

11-3486-cv
Looney v. Black et al.

1
2 UNITED STATES COURT OF APPEALS
3 FOR THE SECOND CIRCUIT
4

5 August Term, 2012

6 (Argued: September 27, 2012

Decided: December 21, 2012)

7 Docket No. 11-3486
8

9 PATRICK LOONEY,

10 *Plaintiff-Appellee,*

11 – v. –
12

13 WILLIAM BLACK, RIVA R. CLARK, AND JOSEPH LABELLA,
14

15 *Defendants-Appellants,*

16 TOWN OF MARLBOROUGH,
17

18 *Defendant.*
19
20

21 Before: JACOBS, *Chief Judge*, STRAUB AND DRONEY, *Circuit Judges*.
22

23 An appeal from an order of the United States District Court for the District of
24 Connecticut (Vanessa L. Bryant, *Judge*), denying Defendants-Appellants Black, Clark, and
25 LaBella's motion to dismiss on the ground that they were each entitled to qualified immunity.
26 We hold that the District Court erred in determining that defendant Black was not entitled to
27 qualified immunity as to plaintiff's procedural due process claim, as plaintiff does not adequately
28 allege that he had a constitutionally protected property right in retaining full-time, rather than
29 part-time, employment. We hold also that the District Court erred in determining that
30 defendants Black, Clark, and LaBella were not entitled to qualified immunity as to plaintiff's
31 claim under the First Amendment, as plaintiff does not adequately allege he engaged in protected
32 speech made as a private citizen.

33 Accordingly, the order of the District Court is **REVERSED**, and the case is
34 **REMANDED** with direction to enter judgment for the Defendants-Appellants.
35

36 Judge DRONEY dissents in a separate opinion.

JACQUES J. PARENTEAU (Justin E. Theriault, *on the brief*), Madsen, Prestley & Parenteau, LLC, New London, CT, *for Plaintiff-Appellee*.

MICHAEL J. ROSE (Robin B. Kallor and Johanna G. Zelman, *on the brief*), Rose Kallor LLP, Hartford, CT, Andrew L. Houlding, Rome McGuigan, P.C., Hartford, CT, *for Defendants-Appellants*.

STRAUB, *Circuit Judge*:

Plaintiff Patrick Looney served as the Building Official for the Town of Marlborough, Connecticut from 1994 until 2010. He now sues Marlborough as well as three members of Marlborough's Board of Selectmen, Defendants-Appellants William Black, Riva Clark, and Joseph LaBella, under 42 U.S.C. § 1983, alleging that he was deprived of his procedural due process and free speech rights when his position was reduced from full to part time after he made certain statements regarding the use of wood-burning stoves, as well as when he subsequently was not reappointed as the town's Building Official.

For the reasons that follow, we hold that the District Court erred in determining that Defendant-Appellant Black was not entitled to qualified immunity as to Looney's Fourteenth Amendment procedural due process claim, as Looney has not adequately alleged that he had a constitutionally protected property right in full-time employment. We hold also that the District Court erred in determining that Defendants-Appellants Black, Clark, and LaBella were not entitled to qualified immunity as to Looney's First Amendment claim, as Looney does not adequately allege that he spoke in his capacity as a private citizen. Accordingly, we **REVERSE** the order of the District Court, and **REMAND** the case with the direction that the District Court enter judgment for Defendants-Appellants.

1 **BACKGROUND**

2 The following facts are drawn from the allegations in Looney's Second Amended
3 Complaint ("SAC") and are assumed true for purposes of this appeal.

4 The position of Building Official is established in the town of Marlborough,
5 Connecticut's Town Charter ("Charter"). The Charter notes that the powers and duties of the
6 position are prescribed by ordinance and the Connecticut General Statutes. The Charter also
7 gives Marlborough's Board of Selectmen the power to appoint all officers set forth therein,
8 including the Building Official.

9 Connecticut law provides that a Building Official is appointed to a "term of four years
10 and until his successor qualifies" Conn. Gen. Stat. § 29-260(a). A Building Official may
11 be "dismissed" under the procedures set forth in Connecticut General Statutes § 29-260(b) and
12 (c) if and when he "fails to perform the duties of his office." *Id.* § 29-260(b), (c). The Charter
13 notes that approval of the entire Board of Selectmen is needed to discharge or remove any
14 appointed official or employee of the town, including the Building Official.

15 Looney was appointed as Marlborough's Building Official on August 15, 1994. He
16 learned of the position from a public notice that quoted a salary and stated that the position
17 included a pension and benefits package, both of which are available only to full-time
18 employees. Prior to his accepting the job, Marlborough's then-First Selectman Howard Dean
19 told Looney that he would be given full-time, salaried employment at \$33,000 per year, along
20 with a full benefits package.

21 Subsequently, Looney was reappointed as Marlborough's Building Official four times, in
22 November 1995, November 1999, February 2004, and April 2006. At this last reappointment,

1 Marlborough's Board of Selectmen "decided to 'continue [his] appointment per C.G.S. Sec.
2 29-260(a) for an additional four years.'" (JA-90, ¶ 17.) No other conditions or terms of this
3 last reappointment were noted by the Board of Selectmen at that time.

4 Throughout these appointments, and until February 2, 2010, Looney was always a
5 "full[-]time employee entitled to all benefits provided to full-time employees according to
6 Section 1.1C of the Town's Personnel Rules and Regulations. These benefits included, but
7 were not limited to, group health and dental insurance, group life insurance, long term disability
8 insurance, contributions to retirement, bereavement leave, personal days, leave of absence with
9 pay for jury duty, reimbursement/ accumulated sick leave, holiday pay, and vacation pay."

10 (JA-90-91, ¶ 19.) A collective bargaining agreement ("CBA") entered into between the town
11 and Local 1303-433 of Council 4 AFSCME, AFL-CIO ("Union") on July 1, 2007 recognized the
12 position of Building Official as full time.

13 In October 2009, Looney filed a grievance relating to a purported infringement of his
14 First Amendment rights by his supervisor Peter Hughes, who served as Marlborough's Planning
15 & Development Director. Hughes allegedly attempted "to limit [Looney's] communication of
16 information to a Town resident regarding wood burning boiler/stove and smoke discharge as
17 public health concerns." (JA-91-92, ¶ 23.)

18 After Looney filed his grievance against Hughes, matters escalated. Hughes again
19 requested that Looney not "engage in discussions of substantive matters outside his job duties
20 concerning other Town agenc[ies] or jurisdiction[s]." (JA-92, ¶ 24.) Looney continued to
21 protest Hughes's attempts to limit his communication with the public and ultimately retained
22 counsel. His counsel sent Black a letter on December 23, 2009 advising him that Hughes's

1 restriction was an “illegal prior restraint on speech in violation of the First Amendment.”
2 (JA-92, ¶¶ 25, 26.) Marlborough announced a week later that it would not remove the
3 restriction Hughes had placed on Looney’s speech, and threatened to discipline or discharge
4 Looney. On January 4, 2010, Marlborough’s counsel informed the Union that certain of its
5 members would be laid off or have their hours reduced, and that the Building Official position
6 would be reduced to 20 hours a week.

7 Looney then received a letter from Black on January 28, 2010, confirming the reduction
8 in his hours, and stating that he would be paid “\$33 per hour with no additional compensation for
9 loss of benefits.” (JA-93, ¶ 29.) On April 5, 2010, Looney notified Marlborough that he
10 intended to file suit against the town for the events that had transpired. He then commenced
11 this litigation on June 14, 2010, asserting claims pursuant to 42 U.S.C. § 1983 based on
12 violations of the First Amendment and the Fourteenth Amendment procedural due process
13 guarantee.

14 After the lawsuit had commenced, Black announced that he planned to post a notice
15 seeking to fill the Building Official position. LaBella and Clark, as Selectmen, were included
16 in the search committee that interviewed candidates for the position. Looney applied to be
17 reappointed during the application period, and during his interview LaBella noted “that he had
18 brought a lawsuit against” Marlborough. (JA-94, ¶ 39.) Clark also stated during the interview
19 that she had “serious issues recommending someone who is suing the Town.” (JA-94, ¶ 40.)
20 Black, Clark, and LaBella all voted for a candidate other than Looney to fill the position.
21 Looney was not reappointed.

22

1 On September 30, 2010, Black, Clark, and Labella moved to dismiss Looney's complaint
2 on the grounds that, *inter alia*, all three individual defendants were entitled to qualified immunity
3 as to the applicable claims.¹ Looney then sought leave to file the SAC. The District Court
4 granted Looney's motion to file the SAC, and denied defendants' motion to dismiss in its
5 entirety.

6 In rejecting the argument made by Black that he was entitled to qualified immunity as to
7 Looney's Fourteenth Amendment due process claim, the District Court held that Looney had
8 adequately alleged a valid property interest in full-time employment. *Looney v. Town of*
9 *Marlborough*, No. 3:10-cv-1068, 2011 WL 3290202, at *8 (D. Conn. July 30, 2011). It based
10 this determination on its understanding that while Looney's alleged right to "full-time
11 employment with pension and benefits was not memorialized in a written contract," there was a
12 sufficiently "consistent course of conduct over a period of more than fifteen years," and Looney
13 had "relied upon those benefits to secure medical coverage for himself and his disabled spouse."
14 *Id.* Thus, the District Court determined that Looney had a constitutionally protected property
15 right under the Fourteenth Amendment. *Id.*

16 From this determination, the District Court further concluded that "the law was defined
17 with reasonable clarity and that, based upon the allegations of the [SAC], Black's conduct in
18 reducing Looney's hours was not objectively reasonable." *Id.* at *9. Accordingly, it denied
19 the motion to dismiss to the extent that Black argued he was entitled to qualified immunity as to
20 Looney's procedural due process claims.

¹ Black is the only individual defendant named in Looney's Fourteenth Amendment procedural due process claim. Black, Clark, and LaBella are all named in the First Amendment claim. The Town of Marlborough is named only in two separate claims that are not at issue on appeal. It did not move to dismiss the claims against it.

The District Court then considered Black, Clark, and LaBella’s arguments that they were entitled to qualified immunity as to Looney’s First Amendment claim. The court denied the motion to dismiss on this ground as well, holding that defendants “appear[ed] to concede that Looney spoke as a citizen instead of pursuant to his official duties,” and that Looney’s allegations regarding the speech at issue adequately established that it touched on a matter of public concern. *Id.* at *10.

Based on this determination, the District Court held that the SAC adequately alleged both a violation of Looney’s clearly established First Amendment rights, and that Black, Clark, and LaBella had committed acts of retaliation against Looney for his speech, such that they did not act in an objectively reasonable manner. *Id.* at *14. Accordingly, the District Court held that the individual defendants were not entitled to qualified immunity at this stage of the litigation as to Looney’s First Amendment claims, and their motion to dismiss was denied on this ground as well.

This timely appeal followed.

DISCUSSION

Qualified immunity provides government officials “immunity from suit rather than a mere defense to liability.” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). Government officials who are “performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

1 “[T]he ‘driving force’ behind creation of the qualified immunity doctrine [is] a desire to
2 ensure that “‘insubstantial claims” against government officials [will] be resolved prior to
3 discovery.’” *Pearson*, 555 U.S. at 231 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 n.2
4 (1987)); *see also Saucier v. Katz*, 533 U.S. 194, 200 (2001) (“A ruling” on qualified immunity
5 “should be made early in the proceedings so that the cost and expenses of trial are avoided where
6 the defense is dispositive”), *overruled on other grounds by Pearson*, 555 U.S. 223.

7 We review a denial of qualified immunity de novo. *Clubside, Inc. v. Valentin*, 468
8 F.3d 144, 152 (2d Cir. 2006); *Velez v. Levy*, 401 F.3d 75, 84 (2d Cir. 2005). In reviewing such
9 a denial, “[f]irst, we ask whether there was a constitutional violation. If the answer to this
10 question is yes, we must then determine whether the right was clearly established at the time of
11 the violation.” *Clubside*, 468 F.3d at 152 (citing *Saucier*, 533 U.S. at 201). A right is clearly
12 established if the law (1) was “defined with reasonable clarity,” (2) has been affirmed by “the
13 Supreme Court or the Second Circuit[,]” and (3) where the conduct at issue would have been
14 understood by a reasonable defendant to be unlawful under the existing law. *Young v. Cnty. of*
15 *Fulton*, 160 F.3d 899, 903 (2d Cir. 1998); *see also Reichle v. Howards*, __ U.S. __, 132 S. Ct.
16 2088, 2093 (2012) (“To be clearly established, a right must be sufficiently clear that every
17 reasonable official would have understood that what he is doing violates that right. In other
18 words, existing precedent must have placed the statutory or constitutional question beyond
19 debate.” (citations, modifications, and internal quotation marks omitted)). Finally, we must
20 decide whether “it was objectively reasonable [for the defendants] to believe that their acts did
21 not violate these clearly established rights.” *Young*, 160 F.3d at 903 (internal quotation marks
22 omitted).

1 On appeal, Defendants-Appellants argue that the District Court erred in denying their
2 motion to dismiss the complaint because (1) Black is entitled to qualified immunity as to
3 Looney's procedural due process claim, and (2) all three individual defendants are entitled to
4 qualified immunity as to Looney's First Amendment claim. We address these arguments in
5 turn.

6 **I. Procedural Due Process Claim**

7 In determining whether Looney's complaint adequately alleges that there was a
8 constitutional procedural due process violation, we inquire first as to whether he adequately
9 alleged a property right protected under the Constitution. See *Bd. of Regents of State Colls. v.*
10 *Roth*, 408 U.S. 564, 576-77 (1972). Such property interests cannot be found on the face of the
11 Constitution, but rather "are created[,] and their dimensions are defined by[,] existing rules or
12 understandings that stem from an independent source such as state law-rules or understandings
13 that secure certain benefits." *Id.* at 577. A "unilateral expectation" is not sufficient to
14 establish a constitutionally protected property right. *Id.* Rather, a plaintiff must have "a
15 legitimate claim of entitlement to" the alleged property interest. *Id.*

16 Where a valid property right is established, we consider whether a plaintiff was deprived
17 of that right without due process. *Narumanchi v. Bd. of Trs. of Conn. State Univ.*, 850 F.2d 70,
18 72 (2d Cir. 1988). In making this determination, we inquire into what process was due, and
19 whether the government provided such minimum process. See *Mathews v. Eldridge*, 424 U.S.
20 319, 332-35 (1976) (elaborating how to determine what process is due when a plaintiff has been
21 deprived of a valid property interest).

1 To determine whether Black is entitled to qualified immunity as to Looney's procedural
2 due process claim, we must determine also whether the constitutionally protected property right
3 was "clearly established."² *Reichle*, 132 S. Ct. at 2093. This determination is a particularized
4 inquiry based on the situation facing an individual defendant at the time of her alleged actions.
5 A defendant's alleged conduct must have violated plaintiff's procedural due process rights in a
6 manner that "every reasonable official would have understood . . . violate[d] that right." *Id.* at
7 2093 (citations, modifications, and internal quotation marks omitted).

8 The District Court's holding that Black was not entitled to qualified immunity as to
9 Looney's procedural due process claim at this stage in the litigation was grounded in the
10 determination that Looney had a constitutionally protected property right in full-time
11 employment. In so deciding, the court relied on three primary sources identified in Looney's
12 complaint. These were: (1) Connecticut General Statutes § 29-260(a)-(c), which establishes
13 both that the Building Official is appointed for a four-year term, and the procedure for dismissing
14 a Building Official who has failed to perform his duties, *Looney*, 2011 WL 3290202, at *7; (2)
15 Marlborough's Employee Handbook, Section 1.1.C, which identifies "full[-]time employees" as
16 those working thirty hour weeks or more, and indicates that those employees are entitled to
17 pension and healthcare benefits, *id.*; and (3) Looney's four reappointments as Building Official
18 over the course of fifteen years, each time beginning his term with pension and benefits as a
19 full-time employee, *id.* at *8.

20 The District Court, however, did not rely on the CBA in making its determination that
21 Looney had a property interest in full-time employment. Indeed, Looney argued in his

² A court may exercise its discretion in deciding to first address whether (1) a plaintiff has adequately alleged a constitutional violation, or (2) such a constitutional right was clearly established. *See Pearson*, 555 U.S. at 242.

1 sur-reply that his property interest was “protected by Connecticut Statute, not the CBA,” a
2 statement that the District Court credited. (JA-186, 219.)

3 The District Court based its holding on *Ezekwo v. New York City Health and Hosps.*
4 *Corp.*, 940 F.2d 775 (2d Cir. 1991). There, plaintiff Ezekwo was a doctor who had been
5 accepted into a residency program at a hospital run by the defendant. She was notified at the
6 outset of her residency that every resident would “serve as ‘Chief Resident’ for four months
7 during his or her third year.” *Id.* at 777. Shortly before her third year began, despite receiving
8 negative performance reviews, she was again told that she would be serving as Chief Resident
9 later that year. After filing certain allegations of race and gender discrimination against her
10 supervisor, Ezekwo was notified that she would not be able to serve as Chief Resident. *Id.* at
11 778. We there found that the plaintiff had more than just a “unilateral expectation of becoming
12 Chief Resident” because she had been “consistently . . . informed that she would rotate through
13 the position of Chief Resident and receive a salary differential as a result of that designation.”
14 *Id.* at 782-83. Indeed, the practice of rotating residents through the Chief Resident position
15 “was expressly highlighted in HHC’s informational documents.” *Id.* at 783. Accordingly, we
16 determined that the written documents, the “course of conduct,” and “Ezekwo’s reasonable
17 reliance thereon” created a contractual right under New York state law that “rose to the level of a
18 significant property interest.” *Id.*

19 The District Court relied on *Ezekwo* to hold that both the Connecticut General Statutes
20 and Marlborough’s Employee Handbook, in conjunction with Looney’s four consecutive
21 reappointments to the Building Official position, gave rise to a sufficiently “consistent course of
22 conduct” to entitle Looney not only to a property interest in his employment, but to a property

1 interest in full-time employment in particular. *Looney*, 2011 WL 3290202, at *9. The court
2 emphasized that while Looney’s interest was “perhaps . . . of lesser value than Ezekwo’s
3 once-in-a-lifetime opportunity to become a chief resident,” full-time employment was still “very
4 important to him.” *Id.* at *8.

5 Two other cases, *Ciambrello v. County of Nassau*, 292 F.3d 307 (2d Cir. 2002) and
6 *Harhay v. Town of Ellington Board of Education*, 323 F.3d 206 (2d Cir. 2003), were
7 distinguished by the District Court, which deemed them to be not “directly on point.” *Looney*,
8 2011 WL 3290202, at *7-*8. We, however, find them to be important precedents.

9 *Ciambrello* concerned a civil service employee who was demoted back to his original
10 position from a recent promotion because Nassau County, his employer, determined he had been
11 promoted in violation of his union’s collective bargaining agreement. *Ciambrello*, 292 F.3d at
12 312. We held that the applicable collective bargaining agreement, which expressly prohibited
13 demotion or disciplinary proceedings absent “incompetence and/or misconduct,” gave the
14 plaintiff a “property interest in his promotion,” as he was demoted in direct violation of the
15 collective bargaining agreement’s terms. *Id.* at 316.

16 *Harhay* similarly involved a property right that we held was established under the terms
17 of the applicable CBA. *See Harhay*, 323 F.3d at 212. Based on the text of the collective
18 bargaining agreement at issue in that case, which provided the plaintiff a “contractual right . . . to
19 be reappointed to any vacant position for which she was qualified,” we determined that it was
20 “clear” that the plaintiff, a tenured school teacher, had a constitutionally protected property right
21 in being reappointed. *Id.*

1 *Ezekwo, Ciambrello, and Harhay* therefore all involved a plaintiff who had been
2 promised something explicitly — either verbally, or in the terms of the applicable collective
3 bargaining agreement — about specific conditions during the future term of their employment.
4 Ezekwo was told both in writing and in person that she could expect to be chief resident during
5 her third year of residency. *Ezekwo*, 940 F.2d at 782. Ciambrello was working pursuant to a
6 collective bargaining agreement that stated he would not be demoted without engaging in
7 incompetence or misconduct. *Ciambrello*, 292 F.3d at 319. Harhay was contractually
8 promised that she would be reappointed to an available position. *Harhay*, 323 F.3d at 212.

9 In this case, however, Looney does not allege that any writing or verbal communication
10 he was a party to indicated that his position as Building Official necessarily was to continue full
11 time, or even that he was guaranteed reappointment to the position. He alleges, instead, simply
12 that it always had been so.

13 In doing so, he relies on a conglomeration of sources that he argues create a sufficient
14 “course of conduct,” including (1) the relevant Connecticut General Statutes sections; (2) a
15 discussion he had in 1994 with then-First Selectman Dean regarding the terms of his initial
16 appointment as Building Official; (3) the 1994 job advertisement for the position of Building
17 Official, which indicated that it came with a “pension/benefits package”; (4) the Marlborough
18 Employee Handbook, which defines a “full[-]time employee” as one who works thirty hours or
19 more per week, and indicates that such employees are entitled to pension and benefits; and (5)
20 the fact that he was reappointed four separate times over a fifteen year span, and that during the
21 entirety of each appointment (until the last) he worked as a full-time employee, receiving
22 pension and benefits.

1 Nothing in any of these documents or interactions, however, indicates that Marlborough
2 or any other party provided a written guarantee or an explicit indication that Looney should
3 expect to be employed full time from appointment to appointment, or throughout the duration of
4 a single appointment. While Looney alleges that the discussion he had and advertisement he
5 saw regarding the position in 1994, before he was first appointed, indicated that he could expect
6 the job to be full time and to come with pension and benefits, those statements were made more
7 than fifteen years ago, and indicated, at best, only the “terms and conditions” of Looney’s initial
8 appointment.

9 Furthermore, Connecticut General Statutes § 29-260 states only that the Building Official
10 is to be *appointed* for four years, and provides a mechanism for *removing* the Building Official
11 from his or her position if and when certain conditions are met. It is silent as to any guarantee
12 or procedural requirement for reducing a Building Official’s hours from full to part time.

13 All of the other documents identified in Looney’s complaint — the Employee Handbook,
14 the town’s Charter, and the CBA — merely define what was or was not considered “full time”
15 employment, and accordingly whether an employee could expect to receive, *inter alia*, pension
16 and health care benefits. None of these items affirmatively indicated that Looney could expect
17 to continue being a full-time employee. In fact, the SAC alleges only that the Board notified
18 Looney of his final term of reappointment in April 2006 by stating that it had decided to
19 “continue [Plaintiff’s] appointment per C.G.S. Sec. 29-260(a), for an additional four years
20 effective August, 2006.” (JA-90, ¶ 17; JA-150.) But the Board said, and therefore
21 guaranteed, nothing about the terms of that appointment when it so notified him.

22

1 The complaint's allegations, without any written or spoken guarantee as to the terms of
2 his employment, leave Looney with nothing more than a "unilateral expectation" that he would
3 continue to be reappointed to his position, and that such reappointment would be full time.
4 Such a unilateral expectation does not qualify as a constitutionally protected property right. *See*
5 *Roth*, 408 U.S. at 577 (stating that an "abstract concern in being rehired" without more is
6 insufficient to create a property interest). Indeed, while none of the documents or interactions
7 on which Looney relies can rightly be said to create an affirmative expectation that he would
8 continue to be a full-time employee, the CBA, which provides in Article 23 that the town may
9 "determine[] that layoffs or reductions in hours are necessary" (JA-168), and provides also a
10 hierarchy by which such layoffs and reductions should take place, affirmatively indicates that he
11 should have been prepared for the possibility that his hours would be reduced.

12 We do not doubt that Looney's interest in his continued full-time employment was
13 important, or that he has felt the negative effects of being deprived of his pension and health care
14 benefits. Unfortunately, however, Looney's interest in these items does not suffice to guarantee
15 them constitutional protection as property rights to which he has any procedural entitlement.³
16 We therefore conclude that Looney has not adequately alleged a constitutionally protected
17 property interest in his full-time employment. Accordingly, the District Court erred in
18

³ The few other Second Circuit and Supreme Court cases cited by the parties that discuss employees' property rights in the specific terms of their employment do not assist Looney either. *See Roth*, 408 U.S. at 576-78 (holding assistant professor did not have property right in renewed employment where no mention of re-employment existed); *O'Connor v. Pierson*, 426 F.3d 187, 197 (2d Cir. 2005) (finding property right in forcing plaintiff to take sick leave without pay, as it was comparable to a suspension without pay); *Finley v. Giacobbe*, 79 F.3d 1285, 1294-95 (2d Cir. 1996) (stating that at-will probationary employees do not have protectable property rights in their employment); *Narumanchi*, 850 F.2d at 72 (holding plaintiff had a property right in his employment that was violated by two-week suspension without pay, but determining that plaintiff had not utilized already available process for airing his grievance).

1 determining that Black was not entitled to qualified immunity as to Looney's procedural due
2 process claim.

3 **II. First Amendment Claim**

4 As with Looney's Fourteenth Amendment claim, the individual defendants moved to
5 dismiss Looney's First Amendment claim, and so the allegations must be read in the "light most
6 favorable to [Looney], and [we] construe the complaint liberally." *Gregory v. Daly*, 243 F.3d
7 687, 691 (2d Cir. 2001) (internal quotation marks omitted). We are bound to make our
8 determination based only on the contents of the complaint. *See McKenna v. Wright*, 386 F.3d
9 432, 436 (2d Cir. 2004) (stating that the court can only consider the "face of the complaint" in
10 deciding whether a defendant is entitled to qualified immunity on a motion to dismiss).

11 In determining whether a defendant is entitled to qualified immunity as to a plaintiff's
12 First Amendment claims, we must first determine whether the plaintiff's constitutional right to
13 free speech was impinged. Generally, government employees are entitled to First Amendment
14 protection when they speak as a private "citizen addressing matters of public concern."
15 *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006); *see also Sousa v. Roque*, 578 F.3d 164, 170 (2d
16 Cir. 2009). A "matter of public concern" is one that relates to a "matter of political, social, or
17 other concern to the community." *Connick v. Myers*, 461 U.S. 138, 146 (1983).

18 Public employees speaking "pursuant to their official duties," however, are not afforded
19 protections under the First Amendment. *Ross v. Breslin*, 693 F.3d 300, 305 (2d Cir. 2012)
20 (internal quotation marks omitted). "This is the case even when the subject of an employee's
21 speech is a matter of public concern." *Id.* It is also true, however, that "a public employee
22 does not relinquish First Amendment rights to comment on matters of public interest [simply] by

1 virtue of government employment.” *Connick*, 461 U.S. at 140. Rather, where the speech at
2 issue “owes its existence to a public employee’s professional responsibilities,” *Garcetti*, 547 U.S.
3 at 421-22, it can properly be said to have been made pursuant to that party’s official duties. *See*
4 *also Ross*, 693 F.3d at 308 (holding the speech at issue was not protected because it “owed its
5 existence” to plaintiff’s “job duties”); *Weintraub v. Bd. of Educ.*, 593 F.3d 196, 203 (2d Cir.
6 2010) (noting that the speech alleged was “part-and-parcel” of the plaintiff’s employment
7 responsibilities (internal quotation marks omitted)).

8 To defeat an assertion of qualified immunity, an employee’s constitutional right to free
9 speech must also be “clearly established” under the law. *Reichle*, 132 S. Ct. at 2093. Further,
10 even where a plaintiff has shown that the defendant’s actions violated a clearly established
11 constitutional right, the defendant may still be entitled to qualified immunity if she is alleged to
12 have acted in an objectively reasonable way. *See Amore*, 624 F.3d at 530.

13 On appeal, defendants argue that they did not, as the District Court determined,
14 “concede” that Looney was not acting in his official capacity, and thus must have been speaking
15 as a private citizen. It is true that defendants failed to cite *Garcetti* or *Weintraub*, or to
16 otherwise make any arguments directly addressing this issue in their motion to dismiss or reply
17 papers below.⁴ But it is also true that both the plaintiff and the District Court cited and relied
18 on *Garcetti*. Looney briefed the issue of whether or not he spoke pursuant to his official duties
19 in his opposition to defendants’ motion to dismiss. The District court also noted that “public
20 employees are not speaking as citizens for First Amendment purposes when they make

⁴ Defendants argue on appeal that their general objection below that Looney did not adequately allege he had engaged in protected speech with any particularity encompassed, *inter alia*, the failure to adequately allege that he spoke as a private citizen.

1 statements ‘pursuant to their official duties.’” *Looney*, 2011 WL 3290202, at *10 (quoting
2 *Garcetti*, 547 U.S. at 421).

3 Thus, the argument is preserved for appeal. *See Higgins v. N.Y. Stock Exch., Inc.*, 942
4 F.2d 829, 832 (2d Cir. 1991) (considering an argument that was raised below because the
5 “argument, although different in emphasis from the point pressed on appeal, at least introduced
6 the notion” in the district court). Furthermore, even if the argument had been waived below, we
7 may exercise our discretion and consider it now. *See Allianz Ins. Co. v. Lerner*, 416 F.3d 109,
8 114 (2d Cir. 2005) (stating that because rule that appellate court will not consider argument not
9 raised below “is prudential, not jurisdictional, we have discretion to consider waived arguments”
10 (internal quotation marks omitted)).

11 We therefore turn to the question of whether Looney’s complaint adequately alleges that
12 his speech was made as a private citizen, rather than in the course of his official duties:

13 The inquiry into whether a public employee is speaking pursuant to her official duties is
14 not susceptible to a brightline rule. Courts must examine the nature of the plaintiff’s job
15 responsibilities, the nature of the speech, and the relationship between the two. Other
16 contextual factors, such as whether the complaint was also conveyed to the public, may
17 properly influence a court’s decision.
18
19 *Ross*, 693 F.3d at 306 (citation and internal quotation marks omitted). The proper inquiry here
20 is a “practical one.” *Garcetti*, 547 U.S. at 424.

21 Looney’s allegations regarding the content and scope of what he said to the town
22 resident, as well as the capacity in which he said it, are vague. The vast majority, if not the
23 totality, of the allegations regarding Looney’s allegedly protected speech made to a town resident
24 appear in paragraphs 23 through 25 of his complaint. They are as follows:

25 23. On or about October 8, 2009, Plaintiff filed a grievance claiming harassment relative
26 to his freedom of speech rights based on the attempt by Plaintiff’s supervisor, Peter

1 Hughes, Planning and Development Director, to limit the communication of information
2 to a Town resident regarding wood burning boiler/stove and smoke discharge as public
3 health concerns.
4

5 24. On October 30, 2009, Peter Hughes responded, “Mr. Looney has been requested to
6 restrict his actions in the office to that of his duties and not to make determinations or
7 engage in discussions of substantive matters outside his job duties concerning other Town
8 agenc[ies] or jurisdiction[s].
9

10 25. On November 5, 2009, in a memorandum to First Selectman Black, Plaintiff
11 continued to protest limits placed on his ability to communicate information to the public
12 relative to the outdoor burning boilers issue whereby Plaintiff was voicing his opinion
13 regarding an outside agency enforcing a cease and desist order against Town residents.
14

15 (JA-91-92.)

16 Looney alleges that he “communicat[ed] . . . information to a Town resident regarding
17 wood burning boiler/stove and smoke discharge as public health concerns.” (JA-92, ¶ 23.)

18 Similarly, he alleges that he “communicate[d] information to the public relative to the outdoor
19 wood burning boilers issue” by “voicing his opinion regarding an outside agency enforcing a
20 cease and desist order against Town residents.” (JA-92, ¶ 25.)

21 As to the scope of his duties as Building Official, Looney alleges generally that “[a]t all
22 times relevant” to the complaint, he was “employed as the Building Official of the Town of
23 Marlborough,” (JA-87, ¶ 1) and as such was responsible for the “administration and enforcement
24 of the State Building Code at the municipal level, including the organization and conduct of the
25 building advisory, inspection and enforcement program” (JA-88, ¶ 7). He further alleges that
26 throughout his employment he kept “uppermost in mind his obligation to enforce the State
27 Building Code to ensure the safety of the townspeople.” (JA-91, ¶ 21.)

28 Beyond this, the complaint does not allege specifics as to what Looney said, or the
29 context in which he said it. The job falls to us to so infer, reading all available allegations in the

1 “light most favorable” to Looney. *Daly*, 243 F.3d at 691 (internal quotation marks omitted).

2 In the absence of anything more specific, Looney’s vague allegations force us to
3 conclude that, as the town employee who oversaw the entire “organization and conduct of the
4 building advisory, inspection and enforcement programs,” particularly in light of his
5 self-described “obligation to enforce the State Building Code,” the alleged speech set forth in the
6 complaint was closely related to his work as Building Official. (JA-88, ¶ 7.) This
7 understanding is furthered by Looney’s dual allegations that (1) it was a part of his job to “ensure
8 the safety of the townspeople” by enforcing the relevant building codes, and (2) the smoke
9 discharge that was causing the issue discussed regarding the wood burning stoves or boilers was
10 a “public health concern[.]” (JA-91-92, ¶¶ 21, 23.) The only sensible way to interpret
11 Looney’s allegations is that he spoke on these issues *because* he was in an official position that
12 required, or at least allowed, him to do so. It follows that these statements owed their existence
13 to his position as the Building Official. As a consequence, Looney has not adequately alleged
14 that he spoke as a private citizen.

15 It is true that Looney alleges that his supervisor, in admonishing him for this alleged
16 speech, requested that he refrain from discussing matters “*outside* [Looney’s] job duties.”
17 (JA-92, ¶ 24 (emphasis added).) It is also alleged that his speech regarded an “*outside* agency
18 enforcing a cease and desist order against Town residents.” (JA-92, ¶ 25 (emphasis added).)
19 But “[f]ormal job descriptions often bear little resemblance to the duties an employee actually is
20 expected to perform, and the listing of a given task in an employee’s written job description is
21 neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the
22 employee’s professional duties for First Amendment purposes.” *Garcetti*, 547 U.S. at 424-25.

1 Similarly, whether “speech was unprotected does not rest on the fact that [the] speech was made
2 in the workplace as opposed to elsewhere.” *Ross*, 693 F.3d at 307.

3 The face of Looney’s complaint alleges nothing more than a vague set of circumstances
4 regarding speech which necessarily “owed its existence” to Looney’s role as Building Official.
5 *Id.* at 308. Because the speech at issue is alleged to have been made in the course of Looney’s
6 official duties, he has not adequately alleged that such speech is entitled to First Amendment
7 protection.⁵

8 The District Court therefore erred in holding that Black, Clark, and LaBella were not
9 entitled to qualified immunity as to Looney’s First Amendment claim.

10 CONCLUSION

11 For the aforementioned reasons, the order of the District Court denying Black, Riva, and
12 LaBella qualified immunity is **REVERSED**, and the case is **REMANDED** with the direction to
13 enter judgment for the Defendants-Appellants.

⁵ As Looney has not adequately alleged that the underlying speech is entitled to First Amendment protection, to the extent his First Amendment claims may properly be categorized as claims of retaliation for filing a petition against the Defendants-Appellants, rather than freedom of speech claims, they necessarily fail as well. *See Garcetti*, 547 U.S. at 424.