Appeal No. 06-3886-CV

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ANGELO RUOTOLO,
Plaintiff and Appellant

vs.

CITY OF NEW YORK; RAYMOND KELLY, Commissioner of Police, City of New York; PATRICK TIMLIN, former Chief of Police, City of New York, Bronx; ANTHONY IZZO, Chief of Police, City of New York, Bronx; RAYMOND ROONEY, Deputy Inspector, New York City Police Department, formerly Commanding Officer, 50th Precinct, Bronx; WILLIAM RILEY, Lieutenant, New York City Police Department, formerly Integrity Control Officer, 50th Precinct, Bronx; THOMAS DIRUSSO, Deputy Inspector, 50th Precinct, New York City Police Department, Bronx; PHILIP WISHNIA, Lieutenant, 41st Precinct, New York City Police Department, Bronx; ANTHONY HENRY, Lieutenant, 41st Precinct, New York City Police Department, Bronx; JAMES ESSIG, Commanding Officer, 41st Precinct, New York City Police Department, Bronx; CHIEF TERENCE MONAHAN, Commanding Officer, New York City Police Department, Bronx,
Defendants and Appellees.

ON APPEAL FROM A FINAL DECISION OF THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT ANGELO RUOTOLO

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JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. §1331 because the case involved a claim under the Constitution and the laws of the United States.

This Court has appellate jurisdiction pursuant to 28 U.S.C.§1291 in that the appeal is from a final judgment of the United States District Court for the Southern District of New York (Stein, J.), entered on July 21, 2006, that disposes of all of plaintiff's claims. (J.A. 391). Plaintiff filed timely Notice of Appeal on August 17, 2006. (J.A. 389-390).

ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in dismissing the entirety of plaintiff's complaint for civil rights violations based upon a broad application of *Garcetti* to all of his causes of action when there were separate claims of retaliation and harassment arising from plaintiff's filing of a federal lawsuit, which was speech outside of his official duties.

2. Whether the District Court erred in dismissing Ruotolo's complaint where it based its decision, in part, on facts outside of the complaint and it failed, as is required when considering extrinsic evidence, to convert the Rule 12(b)(6) motion to dismiss to a Rule 56 motion for summary judgment.

3. Whether the District Court abused its discretion by refusing to allow Ruotolo to amend his complaint to encompass facts exposed in discovery and the Court was aware of from a previous motion that may have complied with the new mandate of the Supreme Court, which came down just two weeks before the case was to go to trial and which changed the existing law in the Second Circuit.

4. Whether New York Civil Service Law Section 75-b, which is supposed to protect public employees from retaliation for disclosures of wrongdoing, is an unconstitutional violation of the Fourteenth Amendment because it does not guarantee the procedural due process of law to whistle blowers who are union members subject to a grievance procedure in a collective bargaining agreement and it precludes a private cause of action if the union fails to act on the grievance.

STATEMENT OF THE CASE

This civil rights action stems from the harassment and mistreatment of plaintiff-appellant Angelo Ruotolo ("Ruotolo), a twenty-year veteran of the New York City Police Department ("NYPD"), which resulted from his attempts to exercise and defend his Constitutional rights. Sergeant Ruotolo wrote a report detailing the environmental problems at his police precinct and the connection to a series of serious illnesses suffered by numerous precinct personnel. When this report became public it resulted in tremendous embarrassment to the NYPD and his supervisors, who had long failed to address this serious safety problem, and it forced the City of New York to incur great time and expense to remediate the environmental problems that Ruotolo was instrumental in uncovering. In response to the report and due to the adverse effects on his employers, Ruotolo began to experience a series of retaliatory acts by his superiors at the NYPD. The treatment got so bad that Ruotolo was forced to consult with his union representatives, and when that was not effective, Ruotolo retained a lawyer. This ultimately led to Ruotolo seeking to protect and affirm his Constitutional rights by filing this federal lawsuit in the U.S. District Court for the Southern District of New York in July 2003 (Joint Appendix 24-39).[1]

[1] The Joint Appendix will be hereinafter referred to as "J.A."

After all the parties were served, defendants moved to dismiss the complaint for failure to state a cause of action. This motion was denied as to the first and second causes of action related to allegations of violations of plaintiff's First and Fourteenth Amendment rights, but it was granted as to the third cause of action based upon the New York State whistleblower statute (J.A. 91-100). Plaintiff then made a motion to amend his complaint to add claims for the continuing retaliation he was experiencing after filing the lawsuit and as a result of the lawsuit. This motion was initially denied by the Magistrate Judge (J.A. 224-235), but it was granted upon reconsideration (J.A. 224-235) and a Second Amended and Supplemental Complaint ("Second Amended Complaint") was filed (J.A. 236-252).

Following the completion of most discovery, defendants filed a motion for summary judgment. The District Court denied this motion in all respects except that it limited any claims to those based upon events that occurred only within the three year statute of limitations period that the Court held governed this action (J.A. 253-274). The case was set for a jury trial to begin on June 19, 2006 (J.A. 334).

However, two weeks prior to the start of the trial, the Supreme Court decided *Garcetti v. Ceballos*, 547 U.S. ___, 126 S. Ct. 1951, 164 L. Ed.2d 689 (2006), which addressed issues related to this case. Despite the fact that discovery had been completed and the Court had previously denied in major part defendants' motion for summary judgment, defendants were permitted to file another Rule 12(b)(6) motion to dismiss the Second Amended Complaint for failure to state a claim. In an Opinion and Order dated July 19, 2006, the District Court granted defendants' motion to dismiss based a broad application of the rule in *Garcetti*, holding that all of the retaliation that Ruotolo suffered stemmed from unprotected speech and thus was not actionable (J.A. 333-342). Plaintiff moved for relief from the judgment, for leave to amend the

complaint and for reconsideration of the court's decision on the motion to dismiss. (J.A. 343-344). The District Court denied this motion in a Memorandum Order dated August 15, 2006 (J.A. 343-344).

Ruotolo filed his timely Notice of Appeal in the District Court on August 17, 2006. (J.A. 384-388).

STATEMENT OF FACTS

At its core, this case is about a dedicated public servant who, when he spoke truth to power, suffered the wrath of his employers through their retaliatory acts, harassment, targeted discipline all of which forced him to retire rather than fight a lonely and uphill battle against his union, the chain of command at the NYPD and the power structure of the City of New York.

Angelo Ruotolo, the plaintiff-appellant in this action, spent twenty years as an officer of the New York City Police Department, rising to the rank of Sergeant, until he reluctantly and under pressure retired in 2004. (J.A. 238, ¶16). Ruotolo joined the NYPD in 1984. In 1998, after fourteen years of service with an exemplary record and a history of only positive performance reviews, Ruotolo was named to the position of Safety and Training Sergeant for the 50th Precinct in the Riverdale section of the Bronx. (J.A. 238, ¶17).

In October of 1999, while serving as Safety and Training Officer, Ruotolo was given the task of identifying possible environmental risks in the 50th Precinct. (J.A. 238, ¶18). Ruotolo conducted a thorough and exhaustive examination of the environmental situation at the 50th Precinct and wrote a report detailing his findings ("the Report"). (J.A. 238-239, ¶19). Upon completion the Report was presented to Ruotolo's Commanding Officer, defendant Raymond Rooney, on October 28, 1999. (J.A. 238, ¶18). Ruotolo's investigation discovered that there was possible contamination of the precinct's air and water supplies due to leaks and spills from

the precinct's gasoline storage tanks. (J.A. 238, ¶19). The Report also showed that there were numerous officers serving in the 50th Precinct who were experiencing unexplained serious health problems. These illnesses included: 13 cases of diagnosed cancer in relatively young and otherwise healthy officers; 12 cases of miscarriages or birth defects; and 8 cases of other serious respiratory and neurological health problems. (J.A. 239, ¶19). Ruotolo was not a scientist so he only reported the findings to his supervisors. He also recommended that a thorough environmental evaluation be conducted by qualified experts to determine if the problems, in fact, existed and if there was a connection between the problems and the health issues he had uncovered for many who worked at the precinct. (J.A. 239, ¶20).

An expert environmental analysis was performed on the 50th Precinct building. The experts confirmed that there was a chemical spill and leakage from the precinct's fuel storage tank into the soil under the basement of the building and into the air. The levels were all in excess of federal OSHA and EPA standards for safety. (J.A. 239, ¶22). These environmental problems were particularly dangerous to public safety because the leaks often go unattended for long periods of time and the fuels used by police for their high performance vehicles contain more chemical additives, which would be very hazardous to officers in the precinct and members of the public who might come in contact with these chemicals. (J.A. 239, ¶23). Following these expert findings, The City of New York was forced, at great expense over the course of several months, to abate the environmental problems. This was done by purifying the contaminated ground soil and installing an elaborate ventilation system to prevent current and future air problems caused by the spillage. (J.A. 239-240, ¶24). These environmental problems were covered by the local Riverdale press as well as city-wide in a story in the *New York Times*. (J.A. 239, ¶22).

Due to the problems disclosed in the Report, the expense of remedying the environmental problems and the very unfavorable press received by the City, the NYPD and the senior officers of the 50th Precinct, Ruotolo's supervisors began to retaliate against him for the Report. (J.A. 239-240, ¶24-25). This began with a series of reassignments. In a nine-month period, Ruotolo was reassigned more than 140 times between Training, Patrol and Desk duties. (J.A. 240, ¶26). These reassignments were not typical for a sergeant of Ruotolo's experience and seniority and were a departure from the normal practices in the 50th Precinct. (J.A. 240, ¶27). Other retaliatory acts included: denial of time off without explanation and when others were granted their requests (J.A. 240, ¶29); removal as Safety and Training Officer for the 50th Precinct and replacement by a less senior and less qualified officer, just after Ruotolo had received a very high performance rating at this job (J.A. 240, ¶30); administrative transfer from the 50th Precinct in Riverdale to the 41st Precinct in the South Bronx without reason and over Ruotolo's objection (J.A. 240-241, ¶31).

After several months of suffering these retaliatory acts and no sign that they would cease, Ruotolo sought legal counsel. His attorney wrote a letter to Police Commissioner Kelly on February 18, 2003 detailing the alleged harassment and retaliation against Ruotolo. (J.A. 242, ¶38-39). Although a prompt response to the allegations was promised, none was ever received. (J.A. 242-243, ¶39).

In April 2003, frustrated with the lack of response and continuing to endure continuing harassment on the job, Ruotolo filed a Notice of Intention to File a Claim against the City of New York to seek damages for financial loss due to the retaliatory actions against him. (J.A. 243, ¶41). In July 2003, Ruotolo filed this action in the U.S. District Court for the Southern

District of New York against the City, the NYPD and numerous individual members of the NYPD who specifically harassed and acted unlawfully toward him. (J.A. 244, ¶44).

The filing and service of the complaint had immediate repercussions on Ruotolo. The retaliatory acts and harassment by Ruotolo's superior officers against him worsened. (J.A. 244, ¶45). He was regularly threatened with unwarranted discipline, he was subjected to severe verbal abused, and he was refused the opportunity to earn overtime despite his express willingness to work shifts that were available but not otherwise staffed. (J.A. 244, ¶¶45-46).

In February 2004, while Ruotolo's federal lawsuit was pending, Ruotolo received the first negative performance review in his twenty-year career. (J.A. 245, ¶¶49-54). This happened despite the exemplary job he had done on the Report, which had potentially saved lives and prevented serious danger to NYPD officers and the public.

Additionally, during this time Ruotolo was targeted for disciplinary actions by two of his superior officers, one lieutenant who was already named as a defendant in the lawsuit, and another lieutenant who later became a defendant in this action. (J.A. 245, ¶55). Defendants Anthony Henry and Philip Wishnia, seeking to find any reason to discipline Ruotolo, decided to follow Ruotolo while he ran a personal errand that took him outside the bounds of his precinct on his lunch hour.[2] (J.A. 246, ¶56). When Ruotolo ventured outside the bounds of his precinct, defendant Henry immediately seized upon this technical violation of department rules, got out of his car and approached Ruotolo. Defendant Henry told Ruotolo he was being charged with the minor rules violation of leaving the precinct boundaries while on duty. (J.A. 246, ¶57).

They returned to the 41st Precinct where Ruotolo was told that an investigation would be conducted into this violation. The investigation was a sham. Ruotolo was never given a chance

[2] Ruotolo had previously gotten permission from his supervisor to do this same errand just a short time earlier without any difficulties or repercussions.

to defend himself and he was summarily relieved of his duties and placed on modified duty. (J.A. 246, ¶59). He was forced to surrender his badge, shield, identification card and weapons.[3] Modified duty is usually reserved for police personal who are alleged to have committed serious criminal acts or serious misconduct, not for something as minor as leaving the precinct while on duty. (J.A. 246, ¶61). Ruotolo alleged that this outsized punishment was in retaliation for his Report and/or the filing of the federal lawsuit. (J.A. 246, ¶63).

Additionally, because Ruotolo was on modified duty for an extended period of time and his union grievance was never acted upon, he was unable to earn the usual overtime pay that would have been available to him. This affected both his earning potential at the time and his future pension benefits because they are partially based upon an officer's income during his final three years of service. (J.A. 248, ¶72-73).

After another series of reassignments, Ruotolo saw that he would never again receive fair treatment from the NYPD so he applied for retirement. Ruotolo took this drastic step because he believed that the harassment would continue and that his pension rights might be put in further jeopardy as part of the continuing retaliation against him. (J.A. 247, ¶67). In the months leading up to his retirement Ruotolo attempted to have the outstanding rules violation charges formally presented and adjudicated so that they could be resolved before he left the NYPD. Ruotolo was formally served the charges only days before his retirement date, leaving him no time to defend himself. (J.A. 247, ¶68) He feared that the department would fight to uphold and maybe extend the unwarranted discipline and that this might endanger his future pension rights. Under these

[3] The weapons seized were purchased by Ruotolo so they were his personal property. To date, the weapons have never been returned to him and are being wrongfully held by the NYPD. *See* J.A. 246, ¶59.

pressures Ruotolo was forced to retire from the NYPD on modified duty without his weapons privileges. (J.A. 247, ¶68, 70) His retirement became official on July 26, 2004. (J.A. 247, ¶69).

The weapons restrictions have severely limited Ruotolo's ability work in the field of security, in which many retired police officers work. Since the events of September 11, 2001 security businesses have been in great demand for experienced personnel like Ruotolo, a twenty-year veteran of the NYPD. *See* J.A. 248, ¶¶72, 75. Ruotolo was forced to retire from the NYPD at age 45 but he could have looked forward to many productive and lucrative years of working in security. In fact, Ruotolo has applied for numerous security jobs and has been offered work at salaries of $20-$25/hour but all were conditioned on his ability to lawfully carry a firearm. (J.A. 248, ¶71). However, the NYPD's refusal to waver from its unjustified position on Ruotolo's weapons, the primary result of its retaliation against him for the filing of his federal lawsuit in July 2003, has severely curtailed Ruotolo's earning potential. (J.A. 248, ¶72). All of these actions following the filing of the Second Amended Complaint form the basis for the bulk of Ruotolo's claimed monetary damages. Ruotolo also alleged damages stemming from emotional distress, humiliation and his legal fees and costs of this action. (J.A. 248 ¶76).

Ruotolo seeks injunctive relief, compensatory and punitive damages from two main causes of action: (1) Violation of his First Amendment rights from actions taken under color of state law under the Federal Constitution and 42 U.S.C. §1983 (J.A. 251, ¶87-89); and (2) Violation of his right to Due Process of Law under the Fourteenth Amendment and 42 U.S.C. §1983 (J.A. 251, ¶90-92).

SUMMARY OF ARGUMENT

The District Court committed numerous errors which require that the dismissal of Ruotolo's Second Amended Complaint be reversed and the case remanded for further proceedings.

First, the claim for violation of plaintiff's First and Fourteenth Amendment rights should be sustained based upon its allegations of retaliation by his employers for filing a federal lawsuit. The lawsuit constitutes speech that was not related to his official duties, it was ruled to have addressed a matter of public concern and thus it was protected by the Constitution. Ruotolo's lawsuit had a good faith basis for filing this lawsuit under the law of this Circuit at the time it was commenced. Thus, the retaliation claim based on the filing of the lawsuit should not have been dismissed by the District Court.

Second, the District Court, in its opinion dismissing the complaint, erred in relying upon facts outside of the Second Amended Complaint and the Court did not, as required by the Federal Rules when considering extrinsic evidence, convert the Rule 12(b)(6) motion to a Rule 56 motion for summary judgment. This failure prevented plaintiff from submitting the proper and complete defense to such a motion that he was entitled to do under the Federal Rules.

Third, the District Court abused its discretion by refusing to allow plaintiff leave to amend its complaint to include facts disclosed in discovery that may have saved the complaint in light of the Supreme Court's decision in *Garcetti*, which changed the prevailing law in the Second Circuit two weeks before the case was to go to trial. Plaintiff had no way of anticipating this drastic change in law and it was an egregious abuse of discretion for the District Court not to allow him the chance, after there years of litigation, to amend the complaint to attempt to comply with the Supreme Court's new requirements.

Fourth, the New York State public employee whistle blower protection statute violates the Federal and State guarantee procedural due process. This statute does not ensure that union members will be treated the same as other government employees when it comes to protecting those who speak out against governmental wrongdoing. This is because there is no guarantee that union members will have retaliatory grievances heard or acted upon by the union and the statute forecloses a private right of action if the union does nothing to protect that member's rights.

STANDARD OF REVIEW

The Court of Appeals reviews de novo a District Court's dismissal of a complaint pursuant to Rule 12(b)(6). *Allaire Corp. v. Okumus*, 433 F.3d 248, 249-50 (2d Cir. 2006).

The standard of review for denial of leave to amend a complaint is abuse of discretion. *Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir. 1993).

ARGUMENT

POINT I

PLAINTIFF HAS STATED A VALID CLAIM FOR VIOLATION OF HIS FIRST AND FOURTEENTH AMENDMENT RIGHTS FOR RETALIATION FOR THE PROTECTED ACTIVITY OF FILING A FEDERAL LAWSUIT AGAINST HIS EMPLOYERS

The District Court erred in applying a much too broad reading of the Supreme Court's ruling in *Garcetti* to dismiss all of Ruotolo's claims, including those that constituted speech outside of his official duties, namely the retaliation for his filing the federal lawsuit and for the meetings he had with union lawyers. The federal lawsuit and the conversations with PBA lawyers are subject to the protection of the First Amendment and these claims should have been allowed to go forward.

On appeal from a judgment granting a motion to dismiss, the allegations contained in the complaint are taken as true and all inferences must be drawn in the plaintiff's favor. *Global Network Communications, Inc. v. City of New York*, 458 F.3d 150, 154 (2d Cir. 2006). "The court's function on a Rule 12(b)(6) motion is not to weigh the evidence that might be presented but merely to determine whether the complaint itself is legally sufficient." *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985). A complaint cannot be dismissed "unless it appears beyond doubt, even when the complaint is liberally construed, that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). "This caution applies with greater force where the complaint is submitted *pro se* or the plaintiff alleges civil rights violations." *Sykes v. James*, 13 F.3d 515, 519 (2d Cir. 1993).

Moreover, the Federal Rules do not require that every possible fact that supports each claim be pleaded in the complaint. Rule 8(e) states that averments in pleadings must be "simple, concise, and direct," and a proper pleading is one where the court and all the parties are given fair notice of the claims asserted. Fed. R. Civ. P. 8(e). Federal Courts have long held that pleading is not a "game of skill" and that the rules will be applied so that cases should be adjudicated on their merits, not the formalities of pleading. *See Salahuddin v. Cuomo*, 861 F.2d 40, 42 (2d Cir. 1988).

It is well-established that public employees do not surrender all of their First Amendment rights by reason of their employment. *See Pickering v. Board of Ed. of Township High School Dist. 205*, 391 U.S. 563 (1968). However, in *Garcetti* the Supreme Court stated that "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*, 126 S. Ct. at 1951. Under this theory, the Court stated that the First Amendment does not protect a public employee "from discipline based on speech made pursuant to the employee's official duties." *Id.* at 1955. The District Court broadly applied this holding to dismiss the entirety of Ruotolo's Second Amended Complaint. (J.A. 338-342).

The District Court erred in lumping all of the retaliation claims together when the complaint makes clear that Ruotolo suffered retaliation for both the Report and for the federal lawsuit he filed against his employers and several individuals within the NYPD. Ruotolo's original complaint only alleged retaliation from the Report. (J.A. 28-34). Later, when the retaliation continued, Ruotolo was specifically permitted to amend his complaint to encompass retaliation that he suffered as a result of filing the federal lawsuit. (J.A. 225-229). Ruotolo concedes that under *Garcetti* the retaliatory discipline for the Report that brought embarrassment and monetary costs to the NYPD and his superiors, though unjust, was not a violation of his First Amendment rights. *Garcetti*, 126 S. Ct. at 1955.

However, the District Court should have seen the different circumstances surrounding the retaliation brought about by the lawsuit, especially the actions of his superiors who targeted him for discipline and other disparate treatment after they had been served and were forced to defend against this action. The Supreme Court in *Garcetti* specifically remanded the case to consider speech Ceballos (the public employee) claimed was not "pursuant to his employment duties." *Id.* at 1961. As Justice Souter pointed out in his dissent, "Upon remand, it will be open to the Court of Appeals to consider the application of *Pickering* to any retaliation for other statements; not all of those statements would have been made pursuant to official duties in any obvious sense…" *Id.* at 1973 (Souter, J. *dissenting*).

In the instant case, Ruotolo was specifically permitted to amend his complaint to include retaliatory acts that were taken against him for filing the lawsuit, which Ruotolo argued was likewise not "pursuant to his employment duties." (J.A. 312). There was a clear delineation in the Second Amended Complaint between retaliation arising out of the Report and the retaliation arising out of Ruotolo's federal lawsuit.

If, as Ruotolo alleges, the lawsuit was speech outside of his official duties, the analysis remains the same as this Court has previously utilized. *Konits v. Valley Stream Cent. High School District*, 394 F.3d 121 (2d Cir. 2005), *Munafo v. Metropolitan Transit Authority*, 285 F.3d 201, 211 (2d Cir. 2002). "[A]lthough a governmental entity enjoys significantly greater latitude when it acts in its capacity as employer than when it acts as sovereign, the *First Amendment* nonetheless prohibits it [generally, subject to certain defenses,] from punishing its employees in retaliation for the content of their speech on matters of public importance." *Id.* at 211. Under *Konits*, in order to establish a First Amendment claim of retaliation as a public employee, Ruotolo must allege that, "(1) his speech addressed a matter of public concern, (2) he suffered an adverse employment action, and (3) a causal connection existed between the speech and the adverse employment action." *Konits*, 394 F.3d at 124.

In an earlier decision, the Magistrate Judge found that the complaint in this action "constituted speech on a matter of public concern" (J.A. 228) which makes Ruotolo's lawsuit subject to the protection of the First Amendment. *See Konits*, 394 F.3d at 124 (there is a public interest in the seeking truthful testimony in legal actions seeking the redress of an individual's Constitutional rights), *Skehan v. Village of Mamaroneck*, 465 F.3d 96, 106 (2d Cir. 2006) (misfeasance within police department and allegations of ongoing cover-up to silence those who spoke out against it constitute matter or public concern). Ruotolo has also adequately alleged

that he suffered an adverse employment action and a causal connection between the lawsuit and the retaliation that he suffered. *See Konits*, 394 F.3d at 124.

Moreover, this demonstrates the incorrect logic of the District Court statement that plaintiff attempted to "bootstrap a non-actionable objection to legitimate employer discipline into a valid First Amendment claim." (J.A. 341). A complaint about illegal conduct can be the basis of a retaliation claim. Ruotolo did not have to prove that the conduct he was complaining of when he filed the lawsuit was an actual Civil Rights violation in order to support his claim for retaliation. He only needed to have a "good faith, reasonable belief, that the underlying employment practice was unlawful." *Reed v. A.W. Lawrence & Co. Inc.*, 95 F.3d 1170, 1178 (2d Cir. 1998), *Manoharan v. Columbia U. Col. of Phys. & Surgeons*, 842 F.2d 590 (2d Cir. 1988) (for an employee to prove he was engaged in protected activity he only needs to show "a good faith reasonable belief that the underlying challenged actions of the employer violated the law), *see also Galdieri-Ambrosini v. Nat'l Realty & Development*, 136 F.3d 276, 292 (2d Cir. 1998).

Ruotolo had a good faith belief that he was suffering retaliation based on his Report that became so prevalent and unbearable that he sought to protect his rights by filing this federal lawsuit. This is made obvious by the District Court's repeated refusal to dismiss the lawsuit prior to *Garcetti*. As alleged in the Complaint, after a long career of faithful service to the NYPD, one in which he repeatedly received positive, if not glowing evaluations, Ruotolo suddenly became the target of unjustified harassment and discipline after the Report caused his superiors in the NYPD serious embarrassment. Ruotolo not only had a good faith basis for his claims, his complaint was sustained after repeated attack by defendants under the law of this Circuit throughout the three years of this litigation. That the Supreme Court changed the law on the eve of trial does nothing to take away the "good faith, reasonable basis" that Ruotolo had for

the lawsuit when it was filed. Therefore, the claim that he suffered unlawful retaliation at the hands of his employers after the filing of the lawsuit, which was adequately pleaded in the Complaint, should stand. *See Reed*, 95 F.3d at 1178.

Additionally, the District Court erred in concluding that Ruotolo's meeting with the PBA and its lawyers was pursuant to his duties as the 50th Precinct's Safety and Training Officer. The District Court stated that Ruotolo "did not allege, for instance, that he signed up to join the PBA lawsuit or that he spoke with lawyers outside of the precinct premises." (J.A. 339).

This statement is incorrect for two reasons. First, as made clear in the Second Amended Complaint, Ruotolo was a sergeant. (J.A. 236, ¶1). As a sergeant Ruotolo was not a member of the Patrolman's Benevolent Association. He was a member of the Sergeant's Benevolent Association. Therefore, Ruotolo would not have been able to join in any PBA lawsuit arising out of his Report. Although this was not specifically pleaded in the complaint, the District Court, in including this rationale for its decision, should have taken judicial notice of this vital distinction in union membership. *See Allen v. WestPoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991) (appended documents and matters of judicial notice may be considered in ruling on a motion to dismiss). Because Ruotolo could not have joined the PBA lawsuit, the District Court made an incorrect finding of fact which, in and of itself, is a reason for the decision's reversal.

Second, it was incorrect to conclude that Ruotolo's meeting with the PBA lawyers, who was seeking information about possible lawsuits against the NYPD, was part of his duties as precinct Training and Safety Officer. This is a question of fact that should not have been decided by the District Court. *See Garcetti*, 126 S. Ct. at 1956 (remanding case for consideration of

actions by plaintiff other than writing the disposition memo were within the scope of his official duties).[4]

As the Court concluded in upholding the retaliation claims stemming both from the Report and the lawsuit in motions to dismiss and for summary judgment, Ruotolo had stated adequate claims under the then-existing law of the Second Circuit. (J.A. 264-268). While the District Court may have correctly dismissed the retaliation claims arising out of the Report after *Garcetti*, it should have allowed the retaliation stemming the lawsuit, which was clearly not started pursuant to any of Ruotolo's duties as a sergeant in the NYPD, to go forward. *See Garcetti*, 126 S. Ct. at 1955.

In summary, the retaliation from filing the lawsuit is separate and distinct from the retaliation from the Report. Even though *Garcetti* may preclude claims for retaliation arising out of the Report, it does not preclude claims arising out of the lawsuit, which, as shown above, was not in the performance of Ruotolo's official duties and thus were protected by the First Amendment.

[4] The Court should note that in Ruotolo's motion for reconsideration, he submitted NYPD Patrol Guide Section 212-76, which pertains to releasing information to a member of a New York City agency when there is a possibility that litigation may ensue. (J.A. 381-383). Under this procedure, Ruotolo could not have been acting pursuant to his duties when he met with PBA lawyers because this procedure calls for referring individuals to the New York City Corporation Counsel if litigation is anticipated. This is an example of materials that would have been submitted had the Court, as it should have, converted defendants' Rule 12(b)(6) motion to a Rule 56 motion, *see* Point II, *infra*, and would have demonstrated the distinction between the instant case and the *Garcetti* ruling.

POINT II

THE DISTRICT COURT ERRED IN GRANTING THE MOTION TO DISMISS BASED IN PART UPON FACTS OUTSIDE OF THE COMPLAINT AND FAILING TO CONVERT IT TO A MOTION FOR SUMMARY JUDGMENT

As more fully demonstrated below, the District Court committed the error of relying upon facts outside of the Complaint as the basis, in part, for granting defendants' motion to dismiss for failure to state a claim upon which relief may be granted pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. In doing so, the District Court further erred in failing, as required, to convert defendants' Rule 12(b)(6) motion to dismiss to a Rule 56 motion for summary judgment and thereafter to permit plaintiff to submit evidence disclosed in discovery so that he could properly defend against summary judgment. These errors require that the District Court's decision be vacated and the case remanded for further proceedings that comply with the Federal Rules of Civil Procedure.

When matters outside the pleadings are presented in support or response to a 12(b)(6) motion, a District Court has two options: (1) exclude the extrinsic materials and decide the motion based on its analysis of the complaint alone; or (2) it can accept and consider the additional materials and convert the motion to one for summary judgment under Rule 56. *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 154 (2d Cir. 2002); *Fonte v. Board of Managers of Continental Towers Condominium*, 848 F.2d 24, 25 (2d Cir. 1988). If the second choice is made, Rule 12(b) specifically states that if in a motion to dismiss for failure to state a claim,

> "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to

> present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b).

This conversion requirement is strictly enforced whenever there is a "legitimate possibility" that the District Court relied on material outside the complaint in ruling on the motion. *Amaker v. Weiner*, 179 F.3d 48, 50 (2d Cir. 1999), *see also Kopec v. Coughlin*, 922 F.2d 152, 154-55 (2d Cir. 1991) (reversing a Rule 12(b)(6) dismissal where the District Court failed to convert to a summary judgment motion where it had relied in part on information contained in extrinsic materials attached to the motion), *Fonte*, 848 F.2d at 25 (reversing where District Court's opinion referred to factual matters contained in movant's memorandum of law because this raised the possibility that the Court relied on matters outside the pleading). Thus, a district court errs when it relies on factual allegations contained in legal briefs or memoranda in ruling on a 12(b)(6) motion to dismiss. *See id.* Vacatur is required even where the court's ruling simply "makes a connection not established by the complaint alone" or contains an "unexplained reference" that "raises the possibility that it improperly relied on matters outside the pleading in granting the defendant's Rule 12(b) motion." *Id.*

The conversion requirement of Rule 12(b) ensures that the motion is governed by the rule specifically designed for the fair resolution of the parties' competing interests at a particular stage of the litigation. A Court is prevented from considering matters extraneous to a complaint without giving the parties the proper notice that outside matters would be considered in a motion that could determine the outcome of the plaintiff's case. The trial court is prohibited from engaging in fact-finding when ruling on a motion to dismiss and ensures that if a trial judge chooses to consider evidence outside the four corners of the complaint, a plaintiff will have an opportunity to contest defendant's relied-upon evidence by submitting material that controverts it. *See* Fed. R. Civ. P. 12(b) (requiring that "all parties . . . be given reasonable opportunity to

present all material made pertinent to [the converted motion]"); *Amaker*, 179 F.3d at 50, *Cooper v. Parsky*, 140 F.3d 433, 440 (2d Cir. 1998), *Ryder Energy Dist. Corp. v. Merrill Lynch Commodities, Inc.*, 748 F.2d 774, 777 (2d Cir. 1984), *see also* 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §1356 (3d ed. 2004).

An analysis of the District Court's opinion granting the motion to dismiss shows that there was an improper consideration of and reliance upon materials outside of the complaint. Defendants' motion papers present a large amount of extrinsic evidence that the District Court could not help but consider. At the outset of its letter brief in support of the renewed motion to dismiss, in the section labeled "Relevant Facts" defendants use direct quotations from plaintiff's deposition testimony. (J.A. 276). This is obviously outside of the Complaint and such evidence was improperly introduced in its 12(b)(6) motion. *See Fonte*, 848 F.2d at 25.

Later on in the same letter brief, defendants cite numerous arguments from memoranda of law that plaintiff submitted in opposition to defendants' motion for summary judgment as support of its second motion to dismiss. (J.A. 279-280). The clearest example of this error concerns defendants' arguments regarding dismissal of the Fourteenth Amendment Due Process claim. Here, defendants claimed that plaintiff did not have a liberty or property interest at stake in the alleged civil rights violations. Defendants then quote plaintiff's opposition papers to the motion to dismiss to support this argument. (J.A. 279-280).

> "Plaintiff's claim is not based on an argument that Sgt. Ruotolo had a constitutional due process right to his particular assignment or to his tour or place of duty. He claims no property right in denied overtime or freedom of disciplinary charges." J.A. (279-280).

Defendants also specifically cite plaintiff's memorandum of law in opposition to defendants' motion for summary judgment as further support for their argument on this point.

(J.A. 280, footnote 8). This highlights the procedural history that makes it highly probable that the District Court, despite its best efforts, considered materials more proper for a summary judgment motion rather than for a motion to dismiss.

These materials were outside of the complaint and improperly introduced in the motion to dismiss. That the District Court relied on these and other materials outside of the complaint is obvious from its opinion in summarily dismissing, without much explanation, Ruotolo's due process claim:

> Ruotolo claims he was denied due process of law when he was retaliated against on the basis of the Report. His claim is not that he was stripped of a liberty or property right, but that by retaliating against him, his superiors chilled his free speech under the First Amendment. Because Ruotolo premised his due process claim solely on his First Amendment claim and he had no valid First Amendment claim, his due process claim also fails. (J.A. 342).

However, contrary to the District Court's erroneous finding, Ruotolo's Second Amended Complaint explicitly alleges that he had a loss of property rights due to the civil rights violations of defendants against him. He alleged a monetary loss of overtime pay. (J.A. 248, ¶72). He alleged a reduction in his pension benefits. (J.A. 248, ¶73). He alleged a loss of future earning potential due to alleged forced retirement on modified duty without the benefit of the ability to carry a firearm. (J.A. 248, ¶75). He alleged the confiscation of his personally purchased guns, which were never returned to him. (J.A. 248, ¶76). All of these allegations constitute the loss of property rights and this is all that the District Court should have considered in judging the adequacy of the complaint. Instead, the District Court adopted wholesale defendants' argument in whole based upon arguments and non-factual statements from deposition testimony and memoranda of law submitted for prior motions.

Additionally, the District Court erred in improperly deciding questions of fact concerning plaintiff's argument referring to conversations he had with Police Benevolent Association attorneys concerning his rights, all of which was outside of the complaint. The District Court describes this section of the opinion as "inartful" (J.A. 385) but it is better termed "reversible error." This is precisely what this Court in *Fonte* was referring to when it stated that vacatur is required where the court's ruling simply "makes a connection not established by the complaint alone" or contains an "unexplained reference" that "raises the possibility that it improperly relied on matters outside the pleading in granting the defendant's Rule 12(b) motion." *Fonte*, 848 F.2d at 25.

Finally, it is important to note that the District Court, prior to granting this motion to dismiss right before trial, considered a motion for summary judgment by defendants. In this earlier motion, the parties were able to submit facts disclosed during the extensive discovery in this case. The District Court learned of and considered all of these facts outside of the complaint when it denied in major part defendants' Rule 56 motion. To allow a Rule 12(b)(6) motion after already hearing a Rule 56 motion and after discovery had been completed may be permissible under the Federal Rules, but it seems virtually impossible for a District Court to ignore all that it learned in the Rule 56 motion in making its decision on a subsequent motion to dismiss. Under these circumstances, despite a District Court's best efforts, it is only natural to be influenced by facts outside of the Complaint that were learned in the Rule 56 motion.

Having considered materials outside of the complaint, the District Court was required to convert the motion to one for summary judgment. The District Court failed to do so. This failure to convert the Rule 12(b)(6) motion to a Rule 56 motion deprived plaintiff the opportunity to submit any and all materials necessary and proper to defend against what amounted to a

motion for summary judgment. Given the existence of three years of pleadings and discovery, it is fair to say that plaintiff would have had a wide range of materials to submit in opposition to a summary judgment, certainly far in excess of that he was able to submit against the Rule 12(b)(6) motion. In fact, the Court previously heard and denied all but two minor parts of defendants' earlier summary judgment motion so it was well aware of some of the facts and materials disclosed in discovery that would have been available to plaintiff had the rightful conversion to another Rule 56 motion been made. This is patently improper and requires that this Court vacate the dismissal.

POINT III

THE DISTRICT COURT ABUSED ITS DISCRETION BY NOT ALLOWING PLAINTIFF LEAVE TO AMEND ITS COMPLAINT WHEN FACTS PREVIOUSLY DISCLOSED IN DISCOVERY WOULD REMEDY ANY DEFECTS IN THE COMPLAINT AND THUS WOULD NOT RESULT IN ANY PREJUDICE TO THE DEFENDANT

Under the extraordinary circumstances of this three-year long litigation, where a decision by the United States Supreme Court in *Garcetti* changed the law in the Second Circuit on the eve of trial, it was an abuse of discretion for the District Court to deny plaintiff leave to amend his complaint to plead facts that may have allowed plaintiff his day in Court. *See Ruffolo*, 987 F.2d at 131.

As the District Court stated in summarizing the course of litigation:

> This motion (to dismiss) comes before the Court on the cusp of trial after three years of litigation during with the parties beat a steady tattoo of motions for resolution by the Court. Among other matters, the Court ruled on a previous motion to dismiss the complaint as well as a motion for summary judgment, a motion to amend the complaint, various discovery motions and motions for reconsideration, as well as a motion to bifurcate the *Monell* claims from the claims against individual police officers. On May 30, the

> day the parties submitted the final Joint Pretrial Order, and with trial only two weeks away, the U.S. Supreme Court issued its decision in *Garcetti v. Ceballos*. Defendants immediately renewed their motion to dismiss and the Court adjourned the trial pending resolution of this motion. (J.A. 334).

Inherent in the District Court's recitation of the exhaustive nature of the litigation is the fact that plaintiff had survived multiple attempts by defendants to have the case dismissed and that the plaintiff had validly pleaded claims that were entitled to and ready to be heard by a jury. The District Court ruled twice that Ruotolo had valid claims under the law of this Circuit at the time the dispositive motions were heard. Coupled with the error of essentially granting defendants summary judgment without affording plaintiff the ability to defend such a motion (*see* Point II, *supra*), this abuse of discretion requires that the District Court's decision be vacated and remanded with leave for plaintiff to file and serve an amended complaint.

Rule 15(a) provides that leave to amend a complaint "shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The foundation of this rule is that "absent evidence of undue delay, bad faith or dilatory motive on the part of the movant, undue prejudice to the opposing party, or futility, Rule 15's mandate must be obeyed." *Monahan v. New York City Dep't of Correction*, 214 F.3d 275, 283 (2d Cir. 2000), *cert. denied*, 531 U.S. 1035 (2000). In addition, mere delay, without also showing of bad faith or undue prejudice, will not provide the basis for the denial of a motion to amend. *Block v. First Blood Assocs.*, 988 F.2d 344, 350 (2d Cir. 1993). A Court should only find undue prejudice to deny a motion to amend if the proposed amendment would: (1) require the opponent to expend significant additional resources to conduct discovery to prepare for trial; (2) significantly delay the resolution of the dispute; or (3) prevent the plaintiff from bringing a timely action in another jurisdiction. *Monahan*, 214 F.3d at 284.

Defendants would suffer no undue prejudice if Ruotolo is permitted to amend his complaint because little, if any, additional discovery would be required. Defendants have known since they took Ruotolo's deposition that he relied on the facts relating to his communications with the PBA and its lawyers to support his First Amendment claims. These facts came to light in Ruotolo's deposition and were included in his opposition to defendants' motion for summary judgment. Because these facts were already disclosed in discovery and were relevant to the issue of defendants' retaliatory motives, the amendments to the complaint that plaintiff proposed to cure the defects in light of *Garcetti* would necessitate little or no additional discovery. Moreover, these issues were likely already part of defendants' preparation for trial, which was to be held just two weeks prior to defendants being granted permission to renew its motion to dismiss. The only new issue raised by the proposed amendments is whether Ruotolo's communications with the PBA and its lawyers were made pursuant to his official duties. *See Garcetti*, 126 S. Ct. at 1955. The introduction of this narrow issue would not delay in the resolution of the case or require the expenditure of significant additional resources. *See Monahan*, 214 F.3d at 284.

The District Court's finding that plaintiff delayed in amending the complaint to encompass facts that would have complied with the *Garcetti* ruling is erroneous. Prior to *Garcetti*, it made no difference under the First Amendment law of this Circuit to whom Ruotolo gave his report or otherwise communicated his health concerns. Also, there was no requirement that the facts regarding motive and intent be pleaded with specificity in a retaliation complaint. *See Dougherty v. Town of North Hempstead*, 282 F.3d 83, 91 (2d Cir. 2002). As soon as the law of this Circuit was changed, plaintiff defended against yet another motion to dismiss, and when it was granted he immediately moved for leave to amend the complaint. (J.A. 343-344).

As the District Court stated, in the course of three years of litigation, "defendants have filed a motion to dismiss and a motion for summary judgment, discovery has closed" and "trial was scheduled." (J.A. 388). Ruotolo had no legal obligation to anticipate that the Supreme Court would change the law of this Circuit after he survived those motions and just two weeks before the case was to be tried before a jury. He had met the requirements and the Court had ruled the complaints valid two separate times. In refusing to allow amendment after the change in the law, the District Court essentially held that Ruotolo should have been clairvoyant and that he was required to include every fact that could possibly support his claims even if it wasn't necessary under the existing law at the time of the drafting of the pleading. The Federal Rules do not require this level of specificity in pleading the claims in this action. *See* Fed. R. Civ. P. 8(e). It would go against the letter and spirit of the Federal Rules to find that there was bad faith on the part of plaintiff in failing to anticipate this change in the law.

Given that little if any additional discovery would be required, there would also be no significant delay in resolution of this dispute. And, bringing a timely action in another jurisdiction is not applicable here. All of these factors taken together and applied to the facts in this case weigh heavily in finding no prejudice to defendants if plaintiff is allowed to amend his complaint. *See Monohan*, 214 F.3d at 284.

Finally, Ruotolo's proposed amendments would not be futile. An amendment is futile only if it "would be subject to immediate dismissal for failure to state a claim." *Jones v. New York State Div. of Military and Naval Affairs*, 166 F.3d 45, 55 (2d Cir. 1999). As previously discussed, dismissal for failure to state a claim is proper only if, assuming all of the allegations are true, the plaintiff can prove not set of facts that would entitle him to relief. *Cleveland v. Caplaw Enterprises*, 448 F.3d 518, 521 (2d Cir. 2006).

The proposed amendments make the following allegations that would support his complaint in light of *Garcetti*:

- Ruotolo gave a copy of his Report to a delegate of the PBA and that Ruotolo later spoke about his Report and the health concerns it raised with representatives of the PBA and with lawyers the PBA brought to the precinct to evaluate potential plaintiffs for a lawsuit against the NYPD arising out of the environmental problems at the 50th Precinct (J.A. 352, ¶¶ 21-24);

- Soon after Ruotolo met with the PBA lawyer his commanding officer sent a memorandum to the Commanding Officer, Patrol Borough Bronx with the subject "Litigation Against the New York City Police Department and the City of New York" (J.A. 353, ¶27);

- After this memorandum was circulated, there was retaliation against Ruotolo by his supervisors in the NYPD (J.A. 354, ¶33).

- The communications Ruotolo had with the PBA representatives and PBA lawyers were not required or made pursuant to his duties as Command Safety Officer or any official duties as a New York City police sergeant (J.A. 352, ¶25);

- The communications were not authorized by his commanding officer or any other authority at the NYPD (J.A. 352, ¶26);

- Ruotolo made these statements as a citizen who was concerned about the possible adverse effects of the environmental conditions at the precinct on the health and safety of his fellow police officers and the public in general (J.A. 353, ¶27);

If the Court assumes all of these allegations are true, as is required at the pleading stage, Ruotolo's claim would not be barred by *Garcetti*. It is instructive that in *Garcetti*, the Supreme Court stated "[t]hat Ceballos expressed his views inside his office, rather than publicly, is not dispositive. Employees in some cases may receive First Amendment protection for expressions made at work." *Garcetti*, 126 S. Ct. at 1959. Ruotolo's meetings with PBA representatives on NYPD premises does not automatically render this speech not protected, particularly when, as

pointed out earlier, plaintiff can show that the conversations with the PBA were not pursuant to his official duties.

As a last point, the Court should note how another District Judge in the Southern District of New York exercised her discretion in a fair and equitable manner under circumstances similar to the instant case when *Garcetti* changed the law in the Second Circuit in the midst of an ongoing case. In *Winters v. Meyer*, 442 F. Supp. 2d 82 (S.D.N.Y. 2006), the plaintiff, a public employee, brought suit alleging First and Fourteenth Amendment violations stemming from retaliatory actions taken by her employers for complaints of wrongdoing she alleged against her supervisor. A short time after the suit was filed, the Supreme Court decided *Garcetti* and based largely on this new ruling, defendants' moved to dismiss the case pursuant to Rule 12(b)(6). Judge McMahon granted defendants' motion to dismiss. However, despite the deficiencies in the complaint in light of the *Garcetti* ruling, Judge McMahon granted plaintiff leave to amend her complaint with the following insightful reasoning:

> Defendants ask this Court to hold (as a matter of first impression) that, in light of *Garcetti*, a government employee plaintiff bringing a *First Amendment* retaliation claim must allege affirmatively that the speech or expression that led to the retaliation was not made pursuant to official or actual job duties or obligations. See Reply Mem. at 3. Since the Second Circuit has required plaintiffs to plead in a non-conclusory way that their speech or expression was protected by the *First Amendment* and since, after Garcetti, a government employee's speech or expressions do not receive such protection when they are made "pursuant to [the employee's] official duties," see *Garcetti, 126 S.Ct. at 1960*, a plaintiff such as Winters needs to plead facts tending to show that her speech remains protected after Garcetti. Because the legal landscape has changed, through no fault of Plaintiff's, it would be inappropriate to dismiss her complaint without allowing her the opportunity to plead facts that would allow her to vindicate her constitutional rights. Therefore, I will give Plaintiff twenty (20) days in which to file a new complaint, one containing factual allegations that will satisfy 42 U.S.C. § 1983. *Id.* at 87.

The instant case is an even clearer example of why Ruotolo should be permitted to attempt to cure the deficiencies in his complaint. In *Winters*, the case had just begun when *Garcetti* came down. Here, Ruotolo had engaged in three years of extensive litigation involving numerous motions and extensive discovery when *Garcetti* was decided. He had survived a previous motion to dismiss and a motion for summary judgment. Discovery had been completed and a trial date had been set. It was only then that *Garcetti* changed the law that applied to part of Ruotolo's case.

After three years of litigating the case in compliance with the prevailing law of the Second Circuit, and on the cusp of trial, it would be patently unfair and unjust for Ruotolo to be prevented from attempting to amend his complaint to plead facts, already disclosed in discovery, that would cure the defects in the complaint and comply with the new requirements the Supreme Court laid out in *Garcetti*. *See id.*

It was a clear abuse of discretion for the District Court to deny Ruotolo the opportunity to amend his complaint. Coupled with the errors outlined in Points I and II, *supra*, the abuse of discretion in not allowing plaintiff the opportunity to amend his complaint is even more apparent and egregious. As such, the August 15, 2007 decision of the District Court on the motion for reconsideration and to amend the complaint should be vacated and remanded to allow for the submission of an amended complaint that will attempt to comply with *Garcetti*. *See Morris-Hayes v. Board of Education*, 2007 U.S. App. LEXIS 176 (2d Cir. January 3, 2007) (summary order available at no-fee database: http://www.ca2.uscourts.gov/) (remanding after *Garcetti* to give parties opportunity to develop record to see if speech by public employee was related to official duties).

POINT IV

RUOTOLO'S STATE WHISTLEBLOWER CLAIMS SHOULD NOT HAVE BEEN DISMISSED BECAUSE THE NEW YORK STATUTE FAILS TO GUARANTEE AND DUE PROCESS OF LAW FOR UNION MEMBERS

Exercising its Supplemental Jurisdiction under 28 U.S.C. §1367, this Court should declare New York Civil Service Law §75-b unconstitutional under the Fourteenth Amendment because it denies due process of law to New York public employees who are subject to a grievance procedure in a collective bargaining agreement. This statute purports to protect the rights of whistleblowers to disclose wrongdoing but, in fact and in practice, it puts government employees at the mercy of their unions, which are not required to address their grievances, and closes the doors of the courthouse to whistleblowers who do not have their interests protected or even addressed by their unions.

One of the main reasons the Supreme Court gave in sharply limiting the First Amendment free speech rights for public sector employees was that there were numerous state statues that constituted a "powerful network of legislative enactments – such as whistleblower protection laws and labor codes – available to those who seek to expose wrongdoing." *Garcetti*, 126 S.Ct. at 1962.

The Supreme Court was apparently referring to statutes such as N.Y. Civil Service Law §75-b, and it was deferring to the states to protect the Constitutional rights of its public employees. However, a closer examination of this statute shows that rather than protect Constitutional rights, this law leaves a gaping hole in a New York public employee's protections because it does not guarantee the employee the right to have his grievance heard or acted upon by his or her union through its collectively bargained grievance procedure. Furthermore, the statute forecloses a cause of action in a lawsuit where, as here, the union, despite having a

grievance procedure in a collective bargaining agreement, is not required to act, and in fact refused to act upon Ruotolo's complaint or have the merits of his grievance adjudicated. N.Y. Civil Service Law §75-b.

In his Amended Complaint, Ruotolo pleaded a cause of action arising under New York Civil Service Law §75-b. (J.A. 85). This statute provides, in relevant part:

> 2. (a) A public employer shall not dismiss or take any other disciplinary or other adverse personnel action against a public employee regarding the employee's employment because the employee discloses to a governmental body information: (i) regarding a violation of a law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety; or (ii) which the employee reasonably believes to be true and reasonably believes constitutes an improper governmental action. N.Y. Civil Service Law §75-b(2)(a).

The statute states that an employee can bring a claim in a lawsuit under Section 75-b only where a collective bargaining agreement does not substitute its own grievance procedure for the relief encapsulated by the statute:

> 3. (b) Where an employee is subject to a collectively negotiated agreement which contains provisions preventing an employer from taking adverse personnel actions and which contains a final and binding arbitration provision to resolve alleged violations of such provisions of the agreement and the employee reasonably believes that such personnel action would not have been taken but for the conduct protected under subdivision two of this section, he or she may assert such as a claim before the arbitrator. The arbitrator shall consider such claim and determine its merits and shall, if a determination is made that such adverse personnel action is based on a violation by the employer of such subdivision, take such action to remedy the violation as is permitted by the collectively negotiated agreement.
>
> (c) Where an employee is not subject to any of the provisions of paragraph (a) or (b) of this subdivision, the employee may commence an action in a court of competent jurisdiction under the same terms and conditions as set forth in article twenty-C of the labor law.

N.Y. Civil Service Law §75-b(3)(b).

Because Ruotolo was a member of the Sergeants' Benevolent Association union, which has a grievance procedure in its collectively bargained contract, he was precluded from bringing a cause of action for retaliation for whistle blowing in his lawsuit. *See also Munafo v. Metropolitan Transportation Authority*, 2003 U.S. Dist. LEXIS 13495 (E.D.N.Y. 2003) ("An employee may bring suit under §75-b in a court of competent jurisdiction only where a collective bargaining agreement does not substitute its own grievance procedure for the relief encapsulated in the statute."), *Healy v. City of N.Y. Dep't of Sanitation*, 2006 U.S. Dist. LEXIS 86344 (S.D.N.Y. 2006) (granting summary judgment dismissing claim under §75-b because plaintiff's sole remedy was through his union grievance procedure), *Shaw v. Baldowski*, 192 Misc.2d 635, 747 N.Y.S.2d 136, 143 (Sup. Ct. N.Y. County 2002).

It is well-settled that procedural due process must be provided to public employees when they are terminated or they are subjected to any disciplinary sanctions. *See Arnett v. Kennedy*, 416 U.S. 134, 94 S. Ct. 1633, 40 L. Ed. 2d 15 (1974). In judging the adequacy of the New York state law as applied to Ruotolo's situation where he sought to use the union grievance procedure open to him, but there was no requirement that the grievance be acted upon at all, the Court should look to test provided by the Supreme Court in *Gilbert v. Homar*, 520 U.S. 924, 117 S. Ct. 1807, 138 L. Ed. 2d 120 (1997). The *Gilbert* Court held that there are three factors to consider as to whether a public employee has been afforded procedural due process in being subjected to employer discipline: (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional substitute procedural safeguards; and (3) the government's interest.

Id. at 931-32, 117 S. Ct. at 1812, 138 L. Ed. 2d at 125 *quoting Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18 (1976).

In Ruotolo's case, his private interest in his job, his pension rights, his weapons (his own personal property) and his future earning potential was clearly affected by the official actions taken against him. He was denied numerous rights and privileges of his employment; he suffered harassment and was targeted for harsh discipline following the filing of his federal lawsuit; and he was placed upon modified duty for a minor rules infraction. The private interest is balanced with the third factor, the government's interest in disciplining its employees. Ruotolo certainly does not argue that there is no government interest in disciplining employees for rules infractions. However, this government interest still requires that certain procedures be followed in order for a subject of the discipline, such as Ruotolo, to have his rights protected. *See id.*

The second factor is most telling when applied to Ruotolo and the New York whistleblower statute. The statute includes no requirement that a public employee subject to a collective bargaining agreement with a grievance procedure actually have the grievance heard by an arbitrator or any other independent decision-maker. *See* N.Y. Civil Service Law §75-b(3)(a)-(c). In other words, a collective bargaining agreement may have a grievance procedure but if the union fails or refuses to consider a member's claim for retaliation for whistle blowing, this public employee is left with no other avenue of recourse. Under the statute and its interpretations, the whistleblower cannot bring an independent lawsuit claiming retaliation. The failure of the statute to protect the rights of these union members clearly demonstrates that there is a very large risk of erroneous deprivation of a whistleblower's interests because there are no required procedures to vindicate these rights and there is no value of additional substitute procedural

safeguards, such as access to the courts, because these safeguards are not open to union members. *See id., see also Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985) (requiring some kind of hearing prior to the discharge of a public employee who has a constitutionally protected interest in employment).

It appears that the legislative intent behind the differentiation between those public employees who are and who are not subject to a collective bargaining agreement was the belief that unions are best equipped to protect their members from retaliation for whistle blowing. As The District Court stated in dismissing Ruotolo's state claim that, despite not having been presented with the Sergeant's Benevolent Association (SBA) (Ruotolo's union) contract, "it is only logical to believe that there is a union grievance procedure for just this sort of thing. That is one of the key things that a union does: Protect its members against retaliation for whistle blowing." (J.A. 191).

Although the District Court makes a valid assumption, in practice there is no guarantee that a union, despite having a grievance procedure, will actually hear and avail the union member to arbitration to resolve the dispute. The collective bargaining agreement between the City of New York and the SBA provides for a grievance procedure with arbitration as the final step. However, the union grievance procedure has no requirement that the union act on any complaint in a timely manner or at all. This fails to afford union members due process of law. Additionally, in specific regards to a whistle blower grievance such as Ruotolo's, the arbitration procedure is limited to interpretation and application of the collective bargaining agreements rules and regulations and appears to preclude the arbitrator from considering a whistle blower claim. Therefore, Ruotolo was left with no way of protecting his Constitutional rights.

Unions often have competing and conflicting interests in addressing the needs of some members against others. This is particularly true in the NYPD where each rank has a separate union. Therefore, the union should not be the only and final route for a member to seek redress of his or her Constitutional rights. The law must allow for all public employees, regardless of union membership or contract language, to have the ability to seek justice in the Courts. To decide otherwise is to limit the rights of public employees to have their grievances addressed by an impartial body. It treats similarly situated persons differently, requiring due process for some but not for others.

In essence, New York Civil Service Law Section 75-b, Subsection 3 leaves union members at the mercy of their collective bargaining agreements and grants them less rights than their fellow public employees who are not part of a union. This part of Section 75-b violates the Fourteenth Amendment's rights granted to citizens to procedural due process of law. Consequently, it should be declared unconstitutional.

CONCLUSION

Accordingly, for all of the foregoing reasons, plaintiff respectfully requests that this Court vacate the judgment of dismissal of the District Court, grant plaintiff leave to amend his complaint, reinstate plaintiff's state whistleblower cause of action and remand this action for proceedings in compliance with this opinion.

Dated: New York, New York
February 22, 2007

Respectfully submitted,

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