

12-432-cv
Ricciuti v. Gyzenis

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

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4
5 August Term, 2015
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7 (Argued: March 9, 2016

Decided: August 24, 2016)

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9 Docket No. 12-432-cv
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13 REBECCA RICCIUTI,

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15 *Plaintiff-Appellee,*

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17 v.
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19 GARRY GYZENIS, EMILE GEISENHEIMER,
20 DAVID SMITH, LAWRENCE MOON,
21 EDWARD KRITZMAN, ROBERT NOLAN,
22 TOWN OF MADISON,

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24 *Defendants-Appellants.*
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28 Before: LEVAL, POOLER, and WESLEY, *Circuit Judges.*
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30 Appeal from a December 28, 2011 order of the United States District Court
31 for the District of Connecticut (Kravitz, J.), denying defendants' motion for

1 summary judgment. The district court held that police officials were not entitled
2 to summary judgment of qualified immunity on plaintiff's claim that they
3 retaliated against her for protected speech in violation of the First Amendment.
4 We affirm.

5 Affirmed and remanded.

6

7 SCOTT M. KARSTEN, West Hartford, CT, *for*
8 *Defendants-Appellants.*

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10 GOUTAM U. JOIS, Gibson Dunn & Crutcher LLP
11 (Matthew D. McGill, James A. Macleod, *on the brief*),
12 New York, NY; Norman Pattis, Pattis Law Firm, LLC,
13 New Haven, CT, *for Plaintiff-Appellee.*

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15 POOLER, *Circuit Judge:*

16 According to Rebecca Ricciuti, something was amiss at the Madison Police
17 Department. Supervisors were assigning themselves unnecessary overtime to
18 "pad their pensions," all while the department was in dire need of new
19 equipment that it could not afford. After Ricciuti spoke to local leaders about
20 what she saw as a "scam," the police chief ordered an internal affairs
21 investigation of her. Two months later, she was fired.

1 Ricciuti sued the Town of Madison, its acting chief of police, and members
2 of its police commission, alleging that she was fired for exercising her First
3 Amendment right to free speech. Defendants moved for summary judgment,
4 arguing, among other things, that the police officials who fired Ricciuti were
5 entitled to qualified immunity. The district court (Kravitz, J.), held that the
6 officials had not shown entitlement to summary judgment of qualified immunity
7 because, accepting Ricciuti's facts as true and drawing all permissible factual
8 inferences in her favor, she had shown that they had violated her clearly
9 established constitutional rights. *Ricciuti v. Gyzenis*, 832 F. Supp. 2d 147, 168 (D.
10 Conn. 2011). Accepting Ricciuti's facts as true, as we must on this interlocutory
11 appeal, we agree with the district court that defendants have not shown
12 entitlement to summary judgment of qualified immunity. Accordingly, we affirm
13 and remand the case for trial.

14 BACKGROUND

15 Shortly after receiving her master's degree in forensic science, Rebecca
16 Ricciuti was hired as a patrol officer in the Madison Police Department. Early on,
17 Ricciuti expressed concerns about a number of issues that she saw in the

1 department. In Ricciuti's view, officers were conducting improper interrogations,
2 mishandling evidence, and inadequately trained to use their firearms. The
3 department also needed new equipment—police cruisers had “mismatched snow
4 tires, broken radios, . . . unsafe prisoner cages, high mileage, broken air
5 conditioning, and broken radar unit[s].” App'x at 272.

6 One day, Ricciuti expressed her concern about the outdated equipment to
7 a lieutenant. He told Ricciuti that the department couldn't afford to purchase
8 new equipment because the money was needed to pay overtime to department
9 supervisors. On her own initiative, Ricciuti then drafted a new schedule that
10 would have cut down on the amount of overtime that was needed, thereby
11 saving the department money that could have been used to purchase new
12 equipment. But when Ricciuti presented the schedule to the lieutenant, he told
13 her that scheduling was “none of [her] business” and that he needed the
14 overtime to “pad [his] pension.” App'x at 271. Ricciuti says that, “as a taxpayer
15 in Madison,” she was “disgusted by the amount of money being spent on
16 unnecessary overtime.” App'x at 272.

1 Ricciuti raised her concerns about the department's schedule at a meeting
2 with the new chief of police, Robert Nolan. The chief told Ricciuti that he was
3 open to suggestions on how to improve the schedule. Ricciuti teamed up with
4 another officer, Scott Pardales, to draft a "New Schedule Proposal" — a 17-page
5 document that identified problems with the current schedule and proposed
6 several reforms. App'x at 291-307. One of the pages addressed "overtime
7 considerations," App'x at 305, but nothing in the presentation addressed the
8 issue of supervisors assigning themselves unnecessary overtime at taxpayer
9 expense.

10 Separately, Ricciuti and Pardales prepared a second document, which the
11 parties refer to as the "overtime matrix." App'x at 309-319. The matrix showed
12 the schedule of the department's supervisors and noted the number of days
13 during the week when a supervisor's shift was "vacant," requiring that another
14 supervisor work overtime to cover the shift. The matrix included a series of
15 slides titled "Cost to Town as Result of Mismanagement of Supervisor's
16 Schedule," which calculated in detail the amount of taxpayer money that was
17 being wasted due to mismanagement. App'x at 311-14. In total, the matrix

1 estimated that, in 2008, Madison taxpayers spent at least \$100,000 for
2 unnecessary overtime for supervisors.

3 Ricciuti contends that she prepared the overtime matrix on her own time
4 and on her own initiative. No one at the police department asked Ricciuti to look
5 into mismanagement of the supervisor schedule. Unlike the new schedule
6 proposal, the overtime matrix did not bear the Madison Police Department logo,
7 and Ricciuti never presented it to department supervisors. She contends that all
8 of the information in the matrix was public information and that past schedules
9 of supervising officers and staffing levels were easily accessible through a
10 Freedom of Information Act request.

11 Ricciuti and Pardales shared the matrix with local political leaders.
12 Pardales met with Madison First Selectman Al Goldberg, the chief executive and
13 chief administrative officer of the town of Madison, as well as a member of the
14 town's Board of Finance, to present the matrix. Ricciuti e-mailed the matrix to a
15 former town official, writing, "Here is the file that I put together. . . . Hopefully
16 [Pardales's] meeting with Goldberg opens the door to this scam." App'x at 67.
17 Ricciuti also called Walter Lippmann—a Madison resident, vocal critic of the

1 police department, and frequent attendee of Police Commission meetings—and
2 gave him a copy of the matrix. Like Ricciuti, Lippmann had been researching the
3 issue of overtime at the department and was concerned about the amount of
4 money that Madison was spending on overtime wages.

5 One week after Ricciuti met with Lippman, Chief Nolan e-mailed all
6 members of the department to remind them of their duties to follow department
7 standards of conduct, particularly those regarding “Malicious Gossip,”
8 “Divulging Information,” and “Dissemination of Information.” App’x at 52 ¶ 71.
9 Shortly thereafter, Chief Nolan asked a lieutenant to conduct an internal affairs
10 investigation of Ricciuti. The lieutenant testified that he was assigned to
11 investigate Ricciuti because “[t]here was a matrix that was out in the public” and
12 there were blogs and e-mails circulating that were critical of the department.
13 App’x at 155.

14 Two months after Chief Nolan initiated the investigation, he met with
15 Ricciuti twice to discuss her job performance. At the second meeting, a dispute
16 arose over the presence at the meeting of a lieutenant whom Ricciuti disliked and
17 distrusted. Ricciuti told Chief Nolan that she was uncomfortable having their

1 conversation in the lieutenant's presence. According to Ricciuti, Chief Nolan then
2 said that he would check with the police board about whether someone besides
3 the lieutenant could attend another meeting the following day. According to
4 Nolan, Ricciuti unilaterally terminated the meeting, which he viewed as
5 insubordinate and unacceptable.

6 Chief Nolan says that he reported Ricciuti's behavior to the police
7 commission, which then voted unanimously to fire her. The commission did not
8 provide a reason for its decision. According to Chief Nolan, the Commission
9 fired Ricciuti because of her conduct at the second meeting. According to
10 Ricciuti, however, the Commission fired her in retaliation for speaking out about
11 corruption at the department.

12 Ricciuti sued the Town of Madison, its acting chief of police, and members
13 of its police commission, alleging that they unlawfully retaliated against her for
14 speech that was protected by the First Amendment. Defendants moved for
15 summary judgment, arguing that Ricciuti's speech was not protected because she
16 had spoken as an employee addressing private workplace grievances, that
17 Ricciuti would have been fired even had she not spoken out, and that her speech

1 was more disruptive than valuable. The individual defendants also argued that
2 they were entitled to qualified immunity because their conduct was not
3 prohibited by clearly established law at the time of Ricciuti's termination.

4 The district court denied the motion. *See Ricciuti v. Gyzenis*, 832 F. Supp. 2d
5 147 (D. Conn. 2011). The court concluded that, resolving all ambiguities and
6 drawing all permissible inferences in favor of Ricciuti, Ricciuti's speech was
7 protected under the First Amendment, a reasonable juror could conclude that
8 there was a causal connection between the speech and her termination, and there
9 were genuine issues of material fact on the question whether the speech was
10 more disruptive than valuable. The court also concluded that the individual
11 defendants were not entitled to qualified immunity because "the law was
12 sufficiently clear in 2009 that a government employer should have known [with
13 respect to Ricciuti's disputed version of the facts] that it could not fire an
14 employee because she spoke out as a citizen about a matter of public concern."
15 *Ricciuti*, 832 F. Supp. 2d at 165.

16 Defendants now appeal the district court's denial of qualified immunity.

DISCUSSION

Ordinarily, we lack jurisdiction to review the denial of a motion for summary judgment. *See* 28 U.S.C. § 1291; *Walczyk v. Rio*, 496 F.3d 139, 153 (2d Cir. 2007). Under the “collateral order” doctrine, however, there is an exception to this general rule “when the denied motion was based on a claim of immunity, at least to the extent the immunity claim presents a ‘purely legal question.’” *Walczyk*, 496 F.3d at 153 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)).

[D]efendants may appeal from denials of qualified immunity if they are willing, for the purposes of appeal only, to pursue the appeal on the basis of stipulated facts or the facts as alleged by the plaintiff. Alternatively, the defendants may appeal if they assume that all the facts that the district court found to be disputed are resolved in the plaintiff’s favor. While we may not inquire into the district court’s determination that there was sufficient evidence to create a jury question, we may resolve whether, as a matter of law, the defendants are entitled to qualified immunity either because the law was not clearly established or because, on the facts assumed for the purposes of appeal, the defendants’ conduct did not constitute a violation of a constitutional right.

Skehan v. Vill. of Mamaroneck, 465 F.3d 96, 104-05 (2d Cir. 2006) (citation omitted), *overruled on other grounds by Appel v. Spiridon*, 531 F.3d 138 (2d Cir. 2008); *see also Golodner v. Berliner*, 770 F.3d 196, 201 (2d Cir. 2014).

1 “We review *de novo* a decision by a district court to deny summary
2 judgment on the basis that a public official is not entitled to qualified immunity.”
3 *Golodner*, 770 F.3d at 201. The Supreme Court has articulated a two-prong test to
4 determine whether an official is entitled to qualified immunity. See *Saucier v.*
5 *Katz*, 533 U.S. 194, 201 (2001). “Qualified immunity shields federal and state
6 officials from money damages unless a plaintiff pleads facts showing (1) that the
7 official violated a statutory or constitutional right, and (2) that the right was
8 ‘clearly established’ at the time of the challenged conduct.” *Ashcroft v. al-Kidd*,
9 563 U.S. 731, 735 (2011) (citation omitted); *Pearson v. Callahan*, 555 U.S. 223, 236
10 (2009).

11 “The Supreme Court has long recognized that the First Amendment
12 affords a degree of protection to public employees to exercise the right of free
13 speech without risk of retaliation by the State employer if the employee’s speech
14 in question is ‘on matters of public interest.’” *Lynch v. Ackley*, 811 F.3d 569, 577
15 (2d Cir. 2016) (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

16 Recognizing both that public employees do not relinquish the First
17 Amendment rights they would otherwise enjoy as citizens simply
18 because of their public employment, and that government could not
19 function if every employment decision became a constitutional

1 matter, courts try to arrive at a balance between the interests of the
2 [public employee], as a citizen, in commenting upon matters of
3 public concern and the interest of the State, as an employer, in
4 promoting the efficiency of the public services it performs through
5 its employees.

6 *Nagle v. Marron*, 663 F.3d 100, 106 (2d Cir. 2011) (citations and internal quotation
7 marks omitted).

8 In pursuit of this balance, the Supreme Court has identified three
9 circumstances in which public employee speech is not protected from retaliation:

10 First, speech about *personal* matters, as opposed to “matters of public
11 concern,” is not protected from retaliation. *Connick v. Myers*, 461 U.S.
12 138, 147 . . . (1983). Second, even speech on matters of public concern
13 is not protected from retaliation unless the employee’s First
14 Amendment interests outweigh government employers’ legitimate
15 interests in efficient administration. *Pickering*, 391 U.S. at 568
16 Third, speech made by employees “pursuant to . . . official duties”
17 rather than “as a private citizen” is not protected from retaliation.
18 See *Garcetti [v. Ceballos]*, 547 U.S. 410, 421-22 (2006)].

19 *Lynch*, 811 F.3d at 578 (footnote omitted).

20 Before *Garcetti*, to determine whether public employee speech was
21 protected from retaliation, courts focused on the two-step inquiry outlined in
22 *Pickering*. See, e.g., *Melzer v. Bd. of Educ.*, 336 F.3d 185, 193 (2d Cir. 2003). Under
23 the “*Pickering* test,” the court “first . . . determine[d] whether the speech which
24 led to an employee’s discipline relate[d] to a matter of public concern;

1 and, second, if so, the balance between free speech concerns [was] weighed
2 against efficient public service to ascertain to which the scale tips." *Id.*

3 In *Garcetti*, the Court made clear that even if a public employee's speech
4 relates to a matter of public concern, and even if the speech passes the *Pickering*
5 "balancing" test, the speech may nevertheless lack protection from retaliation if it
6 was made "pursuant to [the employee's] official duties," rather than "as a private
7 citizen." 547 U.S. at 421-22. The plaintiff in *Garcetti*, a deputy district attorney
8 named Ceballos, had prepared a memo recommending that a case be dismissed
9 in light of inaccuracies in an affidavit used to obtain a search warrant. *Id.* at 413-
10 14. The parties stipulated that Ceballos had prepared the memo pursuant to his
11 employment duties. *Id.* at 424. According to the Court, the "controlling factor" in
12 the case was that the attorney's "expressions were made pursuant to his duties as
13 a calendar deputy." *Id.* at 421. The Court explained,

14 Ceballos wrote his disposition memo because that is part of what he,
15 as a calendar deputy, was employed to do. . . . The significant point
16 is that the memo was written pursuant to Ceballos' official duties.
17 Restricting speech that owes its existence to a public employee's
18 professional responsibilities does not infringe any liberties the
19 employee might have enjoyed as a private citizen. It simply reflects
20 the exercise of employer control over what the employer itself has
21 commissioned or created. Contrast, for example, the expressions

1 made by the speaker in *Pickering*, whose letter to the newspaper had
2 no official significance and bore similarities to letters submitted by
3 numerous citizens every day.

4 *Id.* at 421-22 (citation omitted).

5 As noted, on defendants' motion for summary judgment of qualified
6 immunity, the district court ruled that, if all disputed facts were resolved in
7 Ricciuti's favor, defendants would not be entitled to summary judgment of
8 qualified immunity. On appeal, defendants challenge the district court's ruling
9 on two grounds, both relating to the scope of *Garcetti*.

10 First, defendants argue that the district court's ruling must be vacated
11 because the court relied heavily on this Court's decision in *Weintraub v. Board*
12 *of Education*, 593 F.3d 196 (2d Cir. 2010), which had not yet been decided at the
13 time of the defendants' challenged actions. In *Weintraub*, we ruled that an
14 employee's speech can be found to be within the scope of the employee's duties
15 within the meaning of *Garcetti* when it is "part-and-parcel" of the employee's
16 general work, even if the employee's job duties did not explicitly call for such
17 speech. Defendants contend that *Garcetti*'s scope, as perceived by the district

1 court, was not “clearly established” when defendants acted and therefore cannot
2 be the basis for a decision in Ricciuti’s favor.

3 Because *Weintraub* was issued after defendants fired Ricciuti, defendants
4 rightly note that they could not have relied on that decision in deciding whether
5 to fire Ricciuti. But while the district court appropriately relied on *Weintraub*’s
6 gloss on *Garcetti* in determining whether Ricciuti established the violation of a
7 constitutional right, the court did not rely on *Weintraub* in determining whether
8 that right was clearly established at the time of the defendants’ conduct. On that
9 question, the court relied exclusively on *Garcetti* and pre-*Garcetti* case law, which
10 clearly established that Ricciuti could not be fired simply because her speech
11 owed its existence to her employment. Thus, defendants are not entitled to
12 qualified immunity simply because they did not have the benefit of our decision
13 in *Weintraub* at the time of their actions.

14 A further problem with defendants’ argument is that it relies on their
15 version of the facts, not Ricciuti’s. Unlike the plaintiff in *Garcetti*, Ricciuti does
16 not concede that she prepared the overtime matrix pursuant to her official duties.
17 Instead, she vigorously disputes the issue, insisting that no one asked her to

1 create the matrix, that she made it on her own time, and that the matrix
2 contained only public information. Moreover, unlike the plaintiff in *Garcetti*,
3 Ricciuti communicated her concerns to members of the public and contacted
4 local leaders to push for reform, just as a private citizen exercising her First
5 Amendment rights would do. Defendants, of course, dispute these facts. They
6 dispute, for example, that the matrix contained only public information, noting
7 that Ricciuti stated in her deposition that she relied in part on information
8 contained in a clipboard chart posted in a sergeant's private office. But the
9 district court concluded that the evidence proffered by Ricciuti on this issue—
10 including an affidavit by a former police officer stating that the information
11 contained in the matrix was public and available through Freedom of
12 Information Act requests—was sufficient to create a genuine issue of material
13 fact. *Ricciuti*, 832 F. Supp. 2d at 166. And on this interlocutory appeal, we “may
14 not inquire” into whether “there was sufficient evidence to create a jury
15 question.” *Skehan*, 465 F.3d at 105. We *must* accept that “all the facts that the
16 district court found to be disputed are resolved in the plaintiff's favor.” *Id.* Under
17 Ricciuti's version of the facts, there was no doubt that under the prevailing

1 decisions, Ricciuti's speech (accepting her version of the facts) was not made
2 "pursuant to" her official duties as a patrol officer.

3 Defendants' second argument fares no better. It is based on our court's
4 decision in *Taravella v. Town of Wolcott*, 599 F.3d 129 (2d Cir. 2010), that "even
5 where the law is 'clearly established' and the scope of an official's permissible
6 conduct is 'clearly defined,' the qualified immunity defense also protects an
7 official if it was 'objectively reasonable' for him at the time of the challenged
8 action to believe his acts were lawful." *Id.* at 134 (alteration in original) (internal
9 quotation marks omitted)); *see also Walczyk*, 496 F.3d at 154 ("Even if the right at
10 issue was clearly established in certain respects, . . . an officer is still entitled to
11 qualified immunity if 'officers of reasonable competence could disagree' on the
12 legality of the action at issue in its particular factual context." (quoting *Malley v.*
13 *Briggs*, 475 U.S. 335, 341 (1986))).

14 Defendants contend that because Ricciuti's speech owed its existence to
15 her employment, it was "reasonable" of the defendants to believe their conduct
16 was lawful under *Garcetti*. *Taravella's* arguable creation of an additional
17 "reasonableness" hurdle a plaintiff must satisfy to prevail in a suit against a

1 public officer alleging a constitutional tort has not been without controversy. *See*
2 *Taravella*, 599 F.3d at 136-48 (Straub, J., dissenting); *Walczyk*, 496 F.3d at 165-71
3 (Sotomayor, J., concurring).

4 We need not resolve whether the “reasonableness” of a defendant-officer’s
5 belief that his conduct did not violate the law is an independent basis for
6 granting qualified immunity, over and above lack of clarity in the law, because,
7 in any event, on the factually disputed record presented to the district court on
8 the defendants’ motion for summary judgment, the obligation to resolve factual
9 disputes in the plaintiff’s favor compelled a denial of the defendants’ motion for
10 summary judgment on the basis of qualified immunity.

11 As we have explained above, no reasonable officer faced with Ricciuti’s
12 version of the facts could have concluded that Ricciuti’s speech was made
13 “pursuant to” her official duties as a patrol officer under the meaning of *Garcetti*
14 merely because her speech owes its existence to her job. Defendants therefore
15 failed to show entitlement to fire Ricciuti or entitlement to qualified immunity
16 under her version of the facts. The law on this issue was clearly established at the

1 time Ricciuti was fired, even though our decision in *Weintraub* had not yet been
2 issued. Thus, defendants' conduct was not "objectively legally reasonable."

3 Defendants offer only one additional consideration as to why their actions
4 were objectively legally reasonable: they note that Ricciuti was a probationary,
5 at-will employee. But it has been clearly established for decades that the
6 government may not retaliate against even an "at-will" employee for protected
7 speech. See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), *overruled on other grounds*
8 *by Rust v. Sullivan*, 500 U.S. 173 (1991).

9 For at least a quarter-century, th[e] [Supreme] Court has made clear
10 that even though a person has no "right" to a valuable governmental
11 benefit and even though the government may deny him the benefit
12 for any number of reasons, there are some reasons upon which the
13 government may not rely. It may not deny a benefit to a person on a
14 basis that infringes his constitutionally protected interests—
15 especially, his interest in freedom of speech.

16 *Id.* Thus, the fact that Ricciuti was a probationary employee is irrelevant, and no
17 officer of reasonable competence could believe otherwise. It follows that, at least
18 on Ricciuti's version of the facts, defendants failed to show that their conduct
19 was objectively legally unreasonable.

CONCLUSION

For the foregoing reasons, the order of the district court is AFFIRMED and REMANDED for trial.