In the

United States Court of Appeals

For the Seventh Circuit

No. 22-1467

PATRICK FEHLMAN,

Plaintiff-Appellant,

v.

JAMES MANKOWSKI,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Wisconsin.
No. 3:21-cv-00362-jdp — **James D. Peterson**, *Chief Judge*.

ARGUED OCTOBER 31, 2022 — DECIDED JULY 26, 2023

Before EASTERBROOK, JACKSON-AKIWUMI, and LEE, *Circuit Judges*.

JACKSON-AKIWUMI, *Circuit Judge*. Patrick Fehlman, a former member of the Neillsville, Wisconsin police department, sued Chief of Police James Mankowski, alleging the Chief retaliated against him for critiquing the Chief's leadership, in violation of the First Amendment. The district court dismissed Fehlman's complaint. The court determined that Fehlman's statements, both directly to the Chief and later to the Neillsville Police & Fire

Commission, were made as a public employee and therefore foreclosed from First Amendment protection by *Garcetti v. Ceballos*, 547 U.S. 410 (2006). On appeal, Fehlman challenges the district court's decision about his statements to the Police & Fire Commission, but we affirm for the same reason as the district court: Fehlman's remarks were made in his capacity as a public employee, not a private citizen.

I

Fehlman appeals a judgment granting a motion to dismiss, so in our review of his case we assume the truth of his well- pleaded allegations. *Peterson v. Wexford Health Sources, Inc.*, 986 F.3d 746, 751 (7th Cir. 2021). Fehlman served as the Neillsville Police Department's interim police chief for most of 2019. At the start of 2020, James Mankowski was hired as the permanent police chief and Fehlman returned to his role as a rank-and-file officer.[1] Over the next several months, Fehlman raised a series of concerns about the management of the department to Mankowski, only to be rebuffed.

Fehlman and several other officers requested a meeting with the Neillsville Police & Fire Commission ("PFC") to detail their concerns. At the meeting, Fehlman addressed issues of "professional integrity and ethics," raising the following concerns:

- Mankowski instilled fear in officers at the NPD, and they feared retaliation from him.

[1] The parties do not specify Fehlman's position during the period relevant to this suit, but both suggest he returned to being a rank-and-file officer. While this omission is notable, we take the parties' suggestion as true.

- Mankowski lacked professionalism; in one instance, while on duty, he told a business owner that he should consider installing a stripper pole in the bar and having the business owner's wife dance on it topless.

- Mankowski ordered officers to turn off their body cameras in violation of department policy and best practices.

- Mankowski verbally abused suspects, berating them and insulting them gratuitously.

- Mankowski changed radio talk procedures in ways that threatened officer safety.

- Mankowski prioritized speed limit enforcement over responding to an allegation of child abuse at a school

Mankowski, upset that Fehlman had taken these concerns to the PFC, harassed Fehlman afterwards, including by taking away his work credit card. Mankowski also yelled at Fehlman and the other officers, threatening them with charges of insubordination.

Fehlman resigned from the NPD the next day and sought work with the Clark County Sheriff's Office. Mankowski interfered with Fehlman's recruitment by making false, negative comments about the former officer (Fehlman was hired nonetheless). Fehlman also discovered that his NPD personnel file had been altered, and that Mankowski gave information to the unemployment compensation office that led to a delay in benefits. Upon learning Fehlman had reentered the NPD

building to examine his personnel file, Mankowski sent the ex-officer a letter banning him from the premises.

Fehlman sued Mankowski under 42 U.S.C. § 1983, alleging violation of his First Amendment rights. Mankowski moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing that Fehlman's speech lacked constitutional protection because it was made pursuant to his official duties. The district court agreed with Mankowski, leading to this appeal. Fehlman concedes that the complaints he directed initially to Mankowski do not qualify for First Amendment protection, so this appeal concerns only his statements to the PFC.

II

We review a dismissal for failure to state a claim under Rule 12(b)(6) de novo, accepting as true all well-pleaded facts and drawing reasonable inferences in favor of the non-moving party. *Peterson*, 986 F.3d at 751.

Establishing a prima facie case of First Amendment retaliation requires showing (1) Fehlman engaged in constitutionally protected speech; (2) he suffered a deprivation likely to deter him from exercising his First Amendment rights; and (3) the speech was a motivating factor in the employer's adverse action. *Sweet v. Town of Bargersville*, 18 F.4th 273, 277–78 (7th Cir. 2021). Fehlman claims that he suffered retaliation both during and after his employment with the NPD. But because we conclude that Fehlman's speech was not constitutionally protected, we deny his appeal.

Whether a public employee's speech is protected turns first on whether the speech was made in the employee's capacity as an employee or as a private citizen. *McArdle v. Peoria Sch. Dist. No. 150*, 705 F.3d 751, 754 (7th Cir. 2013).

If speech occurs "pursuant to their official duties," employees are not speaking as private individuals for First Amendment purposes and therefore cannot turn to the Amendment's protections as a defense against employer discipline. *Garcetti v. Ceballos,* 547 U.S. 410, 421 (2006).

Whether speech is made "pursuant to" official duties is broader than an employee's job description. Employees' statements about "misconduct affecting an area within [their] responsibility" are considered official-capacity speech even if those employees are not ordinarily responsible for investigating misconduct. *McArdle*, 705 F.3d at 754. This is particularly pronounced for law enforcement officers whose "duty to report official police misconduct is a basic part of the job." *Forgue v. City of Chicago*, 873 F. 3d 962, 967 (7th Cir. 2017).

We conclude that Fehlman's speech to the PFC was made in his role as a police officer. A key factor in this determination is the structure of the PFC itself. By statute, boards like the PFC retain the general authority "[t]o organize and supervise the fire and police … departments and to prescribe rules and regulations for their control and management." WIS. STAT.
§ 62.13(6). Relatedly, the PFC has disciplinary authority over the chief of police, who "shall hold their offices during good behavior, subject to suspension or removal by the [PFC] for cause." *Id.* § 62.13(3). The Wisconsin Supreme Court has also interpreted this provision as creating a "comprehensive system" requiring cities to maintain commissions "with jurisdiction over the hiring, promotion, and discipline of members of police and fire departments." *City of Madison v. Wis. Emp. Rels. Comm'n*, 2003 WI 52, ¶ 13, 261 Wis. 2d 423, 432, 662 N.W.2d 318, 322 (2003). These statutory provisions governing the PFC strongly suggest the body is best seen as part of Fehlman's chain of command. This renders Fehlman's remarks a form of

internal grievance. *See, e.g.*, *Tamayo v. Blagojevich*, 526 F.3d 1074, 1092 (7th Cir. 2008) (holding that a senior administrator who testified before a legislative committee with oversight of her agency was "discharging the responsibilities of her office, not appearing as 'Jane Q. Public.'"); *Houskins v. Sheahan*, 549 F.3d 480, 491 (7th Cir. 2008) (distinguishing an employee's internal complaint about an assault, which was made pursuant to official duties, from a police report on the same conduct, which was provided as a citizen). Fehlman's statements to the PFC are the definition of speech that, in *Garcetti*'s formulation, "owes its existence to a public employee's professional responsibilities," and therefore do not implicate speech liberties the employee enjoys as a private citizen. 547 U.S. at 421–22.

Fehlman disagrees, arguing Wisconsin law demonstrates his remarks were made as a citizen. In doing so, he notes police chiefs have the authority to file disciplinary charges against subordinates with the PFC, *see* WIS. STAT.
§ 62.13(5)(b), but subordinates do not have corresponding power to bring charges upwards against their chiefs to the PFC. From this, Fehlman concludes that "[a]ny misconduct exposed by a subordinate before a police commission against a chief would necessarily be as a citizen." Fehlman's supposition is a cramped view of the Wisconsin statute. That subordinates lack the ability to bring charges against superiors does not necessarily reduce the subordinates' complaints to that of a common citizen. Further, simply because the statute does not provide a mechanism for subordinates to file formal

complaints against their superiors does not mean the PFC cannot solicit employees' views as a part of the investigations it undertakes pursuant to its statutory authority discussed above.

The circumstances of Fehlman's meeting with the PFC further support our conclusion that his speech was made in his capacity as a police officer, not a private citizen. Fehlman alleged that he and his fellow officers "requested a meeting" with the PFC. He then attended the meeting, along with two other officers. So did Mankowski, who at some point also spoke with the PFC. Fehlman does not allege the meeting was open to the public, and the minutes from the PFC's meeting indicate that it went into closed session "for the purpose of considering employment, promotion, compensation or performance evaluation data of any public employee over which the governmental body has jurisdiction or exercises responsibility, specifically issues and procedures of the Neillsville Police Department."[2] That Fehlman spoke in a closed meeting, which he requested, and which the PFC described as a meeting to address governance issues involving the NPD, underscore the degree to which Fehlman's speech was made pursuant to his official duties. He used what is effectively a

[2] Neillsville, WI. Police & Fire Commission, Minutes of the Thursday, June 25, 2020 3:00 PM Meeting, https://neillsville-wi.com/wp-content/uploads/2020/07/Minutes-Police-Fire-06-25-20- OPEN.pdf. The PFC meeting's minutes are not attached to Fehlman's amended complaint or otherwise included in the record. However, the complaint references the minutes at paragraph 20. Documents that a plaintiff relies on in a complaint may be considered at the motion to dis- miss stage and therefore by this court on appeal. *Williamson v. Curran*, 714 F.3d 432, 436 (7th Cir. 2013).

supervisory agency of the NPD to raise a complaint about his manager.

Taken as a whole, the record before us suggests the PFC is best considered an extension of the NPD's management and operational structure. Fehlman provided insight from his perspective as an employee, not a private citizen, to assist the PFC in carrying out that function.

Because we conclude that Fehlman spoke not as private citizen but as a public employee, we do not reach the second hurdle he would need to surmount to succeed with a First Amendment retaliation claim. That second question, reserved for private citizen speakers only, is whether the speech addressed a matter of public concern. *Bivens v. Trent*, 591 F.3d 555, 560 (7th Cir. 2010). As the district court ably explained, "under *Garcetti v. Ceballos*, 547 U.S. 410 (2006), a public employee's speech made pursuant to his official duties isn't protected by the First Amendment, no matter how important that speech may be or how it could affect the public interest." Because Fehlman's comments were made in his role as a public employee, they are not subject to First Amendment protection, regardless of whether his critiques of Mankowski might affect or interest the public.

III

Fehlman argues that even if his speech was not protected under the First Amendment when he was employed by the NPD, his speech is protected from Makowski's alleged postemployment retaliation because none of the policy arguments underpinning *Garcetti* apply to the post-employment context. But there is no caselaw supporting this reading of *Garcetti*.

Establishing a prima facie case of First Amendment retaliation requires an initial showing that the speech the employee engaged in was constitutionally protected. *Sweet*, 18 F.4th at 278. If the speech is not protected to begin with, any retaliation for that speech is not actionable under a First Amendment framework, so the question of whether that retaliation happened during or after employment is legally irrelevant.

IV

For these reasons, we **AFFIRM** the district court's decision.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PATRICK FEHLMAN,

Plaintiff,

v.

JAMES MANKOWSKI,

Defendant.

OPINION and ORDER

21-cv-00362-jdp

This First Amendment retaliation case grew from the contentious relationship between two officers who both served as the chief of police for Neillsville, Wisconsin, a small town located between Eau Claire and Stevens Point. Plaintiff Patrick Fehlman was the interim police chief from February 2019 until defendant James Mankowski—an outside hire—took over in December 2019. Fehlman doesn't say whether he and Mankowski competed for the permanent position, but Fehlman's complaint makes it clear that they didn't get along.

Fehlman remained with the department after Mankowski became chief, but Fehlman wasn't pleased with

Mankowski's performance. And Fehlman wasn't shy about his feelings, telling Mankowski that the way he ran the department was violating state law and jeopardizing officer safety. When Mankowski didn't change his ways, Fehlman and some other officers took their concerns to the Police and Fire Commission, alleging that Mankowski was unprofessional to staff and verbally abusive to citizens, among other things.

According to Fehlman, Mankowski confronted him a few days later, threatening to discipline him for going to the commission. The following day, Fehlman quit. Fehlman now accuses Mankowski of retaliating against him in violation of the First Amendment by

threatening him, attempting to interfere with his efforts to find a new job, and banning him from entering the department.

Mankowski moves to dismiss the case for failure to state a claim upon which relief may be granted. Dkt. 13. The question before the court isn't whether Mankowski

attempted to sabotage Fehlman's job prospects, or, if he did, whether it was because Fehlman spoke out against him. Rather, the issue now is whether Fehlman was speaking as a police officer or a citizen when he complained to and about Mankowski. The difference matters because, under *Garcetti v. Ceballos*, 547 U.S. 410 (2006), a public employee's speech made pursuant to his official duties isn't protected by the First Amendment, no matter how important that speech may be or how it could affect the public interest.

Garcetti and the Seventh Circuit cases applying it doom Fehlman's claim, even if everything that Fehlman alleges is true. All of the speech at issue in this case was either a statement to a supervisor about issues affecting the workplace or a complaint to an oversight body about how the supervisor was performing his job. Under the law of this circuit, that is employee—not citizen—speech, even if the speech was motivated in part by concern for the

community. The court will grant Mankowski's motion to dismiss.

ANALYSIS

Fehlman's claim for retaliation arises out of two categories of statements. First, Fehlman alleges that he directly confronted Mankowski over the course of several months in 2020 about concerns that Fehlman had about Mankowski's performance as chief. Fehlman identifies the following examples of the concerns that he expressed to Mankowski:

- The department needed more bullet-proof vests for officers.
- Mankowski's decision to stop writing reports for accidents that occur on private property violated state law.
- Mankowski's policy regarding issuing citations for operating without a license violated state law.
- Mankowski's decision to change "radio talk procedures" created "officer safety issues."
- Mankowski shouldn't have "prioritized speed limit enforcement over responding to an allegation of child abuse at a school."

Dkt. 8, ¶¶ 9, 17–18.

Second, Fehlman raised additional concerns about Mankowski during a meeting that Fehlman and other officers requested with the Neillsville Police and Fire Commission in late June 2020. Fehlman says that he repeated some of the same concerns as above, and he raised the following additional concerns about Mankowski:

- He lacked professionalism and instilled fear in the officers who worked for him.
- He ordered officers to turn off their body cameras in violation of department policies.
- He was verbally abusive to suspects.

Id., ¶¶ 13–18.[1]

Many of the issues raised by Fehlman involve important public concerns. If Fehlman's allegations are true, Mankowski was violating the law and department policy and mistreating employees and citizens. Those are issues that merit public scrutiny. *See Garcetti v. Ceballos*,

[1] Fehlman's complaint also refers to a June 30, 2020 department meeting where Fehlman and Mankowski spoke. Dkt. 8, ¶¶ 22–24. But Fehlman doesn't identify any protected statements that he made at the meeting, and he doesn't respond to Mankowski's contention that he failed to provide fair notice of any claim based on the June 30 meeting. So the court doesn't understand Fehlman to be raising a separate claim based on that meeting.

547 U.S. 410, 425 (2006) ("Exposing governmental inefficiency and misconduct is a matter of considerable significance."); *Vose v. Kliment*, 506 F.3d 565, 569 (7th Cir. 2007) ("[P]olice misconduct is a matter of public concern.").

But to sustain a claim for retaliation under the First Amendment, a public employee like Fehlman must do more than show that he was speaking out on a matter of public concern. In moving to dismiss the case, Mankowski's primary argument is that Fehlman's claim is barred by *Garcetti*, which holds that the First Amendment protects the speech of public employees only if they were speaking "as a citizen" rather than "pursuant to their official duties." 547 U.S. at 421–22.[2]

[2] Mankowski also contends that Fehlman's complaint doesn't comply with federal pleading standards and that his speech isn't protected because it was motivated by private interests, but it isn't necessary to consider those issues because Mankowski's motion to dismiss can be resolved on other grounds.

In crafting this rule, the Supreme Court was trying to balance a public employee's right to speak with the government employer's ability to function efficiently and effectively. *See id.* at 418–19. The Court reasoned that public employees are also citizens, and they can provide important contributions to public debate on matters on which they are better informed than most. *Id* at 419–20. But 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 parties in *Garcetti* agreed that the plaintiff, a deputy district attorney, was speaking pursuant to his duties when he wrote a memo recommending dismissal of a case based on government misconduct. *Id.* at 421. As a result, the Court concluded that the employee's speech wasn't protected by the First Amendment.

Mankowski contends that Fehlman was speaking pursuant to his official duties when he made all the statements at issue in this case, so *Garcetti* bars his claim. Fehlman says that he was speaking as a citizen. Resolving the dispute is complicated somewhat by Fehlman's failure to precisely identify what his job was. Fehlman says that he was the interim police chief before Mankowski became the chief in December 2019. Dkt. 8, ¶ 6. But Fehlman says that he made the relevant statements between March and June 2020, and he doesn't say in his complaint what position he had at that point or what specific duties he had. But neither party suggests that Fehlman retained any supervisory authority after December 2019. Rather, both parties assume in their briefs that Fehlman had the same duties as any police officer working for the Neillsville Police Department. The court will follow the parties' lead. As a result, the question before the court is whether a Neillsville police officer is speaking pursuant to his duties or as a citizen when he: (1) complains directly to the chief that the

chief is undermining officer safety and violating the law and department policy; and (2) complains to the Neillsville Police and Fire Commissioner about the same things, as well as that the chief is mistreating his staff and criminal suspects.

Garcetti itself provides only limited guidance in deciding this case. The Court emphasized that an employee doesn't speak pursuant to his duties simply because the speech occurred at work or is related to the employee's job. *Id.* at 421. The memo at issue in *Garcetti* was part of the plaintiff's everyday duties; it was literally the employee's work product and thus readily viewed as the government's own speech that it had the right to control. *See id.* at 422 ("Refusing to recognize First Amendment claims based on government employees' work product does not prevent them from participating in public debate."). That is not the situation here. Complaining about alleged misconduct of the police chief isn't part of an officer's normal routine. Although Fehlman doesn't identify what his position with

the department was, he does say in his brief that that he wasn't an auditor or head of internal affairs. Dkt. 16, at 9.

But much more judicial ink has been spilled in the years since the Supreme Court decided *Garcetti*. Four post-*Garcetti* trends in the law of this circuit lead to the conclusion that Fehlman's speech in this case isn't protected by the First Amendment. First, the court of appeals has declined to read *Garcetti* as applying only to speech that is part of "a public employee's ordinary daily job duties." *Vose v. Kliment*, 506 F.3d 565, 572 (7th Cir. 2007); *see also Kubiak v. City of Chicago,* 810 F.3d 476, 481–82 (7th Cir. 2016) (*Garcetti* not limited to "routine job duties"). Rather, it is enough if the speech relates to activities that fall "within the general ambit of his job." *Fairley v. Andrews*, 578 F.3d 518, 523 (7th Cir. 2009). It doesn't matter whether the employee had "total control" over the issues he was addressing. *See Ulrey v. Reichhart*, 941 F.3d 255, 260 (7th Cir. 2019).

Second, the court of appeals has consistently held that an employee's complaints to or about supervisors regarding how the agency or department is run owes its existence to the employee's professional responsibilities, so it isn't citizen speech. For example, in *Mills v. City of Evansville, Indiana*, the court concluded that a police sergeant's discussions with her supervisors criticizing a plan to alter the responsibilities of some officers was not protected by the First Amendment. 452 F.3d 646, 648 (7th Cir. 2006). In reaching this conclusion, the court observed that the plaintiff "was on duty, in uniform, and engaged in discussion with her superiors," and the court concluded that she "spoke in her capacity as a public employee contributing to the formation and execution of official policy." *Id.* In other words, an employee's speech disagreeing with supervisors about the direction of the office implicates the employer's management responsibilities, so it is made as an employee rather than a citizen. *See id.*

The court of appeals has reached the same conclusion in numerous other disputes between a public employee and a supervisor.[3] More generally, the court has held that speech that is part of an attempt to improve the functioning of the workplace is not protected under the First Amendment. *See Kubiak*, 810 F.3d at 482 (complaints that "reflected an employee's attempt to improve her work environment" were made as an employee); *Davis v. Cook Cty.*, 534 F.3d 650, 653 (7th Cir. 2008) (*Garcetti* barred claim based on memo that "reflect[ed] the concern of a conscientious nurse to ensure and contribute to the smooth functioning of the ER and to advocate for the well-being of the patients under her care").

Mills and the other cited cases are consistent with the statement in *Garcetti* that courts shouldn't adopt a rule

[3] *See*, *e.g.*, *Ulrey*, 941 F.3d at 259 (principal's disagreement with superintendent about disciplinary issue not protected); *Ogden v. Atterholt*, 606 F.3d 355, 360 (7th Cir. 2010) (concluding that employer's complaint to "ultimate supervisor" asking for department to be reorganized was not protected); *Renken v. Gregory*, 541 F.3d 769, 774 (7th Cir. 2008) (teacher's criticism of his superior's use of grant funds provided to his department was speech as an employee, not a private citizen).

that "mandate[es] judicial oversight of communications between and among government employees and their superiors in the course of official business." 547 U.S. at 423. And Fehlman cites no cases, from this circuit or any other, in which a court concluded that an employee's on-the-job discussions with a supervisor about the management of the office qualify as citizen speech. This strongly suggests that Fehlman's discussions with Mankowski aren't protected.

The third trend in circuit law that undermines Fehlman's claim relates to complaints like Fehlman's that deal with workplace misconduct. Specifically, the court of appeals has consistently held that an employee's complaints about workplace misconduct aren't protected under the First Amendment, even when the employee's express job duties didn't include a duty to report that misconduct. *See*, *e.g.*, *Hatcher v. Bd. of Trustees of S. Illinois Univ.*, 829 F.3d 531, 539 (7th Cir. 2016), *overruled on other grounds by Ortiz v. Werner Enterprises,*

Inc., 834 F.3d 760 (7th Cir. 2016); *McArdle v. Peoria Sch. Dist. No. 150*, 705 F.3d 751, 754 (7th Cir. 2013). Courts must go beyond the job description and apply "a more commonsense, contextual analysis of the role the public employee assumed in making the speech at issue in the case." *Ogden*, 606 F.3d at 360. If an employee's speech about misconduct "affect[s] an area within her responsibility," that is enough to qualify as employee speech. *Hatcher*, 829 F.3d at 539.

Reporting misconduct in the office can be an unstated but expected part of the job for high-level and low-level employees alike. For example, in *Sweet v. Town of Bargersville*, the court concluded that a customer service representative in the clerk-treasurer's office was speaking pursuant to her official duties when she criticized the clerk-treasurer for reconnecting the utility service of a delinquent customer who was the clerk-treasurer's business partner. 18 F.4th 273, 278 (7th Cir. 2021). The court reasoned that the plaintiff's responsibilities included handling customer

service for utility disconnections, so her complaint fell within her area of responsibility. *Id.* The court rejected the plaintiff's contention that it was "not her job as a low- level employee to confront a high-ranking elected official about questions of policy." *Id.*[4] In other cases, the court of appeals has suggested that claims based on reporting misconduct within the workplace are categorically barred by *Garcetti*. *See also Comsys, Inc. v. Pacetti*, 893 F.3d 468, 471–72 (7th Cir. 2018) ("[I]nternal memos protesting coworkers' misconduct are not protected by the First Amendment."); *Tamayo v. Blagojevich*, 526 F.3d 1074, 1091–92 (7th Cir. 2008) (agreeing with other cases holding "that reports by government employees to their superiors concerning alleged wrongdoing in their government office were within the scope of their job duties, and, therefore, the employees were not speaking

[4] *See also Fairley*, 578 F.3d at 523–24 (prison guard's complaint about guard-on-inmate violence was "part of the job" and thus not protected); *Spiegla v. Hull*, 481 F.3d 961, 962 (7th Cir. 2007) (prison guard's complaint about a lapse in security by her supervisor was barred by *Garcetti* because "ensuring compliance with prison security policy was part of what she was employed to do").

as private citizens").

In this case, Fehlman's complaint doesn't discuss his job responsibilities, but in his brief he cites a Neillsville ordinance, which says that an officer's duties include "enforcement" of state and local laws, "prevent[ing]" violations of the law, and "protect[ing] the health, safety, public peace and order of the City and its inhabitants." Dkt. 16, at 11. All of Fehlman's complaints about Mankowski relate to officer safety, protection of the public, compliance with the law, or mistreatment of staff, and those subject matters fall within Fehlman's general responsibilities as described in the ordinance. *See Trigillo v. Snyder*, 547 F.3d 826, 829 (7th Cir. 2008) ("A statute or regulation can help determine the scope of an employee's duties to the extent that it creates responsibilities for that employee's specific job.").

The fourth and final relevant trend in circuit law focuses on police officers, and it forecloses Fehlman's claim. Specifically, the court of appeals has "held on several

occasions that a police officer's duty to report official police misconduct is a basic part of the job" for the purpose of a *Garcetti* analysis, so that type of speech isn't protected. *Forgue v. City of Chicago*, 873 F.3d 962, 967 (7th Cir. 2017) (citing *Roake v. Forest Pres. Dist. of Cook Cty.*, 849 F.3d 342, 346 (7th Cir. 2017); *Kubiak*, 810 F.3d at 481–82; *Vose*, 506 F.3d at 571). Regardless of the officer's job description, he or she has an inherent duty to protect the public from harm. *Forgue*, 873 F.3d at 967. That duty extends to "harm resulting from illegal activity by law enforcement." *Roake*, 849 F.3d at 346–47.

For example, in *Vose*, the court held that a police officer was "merely doing his job," and thus not engaged in protected speech, when he reported suspected misconduct by officers who worked in a different unit. 506 F.3d at 571. In *Roake*, the court held that complaints about racial profiling and unlawful disciplinary action within the police force were employee speech. 849 F.3d at 346–47. It was enough that the employee "shared the complaints only

with his employer, and the complaints focused exclusively on official misconduct by his fellow officer." *Id.* In *Kubiak*, in the court held that an officer was acting as an employee when she reported her own assault. 810 F.3d at 481–82. The court reasoned that an employee in her situation "would be expected to report the inappropriate behavior to a supervisor" and that it "makes even more sense to expect officers to report that a fellow officer acted violently" because that is part of an officer's duty to protect the public from harm. *Id.*[5]

Taken together, these four trends require dismissal of Fehlman's complaint. All of the speech at issue in this case involves allegations of perceived workplace misconduct by Mankowski or complaints about how Mankowski was running the police department. Although the complaint

[5] *See also Davis v. City of Chicago*, 889 F.3d 842 (7th Cir. 2018) (officer's report accusing other officers of misconduct not protected); *Morales v. Jones*, 494 F.3d 590, 597–98 (7th Cir. 2007) (officer's conversations with assistant district attorney about police chief's alleged misconduct not protected); *Sigsworth v. City of Aurora, Ill.*, 487 F.3d 506, 510–11 (7th Cir. 2007) (finding that a detective's report on suspicions of misconduct within the police department were made within his capacity as an investigator and a task force member, and therefore he did not speak as a citizen).

doesn't provide details about Fehlman's precise job title or duties, it is clear from his allegations that he was speaking in his capacity as an officer rather than as a citizen under the law of this circuit. His statements were "intimately connected" to his job and related to subjects that fell within the general responsibilities of all police officers, such as protecting the public and enforcing the law. *See Kubiak*, 810 F.3d at 482 (statements that are "intimately connected" to plaintiff's job more likely to be made pursuant to professional duties).

The parties' briefs include a separate discussion of Fehlman's statements to the Police and Fire Commission, and they dispute whether the commission was part of Fehlman's "chain of command." This is a reference to *Nesvold v. Roland*, in which the court observed that "complaints directed beyond direct supervisors 'up the chain of command' also fall outside of the protections of the First Amendment." 37 F. Supp. 3d 1027, 1039–40 (W.D. Wis. 2014). Fehlman contends that we don't have enough

information to determine at this point whether the commission was part of Fehlman's chain of command, and if it wasn't, that would suggest his statements to the commission were protected.

Fehlman's argument isn't persuasive. *Nesvold* didn't hold that any speech outside an employee's "chain of command" is citizen speech. Rather, *Nesvold*'s larger point was that context matters in deciding whether a plaintiff spoke as an employee or a citizen, and part of that context includes where the employee spoke and to whom. The same point has been made in other cases. For example, in *Lane v. Franks*, the Supreme Court held that "truthful sworn testimony, compelled by subpoena" is inherently "outside the scope of [an employee's] ordinary job responsibilities." 573 U.S. 228, 238 (2014). The Court reasoned that all citizens, not just public employees, have a duty to testify truthfully in a court proceeding. *Id.* at 238–39. *See also Chrzanowski v. Bianchi*, 725 F.3d 734, 739–40 (7th Cir. 2013) (public employee First Amendment

claim based on grand jury testimony not barred by *Garcetti*).

More generally, courts have considered as relevant to the *Garcetti* analysis whether the employee made statements about alleged misconduct to an outside agency. *See Anderson v. Wisconsin Dept. of Health & Fam. Servs.*, No. 08-cv-82-slc, 2009 WL 196736, at *7 (W.D. Wis. Jan. 26, 2009) ("Federal courts have been more likely to conclude that an employee was speaking as a citizen when the employee was addressing an audience outside his or her employer."). For example, in *Houskins v. Sheahan*, the court concluded that an employee's complaint to her employer about workplace harassment was barred by *Garcetii*, but her report to the police about the same conduct wasn't. 549 F.3d 480, 491 (7th Cir. 2008). This was because any citizen, and not just a public employee, can file a police report about alleged criminal behavior. *See also Morales*, 494 F.3d at 598 (complaints to employer about workplace misconduct not protected; deposition

testimony about same misconduct protected).

Fehlman's statements to the commission can't be compared to testimony in a court proceeding or a police report. Under Wis. Stat. § 62.13, each city of more than 4,000 residents must maintain a police and fire commission. Among other things, the commission has jurisdiction over the hiring, promotion, and discipline of members of police and fire departments, including the chief of police. *City of Madison v. Wisconsin Emp. Rels. Comm'n*, 2003 WI 52, ¶ 13, 261 Wis. 2d 423, 432–33, 662 N.W.2d 318, 322; *see also* Wis. Stat. § 62.13(3) and (5)(j) (describing commission's authority to appoint, suspend, and remove police chiefs). So as far as this case is concerned, the commission serves as a personnel board for the chief, not an agency that is completely separate from the workplace. This is similar to the situation in *Lloyd v. Mayor of City of Peru*, in which a police officer made allegations of misconduct about other officers to the city's "dispute-resolution body," called the Board of Works.

761 F. App'x 608, 612 (7th Cir. 2019). The court concluded that the officer's speech wasn't protected because he made "his accusations within the department's operational framework." *Id.*

In this case, Fehlman's complaint makes it clear that he requested a meeting with the commission after Mankowski reacted negatively to Fehlman's comments about Mankowski's job performance. Dkt. 8, ¶¶ 10–11. Fehlman brought two other police officers with him, and their purpose was to "address[] Mankowski's professional integrity and ethics." *Id.*, ¶ 12. In other words, Fehlman and the other offices were complaining to the commission about his effectiveness as a supervisor and as a police chief.

Under these circumstances, Fehlman was not simply acting in a manner that any concerned citizen could. He requested a special meeting to raise employment-related concerns, he was joined by other employees to present those concerns, and he directed his concerns to a body that had disciplinary authority over Mankowski. Fehlman doesn't

allege that the meeting was open to the public. The court concludes that Fehlman's own allegations show that he was speaking to the commission as a police officer, not just a concerned citizen.

Fehlman resists dismissal on two other grounds. First, he says that an analysis under *Garcetti* is fact-sensitive, and most cases are decided on a motion for summary judgment rather than on a motion to dismiss. That is a fair point, and if Fehlman had pointed to facts that he could prove at summary judgment that would save his claim, the court would deny Mankowski's motion as premature. But Fehlman doesn't identify any additional facts consistent with his complaint that would show that he was speaking out as a citizen rather than pursuant to his duties as an officer. The law in this circuit is clear that the First Amendment doesn't protect disagreements with a supervisor about effective management or statements about misconduct related to a police officer's general duties to enforce the law and protect the public. Fehlman's own

allegations show that his speech falls within those unprotected categories. In similar circumstances, the court of appeals hasn't hesitated to apply *Garcetti* in the context of a motion to dismiss. *See*, *e.g.*, *Roake*, 849 F.3d at 346–47 (concluding at pleading stage that *Garcetti* barred public employee retaliation claim); *Aldous v. City of Galena, Illinois*, 702 F. App'x 439, 441–42 (7th Cir. 2017) (same); *Hatcher*, 829 F.3d at 538 (same); *Kubiak*, 810 F.3d at 481–82 (same); *Vose*, 506 F.3d at 568 (same).

Second, Fehlman says that he has stated a claim under the First Amendment because he "repeatedly alleges in his complaint that he was speaking as a private citizen while he was voicing his concerns about Mankowski." Dkt. 16, at 8 (citing Dkt. 8, ¶¶ 9, 12). But the court of appeals has rejected that precise argument:

> [The plaintiff] cannot escape the strictures of *Garcetti* by including in her complaint the conclusory legal statement that she testified "as a citizen . . . outside the duties of her employment." A plaintiff cannot rely on labels and conclusions. Nor are we bound to accept as true a legal conclusion couched as a factual allegation.

Tamayo, 526 F.3d at 1091–92 (citations omitted). It is the same in this case. Fehlman's more specific allegations in his complaint are inconsistent with the conclusion that Fehlman spoke as a citizen. So the court isn't required to accept that allegation as true.

CONCLUSION

Garcetti and its progeny have significantly limited a public employee's protected speech in the workplace. *See Haka v. Lincoln Cty.*, 533 F. Supp. 2d 895, 918–19 (W.D. Wis. 2008) ("[T]he effect of *Garcetti* in this circuit has been devastating for public employees asserting claims for First Amendment retaliation."). As a result, speech about many important issues can be left without constitutional protection, including speech about public corruption, *e.g.*, *Sigsworth*, 487 F.3d at 507, misuse of government funds, *e.g.*, *Renken*, 541 F.3d at 774, harassment, *e.g.*, *Kubiak*, 810 F.3d at 482, and race discrimination, *e.g.*, *Roake*, 849 F.3d at 346–47. For better or worse, there is no "whistleblower carve-out from the category of unprotected employee speech." *Ulrey*, 941 F.3d at 259. So even if Fehlman's purpose in speaking out was to expose misconduct

that threatened the police department and the community, his speech isn't protected by the First Amendment because he spoke as a police officer rather than a citizen. The court will grant Mankowski's motion to dismiss.

The general rule is that the plaintiff should have an opportunity to amend his complaint after a dismissal to fix the defects identified by the court. *Runnion ex rel. Runnion v. Girl Scouts of Greater Chi. & Nw. Ind.*, 786 F.3d 510, 519–20 (7th Cir. 2015). But in this case, the problem isn't that Fehlman failed to plead enough facts; the problem is that the facts he did plead show that he isn't entitled to relief. In that situation, amendment would be futile. In any event, Fehlman has already amended his complaint once, and he doesn't ask for permission to file a second amended complaint in the event that the court grants Mankowski's motion to dismiss. So the court will dismiss the complaint with prejudice and direct the clerk of court to close this case.

ORDER

IT IS ORDERED that defendant James Mankowski's motion to dismiss, Dkt. 13, is GRANTED and the case is

DISMISSED for plaintiff Patrick Fehlman's failure to state a claim upon which relief may be granted. The clerk of court is directed to enter judgment in Mankowski's favor and close this case.

Entered March 1, 2022.

BY THE COURT:

/s/
JAMES D. PETERSON
District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

PATRICK FEHLMAN,

Plaintiff,

v. Case No. 3:21-cv-00362-jdp

JAMES MANKOWSKI (in his individual capacity),

Defendant.

FIRST AMENDED COMPLAINT

NOW COMES THE PLAINTIFF, Patrick Fehlman, by his attorneys Gingras, Thomsen & Wachs by Attorney Paul A. Kinne, and hereby states the following as his First Amended Complaint in the above-captioned matter.

NATURE OF PROCEEDINGS

1. This civil action is brought pursuant to 42 U.S.C. § 1983 and the First and Fourteenth Amendments to the United States Constitution, to redress the retaliatory treatment

of plaintiff by Defendant Mankowski.

PARTIES

2. At all times relevant hereto, Patrick Fehlman (Fehlman) has been an adult resident of the State of Wisconsin. He presently resides within the Western District of Wisconsin.

3. Defendant James Mankowski (Mankowski) is presently the Chief of Police for the City of Neillsville. All conduct attributable to him described in this complaint was undertaken intentionally, and committed within the scope of his employment and under color of law.

JURISDICTION AND VENUE

4. This court has jurisdiction over this matter pursuant to 42 U.S.C. § 1983, the First and Fourteenth Amendments to the United States Constitution, and pursuant to 28

U.S.C. §§ 1331 and 1343.

5. This claim may be venued in the Western District of Wisconsin pursuant to 28 U.S.C. § 1391, insofar as

all the parties reside and/or do business in this district, and the circumstances giving rise to the claim occurred in this district.

FACTUAL ALLEGATIONS

6. In February, 2019, Fehlman was appointed to be the interim police chief for the City of Neillsville Police Department (NPD).

7. On December 31, 2019, Mankowski, an outside hire, was sworn in as the Chief of Police of Neillsville. January 6, 2020, was Mankowski's first day at work.

8. On March 11, 2020, Fehlman received a commendation / Letter of Recognition for his service as interim chief. Pursuant to policy, such a letter is supposed to be placed in an officer's personnel file.

9. From the time period of roughly March through most of June, 2020, Fehlman approached Mankowski to speak to him about Mankowski's actions as chief. Fehlman's motivation was, at least in part, to speak as a citizen, and at

least some of the issues Fehlman raised were on issues of public concern. Examples of issues Fehlman raised with Mankowski include but are not limited to the following:

i. Fehlman noted that two NPD officers (not him) needed new bullet- proof vests. Mankowski responded to this public safety concern by telling Fehlman that the rules pertaining to fund use prevented Mankowski from buying the vests. Fehlman then checked with an employee of the Clark County Sheriff's Department to determine the veracity of what Mankowski explained to Fehlman, and Mankowski discovered that Fehlman communicated with this individual.

ii. Mankowski had ended the practice of writing accident reports for accidents that occurred on private property. Fehlman explained to Mankowksi that his decision was in violation of state statute.

iii. Fehlman explained to Mankowski that Mankowski's policy with respect to issuing citations for Operating

Without a License was in violation of state statute.

iv. Fehlman raised the issue of Mankowski changing radio talk procedures that created officer safety issues, which is further referenced at paragraph 17 of this complaint.

v. Fehlman raised the issue of prioritizing traffic enforcement over a child abuse allegation, which is further referenced in paragraph 18 of this complaint.

10. Mankowski reacted with anger to Fehlman's comments. Mankowski told Fehlman, "I always have my guns loaded," a figurative reference. Mankowski made this comment as a threat of retaliation against Fehlman should Fehlman continue to exercise

his right to speak and complain. Mankowski also said, on more than one occasion, "I could have demoted you," in response to Fehlman's speech.

11. In late June, 2020, Fehlman and other officers requested a meeting with the Neillsville Police & Fire

Commission (PFC). That meeting was scheduled for June 25, 2020.

12. Fehlman attended the meeting with officers Jason King and Brett Chwala.

During the meeting, Fehlman told the PFC that he was not attacking Mankowski as a person, but he was addressing Mankowski's professional integrity and ethics. Fehlman cited his motivation as a sense of duty to the community, and he was making his comments as a citizen as well as a police officer.

13. Fehlman told the PFC that Mankowski had instilled fear in officers at the NPD. He said they feared retaliation.

14. Fehlman told the PFC about Mankowski's lack of professionalism. He informed the PFC of Mankowski's encounter with a local business owner, while on duty. He told the business owner that he should consider installing a stripper pole in the bar and have his wife dance on it topless.

15. Fehlman told the PFC about Mankowski

ordering officers to turn off their body cameras in violation of department policy and best practices.

16. Fehlman informed the PFC that Mankowski was often verbally abusive to suspects, berating them and insulting them gratuitously.

17. Fehlman informed the PFC that Mankowski changed radio talk procedures that created officer safety issues. Fehlman expressed his concerns over officer safety, generally.

18. Fehlman informed the PFC that Mankowski had prioritized speed limit enforcement over responding to an allegation of child abuse at a school.

19. The PFC dismissed Fehlman and the other officers and welcomed Mankowski to the meeting.

20. The PFC minutes indicate that Mankowski was "very upset" about Fehlman's meeting with the PFC. The minutes further indicate that the PFC informed Mankowski of the complaints made, and that Fehlman did most of the

talking.

21. After the meeting, Mankowski harassed Fehlman. For example, Mankowski demanded that Fehlman turn in his work credit card.

22. On June 30, 2020, there was a department meeting at a community business.

The purpose of the meeting was, ostensibly, to clear the air between Mankowski and Fehlman and the other concerned officers.

23. During the meeting, Mankowski was verbally aggressive and raised his voice several times. He threatened Fehlman, who was off duty at the time, with charges of insubordination if Fehlman went to higher authorities over issues Mankowski felt they could solve themselves.

24. During the June 30 meeting, Mankowski made it clear that he was prepared to retaliate against Fehlman for his earlier exercise of free speech. Mankowski told Fehlman and the other officers that he noted policy violations when he started as chief.

He told them that he could have written them up for those violations, and that they were lucky he did not. He said those officers should be grateful that they did not face discipline.

25. These comments were all veiled threats that further exercise of their free speech rights would be met with discipline.

26. In the early morning hours of July 1, 2020, Fehlman submitted his resignation, effective immediately.

27. Fehlman sought employment at the Clark County Sheriff's Office (CLSO).

28. Charles Ramberg was a Patrol Captain with the CLSO. Ramberg was allied with Mankowski; upon information and belief, they were friends.

29. CLSO Patrol Sergeant Wade Hebert was assigned to complete Fehlman's background check. Successful completion of the background check was necessary for Fehlman to secure employment with the CLSO.

30. Upon information and belief, Mankowski told

Ramberg to approach Hebert in an effort to sabotage Fehlman's application for a position with the CLSO.

31. In July, 2020, Ramberg spoke to Hebert, telling him that all Hebert needed to do was to interview Mankowski, then terminate the background check, disqualifying Fehlman for the job at the CLSO.

32. As a result of Ramberg's interference in the background check process, the background check was instead entrusted to the Eau Claire County Sheriff's Office for completion. This delayed Fehlman's application process and start date for the CLSO. It

also forced Fehlman to personally explain to the Clark County Sheriff that Mankowski would not be an obstacle to Fehlman doing good work for the CLSO.

33. Upon information and belief, as part of the background check into Fehlman as part of CLSO's hiring process, Mankowski made false and negative comments about Fehlman as retaliation for Fehlman speaking on issues of

public concern.

34. On or about August 13, 2020, Fehlman examined his personnel file with the NPD. He noted that it had been altered, presumably by Mankowski or at his direction. The file also contained evidence that Mankowski provided false or misleading information to the unemployment compensation office, leading to a delay in Fehlman's receipt of unemployment compensation to which he was entitled.

35. On September 14, 2020, despite Mankowski's efforts to sabotage Fehlman's application with the CLSO, Fehlman started work for the CLSO.

36. Mankowski learned that Fehlman visited the NPD, off duty, as a citizen, on November 4, 2020.

37. On November 10, 2020, Mankowski drafted a letter to Fehlman, which Fehlman received on November 12, 2020. A copy was also sent to the CLSO via email, which was received by the CLSO before Fehlman himself received it.

38. The Mankowski letter informed Fehlman that he

was to refrain from entering the NPD office unless a NPD officer requested that he be on the premises pertaining to a specific law enforcement action.

39. Mankowski sent this letter in further retaliation for Fehlman speaking on an issue of public concern.

FIRST CAUSE OF ACTION AGAINST MANKOWSKI
VIOLATION OF FIRST AMENDMENT RIGHTS

40. The plaintiff realleges and incorporates the preceding paragraphs as if set forth fully herein.

41. By engaging in the conduct set forth in this Complaint, Mankowski violated Fehlman's rights to free speech when Mankowski verbally abused Fehlman, threatened his employment with the NPD, attempted to sabotage his employment with the CLSO, and otherwise acted as described in this complaint.

42. Said violation has caused Fehlman severe and permanent emotional, psychological and economic injuries.

WHEREFORE, the plaintiff demands the following relief:

A. An award of compensatory damages against the

defendant that will justly compensate the plaintiff for his emotional, psychological and economic losses.

B. An award of punitive damages against Mankowski for the willful, wanton and reckless acts he has committed against the plaintiff;

C. An award of plaintiff's reasonable attorneys' fees and costs incurred in this

action;

D. Pre- and post-judgment interest; and

E. Such other relief as the Court deems just and appropriate.

JURY DEMAND

The plaintiff respectfully requests that this matter be tried before a jury of six (6) competent persons.

Dated this 30th day of July, 2021.

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