

SECOND CIRCUIT REVIEW

Expert Analysis

Clarifying Bounds of Protected Speech for Public Employees

This month, we discuss *Matthews v. City of New York*,¹ wherein the U.S. Court of Appeals for the Second Circuit identified circumstances in which public-employee speech qualifies for First Amendment protection. In its decision, written by Judge John M. Walker, Jr. and joined by Judge Peter W. Hall and Judge Garvan Murtha,² the court concluded that, when a public employee engages in speech pertaining to a subject that does not fall within the employee's duties, and does so in a manner in which ordinary citizens would be expected to engage, the employee speaks as a citizen whose speech is protected, not as a public employee, whose speech may be unprotected.

Background

On Feb. 28, 2012, plaintiff, NYPD police officer Craig Matthews, filed a complaint under 42 U.S.C. §1983 alleging that the City of New York retaliated against him in violation of the First Amendment to the U.S. Constitution and Article I, §8 of the New York State Constitution for speaking about the 42nd Precinct's arrest quota policy. Matthews alleged that, beginning in 2008, unnamed supervisors in the precinct implemented a quota system mandating the number of arrests, summons, and stop-and-frisks that police officers must



By
**Martin
Flumenbaum**



And
**Brad S.
Karp**

conduct. Matthews further alleged that, over time, this quota system became more sophisticated as a "point" system was established and different point values were awarded or taken away based on the type of police action.

The court clarified that there is a limit to a government employer's reach with respect to restriction of employee speech on matters of public concern that do not fall within the employee's job function.

As a result of this quota system, and due to his belief that it had a negative impact on the NYPD, Matthews reported the system to the precinct's commanding officer in February 2009. Matthews talked with the precinct's commanding officer on several other occasions in 2009 and then again in 2011 when a new commanding officer assumed leadership of the precinct. In his complaint, Matthews alleged that defendants retaliated against him following his reports to his precinct's leadership by giving him punitive assignments, denying him overtime and leave, separating him from his career-long partner, exposing him to humiliating treatment by supervisors, and unfairly giving him nega-

tive performance evaluations.³

Prior Proceedings

Defendants moved to dismiss Matthews' complaint, arguing that his speech was made in his capacity as an NYPD employee pursuant to his official employment duties and was therefore unprotected speech. On April 12, 2012, district court judge Barbara S. Jones of the Southern District of New York granted defendants' motion to dismiss. On Nov. 28, 2012, a panel of the Second Circuit vacated the dismissal and remanded the case to the district court on the basis that the record had not been fully developed by the trial court and also to determine whether Matthews spoke "pursuant to his official duties when he voiced the complaints."⁴

On remand, Matthews' case was reassigned to district court judge Paul A. Engelmayer. As further discovery was conducted, the record before the district court included evidence related to Matthews' employment duties, the NYPD patrol guide, and the channels available for both NYPD employees and civilians to communicate complaints to the NYPD. On May 20, 2013, defendants moved for summary judgment. On July 29, 2013, the district court granted defendants' motion, holding that Matthews' speech was made as an employee of the NYPD, not as a citizen, and thus was not protected by the First Amendment.

Second Circuit's Decision

The Second Circuit again reversed and remanded the district court's decision, this time holding that Matthews' speech was pro-

MARTIN FLUMENBAUM and BRAD S. KARP are members of Paul, Weiss, Rifkind, Wharton & Garrison. CHARLES J. HAMILTON, a litigation associate at the firm, assisted in the preparation of this column.

tected by the First Amendment. The court explained that when a public employee, whose duties do not involve formulating, implementing, or providing feedback on a policy that implicates a matter of public concern, engages in speech concerning that policy, and does so in a manner in which ordinary citizens would be expected to engage, he or she speaks as a citizen, not as a public employee.

In its remand order, the court directed the district court to determine whether the NYPD had an adequate justification for treating Matthews differently from any other member of the public based on its needs as an employer—and, if necessary, to analyze whether a reasonable jury could find that Matthews suffered retaliation as the result of his speech.⁵

Standard for Analyzing

Citing its decision in *Cox v. Warwick Valley Central School District*,⁶ the court began its analysis by noting that a plaintiff who asserts a First Amendment retaliation claim must establish that (1) his speech or conduct was protected by the First Amendment, (2) the defendant took an adverse action against him, and (3) there was a causal connection between this adverse action and the protected speech.

The court then narrowed its focus to First Amendment retaliation claims in the public-employment context, citing a U.S. Supreme Court decision, *Garcetti v. Ceballos*,⁷ which outlined a two-step inquiry to determine whether a public employee's speech is protected. The first inquiry examines whether the employee spoke on a matter of public concern. Encompassed in that inquiry are two additional queries: (1) whether the subject of the employee's speech was a matter of public concern, and (2) whether the employee spoke "as a citizen" rather than solely as an employee.

The court noted that, if the answer to either of these queries is no, a court need not proceed further, for the public-employee plaintiff has failed to establish a necessary element for his First Amendment retaliation claim. If, however, the answer to both questions is yes, then a court should proceed to the second inquiry, whether the government entity

had an adequate justification for treating the employee differently from any other member of the public based on the government's needs as an employer. Because the district court's grant of summary judgment rested on a determination that Matthews spoke as an employee, the court stated that its opinion addressed only that issue.

Evaluating whether Matthews' speech was made as a public employee or as citizen, the court returned to *Garcetti*, which established a separate two-part inquiry for determining whether a public employee speaks as a citizen, asking (1) whether the speech falls outside of the employee's "official responsibilities," and (2) whether a civilian analogue for the employee's speech exists. The court added that it had followed this approach previously, citing, as examples, its decisions in *Weintraub v. Board of Education*⁸ and *Ross v. Breslin*.⁹

The court explained that when a public employee, whose duties do not involve formulating, implementing, or providing feedback on a policy that implicates a matter of public concern, engages in speech concerning that policy, and does so in a manner in which ordinary citizens would be expected to engage, he or she speaks as a citizen, not as a public employee.

Turning first to the official duties part of the inquiry, the court noted that the Supreme Court in *Garcetti* adopted a functional approach in evaluating an employee's job duties, highlighting the court's view that "the appropriate inquiry is a practical one directed to the regular duties of the employee."¹⁰ Invoking its opinion in *Ross*, the court stated that whether a public employee is speaking pursuant to his official duties is not susceptible to a bright-line rule, and that a court must examine the nature of the plaintiff's job responsibilities, the nature of the speech and the relationship between the two.¹¹

Application to Claim

With these principles in mind, the court considered both Matthews' testimony dur-

ing trial and the duties that are delineated in the NYPD patrol guide. In addition, the court considered Section 207-21 of the patrol guide, titled "Allegations of Corruption and Other Misconduct Against Members of the Service," to determine the existence of a police officer's affirmative duties beyond those outlined in the section of the patrol guide outlining specific duties.

The court determined that Matthews' speech—consisting of several discussions with his precinct's leadership about the existence of a quota system and complaints that the system was causing unjustified stops—related to precinct-wide policy. The court further concluded that such policy-oriented speech fell outside of Matthews' job function or responsibility.

Defendants countered by pointing to the language of Section 207-21—specifically, that "[a]ll members of the service have an absolute duty to report any corruption or other misconduct"¹²—to support the argument that reporting the quota system was, in fact, part of Matthews' job function. The court rejected the defendants' reasoning with respect to Matthews' absolute duty. Going further, it drew a distinction between hypothetical speech identifying an individual violation committed by police officers and Matthews' speech addressing a broad, precinct-wide policy, noting that while the former would fall within an officer's absolute duty pursuant to Section 207-21, the latter would not.

In supporting this position, the court emphasized that Matthews "had no role in setting policy; he was neither expected to speak on policy nor consulted on formulating policy."¹³ The court noted that even if Matthews' speech had fallen within the absolute duty established by Section 207-21, an employer's ability to prescribe such general duties still would greatly limit First Amendment protection for wide swaths of employee speech.

The court recognized the increased relevance of reporting misconduct in the law enforcement context, but concluded that this factor would be more appropriately considered by the district court on remand in its evaluation of the second inquiry outlined in *Garcetti*—whether the government employer had an adequate justification for its actions.

Civilian Analogue

The court also analyzed whether there was a comparable civilian analogue for Matthews' speech. It cited its decision in *Jackler v. Byrne*,¹⁴ defining a relevant civilian analogue as speech made through channels available to citizens generally. In the court's view, the critical factor was whether Matthews could have engaged in his speech even if he were not an NYPD officer. Responding to this question in the affirmative, the court cited testimony by the defendants' witnesses, who testified about monthly community council meetings where citizens could raise concerns with the precinct's leadership. The fact that Matthews raised his concerns about the quota system to the same precinct leaders who attended the monthly community council meetings reinforced the court's conclusion that Matthews had spoken through a channel available to citizens, generally.

In reaching this conclusion, the court disagreed with the district court, which found dispositive the fact that Matthews could speak to the precinct leaders "more readily, more frequently, and more privately than could an average citizen."¹⁵ In response, the court noted that it did not find the relative degree of access to be material, but rather whether the same or similar channel of communication exists for the ordinary citizen. The court added that were it to confine the civilian analogue analysis to the "degree of access" approach relied on by the district court, then internal public employee speech on matters of public concern not made as part of regular job duties would not likely receive First Amendment protection due to the fact that employees generally have better access to supervisors within their place of employment.

Conclusion

In reversing the district court's grant of summary judgment, the court clarified that there is a limit to a government employer's reach with respect to the restriction of employee speech on matters of public concern that do not fall within the employee's job function. While the court did confine its opinion to a relatively narrow set of circumstances, the ruling serves as an additional

consideration for government employers weighing the consequences of infringing upon its employees' First Amendment rights. It remains to be seen whether the district court will find that defendants had adequate justification for restricting Matthews' speech.

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1. *Matthews v. City of New York*, No. 13-2915-cv, 2015 WL 795238 (2d Cir. Feb. 26, 2015).

2. Judge J. Garvan Murtha, of the U.S. District Court for the District of Vermont, sitting by designation.

3. *Matthews*, 2015 WL 795238 at *1.

4. *Matthews v. City of New York*, 488 Fed. Appx. 532, 533 (2d Cir. 2012).

5. *Matthews*, 2015 WL 795238 at *4.

6. *Cox v. Warwick Valley Cent. School Dist.*, 654 F.3d 267, 272 (2d Cir. 2011).

7. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) (citing *Pickering v. Bd. of Educ. of Twp High Sch. Dist. 205, Will Cnty.*, 391 U.S. 563, 568 (1968)).

8. *Weintraub v. Bd. of Educ. of City Sch. Distr. of City of N.Y.*, 593 F.3d 196, 203 (2d Cir. 2010).

9. *Ross v. Breslin*, 693 F.3d 300, 306 (2d Cir. 2012).

10. *Garcetti*, 547 U.S. at 421.

11. *Ross*, 693 F.3d at 306.

12. *Matthews*, 2015 WL 795238 at *6.

13. *Id.*

14. *Jackler v. Byrne*, 658 F.3d 225, 238 (2d Cir. 2011).

15. *Matthews v. City of New York*, 957 F.Supp.2d 442, 465 (S.D.N.Y. 2013).