowpoint*. Reuland counters that he made the statement because, in his view as an Assistant in Homicide, "there's a fair amount of work to be done" and he was "concerned." (Reuland Dep. at 221.)

Here as well, the subject matter of Reuland's statement—independent of his motivation for making it—is certainly a matter of public concern. The statement relates to the murder rate in Brooklyn.[15] *See Morris v. Lindau*, 196 F.3d 102, 111 (2d Cir. 1999) ("The comments . . . , which included speech on crime rates, police staffing, equipment shortages and related budgetary matters quite plainly involve matters of public concern."); *Blum v. Schlegel*, 18 F.3d 1005, 1012 (2d Cir. 1994) ('Blum's speech advocating the legalization of marijuana, criticizing national drug control policy, and debating civil disobedience on its face implicates matters of public concern. The most cursory review of this court's docket will reveal that the abuse of and traffic in controlled substances is a major societal problem. The government's approach to this problem is, therefore, a matter of great importance . . . ."); *cf. Harman v. City of*

[15] Aside from the plain meaning of the quote, the record is replete with evidence that Hynes understood Reuland's comment to relate to Brooklyn's crime rate. (*See, e.g.*, Hynes Dep. at 20-21 ("Marty Markowitz [then-New York State Senator] . . . asked me if I had seen a New York Magazine article which had reference to [Reuland] and something about a skyrocketing murder rate in Brooklyn."); Reuland Dep. at 219-20 (describing his discussion with Hynes in which Hynes told Reuland that he (Hynes) had reduced Brooklyn's crime rate and that therefore reading Reuland's quote in *New York* magazine was "hurtful")).

New York, 140 F.3d 111, 118 (2d Cir. 1998) ("[D]iscussion regarding current government policies and activities is perhaps the paradigmatic matter of public concern." (quotation marks and alterations omitted)).

Hynes therefore focuses on the context in which Reuland made the statement to *New York* magazine, arguing that Reuland made the statement not to bring to light a matter of public concern, but rather solely to promote *Hollowpoint* and himself. Reuland contends otherwise. He responds that he was trying to explain that he "love[s] being a homicide prosecutor" because he "can make a difference" (Reuland Dep. at 222-23), and that "from [his] perspective as a homicide prosecutor," having spoken to victims of violent crimes, "there's a fair amount of work to be done" and he was "concerned" (*id.* at 220-21).[16] For the reasons set forth above, *see supra* Part B.1.a.iii, I cannot conclude as a matter of law that Reuland's statement did not address a matter of public concern.

c. The Statements at the March 9, 2001 Meeting

Hynes argues that Reuland's statements during their March 9, 2001 meeting did not relate to a matter of public concern. Specifically, Hynes contends that he called the meeting

[16] Hynes contends that Reuland's sworn testimony at his deposition that he made the statement because he was concerned about crime (Reuland Dep. at 221) does not alone suffice to defeat summary judgment, despite volumes of caselaw requiring that courts not make credibility determinations at the summary judgment stage, but rather view the evidence in the light most favorable to the nonmoving party, *e.g.*, *Gorman-Bakos v. Cornell Coop. Extension*, 252 F.3d 545, 558 (2d Cir. 2001) ("'Assessments of credibility and choices between conflicting versions of events are matters for the jury, not for the court on summary judgment.'" (quoting *Vital v. Interfaith Med. Ctr.*, 168 F.3d 615, 622 (2d Cir. 1999))). When asked at oral argument what other evidence a plaintiff might present, Hynes's attorney offered, as an example, that a plaintiff might show that he had discussed the topic of the speech before or after the instance of speech at issue. Though I disagree with the suggestion that such additional evidence is necessary, I note that Reuland has presented it here. In the March 9, 2001 meeting called by Hynes to discuss the *New York* magazine quote, Reuland told Hynes (as set forth above) that despite the fact that Brooklyn's crime rate had fallen, "a fair amount of work" still needed to be done, and that he was "concerned." (Reuland Dep. at 221.) These statements—made four to six weeks after the *New York* magazine interview—lend further support to my conclusion that summary judgment in favor of Hynes is inappropriate on this record.

to inquire into Reuland's statements to *New York* magazine and that Reuland's statements were simply personal, internal, departmental disagreements as to where he would be assigned.

The Supreme Court has made clear that government employees do not forfeit their First Amendment protections if they decide to express their views privately rather than publicly. *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414-16 (1979); *see also Ezekwo v. NYC Health & Hosps. Corp.*, 940 F.2d 775, 781 (2d Cir. 1991) (citing *Givhan*, 439 U.S. at 414). Furthermore, despite Hynes's contentions, this meeting did not take place in the usual course of Reuland's employment. Hynes is clear in his deposition that after reading the quote in *New York* magazine, he "asked to see Mr. Reuland as soon as [he] could," in order to "determine why he would write [sic: say] something that was statistically and patently untrue." (Hynes Dep. at 22.) According to Reuland—whose account of the meeting I accept as true for purposes of this motion—Hynes began the meeting by explaining that he became the District Attorney to reduce crime in Brooklyn and that, having succeeded in doing that, remarks such as Reuland's in *New York* magazine were "hurtful." (Reuland Dep. at 219-20.) Reuland's account of his response, which I set forth again here for convenience, is as follows:

> I said that, um, I could appreciate everything that—that you're saying, um, but from my—from my perspective as a homicide prosecutor, as somebody who has spent the last few years dealing with families of homicide victims, victims of violent crime, going out literally to their homes, to their neighborhoods, speaking with them, their supervisors, their families, speaking for them, on trial. Um, from my perspective there's—there's a fair amount of work to be done. And, you know, I was concerned. And this was the motivating factors [sic] behind my remark.

(*Id.* at 220-21.)

These comments were not purely personal, nor did they relate only to Reuland's work assignment, as Hynes contends. I reject Hynes's argument that, as a matter of law, they did not address matters of public concern.

2. Causation

Having concluded that Hynes's motion cannot succeed on the public-concern prong of the *Mount Healthy* analysis, I proceed to address Hynes's arguments with respect to the third element Reuland must prove, i.e., that Reuland's speech was at least a substantial or motivating factor in the adverse employment actions, *e.g.*, *Johnson v. Ganim*, 342 F.3d 105, 112 (2d Cir. 2003). Hynes advances two arguments with respect to causation. The first is that Reuland cannot show that *Hollowpoint* played a substantial or motivating role in Hynes's decisions to demote[17] and terminate Reuland, as there is no evidence that Hynes read the novel. The second is that Hynes's decision to terminate Reuland came well after any protected speech, and in the interim Reuland's performance was unsatisfactory.

"Causation can be established either indirectly by means of circumstantial evidence, for example, by showing that the protected activity was followed by adverse treatment in employment, or directly by evidence of retaliatory animus." *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir. 1999). Where, as here, "questions regarding an employer's motive predominate in

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[17] Though his counsel retreated somewhat at oral argument, Hynes's memorandum in support of the motion suggests that Reuland's transfer out of Homicide was not a demotion. (*See* Def. Mem. Law Supp. Mot. Summ. J. at 15 ("Assuming, for the sake of argument, that transfer of plaintiff from the Homicide Bureau to the Orange Zone was an adverse employment action that was causally connected to protected speech . . . .").) That suggestion is rejected. Adverse employment actions include discharge and demotion. *E.g.*, *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir. 1999). There is ample undisputed evidence in the record supporting the proposition that such a transfer was a demotion. (*See* Hynes Dep. at 27 (discussing Reuland's "request for a promotion" to Homicide); *see also* Anania Dep. at 142 (transfer from Red Zone to Homicide would be considered a promotion), 150 (transfer from Homicide to Orange Zone would be considered a demotion); Reuland Dep. at 195 ("[T]he position to which [all the Assistants] aspire is the homicide bureau. It's the most prestigious bureau in the office.").)

the inquiry regarding how important a role the protected speech played in the adverse employment decision," summary judgment is precluded. *Id.*

a. Hynes Did Not Read *Hollowpoint*

Hynes seeks summary judgment on the ground that Reuland has offered no evidence showing that Hynes actually read *Hollowpoint*. There is, however, evidence showing that many of Reuland's supervisors read the novel (*see* Anania Dep. at 96-97; Feinstein Dep. at 28; Reuland Dep. at 200-02), and a question of fact exists as to what, if anything, those supervisors related to Hynes regarding the substance of the novel. Reuland testified at his deposition that at their March 9, 2001 meeting—at which Hynes demoted Reuland—Hynes said to Reuland, "You sat there, you sat there in—in a chair and you told me that nothing in that book was going to hurt the office." (Reuland Dep. at 224.) This statement, if made, would allow a factfinder to conclude that Hynes's employment decisions as to Reuland were substantially motivated by the contents of *Hollowpoint*.

Moreover, even if Hynes neither read *Hollowpoint* nor was informed of its contents, he was required to make a reasonable investigation into its contents before deciding to take action against Reuland on its basis. *See Heil v. Santoro*, 147 F.3d 103, 109-10 (2d Cir. 1998) ("[A]n employer that has received a report of such speech must make a reasonable investigation before deciding to take action against the employee." (citing *Waters v. Churchill*, 511 U.S. 661, 677-78 (1994) (plurality opinion))). Questions of fact therefore exist regarding what Hynes knew of the contents of *Hollowpoint* (whether or not he read it) and whether such knowledge prompted retaliatory employment action against Reuland.

b. The Time Lapse

Hynes seeks partial summary judgment as to Reuland's termination, arguing that Reuland cannot show that it was substantially motivated by the allegedly protected speech. In making this argument, Hynes relies heavily on the lapse of time.[18] Reuland was fired on July 20, 2001, about six months after the alleged distribution of advance copies of *Hollowpoint* within the District Attorney's Office; about five months after the February 26, 2001 *New York* magazine article; and about four and one half months after the March 9, 2001 meeting. I cannot conclude that this delay would, as a matter of law, preclude the necessary finding of causation.

In a related context, the Second Circuit "has not drawn a bright line to define the outer limits beyond which a temporal relationship is too attenuated to establish a causal relationship between the exercise of a federal constitutional right and an allegedly retaliatory action." *Gorman-Bakos v. Cornell Coop. Extension*, 252 F.3d 545, 554 (2d Cir. 2001). The *Gorman-Bakos* court was "particularly confident," however, that "five months is not too long to support" an allegation of a causal connection, where plaintiffs provided evidence of retaliatory actions throughout that time period. *Id.* at 555; *see also Grant v. Bethlehem Steel Corp.*, 622 F.2d 43, 45-46 (2d Cir. 1980) (holding that eight-month gap between EEOC complaint and retaliatory action suggested a causal relationship); *Suggs v. Port Auth.*, No. 97 Civ. 4026, 1999 WL 269905, at *6 (S.D.N.Y. May 4, 1999) (concluding that six months between filing EEOC complaint and firing suggests causal relationship).

[18] To the extent Hynes premises this argument on Reuland's allegedly unsatisfactory performance after his demotion, I reject it. Hynes's characterization of Reuland's performance is hotly disputed, as are the underlying events that formed the basis of this characterization. These disputes are for a jury to sort out, and summary judgment is therefore inappropriate.

The question here is considerably easier. In the above-cited cases, the time gaps (e.g., eight months in *Grant*, 622 F.2d at 45-46, five months in *Gorman-Bakos*, 252 F.3d at 555) were deemed *short enough to establish a causal connection* between the protected activity and the retaliation. Here, however, Hynes, the defendant, is arguing that similar lengths of time are *so long* as to justify a finding that, as a matter of law, Reuland's speech *could not have been a motivating factor* in his decision to terminate Reuland. Therefore, applying *Gorman-Bakos* by analogy, Hynes's contention must fail.

3. Hynes's Burden and the *Pickering* Balancing

As Reuland has carried his initial burden, the burden shifts to Hynes to show by a preponderance that he would have taken the same adverse employment action "'even in the absence of the protected conduct.'" *Morris v. Lindau*, 196 F.3d 102, 110 (2d Cir. 1999) (quoting *Mount Healthy*, 429 U.S. at 287). The numerous disputed facts regarding Reuland's performance and Hynes's motivation preclude summary judgment on this issue. Furthermore, as Hynes does not allege that Reuland's speech disturbed the normal operations of the office, I need not weigh Reuland's free speech interest against Hynes's efficiency interest under *Pickering*. *See Hale v. Mann*, 219 F.3d 61, 72 (2d Cir. 2000).

C. Qualified Immunity

Hynes alleges that he is entitled to qualified immunity for his actions. "The qualified immunity doctrine shields 'government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Lewis v. Cowen*, 165 F.3d 154, 166 (2d Cir. 1999) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818

(1982)). "'[W]hether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the objective legal reasonableness of the action assessed in light of the legal rules that were clearly established at the time it was taken.'" *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 638 (1987)). Therefore, Hynes "may prevail on his qualified immunity defense only if it was 'objectively reasonable for [him] to believe that his conduct did not violate [Reuland's] rights.'" *Johnson v. Ganim*, 342 F.3d 105, 116 (2d Cir. 2003) (first alteration in original) (quoting *Savino v. City of New York*, 331 F.3d 63, 71 (2d Cir. 2003)).

The qualified immunity inquiry requires a court to define the constitutional right at issue "with some specificity." *Lewis*, 165 F.3d at 167. "The relevant inquiry is not whether the defendants should have known that there was a federal right, in the abstract, to 'freedom of speech,' but whether the defendants should have known that the specific actions complained of violated the plaintiff's freedom of speech." *Id.* With respect to Reuland's claims, "it was established prior to 1985 that government employees had a right under the First Amendment, though not an unlimited right, to speak on matters of public concern." *Frank v. Relin*, 1 F.3d 1317, 1328 (2d Cir. 1993) (citing *Connick v. Myers*, 461 U.S. 138, 146 (1983)). It was equally clear that the crime rate was a matter of public concern. *See United States v. Cone*, 354 F.2d 119, 127 (2d Cir. 1965) ("[T]here is grave and growing public concern about the increasing ineffectiveness of law enforcement . . . ."); *cf. White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1060 (2d Cir. 1993) ("[A] state police corps' performance of its duties is a matter of public concern . . . .").

"Nonetheless, even where the contours of the plaintiff's federal rights and the official's permissible actions were clearly delineated at the time of the acts complained of, the defendant may enjoy qualified immunity if it was objectively reasonable for him to believe that his acts did not violate those rights." *Frank*, 1 F.3d at 1328.

> In such a case, the defense will turn on the particular facts, and summary judgment will be appropriate only if the defendant adduces sufficient facts such that no reasonable jury, looking at the evidence in the light most favorable to, and drawing all inferences most favorable to, the plaintiffs, could conclude that it was objectively unreasonable for the defendant to believe that he was acting in a fashion that did not clearly violate an established federally protected right.

Id.; *see also Johnson*, 342 F.3d at 117 ("[T]he existence of these factual disputes precludes a meaningful resolution of the qualified immunity defense at the summary judgment stage.").

Here, if the facts are as Reuland alleges them to be, no reasonable actor in Hynes's position could have believed his actions were lawful. According to Reuland, he wrote a novel about important matters of public concern, and then spoke to the press and to Hynes personally about Reuland's concerns about the incidence of murder in Brooklyn. In retaliation for what Hynes perceived as criticism (or insufficient praise) of his efforts to fight crime in the borough, Hynes first demoted Reuland and then fired him. It was clear at the time Hynes acted that a government official could not lawfully engage in such retaliation, and no reasonable official could have concluded otherwise.

I hasten to reiterate that Hynes vigorously contests Reuland's version of the facts, but I must accept Reuland's version as true. Because Hynes's defenses to Reuland's claims,

including his defense of qualified immunity, depend on favorable factual findings on issues requiring trial, his motion for summary judgment is denied.[19]

D. Back Pay

Hynes also seeks partial summary judgment on the issue of back pay, arguing that Reuland's salary did not change when he was transferred out of Homicide, and that Reuland failed to seek legal employment for almost two years after being discharged. In response, Reuland offers evidence that he mitigated by turning to writing as a full-time job, and monitored the legal market for employment opportunities. These disputed issues of fact regarding Reuland's efforts to mitigate must await resolution at trial.

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[19] I note that, as a factual matter, Hynes's claim of qualified immunity does not involve the second part of the *Pickering* balancing test. That is, Hynes does not contend that Reuland was fired because his speech undermined the ability of the office to perform its public services; he says he fired Reuland because of poor work performance. Thus, Hynes does not seek immunity on the ground that he made an objectively reasonable (albeit perhaps erroneous) determination that the efficiency of the office's operations required that Reuland be fired. The same is true with respect to the demotion. Hynes contends that Reuland was demoted because he lied to Hynes, not because Hynes believed Reuland's speech impeded the office's work in any way.

Similarly, as Hynes's lawyer made clear at oral argument, Hynes is not claiming that he actually concluded that Reuland's speech was not of "public concern," and that he therefore could discipline (or fire) him for it without facing the risk of a civil action for damages. To the contrary, Hynes insists that his actions were not motivated by Reuland's speech at all. (*See* June 7, 2004 Tr. at 32-33.)

I leave for further briefing at trial the question whether Hynes's subjective motivation in firing Reuland affects the qualified immunity analysis. *See Johnson*, 342 F.3d at 117 ("Though the qualified immunity inquiry is generally an objective one, a defendant's subjective intent is indeed relevant in motive-based constitutional torts such as the one alleged [here]. Otherwise, defendants in such cases would always be immunized from liability so long as they could point to objective evidence showing that a reasonable official could have acted on legitimate grounds. Where a factual issue exists on the issue of motive or intent, a defendant's motion for summary judgment on the basis of qualified immunity must fail.").

CONCLUSION

For the foregoing reasons, Hynes's motion is denied in its entirety. Jury selection and trial will occur on July 12, 2004 at 9:30 a.m.

So Ordered.

JOHN GLEESON, U.S.D.J.

Dated: June 17, 2004
Brooklyn, New York