13-2915-cv

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CRAIG MATTHEWS,

Plaintiff-Appellant,

-against-

CITY OF NEW YORK; RAYMOND KELLY, as Commissioner of the New York City Police Department; JON BLOCH, a deputy inspector in the New York City Police Department; and MARK SEDRAN, a lieutenant in the New York City Police Department,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANTS-APPELLEES

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PRELIMINARY STATEMENT

In this action brought pursuant to 42 U.S.C. § 1983 and alleging violation of his First Amendment rights, plaintiff-appellant ("plaintiff") appeals from an opinion and order of the United States District Court for the Southern District of New York (Engelmayer, U.S.D.J.), dated July 29, 2013 (JA460-496),[1] which granted the summary judgment motion of defendants-appellees the City of New York, Raymond Kelly, as Commissioner of the New York City Police Department, Deputy Inspector Jon Bloch and Lieutenant Mark Sedran (collectively, "defendants" or "the City"), finding that plaintiff did not engage in constitutionally protected speech where such speech was (1) compelled by the NYPD Patrol Guide, (2) concerned the subject matter of his employment, (3) was made internally, and (4) lacked a direct civilian analogue. The District Court's decision was reached after this Court's prior remand of the matter for "some inquiry" to determine the "nature of the plaintiff's job responsibilities, the nature of the speech, and the relationship between the two." *Matthews v. City of New York*, 488 Fed. Appx. 532, 533 (2d Cir. 2012).

The order should be affirmed. The discovery adduced in this matter, including plaintiff's own deposition, resolves this Court's question of whether

[1] Numbers preceded by "JA" contained in parentheses refer to pages of the Joint Appendix.

plaintiff spoke pursuant to his official duties when he voiced the complaints recounted in the Complaint. Plaintiff had an absolute duty to report any corruption or other misconduct, and thus was performing his duty when he told his superiors about a "quota system and that it was causing unjustified stops, arrests, and summonses. . . " (JA28).

Accordingly, the District Court's order granting defendants' summary judgment motion should not be disturbed on appeal.

QUESTION PRESENTED

Did the District Court correctly grant the City's summary judgment motion where the undisputed facts demonstrate that plaintiff's speech was not protected by the First Amendment?

STATEMENT OF RELEVANT FACTS

In interests of judicial economy, defendants incorporate by reference and rely upon the facts as recited by the District Court herein (JA460-469), in addition to emphasizing the following.[2]

[2] Defendants deny that plaintiff ever engaged in the speech the Complaint purports to recount or the existence of any "quota system." Nonetheless, for purposes of the underlying motion only, defendants assume that the speech allegations contained in the Complaint actually occurred.

Plaintiff's Complaint

In his Complaint, plaintiff, a New York City Police Officer, alleges that "on at least four occasions [he] notified commanding officers of the 42nd Precinct about [a] quota system [mandating numbers of arrests, summonses, and stop-and-frisks] being used by mid-level supervisors" (JA20-34). Plaintiff asserts that he has been subjected to adverse employment actions as a result of making these complaints to his supervisors. Plaintiff maintains that his complaints concerning quotas were protected speech under the First Amendment (JA20-34).

Plaintiff claims that "[i]n 2008 supervisors in the 42nd Precinct started to pressure officers to meet numerical quotas for arrests, summonses, and stop-and-frisks" (JA26). Plaintiff's complaint then relates that

> In February 2009 [Plaintiff] reported to the precinct's commanding officer, Captain Timothy Bugge, that a quota system had been established in the precinct. When the quotas continued, he again reported them to Captain Bugge in March and April 2009 and reported them to the precinct executive officer in May 2009.

(JA26). The complaint further alleges that, in June 2009, the Commanding Officer told plaintiff that "the situation was handled" (JA26).

Plaintiff, however, maintains that the quota system persisted and that he was subjected to adverse employment actions (JA26). According to the Complaint, by October 2009, plaintiff "concluded that it was futile to notify

Captain Bugge further about the quota system" (JA26). The Complaint asserts that the alleged harassment and adverse employment actions against plaintiff continued (JA26).

The next and final allegedly protected speech recounted in the complaint purportedly occurred in January 2011 when plaintiff (JA28):

> met with defendant Deputy Inspector Jon Bloch (then a captain), who had become the precinct commanding officer in 2010. In the presence of another officer and the precinct's executive officer, [plaintiff] informed [Deputy Inspector] Bloch about the quota system and that it was causing unjustified stops, arrests, and summonses because police officers felt forced to abandon their discretion in order to meet their numbers. [Plaintiff] also told [Deputy Inspector] Bloch that the quota system was having an adverse effect on the precinct's relationship with the community.

Procedural History

By Notice of Motion dated March 16, 2012, defendants moved to dismiss plaintiff's complaint. Defendants specifically argued that plaintiff's speech was not protected by the First Amendment under *Garcetti v. Ceballos*, 547 U.S. 410 (2006), and its Second Circuit progeny. In an Order dated April 12, 2012, the District Court (Jones, J.), granted defendants' motion to dismiss. The Court found that:

> [h]ere, as in Weintraub, Matthews' complaints to his supervisors are consistent with his core duties as a police officer, to legally and ethically search, arrest, issue summonses, and--in general--police. Here, like the plaintiff in Weintraub, Matthews attempts to carve out his speech for *First Amendment* protection by claiming that he was not technically "required" to initiate grievance procedures and/or expose the problem as part of his employment duties.

Matthews v. City of New York, 2012 U.S. Dist. LEXIS 53213 at *7 (S.D.N.Y. April 12, 2012). The Court went on to conclude that:

> Matthews' concerns about illegal policing practices are "part-and-parcel" of his ability to "properly execute his duties." *Id. at 203*. As he himself describes it, the quota system caused "unjustified stops, arrests, and summonses because police officers felt forced to abandon their discretion in order to meet their numbers." (Complaint, ¶ 28.) And, to the extent Matthews defines his speech as complaints about precinct mismanagement and communication, that speech is not protected under well established Supreme Court precedent. *See Connick v. Myers*, 461 U.S. 138, 147 (1983); *see also Frisenda v. Inc. Vill. of Malverne*, 775 F. Supp. 2d 486 (E.D.N.Y. 2011).

Matthews, 2012 U.S. Dist. LEXIS 53213 at *7-8. The Court further rejected plaintiff's argument that his speech was protected regardless of whether he spoke pursuant to his job duties because the speech had a civilian analogue.

The Court explained that

> It is not, as Matthews contends, that the presence of a civilian analogue necessarily confers *First Amendment* protection, but rather the reverse -- when a public employee engages in citizen speech, it is unavoidable that there will be some civilian analogue to his speech. After all, citizen speech is that which is made "outside the course of performing [one's] official duties," in other words, speech made as an ordinary citizen. . . . It follows, then, that if a public employee is speaking "pursuant to" his duties, there is no civilian analogue to that speech.

Matthews, 2012 U.S. Dist. LEXIS 53213 at *11-13. As a result of this analysis, the District Court dismissed the Complaint. Thereafter, plaintiff appealed.

In a Summary Order dated November 28, 2012, this Court found that the record was not sufficiently developed on the motion to dismiss to determine whether plaintiff spoke pursuant to his official duties when he voiced the complaints made here in the manner in which he voiced them, holding: "The matter may require some inquiry into "the nature of the plaintiff's job responsibilities, the nature of the speech, and the relationship between the two." *Matthews v. City of New York*, 488 Fed. Appx. 532, 533 (2d Cir. 2012) (quoting *Ross v. Breslin*, 693 F.3d 300, 306 (2d Cir. 2012)). Consequently, this Court held that "some discovery as to these matters is necessary before it can be decided whether Matthews can or cannot pursue a *First Amendment* retaliation claim in this

case." 488 Fed. Appx. at 533. This Court, therefore, vacated the District Court's judgment and the remanded the case "for further proceedings consistent with this order." *Id.*

Pursuant this Court's directive, the District Court instituted an Initial Case Management Plan contemplating such discovery as necessary to address the questions concerning "the nature of the plaintiff's job responsibilities, the nature of the speech, and the relationship between the two." Over 4,000 pages of documents were exchanged. Plaintiff was deposed, and, in turn, deposed the current and former Commanding Officers of the 42nd Precinct. Plaintiff also deposed, as Fed.R.Civ.P. 30(b)(6) witnesses, an instructor from the Police Academy and the NYPD's Deputy Commissioner of Labor Relations, John Beirne, Esq.

Defendants' Summary Judgment Motion

After this Court's remand and based on the factual record developed in discovery for elaboration of the record to determine the nature of the plaintiff's job responsibilities, the nature of the speech, and the relationship between the two, by notice of motion dated May 13, 2013, defendants moved for summary judgment (JA8-10). Defendants specifically argued that plaintiff's speech was made pursuant to his official employment duties, and was, thus, not protected by the First Amendment, under *Garcetti v. Ceballos*, 547 U.S. 410 (2006), and its Second Circuit progeny.

In support of its motion, defendants relied upon plaintiff's complaint, the New York City Police Department ("NYPD") Patrol Guide § 207-21, and excerpts of the deposition testimonies of Commissioner John Beirne ("Commissioner Beirne") and plaintiff (JA11-18).

Defendants pointed out the following:

1. NYPD Patrol Guide

NYPD Patrol Guide § 207-21 is entitled "Allegations of Corruption and Other Misconduct Against Members of the Service" and states that:

> All members of the service must be incorruptible. An honest member of the service will not tolerate members of the service who engage in corruption or other misconduct. All members of the service have an absolute duty to report any corruption or other misconduct, or allegation of corruption or other misconduct, of which they become aware.

(JA13).

NYPD Patrol Guide § 207-21 covers any actual or potential misconduct (JA13).

2. Commissioner Beirne's Testimony

The import of the Patrol Guide § 207-21 was explained by Commissioner Beirne during his deposition as representative of the NYPD pursuant to Fed.R.Civ.P. 30(b)(6).

Commissioner Beirne has been with the NYPD for 51 years. He is the NYPD's Deputy Commissioner for Labor Relations, a position he has held since 2001. Prior to becoming the Deputy Commissioner for Labor Relations, John Beirne held every uniform rank in the NYPD from police officer through assistant chief. Commissioner Beirne is also an attorney (JA38-52).

Commissioner Beirne explained that Patrol Guide § 207-21 covers any actual or potential misconduct (JA40, 41). This duty to report corruption or other misconduct is not limited to violations of the penal law (JA43-44). This duty to report corruption or other misconduct has existed in the NYPD for at least the last 51 years. Although over the years the procedure for fulfilling the duty to report misconduct has changed, the duty itself has been a constant (JA45-47). Regardless of how plaintiff went about reporting the alleged misconduct, which purportedly flowed from a quota system, he was acting pursuant to his duty when he spoke about the alleged quota system and its consequences (JA47).

Commissioner Beirne was explicitly asked if the matters about which plaintiff allegedly spoke would constitute misconduct that must be reported. Commissioner Beirne explained that

> A quota that results in an unjustified stop constitutes misconduct that must be reported (JA43).

> A quota that results in an unjustified arrests constitutes misconduct that must be reported (JA43).
>
> A quota that results in an unjustified summonses constitutes misconduct that must be reported (JA43).
>
> A quota that resulted in an adverse employment action constitutes misconduct that must be reported (JA43).

Thus, as Commissioner Beirne explained, plaintiff had a duty pursuant to § 207-21 of the Patrol Guide to report the existence of the activity recounted in paragraph 28 of the Complaint (JA48-50).

If plaintiff believed that the quota system might lead to unjustified stops, arrests and summonses, even if such unjustified stops, arrests and summonses had not yet occurred, plaintiff would have an obligation to report it (JA51-52).

If, as alleged in the last sentences of paragraphs 2 and 18 of the Complaint that "o]fficers in the precinct [were] . . . pressured to meet quota. . . .[and] [t]hose who [did] not [were] subject to punishment including undesirable assignments, a loss of overtime, denial of leave, separation from partners, and poor evaluations. . . ." such actions, would for purposes of the New York State Labor Law, be considered an adverse employment action which plaintiff would have a duty to report (JA48-50).

3. Plaintiff's Testimony

Plaintiff himself admits that were he to know that an officer made an unjustified stop or unjustified arrest or issued an unjustified summons, that unjustified stop, or unjustified arrest, or unjustified summons, is misconduct for which there is a duty to report. Plaintiff testified at his deposition as follows:

> Q. My question is do you believe that unjustified stops fall under the category of misconduct that you have to report?
> MR. DUNN: He is asking a general question, are unjustified stops in the category of misconduct that you feel you must report.
> Q. Assuming that you have determined that the stop was unjustified.
> A. If I'm able to do that, then, yes.
> Q. Similarly if you were able to determine that an arrest was unjustified, is that something that you believe that you have a duty or an obligation to report?
> A. Yes.
> Q. If you were aware that a summons had been issued and that the issuance of that summons was unjustified, do you believe that that is something that you would have a duty or an obligation to report?
> A. Yes.
> Q. In the beginning of Exhibit A [Plaintiff's Complaint], paragraph one, it states in the first sentence that you reported the existence of a highly developed quota system in the 42nd Precinct in the Bronx. Do you consider this alleged quota system to fall under the category of misconduct?
> MR. DUNN: Misconduct that he must report.
> MR. FRAENKEL: First misconduct and then the follow-up questions would be misconduct that he must report.
> Q. So do you consider what you refer to in paragraph one in Exhibit A, highly developed quota system in the 42nd Precinct to be a form of misconduct?
> A. Yes.

(JA57-58).

Later in the deposition, plaintiff explains that he does not believe he would need to report misconduct in the form of highly developed quota system due to his view that only criminal misconduct need be reported (JA60). Plaintiff admits that he has no recollection of the source of that supposed limitation (JA62). Plaintiff also testified, with regard to his interpretation of Patrol Guide § 207-21, as follows:

> Q. So your belief is that if you see another officer doing something wrong, you only have to report it if it's something that's serious?
> A. Criminal.
> Q. Criminal.
> So it's not even whether or not it's serious, it's whether it rises to the level of criminality?
> A. Yes.
> Q. So if you saw an officer smoking marijuana, would you have to report that?
> A. Yes.
> Q. If you saw an officer smoking marijuana while he was on duty, would you have to report that?
> A. Yes.
> Q. If you saw an officer drinking alcohol while on duty, would you have to report that?
> A. I don't believe so.

(JA62).

Plaintiff testified that the procedures in the Patrol Guide are not optional and officers are required to follow those procedures; officers who fail to follow the Patrol Guide procedures may be subject to discipline as a result of such failure (JA55-56).

Plaintiff testified that he has a duty to report an unjustified stop, or unjustified arrest, or an unjustified summons, made by another officer (JA57-58).

Plaintiff admits that the alleged "highly developed quota system in the 42nd Precinct in the Bronx," referred to in the Complaint's first paragraph, is a form of misconduct (JA58-59).

ORDER OF THE DISTRICT COURT

In a 37-page Opinion & Order dated July 29, 2013, the District Court (Engelmayer, U.S.D.J.), granted defendants' summary judgment motion, rejecting plaintiff's contention that his First Amendment rights were violated, and finding that plaintiff did not engage in constitutionally protected speech (JA460-496).

Expressly addressing this Court's remand, the District Court noted that it was required to address "whether, following discovery on this point, the facts permit the Court to find, as a matter of law, that Officer Matthews 'spoke pursuant to his official duties when he voiced the complaints made here in the manner in which he voiced them.'" 488 Fed. Appx. at 533. The District Court noted that it carefully reviewed the undisputed facts and "viewing the facts that are disputed in the light most favorable to Officer Matthews, and applying apposite case law," found that plaintiff "spoke solely as an employee" (JA472).

In making this determination, the District Court, noted that the fact-specific inquiry of whether the speech in question here was made pursuant to

plaintiff's official duties is not susceptible to a brightline rule: "'Courts must examine the nature of the plaintiff's job responsibilities, the nature of the speech, and the relationship between the two'" (*citing Ross v. Breslin*, 693 F.3d 300, 306 (2d Cir. 2012)).

In its analysis, the District Court noted that four factors -- also identified by this Court -- considered in combination, compel the finding that plaintiff's complaints to his supervisors about the quota system were made pursuant to his official duties: (1) the Patrol Guide, (2) subject matter of employment, (3) internal speech, and (4) lack of civilian analogue.

Patrol Guide

The Court first noted that § 207-21 of the Patrol Guide "unambiguously imposed on Officer Matthews a duty to report the fact of 'unjustified stops, arrests, and summonses' that he alleged had been occurring as a result of the quota system" and that "[t]he plain text of § 207-21 imposes a duty to report '[c]riminal activity or other misconduct of any kind including the use of excessive force or perjury that is committed by a member of the service whether on or off duty'" (JA484). The Patrol Guide "sets performance expectations for members of the NYPD" and plaintiff "testified that he did not consider its procedures to be optional" (JA484).

Thus, "[b]y reporting a policy that he asserted had already produced a pattern of unjustified (*i.e.*, unlawful) stops, arrests, and summonses," plaintiff was "necessarily reporting 'misconduct' within the meaning of the Patrol Guide" (JA484).

The Court rejected plaintiff's argument that it was his view that § 207-21 required only the reporting of criminal misconduct," creating "a material factual dispute over the meaning of the phrase 'or other misconduct.'" The Court noted, *inter alia*, that (JA485 [emphasis added]):

> whatever Officer Matthews' subjective belief, the plain language of Section 207-21 cannot be so read. Section 207-21 unconditionally requires reporting of "criminal activity" *and* "other misconduct." *Officer Matthews' reading overlooks the term "other misconduct" and treats it as superfluous. Moreover, although Officer Matthews testified generally that this understanding derived from his training, see id. at 24, 34, he did not offer any evidence (e.g., a training manual or other documentary evidence) supporting this contra-textual reading of Section 207-21, see id. at 39. And he specifically testified that he would have a duty to report unjustified stops, arrests, and summonses--exactly the conduct at issue here.*

Nevertheless, the Court, in holding that § 207-21 supported defendants' claim that plaintiff's speech was within his job responsibilities, expressly noted that it "is mindful that formal descriptions 'often bear little resemblance to the duties an employee actually is expected to perform.'" (JA486 [citing *Garcetti*, 547 U.S. at 424-25.) Accordingly, the Court considered other

factors identified by the Supreme Court and this Court as relevant to that inquiry, which the Court found "point[ed] in the same direction" (JA488).

Subject Matter of Employment

The District Court held that plaintiff's "remarks about illegal stops and arrests, and about the quota policy that brought that misconduct about and to which he claimed he was personally subject, concerned the subject matter of his employment, owed its existence to his employment, and was made in furtherance of that employment" (JA488). Applying the well-established principle that where an employee's speech is "part-and-parcel of his concerns about his ability to properly execute his duties," it is unprotected, the Court held (JA489):

> Here, the Complaint indicates that Officer Matthews spoke out of concern about the effect the quota system had on his and other officers' abilities to perform their duties: It alleges that "police officers felt forced to abandon their discretion in order to meet their numbers" and that the quota system was "having an adverse effect on *the precinct's* relationship with the community." Compl. ¶ 28 (emphasis added). To be sure, Officer Matthews also alleged that the quota system harmed the public. *See id*. ¶ 1 (alleging that Officer Matthews complaint "comes in the context of a city-wide controversy over the NYPD's use of illegal quotas and the damage such quotas inflict on innocent people, policing, and police-community relations"). But Officer Matthews placed significant emphasis on his ability to do his own job; his reference to a related public interest did not transform an employment dispute into citizen speech. . . . As alleged in the Complaint,

> Officer Matthews, by challenging a policy he believed was impeding his and fellow officers' abilities to carry out their duties, was plainly acting in furtherance of his employment.

Moreover, the Court noted that plaintiff's speech also "owed its existence to" his employment, where plaintiff "gained the information he reported while doing his job," emphasizing that (JA489-490 [emphasis added]):

> To be sure, not all speech reporting information learned in the course of one's employment is unprotected; as the Supreme Court has noted, public employees are often the only people with information about their employer's practices, and leaving such speech unprotected could deprive the public of valuable insights. *See Garcetti, 547 U.S. at 419-21* ("The *First Amendment* protects some expressions related to the speaker's job."); *Pickering, 391 U.S. at 572. Here, Officer Matthews' speech was on a subject of consequence: It stood to notify the public that unlawful stops and arrests in the 42nd precinct were occurring and were rooted in an internal quota system. See Griffin, 880 F. Supp. 2d at 400. However, in assessing whether or not Officer Matthews' speech was constitutionally protected, the fact that it directly implicated the subject matter of his employment supports a finding that it was not.*

Internal Speech

Noting that "speech confined to internal channels tends to look less like citizen speech than does the paradigmatic letter to the editor," the Court emphasized that plaintiff's speech was internal to the precinct, since it was made to his direct supervisor (JA491).

Lack of Civilian Analogue

Recognizing that the presence or absence of a civilian analogue is relevant to the issue of protected speech, the Court acknowledged plaintiff's likening his oral complaints to his commanding officers to the reports or complaints that a civilian is free to make to a police department (JA491-492). The Court noted, however, that plaintiff did not file a police report or call Internal Affairs, but rather, made his reports to the commanding officers of the 42nd Precinct during a series of in-person meetings in the precinct (JA493) and that, thus, the decisive question is, therefore, "whether this is a 'channel[] available to citizens generally'" (citing *Weintraub*, 593 F.3d at 204) (JA493).

In determining that it was incorrect for plaintiff to claim that the average citizen enjoyed access to the channel that he used to lodge his complaint about unlawful stops and arrests and about the quota system, the Court held, in relevant part (JA493):

> Officer Matthews argues that civilians may make such complaints in the manner that he did. He notes that the 42nd Precinct's commanding officer has a duty to meet with civilians to receive feedback about police conduct, *see* Beirne Dep. 24-25; Bloch Dep. 22, 48; Bugge Dep. 39; Harrist Decl Ex. 7, and points to Captain Bloch's and Captain Bugge's attendance at public meetings of the 42nd Precinct's Community Council, *see* Bloch Dep. 24-25; Bugge Dep. 45-47, and to their availability for additional in-person meetings to address specific concerns, *see* Bloch Dep. 36, 39,

> 41; Bugge Dep. 64-65; Harrist Decl. Ex. 8, at NYPD 188. Officer Matthews also identifies at least one occasion in which Captain Bugge met in person in his office with a local reverend to discuss his mistreatment during a stop. Bugge Dep. 58-59.
>
> On the other hand, as the City notes, relative to the average citizen, Officer Matthews had superior access to his commanding officers. He spoke with Captain Bugge about the existence of the quota system in February, March, April, June, and October 2009, and with another precinct executive in May 2009. Compl. ¶¶ 20-21. In January 2011, after Captain Bugge was replaced by Captain Bloch--who, apparently, met less frequently with community members, *see* Bloch Dep. 41--Officer Matthews spoke with Captain Bloch. Compl. ¶ 28. By contrast, the only specific instance of a civilian's meeting in person with a commanding officer of the 42nd Precinct in a manner akin to Officer Matthews' involved a prominent local reverend who was an advisor to the Community Council board and was otherwise in the Community Affairs Office 'a couple of times a week.' *See* Bugge Dep. 58-59. Further, even for such local leaders, such meetings would be set up through the Community Affairs Office, which would often resolve the issue at hand before the civilian ever got face time with the commanding officer. *See* Bugge Dep. 65.

The Court recognized that plaintiff did not make his complaints during regularly scheduled meetings with his commanding officers and that "for there to be a civilian analogue there need not be perfect symmetry between the manner in which the plaintiff spoke and the channels available to the ordinary civilian. But the differences here are significant" (JA494). The Court stressed that

plaintiff was "able to get the ear of his commanding officers more readily, more frequently, and more privately than could an average citizen" and, as such, this factor also supported a finding that plaintiff spoke pursuant to his official duties (JA494).

In sum, the District Court, taking into consideration all of the above factors, derived from *Garcetti* and its Second Circuit progeny, concluded that plaintiff's reports of "unlawful stops, arrests, and summonses and the quota policy from which they derived," constituted his speech "as an NYPD employee, not a citizen," where it was "compelled by the NYPD Patrol Guide; concerned the subject matter of his employment; was made internally; and lacked a direct civilian analogue" and, thus, not constitutionally protected (JA494-495).

In so holding, the Court stressed that plaintiff's "speech was more in the nature of an employee grievance than a political statement and the First Amendment does not constitutionalize the employee grievance, while pointing out that "whether speech in the future by police officers protesting unlawful police practices will be similarly classified will turn on the facts and the context" (JA495).

The Court, thus, granted defendants' motion for summary judgment and dismissed plaintiff's complaint in its entirety (JA496).

SUMMARY OF ARGUMENT

The District Court correctly granted defendants' summary judgment motion because the undisputed facts failed to establish that plaintiff's speech was protected as a matter of law, pursuant to well-established Supreme Court and Second Circuit precedent.

STANDARD OF REVIEW

This Court reviews a decision granting a motion for summary judgment *de novo*, viewing facts in the light most favorable to the losing party. *Cellular Tel. Co. v. Town of Oyster Bay*, 166 F.3d 490, 492 (2d Cir. 1999). If the evidence demonstrates that there are no genuine issues of material fact and that the judgment is warranted as a matter of law, then the judgment will be upheld. *Global Network Commc'ns, Inc. v. City of New York*, 562 F.3d 145, 150 (2d Cir.), *cert. denied*, 2009 U.S. LEXIS 9100 (Dec. 14, 2009); *see also* Fed. R. Civ. P. 56(c). An issue of fact is "genuine" if it provides a basis for "a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The moving party bears the initial burden of demonstrating an absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). This burden may be met by demonstrating that the non-moving party lacks evidence to support its claim. *Id.* at 325. If the moving party satisfies this burden,

the burden then shifts to the non-moving party who must set forth specific facts showing there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). "The non-moving party may not rely on mere conclusory allegations nor speculation." *D'Amico v. City of New York*, 132 F.3d 145, 149 (2d Cir.), *cert. denied*, 524 US 911 (1998). Summary judgment is appropriate where no reasonable trier of fact could find in favor of the non-moving party. *H.L. Hayden Co. of New York, Inc. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005, 1011 (2d Cir. 1989).

ARGUMENT

THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT TO DEFENDANTS BECAUSE PLAINTIFF'S ALLEGED SPEECH IS NOT PROTECTED BY THE FIRST AMENDMENT.

The crux of plaintiff's case is the contention that his speech concerning a "quota system" that "was causing unjustified stops, arrests, and summonses" was the protected speech of a citizen and not speech by a government employee (JA20-33). Plaintiff's difficulty is the Supreme Court's unambiguous holding in *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006), and that holding's progeny in this Court.

The *Garcetti* decision declared that: "[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as

citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." 547 U.S. at 421. As demonstrated below, a New York City Police Officer, such as plaintiff, has an absolute duty to report any corruption or other misconduct, or allegation of corruption or other misconduct, of which they become aware. A quota system that causes unjustified stops, arrests, and summonses, that is to say a quota system that engenders illegal police action, is misconduct. An officer, such as plaintiff, has a duty to report such misconduct and that report is made pursuant to his job duties and, therefore, is unprotected.

The District Court, after its thorough analysis of the four factors outlined in its decision -- (1) the Patrol Guide, (2) subject matter of employment, (3) internal speech, and (4) lack of civilian analogue -- properly held that, taken together, they require the finding that plaintiff, when he reported unlawful stops and frisks, arrests, and summonses, and the quota policy from which they derived, spoke as an NYPD employee and not a citizen (JA484-495). As such, the Court correctly found that his speech was not constitutionally protected since it was compelled by the Patrol Guide, concerned the subject matter of his employment, was made internally and lacked a direct civilian analogue (JA494-495).

(1)

Applicable Law

A. The *Garcetti* Framework

"Whether public employee speech is protected from retaliation under the First Amendment entails two inquiries: (1) 'whether the employee spoke as a citizen on a matter of public concern' and, if so, (2) 'whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.'" *Ruotolo v. City of New York*, 514 F.3d 184, 188 (2d Cir. 2008) (*quoting Garcetti v. Ceballos*, 547 U.S. 410, 418 [2006]).

A public employee engages in constitutionally protected speech when she speaks "as a citizen on a matter of public concern." *Garcetti*, 547 U.S. at 418. Therefore, the threshold question in any First Amendment retaliation case is whether the employee was speaking as a citizen on a matter of public concern. *See Connick v. Myers*, 461 U.S. 138, 147 (1983). "'If [the Court] determine[s] that [the plaintiff] either did not speak as a citizen or did not speak on a matter of public concern, [he] has no First Amendment cause of action based on his . . . employer's reaction to the speech.'" *Weintraub v. Bd. of Educ. Of City Sch. Dist.*, 593 F.3d 196, 201 (2d Cir.), *cert. denied*, ___ U.S. ___, 131 S. Ct. 444 (2010) (*quoting Sousa v. Roque*, 578 F.3d 164, 170 (2d Cir. 2009)).

In *Garcetti*, the Supreme Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti*, 547 U.S. at 421. Whether speech is protected by the First Amendment is a question of law, not a question of fact. *See Connick*, 461 U.S. at 148, n. 7.

B. The "Pursuant to Official Duties" Prong

As this Court stated in *Weintraub*, "[t]he *Garcetti* Court defined speech made 'pursuant to' a public employee's job duties as 'speech that owes its existence to a public employee's professional responsibilities.'" *Weintraub*, 593 F.3d at 201 (*quoting Garcetti*, 547 U.S. at 421). The Supreme Court provided the following guidance in determining whether an employee is speaking pursuant to an official duty:

> The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.

Garcetti, 547 U.S. at 424-25.

In *Garcetti*, the plaintiff, a deputy district attorney, was acting pursuant to his official duties when he wrote a memo recommending that a criminal case be dismissed after investigating a faulty warrant because he was regularly tasked with conducting such investigations and filing such memos, even though he admitted that he was acting pursuant to his official duties and the Court did not "articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate." *Id.* at 424. At the other end of the spectrum, the plaintiff teacher in *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), was not speaking pursuant to his official duties when he wrote a letter to a local newspaper critical of his employer, the Board of Education, and its revenue raising proposals. *Garcetti*, 547 U.S. at 422.

In *Weintraub*, this Court adopted the reasoning of other circuits who interpreted *Garcetti* as holding that "speech that government employers have not expressly required may still be 'pursuant to official duties,' so long as the speech is in furtherance of such duties." *Weintraub*, 593 F.3d at 202. This Court held that "under the First Amendment, speech can be 'pursuant to' a public employee's official job duties even though it is not required by, or included in, the employee's job description, or in response to a request by the employer." *Id.* at 203.

Although recognizing that no single factor is dispositive, courts have considered several when attempting to determine if a public employee spoke

pursuant to his official duties. These factors include the plaintiff's job description; the persons to whom the speech was directed; and whether the speech resulted from special knowledge gained through the plaintiff's employment. Courts have also considered whether the speech occurs in the workplace and whether the speech concerns the subject matter of the employee's job. *Schoolcraft v. City of New York*, 2012 U.S. Dist. LEXIS 82888 (S.D.N.Y. June 14, 2012); *Frisenda v. Inc. Vill. of Malverne*, 775 F. Supp. 2d 486, 506 (E.D.N.Y. 2011).

Moreover, as this Court has most recently held in *Matthews v. Lynch*, 483 Fed. Appx. 624 (2d Cir. 2012), the inquiry into whether an employee spoke pursuant to his official duties is "practical." *See Jackler v. Byrne*, 658 F.3d 225, 237 (2d Cir. 2011) (internal quotation marks omitted). This Court, citing *Weintraub*, emphasized that "[s]peech is made pursuant to an employees official duties when it 'owes its existence to [the employee's] professional responsibilities' and that "can be pursuant to a public employee's official job duties even though it is not required by, or included in, the employee's job description, or in response to a request by the employer." *Anemone v. Metro. Transp. Auth.*, 629 F.3d 97, 116 (2d Cir. 2011) (internal quotation marks omitted).

(2)

Plaintiff's speech is not protected by the First Amendment because he spoke as a government employee, rather than a private citizen.

Applying these principles, and after the conclusion of discovery pursuant to this Court's remand, the District Court properly found that plaintiff's speech was made pursuant to his job duties as a New York City Police Officer and is, therefore, not protected by the First Amendment. Employing the factors identified by the District Court compels the conclusion that plaintiff was engaging in speech as an employee and not a citizen.

A. **Patrol Guide: Duty of a Police Officer to Report Corruption**

When the circumstances of plaintiff's purported speech are considered, the prior conclusion of the District Court remains correct. Plaintiff, in speaking to his superiors about what plaintiff himself describes a quota system that caused "unjustified stops, arrests, and summonses," was doing so as "part-and-parcel" of his ability to "properly execute his duties." *Matthews*, 2012 U.S. Dist. LEXIS 53213, at *7-8. One consideration, as explained in *Frisenda*, is "plaintiff's job description." 775 F. Supp. 2d at 506. Although there is no job description for an NYPD Police Officer, there is, however, the NYPD Patrol Guide.

The NYPD Patrol Guide sets for procedures intended to guide NYPD officers. As plaintiff himself admits, Patrol Guide procedures are not optional and

officers are to follow those procedures. Officers may be subject to discipline if they fail to follow the Patrol Guide's dictates (JA55-56).

NYPD Patrol Guide § 207-21 declares that "[a]ll members of the service have an absolute duty to report any corruption or other misconduct, or allegation of corruption or other misconduct, of which they become aware." The language of Patrol Guide § 207-21 is unambiguous. Police officers, including plaintiff, have a duty to report misconduct. Plaintiff himself admits that if he knows that an officer made an unjustified stop, or unjustified arrest, or issued an unjustified summons, that unjustified stop, or unjustified arrest, or unjustified summons, is misconduct for which there is a duty to report (JA57-58). Plaintiff admits that the alleged "highly developed quota system in the 42nd Precinct in the Bronx," referred to in the Complaint's first paragraph, is a form of misconduct as well (JA58-59). The testimony of the NYPD's Fed.R.Civ.P. 30(b)(6) witness echoes plaintiff's testimony confirming that the matters about which plaintiff allegedly spoke would constitute misconduct that must be reported (JA43-52).

The plain language of Patrol Guide § 207-21, and plaintiff's own testimony, establishes that he had a duty to engage in the type of speech he recounts in the Complaint. This conclusion is consistent with the case law. For example, in *Ruotolo v. Mussman & Northey*, 105 AD3d 591 (1st Dept.), *lv denied*, 22 N.Y.3d 855 (2013), the Appellate Division, First Department, found that

because the Patrol Guide required plaintiff, a NYPD officer, to "[a]ct as liaison for command on safety and health issues," plaintiff's conversation concerning a safety issue did not amount to speech protected by the First Amendment. *Id.* at 592.

Similarly, as the District Court properly found, because the Patrol Guide "imposes on police officers the unsurprising obligation of reporting criminal activity and other misconduct within the NYPD," plaintiff's claim that a departmental policy requires police officers to report a pattern of violations of law is not tantamount to speech protected by the First Amendment (JA487-488).

Plaintiff argues that if the requirement of Patrol Guide § 207-21 to report misconduct is a job duty, thereby rendering such speech unprotected, then § 207-21 is akin to an excessively broad job description that the Supreme Court in *Garcetti* said could not be used to render speech unprotected. *Garcetti*, 547 U.S. at 424-425 (App. Brf at 42-48).

Plaintiff is mistaken. Indeed, this Court recently affirmed dismissal of First Amendment retaliation claims in *Carter v. Inc. Village of Ocean Beach*, 415 Fed. Appx. 290 (2d Cir.), *cert. denied, Fiorillo v. Inc. Village of Ocean Beach*, 183 L. Ed. 2d 68, 2012 U.S. LEXIS 4282 (U.S. 2012), where the plaintiffs police officers alleged broad police misconduct, like plaintiff here. Specifically, the plaintiff police officers claimed they were retaliated against for reporting to their supervisors and to the local district attorney various misconduct within their

department, including assigning officers to chauffeur intoxicated colleagues, hiring uncertified officers, retaining unqualified or corrupt officers, instructing officers not to issue summonses to certain people or businesses, and covering up misconduct. This speech, the District Court concluded, "was undertaken in the course of performing one of [plaintiffs'] core employment responsibilities of enforcing the law and, thus, was speech made pursuant to their official duties. *Carter v. Incorporated Village of Ocean Beach*, 693 F. Supp. 2d 203, 211 (2010).

This Court agreed, holding that plaintiffs showed only that they reported alleged misconduct through the chain of command, "misconduct they knew of only by virtue of their jobs as police officers and which they reported as 'part and parcel of [their] concerns about [their] ability to properly execute [their] duties.'" *Carter*, 415 Fed. Appx. at 293 (*quoting Weintraub*, 593 F.3d at 203); *see also Paola v. Spada*, 03CV1628, slip op. (D.Conn.) (2007), *aff'd*, 372 Fed. Appx. 143, 144 (2d Cir. 2010) (affirming the District Court's conclusion that a State Trooper had a duty to report officer misconduct as part of his official duties).

Accordingly, a duty to report any alleged corruption with the New York City Police Department -- either explicitly as denoted in the Patrol Guide or implicitly, in the nature of a sworn law enforcement officer's job -- is not, contrary to plaintiff's assertion, unduly broad (App. Brf at 29-33). Including the reporting of alleged corruption or misconduct is not an effort to restrict speech, but, rather,

an effort to maintain a functional police force by identifying such corruption or misconduct, so the problem can be addressed. While the public has a right to know about matters of public concern, the government, as an employer, has a right to manage the workplace. *See generally Pickering, v. Bd. of Educ.*, 391 U.S. 563; *Garcetti*, 547 U.S. 410.

Plaintiff's concerns about illegal policing practices are "part-and-parcel" of his ability to 'properly execute his duties." *Weintraub*, 593 F.3d at 203. As the District Court properly pointed out: "Officer Matthews placed significant emphasis on his ability to do his own job; his reference to a related public interest did not transform an employment dispute into citizen speech" (JA489).

Plaintiff seems to assert that as a practical matter he does not have an actual duty to report misconduct because it is not something that he commonly does and that it was "no[t] [sic] part of [his] daily activities" (App. Brf at 38-39). It appears plaintiff is arguing that it is the frequency with which a Police Officer performs a particular task that determines if that task is one of his job duties. Job duties, however, are not determined by happenstance. Exceptional events, be it the use of deadly physical force or reporting misconduct, still fall within the job duties of a Police Officer. The lack of occasion to perform an aspect or duty of a job does not abrogate that aspect or duty of the job.

The obligation of NYPD member to report to the NYPD that another NYPD member has or may be engaging in misconduct cannot reasonably be considered an excessively broad demand that no one actually expects will be performed. Both the NYPD and public demand and expect that members of the NYPD report corruption or misconduct.

It is ironic that in a case concerning a police officer's obligation to report misconduct, plaintiff argues that by purposely violating NYPD procedures he can change unprotected speech into protected speech. Plaintiff asserts that by failing to follow procedure and by instead reporting the quota and its consequences to his Commanding Officer rather than to the Internal Affairs Bureau (IAB), as required by the Patrol Guide, he was not acting pursuant to the job duty set forth in Patrol Guide § 207-21 (App. Brf at 39). According to plaintiff, what would have been unprotected speech becomes protected because he chose to break the rules.

If a duty to report exists, a plaintiff cannot abrogate that duty by purposely deviating from the procedure for making the report. *See Lenox v. Town of N. Branford*, 2012 U.S. Dist. LEXIS 174419, at *41-42 (D. Conn. Dec. 7, 2012 (rejecting the idea that a plaintiff can change the substance of his speech [part of his job duties] by selecting the form [filing a lawsuit] that is beyond his job duties.); *Taylor v. N.Y. City Dep't of Educ.*, 2012 U.S. Dist. LEXIS 127810 (S.D.N.Y. Sept. 6, 2012) ("in order to determine whether [plaintiff's] speech was

made as a citizen or as a public employee, the Court must analyze the content of [plaintiff's] speech and cannot rely solely on the individuals or entities to which [plaintiff] directed her speech."). *And see, Anemone v. Metro. Transp. Auth.*, 629 F.3d at 115-117 (holding that a public employee does not immunize his speech by making a report outside his chain of command.); *Ross v. New York City Dep't of Educ.*, 2013 U.S. Dist. LEXIS 49694, at *32-33 (E.D.N.Y. Mar. 22, 2013) (that plaintiff was "not specifically tasked with alerting an outside agency" did not render speech protected).

Moreover, as a factual matter, Commissioner Beirne testified that if, as alleged in the Complaint, plaintiff reported unjustified stops, arrests and summonses to his Commanding Officer, he was acting pursuant to his duty even though he was failing to follow mandated procedure. Commissioner Beirne explained that over the years procedures for reporting misconduct have changed but, for at least the last 51 years, the duty to report misconduct has been a constant (JA45-47). No matter what procedure plaintiff used to report misconduct, reporting such misconduct was a duty of his job.

Although plaintiff admits that, pursuant to the Patrol Guide, he has a duty to report corruption or misconduct, plaintiff claims that obligation only applies when the corruption or misconduct violates the New York State Penal Law (JA82). This interpretation of Patrol Guide § 207-21 defies reason. For example,

according to plaintiff he would be obligated to report an officer who is smoking marijuana on duty but not obligated to report an officer drinking while on duty (JA61). As the District Court correctly held, plaintiff cannot point to any materials which support such an interpretation nor can he recall the source of that supposed limitation (JA62; JA485-486). Not only is this interpretation contrary to Commissioner Beirne's testimony, it is contrary to the text of the Patrol Guide (JA43-44).

Patrol Guide § 207-21 provides a definition of corruption and other misconduct which reads: "Criminal activity or other misconduct of any kind including the use of excessive force or perjury that is committed by a member of the service whether on or off duty." The definition refers to "criminal activity," which would include violations of the Penal Law. The definition then refers to "other misconduct of any kind." If § 207-21 only encompassed Penal Law violations, a definition referring to "criminal activity" would have sufficed.

As the District Court correctly held, the additional words "other misconduct of any kind" are not superfluous, as plaintiff asserts, but evince an intent for the § to reach beyond just criminal or Penal Law violations (JA485). The definitional portion of Patrol Guide § 207-21 stands in opposition to plaintiff's effort to limit the reporting requirement to Penal Law violation. Patrol Guide § 207-21 covers criminal activity or other misconduct of any kind.

Plaintiff cites to the holding in *Griffin v. City of New York*, 880 F. Supp. 2d 384 (E.D.N.Y. 2012), where the Court denied a motion to dismiss in part based on the belief that the Patrol Guide only constituted "training materials" (App. Brf at 45). *Id.* at 397. The Patrol Guide § cited by the *Griffin* Court, Patrol Guide § 200-01, however, does not make any reference to the Patrol Guide as being only "training materials" (JA409-411). The evidence adduced in the instant matter instead establishes that the procedures in the Patrol Guide are not optional and officers are required to follow those procedures. Officers who fail to follow the Patrol Guide procedures may be subject to discipline as a result of such failure (JA55-56). The District Court, in the instant case, noted that, "[t]aken together, *Weintraub*, *Ross*, and *Looney*, along with various non-precedential summary orders, reveal that the Second Circuit has taken a broader view than was necessary to decide *Garcetti* of what constitutes speech pursuant to an employee's official duties" (JA482). Further, as the District Court correctly pointed out here, the "great majority of district court decisions applying these precedents have drawn the same conclusion" (JA483, and fn13 [and cases cited therein]).

Under *Garcetti*, the *Pickering* analysis need not be undertaken if there is an affirmative answer to the threshold question: "Is the speech pursuant to the public employee's job duties?" If the speech is pursuant to the public employee's

job duties the speech, regardless of its utility to public discourse, is unprotected speech and a matter ends.

The First Amendment is not a whistleblower statute. Thus, the *Griffin* court is incorrect in asserting that finding that Patrol Guide § 207-21 imposes on all officer a duty to report misconduct "would effectively curtail all NYPD officers' right to speak out about corruption, thereby discouraging whistleblower activity that is of great benefit to civil society." *Griffin*, 880 F. Supp. 2d at 397. The interaction of *Garcetti* and § 207-21 is not a curtailment of whistleblower activity as such activity is afforded protection by various Federal, State and City whistleblowers statutes. It is simply that after *Garcetti*, speech such as that commanded by § 207-21 is not a Constitutional matter. "Whistleblower" activity is protected but not necessarily by the First Amendment.

The First Amendment does not protect an officer speaking in the course of his duty. This, of course, was the crux of *Jackler*. Making a police report is part of an officer's duties. Making a false report, committing perjury, engaging in illegality, can never be part of an officer's job duties. The *Jackler* Court dealt at length with the fact that Jackler was asked to commit a crime of making a false report. *Jackler*, 658 F.3d at 239-240. This Court acknowledged that all citizens, even public employees, enjoy the right to speak, or to refrain from speaking, to avoid committing a crime. This Court reasoned that committing a

crime was well beyond any description or definition of a public employee's duties and thus could not be considered simply part of a public employee's job. *Id. a*t 241-242 ("We conclude that Jackler's refusal to comply with orders to retract his truthful Report and file one that was false has a clear civilian analogue and that Jackler was not simply doing his job in refusing to obey those orders from the department's top administrative officers and the chief of police."). The legal issue in *Jackler* was whether the First Amendment protected Jackler's refusal to make false statements, not whether the initial truthful report was protected. *Id.*

Therefore, Jakler's speech, although related to his job, was not part of his job duties and, thus, was protected speech. Consequently, as the District Court in the instant matter previously found, *Jackler* is inapposite for the instant matter. *See Matthews*, 2012 U.S. Dist. LEXIS 53213 at *11-13.[3] The District Court here similarly properly distinguished *Jackler*: "Officer Matthews made a series of truthful reports about his concerns; unlike Jackler, he was neither compelled to retract those statements nor to file a false report" (JA479-480).

Accordingly, because the plain language of the Patrol Guide, and even plaintiff's own testimony, establishes that plaintiff had a duty to engage in the type

[3] As noted above, this Court did not comment on Judge Jones' legal analysis. The prior judgment was reversed not for an incorrect legal analysis but because of a purported factual issue that would preclude a motion to dismiss. Judge Jones' legal analysis, including her analysis of *Jackler*, remains cogent and persuasive.

of speech he recounted in the Complaint, the District Court correctly found that his speech was not protected.

B. Subject Matter of Employment and Internal Speech: Considering to Whom the Speech Was Directed, and that the Speech Resulted From Special Knowledge Gained Through His Employment, Plaintiff's Speech Was Unprotected Speech of an Employee.

The District Court correctly found that, as alleged in the Complaint, plaintiff, "by challenging a policy he believed was impeding his and fellow officers' abilities to carry out their duties, was plainly acting in furtherance of his employment" (JA489-450). Plaintiff's complaints resulted from special knowledge gained through his employment NYPD police officer. *See, e.g.*, *Matthews*, 2012 U.S. App. LEXIS 10463, *3 (finding further support for the Court's determination that plaintiff police officer was acting pursuant to his employment duties where plaintiff conceded that "he first reported the misconduct up his chain of command"); *Healy v. City of New York Dep't of Sanitation*, 286 Fed. Appx. 744, 746 (2d Cir. 2008) (Sanitation worker's report to his superior of what he believed to be evidence of corruption was within the scope of his duties and not protected speech).

When an employee's speech is derived from information gained in the course of their employment it is appropriate to conclude that the speech is made in the capacity of an employee. *See Williams v. Board of Educ.*, 519 Fed. Appx. 18, 19 (2d Cir. 2013) ("Viewing the facts in the light most favorable to Williams, this

Court concludes that the speech for which Williams claims she was retaliated against 'owe[d] its existence' to her payroll responsibilities as the school clerk. . . . Regardless of her internal motivations, Williams's speech was clearly 'undertaken in the course of performing' her work completing the payroll for the school" [citing *Garcetti*]); *Bearss v. Wilton*, 445 Fed. Appx. 400, 403 (2d Cir. 2011) (and cases cited therein).

Thus, in *Looney v. Black*, 702 F.3d 701, 713 (2d Cir. 2012), this Court rejected a protected speech claim by employee who spoke to a Town resident regarding public health concerns of wood burning boiler/stove smoke discharges, holding that the speech "necessarily 'owed its existence' to [plaintiff's] role as Building Official." *See, e.g., Healy v. City of New York Dep't of Sanitation*, 286 Fed. Appx. 744, 746 (2d Cir. 2008) (Sanitation worker's report to his superior of what he believed to be evidence of corruption was within the scope of his duties and not protected speech).

In *Malgieri v. Ehrenberg*, 2012 U.S. Dist. LEXIS 181042, at *13-14 (S.D.N.Y. Dec. 21, 2012), the District Court found that a plaintiff "did not plausibly speak at the [Special Education Parent Teachers Association] meeting as a private citizen, but rather spoke in her capacity as a special education teacher." The Court noted that although the plaintiff "spoke at a public forum at which private citizens could presumably speak, and her remarks were not within the

School District chain of command," nonetheless the speech was directed toward "her professional constituents (the parents of special education students)" and "the knowledge underlying her comments could only have come from the performance of her professional duties" and the speech concerned the subject matter of her job.

Moreover, the District Court here properly recognized that the persons to whom plaintiff directed his alleged speech were his commanding officers (JA491). There are no allegations that plaintiff's speech was made to the public at large, to the media, or to elected officials. Plaintiff complained up his chain of command. Indeed, plaintiff does not even allege making a complaint outside his Precinct house. When the persons to whom plaintiff allegedly complained are considered, it can only reasonably be concluded that plaintiff was speaking as an employee pursuant to his job duties.

C. **There is No Civilian Analogue to Plaintiff's Speech**

Plaintiff asserted that his speech was no different than the speech of a member of the public and therefore, because his speech had a civilian analogue, it was protected (App. Brf at 53-56). This argument, thoroughly addressed and correctly rejected by the District Court, fails for several reasons.

First, the mere existence of a civilian analogue does not render employee speech protected. Previously rejecting this argument, the District Court explained that:

> It is not, as Matthews contends, that the presence of a civilian analogue necessarily confers *First Amendment* protection, but rather the reverse--when a public employee engages in citizen speech, it is unavoidable that there will be some civilian analogue to his speech. After all, citizen speech is that which is made "outside the course of performing [one's] official duties," in other words, speech made as an ordinary citizen….It follows, then, that if a public employee is speaking "pursuant to" his duties, there is no civilian analogue to that speech. Jackler is consistent with that principle and neither it, nor the balance of the case law, suggests that a civilian analogue is sufficient to establish a *First Amendment* right.

Matthews, 2012 U.S. Dist. LEXIS 53213 at *11-13; *see also Matthews v. Lynch*, *supra*, 2011 U.S. Dist. LEXIS 38788 at *11-12 (explaining that the question is not whether a reporting avenue was open to both citizens and employees, but whether the employee was obligated to make a report.)

Phrased differently, "analogous speech" is a government worker's speech that is not mandated by or made pursuant to the worker's job duties but is only related to his job. In essence, the government worker sheds his official capacity, since the speech is not mandated by or made pursuant to a job duty but only related to his job, and thus the worker, despite still being a government employee, is now analogous to a civilian. Other Courts have reached similar conclusions. As the Circuit Court for the District of Columbia noted:

> A test that allows a First Amendment retaliation claim to proceed whenever the government employee can identify a civilian analogue for his speech is about as useful as a mosquito net made of chicken wire: All official speech, viewed at a sufficient level of abstraction, has a civilian analogue. Certainly the district attorney's memo in *Garcetti* was analogous in some sense to private speech — for example, testimony or argumentation on the same subject by the criminal defendant it concerned. Critically, though, Ceballos's memo was composed as part of his government job, and the Supreme Court unambiguously 'reject[ed] . . . the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties.'

Bowie v. Maddox, 653 F.3d 45, 48 (D.C. Cir. 2011), *cert. denied*, ____ U.S. ____, 132 S. Ct. 1636 (2012) (*citing Garcetti*)). *Compare Brady v. County of Suffolk*, 657 F. Supp. 2d 331, 348 (E.D.N.Y. 2009) ("many aspects of a police officer's job duties, … directly impact issues important to the citizenry; simply mentioning this potential impact is not enough, by itself, to turn employees' internal disputes with their superiors about official matters into *First Amendment* claims. Such a result would completely undermine the *Garcetti framework*.") (emphasis in the original).

The second reason plaintiff's argument fails, as the District Court appropriately noted, is that members of the public simply do not have the same access to the Commanding officer of the 42nd Precinct as did plaintiff (JA491-493). The situation in the instant case is similar to that in *Williams v. County of Nassau*,

779 F. Supp. 2d 276, 285-286 (E.D.N.Y. 2011). In *Williams*, the Court explained that

> the way in which Williams reported his concerns to Cancellieri has no citizen analogue, or "channel of discourse available to non-employee citizens." *Weintraub*, 593 F.3d at 204. While citizens may write letters to, or request meetings with, the Deputy County Executive, none would have the kind of access to Cancellieri that Williams had as Executive Director of the CSC.

So also here plaintiff had access to the Precinct commander not afforded the general public. Although members of the public may attend community council meetings and request a meeting with the Precinct's commanding officer, their degree of access does not approach the level enjoined by a police officer assigned to the precinct, as emphasized by the District Court (JA493-494). Nor would the public have the access to the information plaintiff relied upon in making his claims of "unjustified stops, arrests, and summonses." These items are not dispositive but support the contention that plaintiff's speech is not of the same nature as that of a civilian, as the District Court properly held.[4]

***

[4] The arguments presented in the briefs filed by the *amici* are addressed by defendants above, and for the same reasons, are meritless, and provide no basis for reversal of the District Court's decision herein.

There is no longer a question whether plaintiff spoke pursuant to his official duties when he voiced the complaints alleged in the Complaint to his Commanding Officers. Pursuant to the NYPD Patrol Guide, plaintiff, by his own admission, had a duty to report the very misconduct recounted in the Complaint, unjustified stops, unjustified arrests, unjustified summons and the "highly developed quota system in the 42nd Precinct in the Bronx" (JA20, 28; JA57-59).

There are no disputes concerning material factual issues that preclude the grant of summary judgment to defendants. Plaintiff admits that the Patrol Guide is not optional. Plaintiff admits that pursuant to Patrol Guide § 207-21 all members of the service must report corruption and misconduct. Plaintiff admits that he complained "[i]n the presence of another officer and the precinct's executive officer, [plaintiff] informed [Deputy Inspector] Bloch about the quota system and that it was causing unjustified stops, arrests, and summonses because police officers felt forced to abandon their discretion in order to meet their numbers" (JA21). Commissioner Beirne stated that unjustified summonses, stops, and arrests, about which plaintiff claims he spoke would be misconduct that officers have a duty to report. Plaintiff has not come forward with any competent evidence that could reasonably suggest that Patrol Guide § 207-21 was limited to only Penal Law violations.

Consequently, the District Court, in its thorough analysis of the factors derived from *Garcetti* and this Court's progeny, correctly granted defendants summary judgment, finding that plaintiff spoke as an NYPD employee and not as a private citizen.

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE AFFIRMED, WITH COSTS.

Dated: New York, New York
February 3, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,231 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dated: New York, New York
February 3, 2014

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