

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

7 -----x  
8  
9 RISA A. ROSS,

10  
11 Plaintiff-Appellee,

12  
13 -- v. --

14  
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,

19  
20 Defendants,

21  
22 ROBERT LICHTENFELD,

23  
24 Defendant-Appellant.

25  
26  
27 -----x  
28  
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

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

7

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

11  
12 RONDIENE E. NOVITZ, Cruser,  
13 Mitchell & Novitz, LLP, Melville,  
14 New York, for Defendant-Appellant.

15

16 JOHN M. WALKER, JR., Circuit Judge:

17 This appeal requires us to determine whether plaintiff-  
18 appellee Risa A. Ross ("Ross") was speaking pursuant to her  
19 official duties as a payroll clerk typist for the Katonah-  
20 Lewisboro Union Free School District ("the District") when she  
21 reported financial malfeasance to defendant-appellant Robert  
22 Lichtenfeld ("Lichtenfeld"), the District's Superintendent, and  
23 to the Katonah-Lewisboro Board of Education ("the Board"). The  
24 United States District Court for the Southern District of New  
25 York (William G. Young, Judge) held that Ross was speaking as a  
26 private citizen and that her First Amendment retaliation claim  
27 could proceed to trial. We disagree. We conclude that Ross's  
28 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

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

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

14 On February 10, 2004, Ross again met with Lichtenfeld to  
15 tell him that John Thibdeau, the director of administrative  
16 services, was retaliating against her for questioning improper  
17 payments he had approved and for an incident involving Lisa Kor.  
18 At this meeting, Ross gave Lichtenfeld documentation of some of  
19 these disbursements. When Lichtenfeld looked at the  
20 documentation, he said something to the effect of: "Oh, my God.  
21 This is worse than the Enron scandal. If taxpayers find out  
22 heads will spin." Ross Deposition 119. Following this meeting,  
23 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.

## 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.