

**Files of Trouble:**

How the Fourth Circuit's Decision in *Sciolino v. City of Newport News*  
Turns the Personnel Files of Public Employers into Legal Minefields

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#### **I. Introduction**

Public employers face many legal pitfalls when they fire their employees. One of these traps is the records accompanying employee terminations that are placed into the employers' personnel files. The simple act of placing a memorandum detailing the justifications for firing the employee into her personnel file can create legal liability for the employer.<sup>1</sup> This is because in some courts, false and stigmatizing information merely placed into a personnel file can be found to have deprived an employee of her occupational liberty interest,<sup>2</sup> which the Supreme Court has defined to be the interest in one's "good name, reputation, honor, or integrity."<sup>3</sup> The Fifth and Fourteenth Amendments require public employers, who are state actors, to provide their employees with due process of law before depriving them of their occupational liberty interest.<sup>4</sup>

In *Bishop v. Wood*,<sup>5</sup> the United States Supreme Court held that employers must make public false and stigmatizing charges against an employee before it can deprive her of an occupational liberty interest.<sup>6</sup> The circuit courts have split over how to define this publicity element.<sup>7</sup> Some circuits have created a likely publication standard while others have established an actual publication standard, and still others have relied on state statutes to dispose of the publicity element.<sup>8</sup>

The Fourth Circuit tackled the publicity element when it decided *Sciolino v. City of Newport News*.<sup>9</sup> Christopher Sciolino was a probationary police officer in the Newport News Police Department when, on June 26, 2003, Acting Chief of Police Carl Burt placed him on administrative duty, alleging that Sciolino had advanced the odometer of his police cruiser

10,000 miles to get a new car sooner.<sup>10</sup> On September 26, 2003, Chief of Police Dennis Mook terminated Sciolino's employment, accusing him in a letter of deliberately destroying city property. Sciolino alleged that the department placed the letter in his personnel file.<sup>11</sup>

On June 2, 2004, Sciolino brought suit against the City of Newport News and Chief Mook for, among other claims, depriving him of his occupational liberty interest without due process.<sup>12</sup> The defendants moved for and were granted dismissal for failure to state a claim.<sup>13</sup> The district court held that Sciolino must allege facts asserting that false and damaging charges were likely to be disseminated to prospective employers or members of the public.<sup>14</sup> Sciolino appealed the dismissal to the Fourth Circuit, contending that the City deprived him of his liberty interest by placing false and stigmatizing charges in his personnel file that "may be available" to prospective employers.<sup>15</sup> The City, relying on *Bishop v. Wood*, argued for an actual publication standard.<sup>16</sup>

The Fourth Circuit rejected both Sciolino's "may be available" standard and the City's actual publication standard in favor of a likely publication standard.<sup>17</sup> It disagreed with the City's reading of the publication standard in *Bishop*, finding that the Supreme Court only held that purely private communications failed to meet the publicity element.<sup>18</sup> It concluded that the actual publication standard did not provide enough protection for employees, who may be restricted from applying for jobs for fear of prospective employers potentially discovering the false and stigmatizing information.<sup>19</sup> The court also rejected Sciolino's "may be available" standard, concluding that the Constitution does not protect employees against a "slight possibility that stigmatizing charges in a personnel could be available to prospective employers."<sup>20</sup> Sciolino had to prove, the court said, that there was a likelihood of his personnel files being published.<sup>21</sup> The court then laid out the methods by which Sciolino could prove the likelihood of publication.<sup>22</sup>

The City also raised the argument that Sciolino cannot meet any publication standard because Virginia state law protects his personnel file from dissemination.<sup>23</sup> The court rejected this argument because of allegations by Sciolino that the City discloses these files in practice, and the City's admission that, in some circumstances, it does share personnel files with prospective employers.<sup>24</sup> The court concluded that the discretion in disclosing personnel files given to the City by state laws and its own policies nullified the City's argument.<sup>25</sup> However, the court did not address the City's determination that state law and its own policies prohibit the dissemination of Sciolino's files nor the district court's finding that state law prohibits the disclosure of Sciolino's personnel files.<sup>26</sup>

This comment will argue that the Fourth Circuit should have relied on Virginia state law to dispose of the publicity element in *Sciolino v. City of Newport News*. This approach would have been in harmony with and complementary to the approach taken by the Ninth and Eleventh Circuits in dealing with the publicity element. In rejecting the City's argument that Sciolino was protected by state law, the court improperly second guessed the City's discretion in dealing with personnel files. Such review of the decisions of a public agency is an improper exercise of authority for a federal court. This unnecessary judicial intrusion into the decision-making process of a public agency discourages the forthright and truthful communication between public employers and employees. The Fourth Circuit could have decided the case on narrower grounds instead of advancing an amorphous publication standard that gives public employers no guidance in personnel matters. By failing to create a bright-line rule for cases where state law prohibits the dissemination of personnel files, the Fourth Circuit has only added to the "shades and permutations that mock the clarity law must provide for human conduct."<sup>27</sup>

## II. Analysis

### A. Case Law Supports Relying Upon a State Statute to Dispose of Publicity Element

The Fourth Circuit, in deciding *Sciolino*, did not have to establish a general publication standard. Instead, it could have followed in the footsteps of the Ninth and Eleventh Circuits and relied upon a state statute to dispose of the publicity element. In *Cox v. Roskelley*,<sup>28</sup> Claude Cox was terminated from employment with Spokane County, Washington and a termination letter was placed into Cox's personnel file.<sup>29</sup> In Washington, state law mandates that the letter be released upon request.<sup>30</sup> The Ninth Circuit held "that placement of the stigmatizing information in Cox's personnel file, in the face of a statute mandating release upon request, constituted publication sufficient to trigger Cox's liberty interest under the Fourteenth Amendment."<sup>31</sup> It relied upon the case of *Buxton v. City of Plant City*,<sup>32</sup> in which the Eleventh Circuit held that "the presence of stigmatizing information placed into the public record by a state entity, pursuant to a state statute or otherwise, constitutes sufficient publication to implicate the liberty interest."<sup>33</sup> The Ninth and Eleventh Circuits, while not establishing a definitive publication standard, created a bright-line rule that gave clear guidance to public employers and employees.

The Fourth Circuit had the opportunity to create a bright-line rule complementary to the one fashioned by its two sister circuits. The district court in *Sciolino* found that Virginia state law would prohibit disclosure of Sciolino's personnel files.<sup>34</sup> This fact gave the Fourth Circuit ample grounds to craft a narrow holding that would give clear guidance to public employers. It could have held that, where state law prohibits its dissemination, the mere presence of stigmatizing information in personnel files does not constitute publication sufficient to implicate occupational liberty interests.<sup>35</sup> The court chose instead to establish a broad likely publication standard,<sup>36</sup> one that likely gave Sciolino no more protection from disclosure than he had before but placed

Newport News and other public employers in legal peril. The City found itself possibly liable for the “likelihood” of doing something it may have had no intention of doing and was illegal to boot.<sup>37</sup>

B. Supreme Court Imperatives Demand Deference to the Discretion of Public Agencies

Not only is a publication standard deferential to state law supported by legal authority, it is justified by sound policy considerations. One of these considerations is the independence and autonomy of public agencies.<sup>38</sup> The Fourth Circuit rejected the City’s argument that Sciolino’s personnel files were protected by Virginia state law because the City disclosed personnel files in some cases.<sup>39</sup> However, the state statute and the City’s own policies give the City some discretion in its personnel decisions.<sup>40</sup> There is no reason to believe that the City had ever disclosed stigmatizing information of the kind in Sciolino’s case. In effect, the court concluded that the City’s discretion in unrelated cases meant that the City might have to face liability in Sciolino’s case,<sup>41</sup> even if Virginia state law and city policy did in fact protect Sciolino.<sup>42</sup>

This is the kind of judicial overreaching the Supreme Court warned against when it stated in *Bishop v. Wood*<sup>43</sup> that a federal court “is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies.”<sup>44</sup> In basing its rejection of the City’s argument on its review of the City’s prior personnel decisions, the Fourth Circuit improperly usurped the autonomy of Newport News. Its adoption of the likely publication standard second guesses the City’s decisions regarding its own employees, holding that independence as something that employees should be protected against. The Supreme Court has made clear that the public agencies themselves need protection from an overactive judiciary.<sup>45</sup> Justice Rehnquist wrote that “we must presume that official action was regular and, if erroneous, can best be corrected in other ways.”<sup>46</sup> The Fourth Circuit failed to give the City this critical

presumption of regularity. In fact, it presumed precisely the opposite—that the City’s exercise of its legal discretion in personnel decisions was indicative of a potential to violate Sciolino’s liberty interest.<sup>47</sup> This mistrust of public agencies is the critical flaw of the likely publication standard, which gives public employers no discretion or autonomy in making their personnel decisions. A publication standard that defers to state law would protect the independence and autonomy of public agencies from unnecessary judicial oversight.

The Supreme Court has also cautioned against a construction of the publicity element that “would penalize forthright and truthful communication between employer and employee.”<sup>48</sup> The decision by the Fourth Circuit in *Sciolino* does exactly that. As Judge Wilkinson points out in his dissent, “the majority's standard will put governments at the mercy of litigants no matter how careful the governments' conduct.”<sup>49</sup> If the careful exercise of its discretion in making personnel decisions will not protect a public employer from potential liability, it will have no incentive to be forthright and truthful in future communications with its employees. If giving employees justifications for their terminations will expose the employer to lawsuits, it will stop doing so<sup>50</sup>—to the detriment of the employees.<sup>51</sup> Allowing Virginia state law and Newport News’s own city policies to protect the City’s employees without judicial interference would remove the chilling effect on employer-employee communication that litigation imposes.

Another important policy consideration is the ability of public employers and employees to assess their legal rights and liabilities arising from personnel files.<sup>52</sup> A major advantage of a publication standard based upon state law is that public employers will be able to rely on state laws that prohibit dissemination of personnel files to protect them from legal liability. Public entities that benefit from such state laws, like Newport News, will no longer have to predict what a court will decide under the likely publication standard. In combination with the bright-line rule

established by the Ninth and Eleventh Circuits, the rule proposed by this comment will allow a public employer in a state where there is some statute dealing with personnel files to be confident in their decision-making process. State legislatures will be encouraged to pass such laws in states that lack them, thereby giving employers protection from liability and employees protection from the possibility of disclosure.

### **III. Conclusion**

Litigation over the contents of personnel files is a frequent occurrence throughout the country.<sup>53</sup> The public employers and employees who may be facing such litigation need direction and clear, bright-line rules. The Fourth Circuit, by supplanting the role of state laws and adopting an unpredictable publication standard in its decision in *Sciolino v. City of Newport News*, failed to provide the necessary judicial guidance. The court could have exercised judicial modesty and relied on Virginia law to decide the publicity element, an approach similar to that taken by the Ninth and Eleventh Circuits. It could have chosen a deferential publication standard, one that allows both employers and employees to ascertain their rights and liabilities before having to litigate. Instead, the Fourth Circuit advanced a publication standard that encourages further litigation and exposes employers to additional legal liability without providing employees additional protection. Its decision interferes with public employers' personnel decisions, discourages employers from providing feedback to employees and giving justifications for terminations, and ultimately harms the employees it purports to protect.



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<sup>1</sup> Katherine Crytzer, Comment, *You're Fired! Bishop v. Wood: When Does a Letter in a Former Public Employee's Personnel File Deny a Due Process Liberty Right?*, 16 GEO. MASON L. REV. 447, 448 (2009).

<sup>2</sup> *Id.*

<sup>3</sup> Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 573 (1972) (quoting Wisconsin v. Constantineau 400 U.S. 433 (1971)).

<sup>4</sup> See U.S. CONST. amend. V; U.S. CONST. amend. XIV.

<sup>5</sup> 426 U.S. 341 (1976).

<sup>6</sup> *Id.* at 348.

<sup>7</sup> Sciolino v. City of Newport News, 480 F.3d 642, 648 (2007).

<sup>8</sup> *Id.*

<sup>9</sup> 480 F.3d 642 (2007).

<sup>10</sup> *Id.* at 645.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 647.

<sup>17</sup> *Id.* at 650.

<sup>18</sup> *Id.* at 647.

<sup>19</sup> *Id.* at 649.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 650.

<sup>23</sup> *Id.* at 647, n.3.

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<sup>24</sup> *Id.*

<sup>25</sup> *See id.* (“The City’s argument . . . is belied by the City’s admission . . .”).

<sup>26</sup> *See id.* at 660 (“Yet neither of these facts saves the city . . .”) (Wilkinson, J., dissenting).

<sup>27</sup> *Id.* at 655.

<sup>28</sup> 359 F.3d 1105 (2004).

<sup>29</sup> *Id.* at 1108-09.

<sup>30</sup> *Id.* at 1109.

<sup>31</sup> *Id.* at 1112.

<sup>32</sup> 871 F.2d 1037 (1989).

<sup>33</sup> *Id.* at 1046.

<sup>34</sup> *Sciolino v. City of Newport News*, 480 F.3d 642, 660 (2007) (Wilkinson, J., dissenting).

<sup>35</sup> *Cf. Cox v. Roskelley*, 359 F.3d 1105, 1111-12 (2004) (holding that under certain circumstances, i.e. when governed by state law, presence of stigmatizing information in a personnel file may constitute publication).

<sup>36</sup> *See id.* at 649 (“When a plaintiff alleges . . . stigmatizing charges that are likely to be inspected . . . he states a claim that the government has deprived him of these liberty interests.”) (majority opinion).

<sup>37</sup> *See id.* at 660 (“Newport News must have imagined that it would not be drawn into court under a likelihood-of-dissemination standard . . .”) (Wilkinson, J., dissenting).

<sup>38</sup> *See id.* at 655 (“Holdings that would ‘mandat[e] judicial oversight of communications between and among government employees and their superiors in the course of official business’ can lead to ‘permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and separation of powers.’”) (quoting *Garcetti v. Ceballos*, 126 S.Ct. 1951, 1961 (2006)).

<sup>39</sup> *See id.* at 647 n.3 (majority opinion).

<sup>40</sup> *See id.* at 660 (Wilkinson, J., dissenting).

<sup>41</sup> *See id.* at 647 n.3 (majority opinion).

<sup>42</sup> *See id.* at 660 (Wilkinson, J., dissenting).

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<sup>43</sup> 426 U.S. 341 (1976).

<sup>44</sup> *Id.* at 349.

<sup>45</sup> *See id.* at 350 (“The United States Constitution cannot feasibly be construed to require federal review for every such error”).

<sup>46</sup> *Id.*

<sup>47</sup> *See* *Sciolino v. City of Newport News*, 480 F.3d 642, 647 n.3 (2007).

<sup>48</sup> *Bishop v. Wood*, 426 U.S. 341, 349 (1976).

<sup>49</sup> *Sciolino v. City of Newport News*, 480 F.3d 642, 660 (2007) (Wilkinson, J., dissenting).

<sup>50</sup> *See* *Crytzer*, *supra* note 1, at 465-66 (citing *Sciolino v. City of Newport News*, 480 F.3d 642, 659 (2007) (Wilkinson, J., dissenting)).

<sup>51</sup> *See id.* at 466 (citing *Russell v. Hodges*, 470 F.2d 212, 217 (2d Cir. 1972)).

<sup>52</sup> *See id.* at 469 (citing *Johnson v. Martin*, 943 F.3d 15, 17 (7th Cir. 1991)).

<sup>53</sup> *See generally* Jon Anderson, *Lieutenant Suing City Fired for ‘Gross Insubordination,’* BIRMINGHAM NEWS, Sept. 22, 2001, at 15, *available at* 2001 WLNR 11239854 (police lieutenant sued city for placing false and defamatory information into his personnel file); Anne Dudley Ellis, *Fresno District, Ex-Principal Settle Claim*, FRESNO BEE, July 3, 1999, at B2, *available at* 1999 WLNR 1882918 (school principal sued school district for disclosing confidential information from his personnel file to the public); Greg Gelpi, *Attorney Still Loves Fighting for Little Guys*, AUGUSTA CHRON., Dec. 8, 2008, at B01, *available at* 2008 WLNR 23653890 (attorney represented police chief who sued city officials for doctoring his personnel file and spreading false information).