10-5275
Ross v. Lichtenfeld

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3

4 August Term 2012

5 (Submitted: January 17, 2012 Decided: September 10, 2012)

6 Docket No. 10-5275-cv

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8
9 RISA A. ROSS,
10
11 Plaintiff-Appellee,
12
13 -- v. --
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15 PETER F. BRESLIN, EVE HUNDT, MICHAEL GORDON, FELYCIA SUGARMAN,
16 DONNA WALSH, BRUCE PAVALOW, WARREN SCHLOAT, BOARD OF EDUCATION OF
17 THE KATONAH-LEWISBORO UNION FREE SCHOOL DISTRICT, KATONAH-
18 LEWISBORO UNION FREE SCHOOL DISTRICT, KEVIN SHELDON,
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20 Defendants,
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22 ROBERT LICHTENFELD,
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24 Defendant-Appellant.
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27 -----------------------------------------------------x
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29 B e f o r e : WALKER, LEVAL, and POOLER, Circuit Judges.

30 Defendant-appellant Robert Lichtenfeld appeals from an order
31 of the United States District Court for the Southern District of
32 New York (William G. Young, Judge) denying Lichtenfeld's motion
33 for summary judgment with regard to plaintiff-appellee's claim



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that she was fired in retaliation for her reports of financial malfeasance. We conclude that plaintiff-appellee was speaking pursuant to her official duties as a public employee and her speech was therefore not protected by the First Amendment. Accordingly, we hold that defendant-appellant is entitled to summary judgment. REVERSED.

JONATHAN LOVETT, Law Office of Jonathan Lovett, Hawthorne, New York, for Plaintiff-Appellee.

RONDIENE E. NOVITZ, Cruser, Mitchell & Novitz, LLP, Melville, New York, for Defendant-Appellant.

JOHN M. WALKER, JR., Circuit Judge:

This appeal requires us to determine whether plaintiff-appellee Risa A. Ross ("Ross") was speaking pursuant to her official duties as a payroll clerk typist for the Katonah-Lewisboro Union Free School District ("the District") when she reported financial malfeasance to defendant-appellant Robert Lichtenfeld ("Lichtenfeld"), the District's Superintendent, and to the Katonah-Lewisboro Board of Education ("the Board"). The United States District Court for the Southern District of New York (William G. Young, Judge) held that Ross was speaking as a private citizen and that her First Amendment retaliation claim could proceed to trial. We disagree. We conclude that Ross's complaints were made pursuant to her official duties and

1 therefore were not protected by the First Amendment. See
2 Garcetti v. Ceballos, 547 U.S. 410 (2006). Accordingly,
3 Lichtenfeld is entitled to summary judgment on Ross's First
4 Amendment retaliation claim.
5
6 **BACKGROUND**
7 When reviewing an interlocutory appeal from a denial of a
8 motion for summary judgment, we resolve all factual disputes in
9 favor of the non-movant. Droz v. McCadden, 580 F.3d 106, 108 (2d
10 Cir. 2009). In 1998, Ross was hired by the District as a payroll
11 clerk typist. Her immediate supervisor was Margaret Taylor.
12 Lichtenfeld was, at all relevant times, the District's
13 Superintendent. Ross testified that her job duties were:

14 To process biweekly payrolls for approximately 800
15 people, transmit direct deposit, [and] mail out [checks
16 relating to other payments, such as taxes and
17 garnishments,] . . . . getting the pay reqs.
18 [requisitions] . . . and processing, making sure that
19 the pay rates were correct, making sure that the totals
20 were correct, and verifying. If there was a mistake
21 with a pay req., bringing it to the appropriate
22 person's attention.
23 . . . .
24 If it was a mistake that I felt was a mistake, I would
25 bring it to the person's attention. . . . If there was
26 a pay req. that I disagreed with and I had questions
27 about . . . .
28 . . .
29 I brought – a lot of them I brought to Bob
30 [Lichtenfeld]'s attention that I didn't think were
31 appropriate.
32

Ross Deposition 64-65. Ross's job required her to know the current salary of each district employee.

Between May 2003 and July 2006, Ross met with Lichtenfeld on numerous occasions to express concern over payments she believed to be improper. At their first meeting in May 2003, Ross informed Lichtenfeld that Howard "Lee" Turner, a District courier, had forged his supervisor's signature to obtain additional pay. Ross played voicemails for Lichtenfeld in which a supervisor told her to forget about Turner's actions and not say anything. Lichtenfeld informed the Board of Turner's forgery. Turner voluntarily resigned to avoid disciplinary action and received compensation for his accrued vacation time and two months of continued health insurance.

On February 10, 2004, Ross again met with Lichtenfeld to tell him that John Thibdeau, the director of administrative services, was retaliating against her for questioning improper payments he had approved and for an incident involving Lisa Kor. At this meeting, Ross gave Lichtenfeld documentation of some of these disbursements. When Lichtenfeld looked at the documentation, he said something to the effect of: "Oh, my God. This is worse than the Enron scandal. If taxpayers find out heads will spin." Ross Deposition 119. Following this meeting, Ross continued to meet with Lichtenfeld about similar complaints.

1 Ross's complaints primarily concerned improper disbursements
2 which she believed were made without the required Board approval
3 based on her review of Board meeting agendas. She had been told
4 by Lichtenfeld that "Board action people" (individuals not under
5 contract who must be annually approved by the Board) were not
6 entitled to overtime. She approached Lichtenfeld with examples
7 of Board action people who were receiving overtime pay without
8 Board approval. Similarly, Lichtenfeld told Ross that it was
9 illegal to give out bonuses or performance awards without Board
10 approval. Ross complained of numerous performance awards,
11 bonuses, stipends, at least one longevity payment, and other
12 miscellaneous disbursements all of which she believed were made
13 without the necessary Board approval. In a separate incident,
14 Ross complained that Lichtenfeld had spent $500 of District funds
15 to buy chocolates for a gift.
16 In October 2005, the District hired Renee Gargano
17 ("Gargano") as an outside consultant to help resolve
18 interpersonal problems among the staff. Gargano was at all
19 relevant times Deputy Superintendent of the Putnam/Northern
20 Westchester BOCES ("Putnam"), a nearby school district. Upon
21 viewing a list of employees, Gargano recognized Ross's name and
22 informed Lichtenfeld that Ross had previously been employed by
23 Putnam. Gargano did not recall having received a reference check
24 call when Ross was hired by the District. Further investigation

1 revealed that Ross had failed to list her employment with – and
2 termination from – Putnam, as well as two other school districts,
3 on her employment application.
4 In January 2006, Ross met with Gargano. Ross told Gargano
5 about the improper payments she had reported to Lichtenfeld and
6 showed her the relevant documentation. Gargano took the
7 documents and said she would discuss the matter with Lichtenfeld.
8 On May 23, 2006, Ross was suspended with pay by Kevin
9 Sheldon, the District's Assistant Business Administrator. On
10 July 21, 2006, Ross wrote a letter on her personal stationary to
11 the individual Board members outlining the concerns she had
12 raised to Lichtenfeld. The letter began: "Although I am an
13 employee of the School District, I am writing to you, . . .
14 President of the Board of Education, on a personal note out of
15 complete frustration with the District's administration." After
16 explaining her conversations with Lichtenfeld and noting her
17 frustration with his failure to take what she considered to be
18 appropriate action, she stated that her suspension was in
19 retaliation for reporting financial malfeasance.
20 After the Board received this letter, it convened an
21 executive session at which Lichtenfeld recommended Ross's
22 termination. The Board voted to terminate her. It subsequently
23 learned, however, that Ross had been entitled to a pre-
24 termination hearing. It rescinded her termination and initiated

1 a disciplinary hearing, which was held on August 24 and 31, 2006,
2 before Hearing Officer Joseph E. Wooley. The Hearing Officer
3 found that Ross had knowingly made false statements on her
4 application and recommended that she be terminated. On December
5 19, 2006, the Board voted unanimously to terminate Ross.

6 Ross filed this amended complaint in March 2007 claiming in
7 relevant part that her termination was a violation of her First
8 Amendment rights. Lichtenfeld moved for summary judgment. On
9 December 6, 2010, the district court granted the motion as to
10 some of Ross's claims, but denied it with regard to her First
11 Amendment retaliation claim. Ross v. Lichtenfeld, 755 F. Supp.
12 2d 467 (S.D.N.Y. 2010). The district court concluded that
13 Lichtenfeld was not entitled to qualified immunity on that claim.
14 Id. at 479. Lichtenfeld appeals.
15
16
17 **DISCUSSION**

18 An interlocutory appeal from a denial of summary judgment is
19 permissible when a district court denies the defendant qualified
20 immunity. See Cowan ex rel. Estate of Cooper v. Breen, 352 F.3d
21 756, 760 (2d Cir. 2003). Such an appeal is allowed only if the
22 defendant contends that he is entitled to qualified immunity
23 under the plaintiff's version of the facts. Id. at 761. Ross
24 argues that we lack jurisdiction because this appeal is based on

1 disputed facts, i.e., Lichtenfeld's intent. However, we agree
2 with Lichtenfeld that even under Ross's version of the facts, her
3 complaints are not entitled to First Amendment protection because
4 they were made pursuant to her job duties. Thus, Ross's
5 jurisdictional argument is without merit.
6 We will grant summary judgment if, taking all the facts in
7 the light most favorable to the non-moving party, the defendant
8 was entitled to qualified immunity as a matter of law. Id. at
9 760-61. In general, qualified immunity shields "government
10 officials performing discretionary functions . . . from liability
11 for civil damages insofar as their conduct does not violate
12 clearly established statutory or constitutional rights of which a
13 reasonable person would have known." Harlow v. Fitzgerald, 457
14 U.S. 800, 818 (1982). The qualified immunity inquiry can turn on
15 either of two questions: whether the complaint alleges the
16 deprivation of an actual constitutional right, or whether the
17 right was clearly established at the time of the incident. See
18 Pearson v. Callahan, 555 U.S. 223, 232, 236 (2009). A "no"
19 answer to either question requires judgment for the defendant.
20 See id. at 245; Costello v. City of Burlington, 632 F.3d 41, 51
21 (2d Cir. 2011) (Pooler, J., concurring). The district court
22 concluded that Ross had presented sufficient evidence that
23 Lichtenfeld violated her clearly established First Amendment
24 right to freedom of speech. We disagree and hold that, because

1 Ross was speaking pursuant to her official duties and not as a
2 private citizen, her speech was not protected by the First
3 Amendment. Because we find that the complaint does not allege a
4 violation of a constitutional right, it is clear a fortiori that
5 the right was not clearly established at the time of the
6 incident.

7 In the First Amendment context, "the State has interests as
8 an employer in regulating the speech of its employees that differ
9 significantly from those it possesses in connection with
10 regulation of the speech of the citizenry in general." Pickering
11 v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., Ill.,
12 391 U.S. 563, 568 (1968). Speech by a public employee is
13 protected by the First Amendment only when the employee is
14 speaking "as a citizen . . . on a matter of public concern."
15 Piscottano v. Murphy, 511 F.3d 247, 269-70 (2d Cir. 2007). In
16 Garcetti v. Ceballos, the Supreme Court held that "when public
17 employees make statements pursuant to their official duties, the
18 employees are not speaking as citizens for First Amendment
19 purposes, and the Constitution does not insulate their
20 communications from employer discipline." 547 U.S. at 421. This
21 is the case even when the subject of an employee's speech is a
22 matter of public concern. Jackler v. Byrne, 658 F.3d 225, 237
23 (2d Cir. 2011); Anemone v. Metro. Transp. Auth., 629 F.3d 97,
24 115-16 (2d Cir. 2011). Therefore, if, as a matter of law, Ross

1 was speaking pursuant to her official duties, Lichtenfeld is
2 entitled to summary judgment.
3 In Garcetti, the plaintiff, Richard Ceballos, who was a
4 deputy district attorney, was asked by a defense attorney to
5 review an affidavit that had been used to obtain a search
6 warrant. Ceballos discovered significant misrepresentations in
7 the affidavit. He informed his supervisors of his discovery and
8 wrote a disposition memo recommending that the charges be
9 dismissed. He claimed that he was subsequently subjected to
10 retaliatory employment action. 547 U.S. at 413-15. The Supreme
11 Court determined that he had not been speaking as a citizen when
12 he told his supervisors about the problems with the affidavit:
13 "The controlling factor in Ceballos' case is that his expressions
14 were made pursuant to his duties as a calendar deputy. . . .
15 Ceballos spoke as a prosecutor fulfilling a responsibility to
16 advise his supervisor about how best to proceed with a pending
17 case . . . ." Id. at 421. In short, "Ceballos wrote his
18 disposition memo because that is part of what he, as a calendar
19 deputy, was employed to do." Id.
20 The Court further observed that "[r]estricting speech that
21 owes its existence to a public employee's professional
22 responsibilities does not infringe any liberties the employee
23 might have enjoyed as a private citizen." Id. at 421-22.
24 Instead, "[i]t simply reflects the exercise of employer control

1 over what the employer itself has commissioned or created." Id.
2 at 422.
3 In Weintraub v. Bd. of Educ., 593 F.3d 196 (2d Cir. 2010),
4 we addressed the applicability of Garcetti to a teacher's
5 complaints about his school administration's failure to
6 discipline a disruptive student. After the administration failed
7 to punish a student in Weintraub's class for throwing a book on
8 two separate occasions, Weintraub told his supervisor and co-
9 workers that he intended to file an employee grievance with his
10 union, and thereafter filed the grievance. Weintraub, 593 F.3d
11 at 198-99. Weintraub argued that his complaints were not made
12 pursuant to his official duties because they were not required by
13 his job description, school policy, or other relevant
14 regulations. Id. at 201-02. We rejected this argument, holding
15 that "under the First Amendment, speech can be 'pursuant to' a
16 public employee's official job duties even though it is not
17 required by, or included in, the employee's job description, or
18 in response to a request by the employer." Id. at 203. We
19 emphasized that the inquiry into whether speech was made pursuant
20 to an employee's "official duties is 'a practical one,'" id. at
21 202 (quoting Garcetti, 547 U.S. at 424), focused on whether the
22 speech "was part-and-parcel of his concerns about his ability to
23 properly execute his duties." Weintraub, 593 F.3d at 203
24 (internal quotation marks omitted). We further noted that

1 Weintraub's speech took the form of an employee grievance, an
2 avenue unavailable to private citizens. Id. at 203-04 ("Although
3 the lack of a citizen analogue is not dispositive in this case,
4 it does bear on the perspective of the speaker - whether the
5 public employee is speaking as a citizen . . . ." (internal
6 citation and quotation marks omitted)).

7 The inquiry into whether a public employee is speaking
8 pursuant to her official duties is not susceptible to a bright-
9 line rule. Courts must examine the nature of the plaintiff's job
10 responsibilities, the nature of the speech, and the relationship
11 between the two. See id. at 201-02. Other contextual factors,
12 such as whether the complaint was also conveyed to the public,
13 may properly influence a court's decision. See id. at 205.

14 In this case, Ross alleges three instances of protected
15 speech: her reports to Lichtenfeld about improper payments and
16 promotions, her statements to Gargano about the same issues, and
17 her letter to the Board members. The district court concluded
18 that the statements to Gargano were not protected because they
19 were in the nature of an employee grievance, but that Ross's
20 statements to Lichtenfeld and her letter to the Board were
21 entitled to First Amendment protection because in those
22 instances, in the district court's view, she was speaking on a
23 matter of public concern, she went outside the chain of command,
24 and her complaints were not in the nature of an employee

1 grievance. Ross, 755 F. Supp. 2d at 474-75. Lichtenfeld
2 contends that, although Ross's speech was on a matter of public
3 concern, it was made pursuant to her duties as a payroll clerk
4 typist and is therefore not protected by the First Amendment. We
5 agree.

6 Ross testified that her job duties included processing the
7 payroll and making sure pay rates were correct. She stated that
8 if there was a mistake with a pay requisition, her duty was to
9 "bring[] it to the appropriate person's attention." Ross
10 Deposition 64. She specifically noted that she brought many such
11 requisitions to Lichtenfeld's attention. Id. at 65. Ross
12 learned that overtime for Board action people and performance
13 bonuses without Board approval – the cause of most of her
14 individualized complaints – were improper because she was told so
15 by Lichtenfeld and her supervisor. Id. at 89, 95-97. She
16 further stated that she was not able to balance out the payroll
17 without knowing whether certain payments had been approved by the
18 Board. Id. at 100-01. Ross attempts to downplay the importance
19 of her role in the District's payroll system, noting that
20 descriptions of her job consistently refer to it as "clerical."
21 Appellee's Br. at 19. However, "[f]ormal job descriptions often
22 bear little resemblance to the duties an employee actually is
23 expected to perform." Garcetti, 547 U.S. at 424-25.

1 Ross's testimony makes plain that reporting pay
2 irregularities to a supervisor was one of her job duties. She
3 admitted that her responsibilities included reporting mistakes to
4 supervisors. Moreover, she acquired all of the information she
5 relayed to Lichtenfeld in the ordinary course of performing her
6 work, and she was not able to meet her responsibility of
7 balancing the payroll without resolving pay requisition
8 irregularities on at least one occasion. Her reports to
9 Lichtenfeld were part and parcel of her official
10 responsibilities.
11 Ross urges that she was speaking as a private citizen
12 because she went outside the chain of command by first bringing
13 her concerns to Lichtenfeld instead of her supervisor and then by
14 writing to the Board. However, Ross testified that her duties
15 included bringing payroll irregularities "to the appropriate
16 person's attention," and went on to say that she frequently
17 brought such issues to Lichtenfeld, implying that reporting to
18 Lichtenfeld as "the appropriate person" was within the purview of
19 her job duties. Ross Deposition 64-65. Moreover, Ross brought
20 her concerns to Lichtenfeld because she believed her supervisor
21 was ignoring them; and she similarly wrote to the Board only when
22 she believed that Lichtenfeld was not acting on her complaints.
23 Taking a complaint up the chain of command to find someone who
24 will take it seriously "does not, without more, transform [her]

1 speech into protected speech made as a private citizen."
2 Anemone, 629 F.3d at 116.
3 Ross's assertion in her letter that she was writing "on a
4 personal note" rather than as a District employee does not alter
5 our conclusion. An employee's characterization of her own speech
6 is not dispositive.
7 Because Ross never attempted to communicate her complaints
8 to the public, she cannot avail herself of the argument that her
9 duties in no way included public revelation of misconduct of
10 district officials that is generally available to the employee
11 who takes the issue public. Cf. Weintraub, 593 F.3d at 205
12 (where the plaintiff had no such argument as he never
13 communicated with the public).
14 We emphasize that our holding that Ross's speech was
15 unprotected does not rest on the fact that her speech was made in
16 the workplace as opposed to elsewhere. Speech to a supervisor
17 even in the workplace can be protected as that of a private
18 citizen if it is not made pursuant to the employee's official
19 duties as an employee. Courts must focus their inquiry on the
20 nature of the speech itself and its relationship to the
21 plaintiff's job responsibilities. We also observe that
22 complaints about workplace misconduct, while they may be
23 unprotected by the First Amendment if made as part of the
24 plaintiff's job duties, still may be protected by whistleblower

1 laws or other similar employment codes. See Garcetti, 547 U.S.
2 at 425-26; Ruotolo v. City of N.Y., 514 F.3d 184, 189 n.1 (2d
3 Cir. 2008).
4 Finally, we note that this circuit's recent holding in
5 Jackler v. Byrne, 658 F.3d 225, does not bear on our case. In
6 Jackler, the plaintiff was a probationary police officer who
7 allegedly witnessed the use of excessive force against a suspect
8 by a fellow officer. That suspect filed a civilian complaint
9 against the officer. At the request of his supervisor, and in
10 accordance with written police procedure, Jackler filed a report
11 corroborating the accusation of excessive force. Id. at 230-31.
12 Jackler's supervisors pressured him to retract the report and
13 falsify his story to protect the offending officer. When Jackler
14 refused, he was not hired as a full-time officer. Id. at 231-32.
15 The panel concluded that Jackler had a cognizable First Amendment
16 claim because, when he refused to file a false report, he was
17 speaking as a citizen.
18 Jackler involved very different circumstances from this
19 case. The panel emphasized that Jackler had been asked to
20 "retract his truthful statements and make statements that were
21 false," and determined that "his refusals to accede to those
22 demands constituted speech activity that was significantly
23 different from the mere filing of his initial Report." Id. at
24 241. Indeed, if Jackler had made a false statement to the

1 police, he would have violated New York law. Id. at 239.
2 Jackler is therefore plainly distinguishable on its facts. Ross
3 alleges that she suffered retaliation for making affirmative
4 statements of misconduct to her supervisors, not for refusing to
5 make false statements that no misconduct had occurred.
6 In this case, the speech that prompted Ross's retaliation
7 claim owed its existence to her job duties and was made in
8 furtherance of those duties. As a payroll clerk, she was tasked
9 with reporting pay irregularities to her supervisors, and that is
10 what she did here. Accordingly, her complaints to Lichtenfeld
11 and the Board were not protected by the First Amendment, and
12 Lichtenfeld is entitled to summary judgment.

13 **CONCLUSION**

14 For the foregoing reasons, the judgment of the district
15 court is REVERSED.