UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CRAIG MATTHEWS

Plaintiff,

v.

THE CITY OF NEW YORK, et al.,

Defendants.

12 CV 1354 (BSJ)

Order

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

This case arises from allegations that Plaintiff, Officer Craig Matthews, was retaliated against for complaining about an illegal quota system in the 42nd Police Precinct. Plaintiff filed suit under 42 U.S.C. § 1983, alleging violation of his First Amendment rights. The Defendant, the City of New York, moves to dismiss on the ground that Plaintiff did not engage in constitutionally protected speech. For the reasons that follow, the City's motion to dismiss is GRANTED.

BACKGROUND

Matthews alleges that, "[s]ince 2008, supervisors in the 42nd Precinct have developed and implemented a system of quotas mandating numbers of arrests, summonses, and stop-and-frisks" as well as a "detailed monitoring system that includes computer reports that use color coding to categorize officers in terms of

their compliance with quotas." (Complaint, ¶ 2.) Because Matthews believed that the quota system "violate[d] the NYPD's core mission and his own commitment as a police officer to protect and serve the public at large," Matthews spoke out about the quota system to his commanding officers, and informed them that the system "was causing unjustified stops, arrests, and summonses because police officers felt forced to abandon their discretion in order to meet their numbers." (Complaint, ¶¶ 19, 28.)

Matthews identifies four occasions on which he notified the commanding officers about the quota system being used by mid-level superior officers. (Complaint, ¶¶ 3, 20, 28.) He claims that, subsequent to these complaints, he was subjected to retaliation. Specifically, Matthews alleges that he was given "punitive assignments (such as footposts or prisoner transport)," denied overtime and leave, separated from his "career-long partner," and has become the "target of humiliating treatment by his supervisors." (Complaint, ¶ 21.) He also alleges that recent negative performance evaluations were retaliatory. (Complaint, ¶¶ 27, 38.)

Matthews brings suit under 42 U.S.C. § 1983, claiming that the City has violated his First Amendment rights. The City moves to dismiss on the ground that Matthews spoke as a public

employee, not as a citizen, and has therefore failed to state a claim under the First Amendment.

LEGAL STANDARD

To survive a motion to dismiss, the Complaint must provide "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The Court will liberally construe the complaint. Att'y Gen. of Can. v. R.J. Reynolds Tobacco Holdings, Inc., 268 F.3d 103, 106 (2d Cir. 2001).

However, "the operative standard requires the plaintiff [to] provide the grounds upon which his claim rests through factual allegations sufficient to raise a right to relief above the speculative level." Goldstein v. Pataki, 516 F.3d 50, 56 (2d Cir. 2008) (internal quotation marks omitted). That is, a plaintiff must assert "enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citation omitted).

DISCUSSION

Whether the First Amendment protects a public employee's speech turns on whether the speech involves a matter of public

concern and whether the employee spoke as a "citizen" rather than as an employee. Garcetti v. Ceballos, 547 U.S. 410 (2006); Sousa v. Roque, 578 F.3d 164, 169-70 (2d Cir. 2009) ("To determine whether or not a plaintiff's speech is protected, a court must begin by asking whether the employee spoke as a citizen on a matter of public concern." (internal quotation marks omitted)).

There is no dispute that Matthews' speech, as alleged in the Complaint, involved a matter of public concern. See Jackler v. Byrne, 658 F.3d 225, 236 (2d Cir. 2011) (speech pertaining to police malfeasance implicates matters of public concern). The only question is whether Matthews spoke as a citizen, rather than an employee. As stated, under Garcetti, if Matthews did not so speak, his speech is not constitutionally protected, regardless whether it involved a matter of public concern. See Anemone v. Met. Trans. Auth., 629 F.3d 97, 115-16 (2d Cir. 2011).

A. Speech "Pursuant to" Job Duties

As the Supreme Court instructs, "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. In advancing this standard, the Garcetti Court explained that "[r]estricting

speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." Id. at 421-22.

The City argues that, here, Matthews spoke pursuant to his duties as a police officer. It refers to several factors that, when taken together, indicate that Matthews' speech was employee speech—that it: was related to Matthews' concern about executing his duties properly; was voiced only to his superiors, in the workplace; concerned the subject matter of his job, and was based on the "special knowledge" that Matthews gained through his public position. (Mot. to Dismiss at 5-6.) At bottom, the City argues that a police officer's duties include reporting beliefs that arrests and summons are being made unlawfully and, as such, Matthews' complaints about the quota and monitoring system fell squarely within his job responsibilities. (Id.)

In his Opposition to the Motion to Dismiss, Matthews argues that his speech was more nuanced than that. He claims that he was not just complaining about the fact that arrests and summonses were being made illegally, but also about the existence of a quota system and the system's impact on the management of other officers, the precinct, and the community. (Opp. at 13.) Under either characterization, the Court finds

that Matthews' speech was made pursuant to his job duties and is therefore not protected by the First Amendment. (Opp. at 13.)

The Second Circuit has a broad and "practical" standard for what constitutes speech "pursuant" to an employee's official duties. In Weintraub v. Board of Education, the plaintiff, a public school teacher, filed a grievance with the union challenging the assistant principal's decision not to discipline a student who had thrown books at the plaintiff during class. 593 F.3d 196 (2d Cir. 2010). The Second Circuit held that the filing of the grievance was in furtherance of "one of [plaintiff's] core duties" as a teacher—maintaining class discipline. Id. at 198.

Here, 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.

The Court rejects that argument as one that elevates form over substance. As Weintraub observed, "[t]he objective inquiry into whether a public employee spoke 'pursuant to' his or her official duties is a 'practical one' [and] [t]he Garcetti Court

cautioned courts against construing a government employee's official duties too narrowly." 593 F.3d at 202. By that standard, the Court concludes 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) (finding that an employee's memorandum concerning communications problems with officers investigating and responding to emergency situations was not protected speech).

B. Speech with a "Civilian Analogue"

Matthews argues, however, that the Second Circuit's opinion in Jackler v. Byrne establishes as a matter of law that his speech is constitutionally protected, regardless whether his speech was pursuant to duties. In substance, he characterizes Jackler as holding that the presence of a civilian analogue—alone—is sufficient to confer First Amendment protection.

Matthews alleges that there was a civilian analogue to his speech because the precinct supervisors routinely participated in community forums at which members of the community were invited to voice their grievances to the precinct's commanding officers, much like Matthews did, internally. (Complaint, ¶¶ 29-30.) The Court does not believe that Jackler stands for the proposition that Matthews suggests and, accordingly, finds that Matthews' reliance on Jackler is misplaced.

Jackler did not introduce the notion of a "civilian analogue" into the case law. The concept was born of dicta in the Supreme Court's holding in Garcetti, where the Court noted that the "theoretical underpinnings" of its decisions in the area of public employee speech were related to the principle that "[e]mployees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government." 547 U.S. at 423. Writing letters to a local newspaper, discussing politics with a co-worker, and making public statements were all examples of that "kind of activity." Id. at 423-24. Later, the Second Circuit in Weintraub acknowledged that the presence of a "civilian analogue" to an employee's speech was relevant in determining whether speech was made as employee or as citizen. In that case, the fact that there was no civilian analogue to

the teacher's grievances (filed with a union) confirmed that the speech at issue was made pursuant to his job duties. Neither of those cases addressed a factual situation where the speech was made "pursuant to" the employee's job duties but for which there was also a civilian analogue. 593 F.3d at 203. But, contrary to Matthews' suggestion, neither did Jackler.

In Jackler, a probation officer wrote a report explaining how he had witnessed an arresting police officer physically assault the arrestee during the arrest. To cover up the police misconduct, Jackler's superiors pressured him to retract his report and to write a false one. Jackler refused and was subject to retaliation. The district court dismissed Jackler's § 1983 claim, finding that the filing of Jackler's report was part of his job duties and so there was no protected speech. The Second Circuit reversed.

The Jackler Court discussed at length the fact that there was a civilian analogue to Jackler's speech. It likened Jackler's report to the civic equivalent of participating in an investigation. The Court noted that, when one gives evidence to law enforcement pursuant to an investigation, regardless whether that person is a public employee or ordinary citizen, that person has a legal obligation to give truthful evidence. It emphasized that the failure to give truthful evidence subjects the participant—again, whether employee or citizen—to criminal

liability. "Thus, a citizen who has truthfully reported a crime has the indisputable right to reject pressure from the police to have him rescind his accusation and falsely exculpate the accused." 658 F.3d at 241. Bearing these realities in mind, the Court reasoned that Jackler "had a strong First Amendment interest in refusing to make a report that was dishonest." 658 F.3d at 240.

As stated above, Matthews appears to believe that, after Jackler, regardless whether he spoke pursuant to his job duties, because his speech had a civilian analogue, it is protected. The Court disagrees. The Jackler Court was careful in characterizing the speech at issue there, defining it as Jackler's refusal to follow his superiors' instructions to retract his truthful report and to speak falsely, not as the filing of the Report; the latter would have been an act of speech that was simply pursuant to Jackler's duties. The refusal to retract a true statement and issue a false one, however, was only related to his job duties. See id. at 241 ("In the context of the demands that Jackler retract his truthful statements and make statements that were false, we conclude that his refusals to accede to those demands constituted speech activity that was significantly different from the mere filing of his initial Report.") The distinction is key. See Weintraub, 593 F.3d at 203 (noting that "[t]he

First Amendment protects some expressions related to the speaker's job," but "[w]hen a public employee speaks pursuant to employment responsibilities, . . . there is no relevant analogue to speech by citizens who are not government employees" (emphasis added) (internal quotation marks omitted) (citing Garcetti, 547 U.S. at 421, 424)). As discussed, the Court finds that Matthews' speech was made pursuant to his job responsibilities, as the Second Circuit and Supreme Court have construed that term, and so Jackler is inapposite.

The Court also believes that Matthews misconceives how the presence of civilian analogue bears on the question of citizen versus employee speech. 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. See Garcetti, 547 U.S. at 423 ("Employees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government." (emphasis added)). 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.

CONCLUSION

For the foregoing reasons, the City's Motion to Dismiss is GRANTED. The clerk of the court is directed to terminate the motion at docket number 11.

SO ORDERED:

BARBARA S. JONES
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
April 12, 2012