

1 **UNITED STATES COURT OF APPEALS**

2
3 **FOR THE SECOND CIRCUIT**

4
5 August Term, 2011

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8 (Submitted: February 15, 2012 Decided: August 1, 2012)

9
10 Docket No. 10-5179-cv

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12 - - - - -X

13
14 TIMOTHY M. WROBEL,

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16 Plaintiff-Appellant,

17
18 - v. -

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20 COUNTY OF ERIE, DOUGLAS NAYLON, Individually and in his
21 official capacity as a County Employee, DANIEL RIDER,
22 Individually and in his official capacity as a County
23 Employee,

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25 Defendants-Appellees.

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27 - - - - -X

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29 Before: JACOBS, Chief Judge, CALABRESI and POOLER,
30 Circuit Judges.

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32 Timothy Wrobel appeals from a judgment entered in the
33 United States District Court for the Western District of New
34 York (Curtin, J.), dismissing on summary judgment his First
35 Amendment claims brought under 42 U.S.C. § 1983 against his
36 former employer, Erie County, and certain employees.
37 Because Wrobel failed to adduce evidence that his

1 mistreatment was caused by political association or by
2 speech about matters of public concern, we affirm.

3 Judge CALABRESI dissents in a separate opinion.

4 Christen Archer Pierrot, Chiacchia & Fleming, LLP, Hamburg,
5 N.Y. (Andrew P. Fleming, on brief), for Appellant.

6
7 David Sleight, Erie County Department of Law, Buffalo N.Y.,
8 for Appellees County of Erie and Daniel Rider.

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10 Robert Louis Boreanaz, Lipsitz Green Scime Cambria LLP,
11 Buffalo, N.Y., for Appellee Douglas Naylor.

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14 DENNIS JACOBS, Chief Judge:

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16 Timothy Wrobel appeals from a judgment entered in the
17 United States District Court for the Western District of New
18 York (Curtin, J.), dismissing on summary judgment his First
19 Amendment claims brought under 42 U.S.C. § 1983 against his
20 former employer, Erie County, and certain employees.

21 Because Wrobel failed to adduce evidence that his
22 mistreatment was caused by political association or by
23 speech about matters of public concern, we affirm.

24 Wrobel was a longtime employee of Erie County's highway
25 division. In 1999, a newly elected Republican county
26 executive appointed the defendants as Wrobel's direct and
27 indirect supervisors. Over the next eighteen months
28 Wrobel's run-ins with them resulted in harassment of him and

1 his transfer to a faraway workplace. His direct supervisor,
2 defendant Douglas Naylon, repeatedly referred to employees
3 that predated his tenure as being part of the "old regime,"
4 and to the office under his supervision as the "new regime."
5 Following his transfer, Wrobel made anonymous complaints to
6 public officials and a confidential report to the FBI, for
7 which he claims he was further persecuted. Wrobel's
8 complaint alleges retaliation in violation of his First
9 Amendment rights to free association and free speech. The
10 thrust of the complaint is that Wrobel suffered
11 discrimination because he was apolitical, and not
12 politically aligned with the "new regime." Because we
13 conclude that no reasonable jury could find that Wrobel's
14 mistreatment was caused by any political activity--or
15 inactivity--we affirm the district court's grant of summary
16 judgment in favor of defendants.

17 18 **BACKGROUND**

19 Timothy Wrobel worked as a blacksmith at a highway
20 maintenance facility of the Erie County highway department
21 called the Aurora barn. In 1999, Republican Joel Giambra
22 succeeded Democrat Dennis Gorski as Erie County Executive.

1 The new administration hired defendant Naylon as the senior
2 highway maintenance engineer at the Aurora barn, in charge
3 of day-to-day activities, including direct oversight of
4 Wrobel and the other employees; defendant Rider was hired to
5 run the entire highway department.

6 The record on summary judgment is extensive, but the
7 salient facts can be summarized. Immediately after the
8 defendants were hired by the county, Wrobel and his
9 coworkers clashed with them. In January 2001, Wrobel
10 confronted Naylon about what he perceived to be rudeness and
11 disrespect. Naylon responded that the trouble with the
12 Aurora barn was Wrobel and other workers from what Naylon
13 labeled the "old regime," and suggested that Wrobel should
14 transfer to another facility.

15 A few months later, Wrobel received written notice to
16 appear for a disciplinary hearing on six charges:
17 insubordination stemming from the January confrontation,
18 falsifying his daily reports, leaving the job-site without
19 permission, lateness, excessive breaks, and personal use of
20 his work phone. The upshot of the disciplinary hearing was
21 that Rider transferred Wrobel to another maintenance
22 facility, the Tonawanda plant. The transfer greatly

1 lengthened Wrobel's commute, and the stress of this ordeal
2 caused him to miss work for several weeks.

3 Although Wrobel admitted to some of the misconduct, he
4 grieved the discipline on the ground that it was actually
5 punishment for his friendship with Naylon's predecessor (and
6 that Naylon's work expectations were unrealistic). An
7 arbitrator ruled for the county, finding that "[t]he
8 grievant seemed determined to function as an independent
9 contractor," and that Wrobel justified his occasional
10 tardiness because "no one ever complained to him about it."
11 (J.A. 272-73.)

12 Soon after Wrobel's transfer, his wife joined with some
13 of his former colleagues to expose Naylon and Rider's
14 mistreatment of county workers, as well as other improper
15 behavior they believed to be taking place in the highway
16 department, such as misusing public funds and operating
17 county equipment while intoxicated. In May 2001, the group
18 sent letters about the Aurora barn--signed only by
19 "Concerned Erie County Employees"--to the state Democratic
20 chairman and the New York State attorney general complaining
21 about the state of affairs at the Aurora barn. (Wrobel's
22 wife also followed Naylon with a camera to catch him

1 misusing county equipment.) In August 2001, Wrobel and
2 others met with an FBI agent to float similar allegations
3 about Naylon.

4 Wrobel alleges that Naylon and Rider punished him for
5 speaking out against them. Specifically, Naylon harassed
6 him, told him to tell his wife to stay away from all County
7 buildings, and accused him of being in contact with a former
8 Aurora barn employee. Shortly after his transfer to the
9 Tonawanda plant, an Erie County sheriff questioned Wrobel
10 about a theft of wood from the Aurora barn, and Wrobel
11 alleges that the defendants inspired the inquiry.

12 During his tenure at the highway department, Naylon was
13 overt in his dislike for those who had preceded him in the
14 Aurora barn and his desire to purge the facility's
15 hold-overs. Early on, Naylon asked Wrobel, as a 22-year
16 veteran of the Highway department, to advise as to who were
17 the "good guys" and "bad guys," who were the employees that
18 "do their jobs" and who are the "goof offs." Wrobel
19 demurred and told Naylon that he would soon figure it out
20 himself. A few months later, Naylon ordered Wrobel to tell
21 a retired employee, Gary Kane, to stop coming by the Aurora
22 barn. Naylon told Wrobel that "it doesn't look good for me

1 and Joel Giambra and the new administration. He's retired
2 from the Gorski administration, tell him to be on his merry
3 way and enjoy himself." (J.A. 696.) Naylon referred to
4 Kane as part of an "old regime."

5 Two former employees of the Aurora barn similarly
6 suffered under Naylon's management. Anthony Marchitte was
7 transferred from the Aurora barn to the Angola barn against
8 his will, after being told the transfer was "in his best
9 interests." Naylon gloated "the fat cat has just begun to
10 sing . . . all you guys are going to be gone . . . things
11 are really going to change around here." (J.A. 1003.)

12 Wrobel's friend Timothy Elliot was also transferred from the
13 Aurora barn in early 2001. Before his transfer, Naylon
14 called him into his office and told him that "everything has
15 to go through us," "that was the old regime, this is the new
16 regime," and "if you're not with us, you're against us."
17 (J.A. 1008.)

18 Other employees provided similar accounts. Paul
19 Rebrovich was asked by Naylon if he was appointed by Gorski,
20 and whether he was backed by the Gorski administration or
21 the current administration. Rebrovich told him that nobody
22 in his position was appointed by an administration and that

1 he had never been politically active. Naylon also boasted
2 to him that, eventually, “we’re going to get our own people
3 in here” and “get rid of this old regime.” (J.A. 946-47.)

4 Wrobel’s deposition recounts a single instance in which
5 political affiliation was discussed. On Naylon’s first day
6 on the job, he asked Wrobel about his political affiliation,
7 and Wrobel told him that he was a Republican (as was
8 Naylon). Elliot likewise reported a single instance: before
9 his transfer out of Aurora, Naylon said to him “we know you
10 guys are all democrats, hired by the other administration.”

11 Wrobel’s complaint alleged (relevant to this appeal)
12 that defendants violated his (1) First Amendment right to
13 freedom of association by harassing him because of his
14 political association with the previous county
15 administration and (2) First Amendment right to freedom of
16 speech by retaliating against him for speaking about matters
17 of public concern taking place within the Erie County
18 highway department. An earlier panel of this Court found
19 that both claims were adequately pleaded. See Wrobel v.
20 Cnty. of Erie, 211 F. App’x 71, 72-73 (2d Cir. 2007). After
21 discovery closed, defendants successfully moved for summary
22 judgment on the ground that Wrobel had adduced insufficient
23 evidence to raise a question of fact on either claim.

1 succeed on a First Amendment claim brought pursuant to
2 Section 1983, a plaintiff must be able to demonstrate that
3 (1) the conduct at issue was constitutionally protected, (2)
4 the alleged retaliatory action adversely affected his
5 constitutionally protected conduct, and (3) a causal
6 relationship existed between the constitutionally protected
7 conduct and the retaliatory action. See Camacho v. Brandon,
8 317 F.3d 153, 160 (2d Cir. 2003).

9 The First Amendment is thus violated when state
10 officials engage in quintessential political patronage, as
11 when a newly-elected county sheriff sought to fire
12 Republican deputies to provide jobs to Democrats, see Elrod
13 v. Burns, 427 U.S. 347, 372-73 (1976) (plurality opinion);
14 when a public defender sought to dismiss Republican
15 assistants based on party affiliation, see Branti v. Finkel,
16 445 U.S. 507, 517 (1980); and when a Governor was giving
17 permission for the hiring, transferring, promotion, and
18 recalling of only state employees who were Democrats, see
19 Rutan, 497 U.S. at 69.

20 The protection of these cases has been extended to
21 politically neutral employees who are treated less favorably
22 than employees politically aligned with those in power, see
23 Welch v. Ciampa, 542 F.3d 927, 939 & n.3 (1st Cir. 2008);

1 Gann v. Cline, 519 F.3d 1090, 1095 (10th Cir. 2008); Galli
2 v. New Jersey Meadowlands Comm’n, 490 F.3d 265, 273 (3d Cir.
3 2007), as well as to employees who suffer because of their
4 political support of a losing faction of the party in power,
5 see McCloud v. Testa, 97 F.3d 1536, 1551 (6th Cir. 1996).

6 However, not every association of a public employee can
7 support a Section 1983 claim. “When employee expression
8 cannot be fairly considered as relating to any matter of
9 political, social, or other concern to the community,
10 government officials should enjoy wide latitude in managing
11 their offices, without intrusive oversight by the judiciary
12 in the name of the First Amendment.” Connick v. Myers, 461
13 U.S. 138, 146 (1983). Only if an employee’s speech or
14 associational conduct “touches on a matter of public
15 concern” can a First Amendment claim proceed. Cobb, 363
16 F.3d at 102; accord Klug v. Chi. Sch. Reform Bd. of Trs.,
17 197 F.3d 853, 857 (7th Cir. 1999); Boals v. Gray, 775 F.2d
18 686, 692 (6th Cir. 1985). Conduct that falls outside this
19 class of activity is beyond the scope of the First
20 Amendment’s protections for public employee speech. See
21 Ezekwo v. N.Y.C. Health & Hosps. Corp., 940 F.2d 775, 781
22 (2d Cir. 1991) (“[N]ot all speech by a public employee can
23 provide the basis for a constitutional cause of action.”).

1 The public-concern requirement “reflects both the historical
2 involvement of the rights of public employees, and the common
3 sense realization that government offices could not function
4 if every employment decision became a constitutional
5 matter.” Connick, 461 U.S. at 143. Whether association or
6 speech is on a matter of public concern is a fact-intensive
7 inquiry; nevertheless it is a question of law for the court
8 to decide. See Lewis v. Cohen, 165 F.3d 154, 164 (2d Cir.
9 1999).

10 Wrobel characterizes his associational conduct as “not
11 pledg[ing] his support for the Giambra administration” and
12 “cho[osing] not to affiliate himself politically” with it.
13 (Appellant Br. 11.) In Wrobel’s first appeal, we decided
14 that retaliation for such conduct, if adequately proven,
15 could give rise to Section 1983 liability. Wrobel, 211 F.
16 App’x at 72. Accordingly, we now consider only whether the
17 evidence submitted on summary judgment is sufficient to raise
18 a question of material fact, such that a jury could find that
19 Wrobel did in fact engage in associational conduct related to
20 a matter of public concern, and that defendants mistreated
21 him as a result of that conduct.

1 The dispositive issue for Wrobel's free association
2 claim is the causal relationship between the association
3 identified and his transfer. To prove that his political
4 indifference was the reason Naylon and Rider mistreated him,
5 he relies principally on Naylon's references to an "old
6 regime" and a "new regime." Assuming that this designation
7 does in fact distinguish between employees brought in by
8 Naylon and those already there when he arrived, there is no
9 evidence or available inference that this distinction is
10 political in the sense that it relates to any political,
11 social, or other community concern. See Connick, 461 U.S. at
12 146. Wrobel submitted evidence that Naylon questioned him
13 about his friends at work, ordered him to tell a friendly
14 former co-worker to stay away from the Aurora barn, and
15 blamed the "old regime" for difficulties at the Aurora barn.
16 Nothing in the record demonstrates that the dysfunction at
17 the Aurora barn was related to anyone's political
18 association. The record shows instead a toxic form of
19 "office politics" that, no matter how severe or how
20 reprehensible, does not violate the First Amendment. See
21 Klug, 197 F.3d at 858. Wrobel alleges no more than
22 generalized references to a heightened standard of
23 performance in the wake of a change of political regime.

1 That is simply to be expected when the voters replace one set
2 of managers with another; the recently-elected call it
3 reform. Naylon's passing references to a "new regime" and an
4 "old regime", without more, cannot transform incompetent and
5 heavy-handed management into a violation of the First
6 Amendment.

7 Wrobel points to one sentence of Timothy Elliot's
8 affidavit, quoting Naylon as stating "we know you guys are
9 all democrats, hired by the other administration." (J.A.
10 1008.) This statement is not enough to create an issue of
11 material fact as to whether Wrobel was being retaliated
12 against for protected associational conduct: Naylon *knew*
13 Wrobel to be a Republican. And the content of the Elliot
14 affidavit renders any inference in Wrobel's favor even more
15 implausible. Naylon also told Elliot that "we're forming a
16 new team and I want to know if you're going to be on my
17 team." (J.A. 1008.) This invitation is incompatible with
18 the idea that Naylon was rejecting employees on the basis of
19 partisan favoritism.

20 The record does support Wrobel's assertion that he did
21 not pledge support for or politically align himself with the
22 Giambra administration. That association, however, is a non
23 sequitur in the context of this case. Wrobel was never asked

1 to donate to, volunteer for, or lend support to any political
2 candidate when Naylon was his supervisor. Other than being a
3 registered Republican (the same as Naylon and Rider), he had
4 no political affiliation or alliance at the office, and never
5 discussed politics with anyone at the office. True, an
6 employee can no more be discriminated against for being
7 apolitical than for being a member of the wrong political
8 party. See Morin v. Tormey, 626 F.3d 40, 44 (2d Cir. 2010).
9 However, the record must still support the fact that such a
10 political association exists. Wrobel cites no evidence
11 showing that any employee did politically align with or
12 pledge allegiance to the Giambra administration, how an
13 employee would do that, or how he would be rewarded for doing
14 so.

15 There is good reason to hold the plaintiff to his burden
16 of proof in a free association case such as this. New
17 administrations and officials will often be brought into
18 office specifically because of dissatisfaction with the
19 status quo, and may be expected to implement reforms. Old
20 employees, especially those in under-performing jobs or
21 facilities, will often be let go to make room for employees
22 who are more capable, trusted or enthusiastic. There is
23 record evidence that Naylon and others believed the Aurora

1 barn to be troubled. It is to be expected that employees
2 affected by a new regime may resist reform measures
3 regardless of political loyalties. Moreover, in a reform
4 context, it is to be expected that employees will be fired,
5 demoted, or transferred soon after the change in
6 administration, with the result that there is temporal
7 proximity between the change in "regime" and the adverse
8 employment action.

9 Absent evidence that the adverse employment action was
10 politically motivated, the First Amendment gives a court no
11 license to intervene in a public workplace whenever a new
12 administration redeploys its workforce. Evidence of
13 political motivation can take different forms. In cases of
14 patronage, the record will often reveal that the plaintiffs
15 were replaced by members or supporters of the ascendant
16 party, or treated less favorably. See, e.g., Elrod, 427 U.S.
17 at 351. This is so even if the associational conduct was the
18 decision not to politically associate. See Welch, 542 F.3d
19 at 935 (plaintiff replaced by "vocal supporter" of prevailing
20 faction); Galli, 490 F.3d at 269 (plaintiff told by superior
21 that her office was "letting Republicans go," that "some
22 Democrat [obviously] wants the spot," and that one has to
23 "pay to play with this administration" (alterations in

1 Galli)). Evidence of political motivation may come in the
2 form of overt pressure to work in a campaign, or donate to
3 it, or vote a certain way. But unless evidence is required
4 that an employee was adversely treated on account of a
5 political association or abstention, any mistreatment of an
6 apolitical public employee would go to a jury on a
7 constitutional claim. See Galli, 490 F.3d at 277 (Baylson,
8 J., dissenting).

9 Wrobel has not sustained his burden at summary judgment
10 of creating a genuine issue of fact as to whether his
11 mistreatment was the result of his lack of *political*
12 allegiance to the new administration. There is ample
13 evidence that the new administration viewed the Aurora barn
14 as in need of reform. It is not enough for Wrobel to show
15 mistreatment coupled with political abstention--there must be
16 some evidence that the two are related, or an available
17 inference that it is so. Naylon's passing references to the
18 "old regime" adds little or nothing. New appointees may
19 always be expected to avow an improvement in public services.
20 To survive a motion under Rule 56(c), Wrobel needed to create
21 more than a "metaphysical" possibility that his allegations
22 were correct; he needed to "come forward with specific facts
23 showing that there is a *genuine issue for trial*." Matsushita

1 Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574,
2 586-87 (1986) (internal quotation marks omitted). He has
3 not.
4

5 II

6 Wrobel's second claim is that he suffered retaliation
7 for speaking out against Naylon and Rider's treatment of
8 employees and misuse of county property. The showing
9 required for a free speech claim is the same as for a free
10 association claim. To prevail on a Section 1983 free speech
11 claim, a public employee must demonstrate (1) his speech
12 addressed a matter of public concern, (2) he suffered an
13 adverse employment action, and (3) a causal connection
14 between the speech and the adverse employment action. Singh
15 v. City of New York, 524 F.3d 361, 372 (2d Cir. 2008). Even
16 assuming that Wrobel has identified speech that touches on a
17 matter of public concern, he has failed to show an adverse
18 employment action or a causal connection between the speech
19 and employment conditions that Wrobel deems adverse.
20

21 A

22 Wrobel cites four instances of speech touching on a
23 matter of public concern: (1) a May 1, 2001 letter to the

1 state chairman of the Democratic party complaining of
2 Naylon's management style, misuse of county property, and
3 corruption; (2) a similar letter sent to the New York State
4 attorney general on May 17, 2001; (3) a July 2001 phone call
5 by Wrobel's wife to the New York attorney general's office,
6 the content of which is unknown; and (4) an August 23, 2001
7 meeting in which the Wrobels and other county workers met
8 with an FBI agent to complain about Naylon's management
9 style, misuse of county property, and corruption.

10 Not all of the communications can be attributed to
11 Wrobel, and not all address matters of public concern. The
12 letters to public officials were anonymous. There is no
13 evidence in the record of a July 2001 phone call allegedly
14 made by Wrobel's wife and, in any event, there is nothing to
15 suggest that Wrobel participated in such a call. The
16 grievances of the county employees related chiefly to the
17 internal workings of the highway department, such as Naylon's
18 mistreatment of employees, and therefore were not of public
19 concern. See Connick, 461 U.S. at 147.

20 Nevertheless, we can safely assume for purposes of this
21 appeal that Wrobel has proffered some evidence of speech on
22 matters of public concern. Wrobel's statements that Naylon
23 misused county equipment, falsified records, and directed

1 county business to friends are arguably of public interest.
2 See Johnson v. Ganim, 342 F.3d 105, 112-13 (2d Cir. 2003).
3 “[M]atters of public concern do include speech aimed at
4 uncovering wrongdoing or breaches of the public trust.”
5 Glass v. Dachel, 2 F.3d 733, 741 (7th Cir. 1993).

6
7

8 **B**

9 “In the context of a First Amendment retaliation claim,
10 we have held that only retaliatory conduct that would deter a
11 similarly situated individual of ordinary firmness from
12 exercising his or her constitutional rights constitutes an
13 adverse action.” Zelnik v. Fashion Inst. of Tech., 464 F.3d
14 217, 225 (2d Cir. 2006) (internal quotation marks and
15 alterations omitted); see also Burlington N. & Santa Fe Ry.
16 Co. v. White, 548 U.S. 53, 57 (2006) (holding that
17 antiretaliation provisions of Title VII apply where employers
18 actions “could well dissuade a reasonable worker from making
19 or supporting a charge of discrimination”). The list of
20 adverse actions has included harsh measures, such as
21 discharge, refusal to hire, refusal to promote, reduction in
22 pay, and reprimand, as well as some lesser sanctions, such as
23 failure to process a teacher’s insurance form, demotion,

1 reassignment to a place that aggravated physical
2 disabilities, and express accusations of lying. Id.

3 The main act of retaliation cited by Wrobel--his transfer
4 to Tonowanda--predates his speech on a matter of public
5 concern. To fill that gap, Wrobel relies on three more acts
6 of retaliation that began soon after the anonymous letters
7 were sent: (1) a July 1, 2001 "interrogation," undertaken by
8 Rider without the presence of a union representative, in
9 which he told Wrobel to tell his wife to "stay out of the
10 County buildings"; (2) Wrobel's questioning by a county
11 sheriff about a theft at the Aurora barn; and (3) defendants'
12 (orchestrated) false testimony at Wrobel's arbitration
13 hearing in 2002.¹

14 As to (1) and (2), such *de minimis* slights and insults do
15 not amount to retaliation. Id. "It would trivialize the
16 First Amendment to hold that harassment for exercising the
17 right of free speech was always actionable no matter how
18 unlikely to deter a person of ordinary firmness from that

¹ Wrobel's brief also portrays as retaliatory conduct the fact that his name appeared on Giambra's so-called "lay-off" list. However, Wrobel was not laid off as a result, and there is no suggestion that he suffered some other adverse employment change as a result of appearing on that list.

1 exercise." Id. at 226 (internal quotation marks omitted).²
2 The evidence does not support an inference that the July 1
3 interaction between Rider and Wrobel was the type of conduct
4 that would "deter an individual of ordinary firmness from
5 exercising his or her constitutional rights." Zelnik, 464
6 F.3d at 225 The same is true of the sheriff deputy's
7 questioning of Wrobel. No competent evidence suggests that
8 defendants initiated the investigation or accused Wrobel of
9 theft, and the entire encounter consisted of a few polite
10 questions, after which Wrobel was left alone.

11 The incident involving the grievance hearing contesting
12 Wrobel's transfer has no support in the record. Wrobel's
13 brief speculates, "on information and belief," that
14 defendants "encouraged and bribed employees to testify
15 against Mr. Wrobel, offering at least one employee a
16 promotion in exchange for his negative testimony."
17 (Appellant's Br. 43.) The only evidence cited is an email
18 from Rider to Naylon asking him to attend the hearing and
19 bring other employees who did "not want him back." The email

² However, a critical mass of minor incidents may support a claim for retaliation. Zelnik, 464 F.3d at 225; Phillips v. Bowen, 278 F.3d 103, 109 (2d Cir. 2002) ("Our precedent allows a combination of seemingly minor incidents to form the basis of a constitutional retaliation claim once they reach a critical mass.").

1 is evidence that defendants disliked Wrobel; but Rider's
2 defense of his past decision to transfer Wrobel is not
3 retaliatory.

4

5 **C**

6 Even if Wrobel had produced evidence that defendants took
7 action sufficiently severe to constitute retaliation, Wrobel
8 would still be required to produce evidence of a causal
9 relationship between his speech--sending anonymous letters to
10 state officials, and speaking confidentially with the FBI--
11 and the retaliation.

12 A causal relationship can be demonstrated either
13 indirectly by means of circumstantial evidence, including
14 that the protected speech was followed by adverse treatment,
15 or by direct evidence of animus. See Mandell v. Cnty. of
16 Suffolk, 316 F.3d 368, 383 (2d Cir. 2003). The sufficiency
17 of such circumstantial evidence depends on the circumstances
18 of each case. However, when (as here) the speech was made
19 anonymously or confidentially, "[i]t is only intuitive that
20 for protected conduct to be a substantial or motivating factor
21 in a decision, the decisionmakers must be aware of the
22 protected conduct." Ambrose v. Twp. of Robinson, 303 F.3d
23 488, 493 (3d Cir. 2002).

Wrobel argues that a jury could infer that defendants knew of his speech because they became aware in August 2001 that someone had anonymously submitted photographs of highway department personnel using county equipment on private property. It would be wholly speculative, however, for a jury to find that defendants believed Wrobel was the person responsible for these photographs. Wrobel argues for the inference on the basis that in April 2002 Rider called Wrobel's wife a "liar" at an arbitration concerning his transfer to Tonawanda. The incident occurred eight months later, and Rider's statement is vague and without context.³ A reasonable jury could not find a causal connection between Wrobel's confidential and anonymous statements, and the conduct alleged to be retaliatory.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

³ Wrobel also argues that knowledge of Wrobel's speech can be inferred from Naylon's statement at the March 2001 disciplinary hearing that "I don't give a f*** what legislator called me, it is not going to do you any good here." (J.A. 426.) Days earlier, Wrobel's wife had called to county legislators to complain of Naylon's mistreatment of his subordinates. However, her complaints did not touch on matters of public concern. See Connick, 461 U.S. at 147.

1 CALABRESI, J., dissenting:

2 I agree with the majority opinion in its description of the facts and history of this case, its
3 statements of the controlling law in Parts I and II, and its ruling that Wrobel failed to raise
4 questions of material fact warranting a trial on his First Amendment speech claim. I respectfully
5 dissent, however, because I believe that Wrobel has adduced sufficient evidence to permit a trial
6 on his First Amendment political association claim.

7 Undoubtedly, newly elected administrations are permitted to pursue reform. Such reform
8 might well include ridding a public agency of underperforming employees hired by preceding
9 administrations. And there is certainly evidence in the record that supports the defendants'
10 claims that Wrobel and other employees hired by the preceding administrations were disobedient
11 and inefficient. Even if these claims were shown to be true, however, the record is also rife with
12 allegations of the defendants harassing their employees or otherwise treating them uncivilly. The
13 tactics allegedly adopted by the defendants remind us that "reform" may carry its own abuses.
14 But such abuses, as the majority rightly emphasizes, do not without more amount to a federal

1 claim. Specifically, for a First Amendment political association claim to be valid, there must be
2 evidence that the abuses were politically motivated.

3 Unlike the majority, I believe that the record before us contains evidence that would
4 permit a jury to conclude that an impermissible political agenda motivated the defendants'
5 treatment of Wrobel. Considered on their own and without some indication of a political context,
6 Naylon's many references to replacing "old regimes" with "new regimes" and forming "new
7 teams" do not carry political valence. These terms could simply serve, in Naylon's manner of
8 talking, to draw non-political lines between previously hired workers and Giambra's newer, and
9 assertedly more effective, employees. In this I agree with the majority. Nevertheless, there is one
10 statement in the record—acknowledged, but I think undervalued, by the majority—that I think
11 would allow a jury to read political valences into all those otherwise neutral references.

12 Timothy Elliott stated in his affidavit of May 24, 2010: "At one point during one of the
13 initial conversations I had with Naylon, he told me that, 'we know you guys are all democrats,
14 hired by the other administration'. . . ." As I read the record, a jury could find that Naylon's
15 remark about "democrats" was made in the same time frame as his other statements regarding

1 “regimes” and “teams.” And, if it did so find, a jury could conclude that, for Naylon, the “old
2 regime” was equivalent to “democrats,” i.e., Naylon’s *political* antagonists. A jury could then
3 reasonably also find that Naylon’s campaign to “get rid of [the] old regime” constituted a
4 politically motivated purge.

5 Of course, Wrobel had declared himself a Republican during an early meeting with
6 Naylon. But Wrobel has also alleged that—notwithstanding this early declaration—
7 Naylon later accused him of being part of the “old regime” and “in the same boat” as Elliott and
8 other pre-Giambra hires. In light of Wrobel’s allegations and Elliott’s testimony, it would be
9 entirely plausible for a jury to conclude (a) that Naylon considered Wrobel part of a faction
10 *politically* opposed to Giambra, and (b) that Naylon took adverse actions against him for this
11 reason.

12 The facts of this case render our disposition a close call. But, all things considered, I
13 would let a jury decide the validity of Wrobel’s political association claim. For that reason, I
14 respectfully DISSENT.