No. 14-35185

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RHONDA LEDFORD; RAYMON GRESTON; JO MCKINNEY; SHANE PENROD; KIM MCCORMICK; BOB ROBINSON; GRACIE REYNA; TOM DE KNIF; FRANK FARNWORTH; DIANA CARNELL; PHILLIP GREGSTON; LISA LITTLEFELD; ADDISION FORDHAM,

Plaintiffs-Appellants,

vs.

IDAHO STATE DEPARTMENT OF JUVENILE CORRECTIONS, AN EXECUTIVE DEPARTMENT OF THE STATE OF IDAHO,

Defendants

SHARON HARRIGFELD, IDJC Director; BETTY GRIMM, IDJC Juvenile Corrections Center – Nampa Superintendent,

Defendants - Appellants.

Appeal from the United States District Court for the District of Idaho
Honorable B. Lynn Winmill Presiding

APPELLANTS' BRIEF

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I. STATEMENT OF JURISDICTION

One of the allegations in the complaint was the contention the Plaintiffs' first amendment rights were violated. Plaintiffs sought relief under 42 U.S.C. § 1983. Accordingly, the District Court possessed jurisdiction pursuant to 28 USC § § 1331 and 1343. Appellate jurisdiction exists pursuant to 28 USC § 1292 which allows for the review of interlocutory orders denying an individual defendant's motion for summary judgment on the grounds that they are entitled to qualified immunity. On March 6, 2014, the District Court issued its Memorandum Decision and Order granting, in part, the defendants' motion for summary judgment. ***See*** E.R., pp. 2065-2085, (Dkt. 65). In its Order, the District Court refused to dismiss the First Amendment claims against Sharon Harrigfeld, and Betty Grimm, in their individual capacities. Individuals who are denied qualified immunity are permitted to take an immediate interlocutory appeal. ***See Mitchell v. Forsyth***, 472 U.S. 511 (1985). This is due to the fact qualified immunity is "immunity from suit rather than a mere defense to liability which like an absolute immunity is effectively lost if the case is erroneously permitted to go to trial." ***Mitchell***, 472 U.S. at 526; ***Plumhoff v. Richard***, 134 S. Ct. 2012, 2018-2019 (2014).

II. ISSUES PRESENTED FOR REVIEW

1. The District Court erred by failing to grant summary judgment to Harrigfeld and Grimm based upon their entitlement to qualified immunity as the case law governing the federal claims alleged by the plaintiffs was not clearly established.

2. The District Court erred by failing to grant summary judgment to Harrigfeld and Grimm by failing to address whether the individual defendants' actions were objectively reasonable in light of the facts and circumstances they were facing.

III. STATEMENT OF THE CASE

The original Complaint was filed June 25, 2012. An Amended Complaint was filed July 25, 2012 and, a Second Amended Complaint was filed July 14, 2013. ***See*** Dkt. Nos. 6 and 24. The defendants filed their answer to the Second Amended Complaint on August 16, 2013. ***See*** E.R. pp. 36-51, (Dkt. No. 25). On November 25, 2013, Defendants filed their first motion for summary judgment. ***See*** E.R., pp. 52-54 (Dkt. No. 33). The motion was supported by the affidavits of Julie Cloud, Betty Grimm, Sharon Harrigfeld, Vicki Tokita, Mike Savoie, Sabrina Payne, Richard Duke, Miren Artiach, and Phillip J. Collaer. ***See*** E.R., pp. 91-279 (Dkts 33-3 - 34).

The plaintiffs filed their response on February 6, 2014. ***See*** E.R., pp. 1932-1958 (Dkt. No. 53). Defendants filed a reply on February 20, 2014. ***See*** E.R., pp. 2022-2032, (Dkt. No. 58) supported by the second affidavits of Julie Cloud and Sharon Harrigfeld. ***See*** E.R., pp. 2033-2053, (Dkt. Nos. 58-1 and 58-2). The Court heard oral arguments on March 5, 2014. ***See*** E.R. 2086, Dkt. No. 66. The Court's Memorandum Decision and Order was issued the following day, March 6, 2014. ***See*** E.R., pp. 2033-2053, (Dkt. No. 65).

IV. STATEMENT OF FACTS

The plaintiffs, Rhonda Ledford, Ray Gregston, Jo McKinney, Shane Penrod, Kim McCormick, Gracie Reyna, Lisa Littlefield, Addison Fordham, Tom DeKnijf, and Frank Farnworth are, with the exception of Ms. Ledford, current employees of the Idaho Department of Juvenile Corrections.[1] Plaintiffs Ledford, and Penrod were employed as safety and security officers. ***See*** E.R. 441, 573. (Ledford Dep. 35:2-3; Penrod Dep. 20:4-14; Reyna Dep. 76:19-22; Fordham Dep. 10:22-11:2; Littlefield Dep. 11:2-23). Reyna, Littlefield, and Fordham work as rehabilitation

[1] On December 6, 2013, nearly two years after this litigation was filed, Rhonda Ledford was served with a Notice of Contemplated Action (NOCA) outlining workplace misconduct and violations of written IDJC policies. ***See*** E.R. 2034, 2044 (Second Affidavit of Julie Cloud, ¶2.) After she responded to the allegations in the NOCA, Ledford's employment was terminated. ***Id.*** (Exb. 2). The policy violations involved the discovery that Ledford had surreptitiously tape recorded conversations with her supervisors and co-workers. ***See*** E.R. 2043. She had been previously warned her actions violated written policy. ***See*** E.R. 2044. She appealed her discharge to the Idaho Personnel Commission. ***See*** E.R. 2046.

technicians. ***See*** E.R. 701, 730. Gregston and DeKnijf are maintenance workers. ***See*** E.R. 520, 827. (Gregston Dep. 14:20-15:14; DeKnijf Dep. 23:11-24:1). McCormick and McKinney are clerical staff. ***See*** E.R. 1152-1153, 635. (McKinney Dep. 21:21:22-18; McCornick Dep. 15:16-22). Mr. Fordham is a licensed practical nurse. ***See*** E.R. 885.[2] Sharon Harrigfeld was, and is currently, the director of the Idaho Department of Juvenile Corrections. ***See*** E.R. 92. (Harrigfeld Aff., ¶1). Betty Grimm was the superintendent of the Nampa facility from 2008 until her retirement on November 9, 2013. ***See*** E.R. 291. (Grimm Aff., ¶1).

In 2011, Ms. Harrigfeld and Ms. Grimm became aware that staff at the Nampa facility and, specifically, workers at the Observation and Assessment Unit (O&A) were locking juveniles in their rooms for an excessive amount of time. ***See*** E.R. p. 92 and 2091. (Harrigfeld Aff., ¶4, Grimm Aff., ¶3). These rooms are small, averaging 8'x8'. They are equipped with a toilet, sink, and a bed. ***See*** E.R. p. 92 (Harrigfeld Aff., ¶4). Harrigfeld and Grimm learned juveniles were being locked in their rooms while staff attended meetings, ate meals, or attended to other duties. This practice was referred to as placing juveniles in their rooms for "staff

[2] Mr. Farnworth is currently on medical layoff. ***See*** E.R. pp. 905-906. (Farnworth Dep, p. 101:20-103:16, Exb. 9). At the time the defendants' motion for summary judgment was heard, he had not returned to work because his medical provider had not provided a release and medical certification releasing him to return. ***See*** E.R. pp. 916-917. (Farnworth Dep, p. 241:14-242:10).

convenience". ***See*** E.R. 303, (Harrigfel Dep. 95:14-20; Harrigfeld Aff., ¶4, pp.92-93. Additionally, when a juvenile exhibited aggressive or assaultive behavior, they were locked in their rooms for 72 hours. During their lock down, the juveniles could not interact with rehabilitation technicians and, were not participating in their classes or group therapy. ***See*** E.R. 302, 92-93. (Harrigfeld Dep. 90:1-91:11; Harrifeld Aff., 4). As a result, the average room time for juveniles at the Nampa facility exceeded national standards. ***See*** E.R. pp. 93-94, 97. (Harrigfeld Aff., ¶7, Exb. 1). Harrigfeld and Grimm concluded these conditions were unacceptable and, instructed staff to cease locking juveniles down for "staff convenience". ***See*** E.R. p. 2091 and pp. 93-94. (Grimm Aff., ¶3; Harrigfeld Aff., ¶¶6-7, Exb. 2). Additionally, staff were no longer allowed to impose an 72 hour lock down for misbehavior. ***Id.*** Instead, when juveniles were locked in their rooms for assaultive or aggressive behavior, staff was required to immediately begin interacting with them to allow the child to be released from their room and reintegrated into their classes and group therapy. ***See*** E.R. pp 93-94, 2091-92. (Harrigfeld Aff., ¶7, Exb. 2; Grimm Aff., ¶4).

In 2010 and 2011, the IDJC subscribed to a service provided by Performance Based Standards (Pbs). That entity develops and provides standards for correctional institutions intended to improve the conditions of confinement of inmates. ***See*** E.R. p. 92. (Harrigfeld Aff., ¶2). In the IDJC system, each facility

throughout the state complies data concerning its operations and provides that information to Pbs for analysis and comparison against national standards. The Pbs coordinator at the Nampa facility was, Laura Roters. ***See*** E.R. 1082. (Roters Dep., p. 18:17-19:8). Ms. Roters complied the data which was provided by the Nampa facility to Pbs. ***See*** E.R. 1082-83. (Roters Dep. 19:18-21:13. That data collection process revealed the excessive room time which caused Ms. Harrigfeld to implement the policies restricts the ability of staff to lock juveniles in their rooms for disciplinary reasons or, for staff convenience. ***See*** E.R. p. 93. (Harrigfeld Aff., ¶6).

Despite these instructions, staff within the O&A unit continued locking juveniles in their rooms for staff convenience. Harrigfeld through her conversations with Grimm learned, through the data compiled by Ms. Roters as part of the Pbs process, the O&A supervisor, Tom Knoff was allowing his staff to continue confirming juveniles in their rooms. ***See*** E.R. 1098, 303. (Roters Dep. 82:4-84:2; Harringfeld Dep. 94:19-95:7). Mr. Knoff disagreed with Ms. Harrigfeld's policy restricting the staff's ability to lock juveniles in their rooms. ***See*** E.R. 1209. (Knoff Dep., p. 136:7-14). Because Knoff was not requiring his staff to follow policy, he was disciplined, and eventually fired. ***See*** E.R. 1216-1217. (Knoff Dep., p. 165:5-169:8).

After Mr. Knoff was fired, a supervisor's position within the Nampa facility became open. Ms. Roters applied for and was chosen for the position. ***See*** E.R. 114-115. (Tokita Aff ¶¶3-4). Certain members of the Nampa staff were displeased with Mr. Roter's selection. They complained Ms. Roters lacked supervisory experience and was given preferential treatment in the application process. E.R. 795-796, 915, 702, 529, 53-31. (Fordham Dep. 93:21-94:22; Farnworth Dep. 138:18-139:24; Reyna Dep. 78:24 – 80:10; Gregston Dep. 50:9-25, 57:19-58:7; DeKif Dep. 83:9-19). Eventually, Ms. Roters became the supervisor of the O&A unit. ***See*** E.R. 116, 127. (Tokita Aff ¶8; Duke Aff, ¶¶5-6).

In November of 2011, Harrigfeld and Grimm attended an all staff meeting at the Nampa facility. One of the issues raised by the staff included Ms. Harrigfeld's decision to restrict the staff's ability to confine juveniles in their rooms. ***See*** E.R. p. 93, Harrigfeld Aff, ¶7, Exb. 2. Harrigfeld was advised her policy had taken away a tool the staff had used to control the behavior of juveniles and, as a result, the safety of staff working in the institution had been compromised. ***Id.*** Ms. Harrigfeld was open to their concerns and solicited their comments through a group email which stated:

> The latest Pbs data from your facility indicates a rate of 18.417 per 100 persons of youth confinement compared to the field average of 3.57 per person days. The numbers speak for themselves. The plans you develop to manage behavior in the three units of your facility have to provide adequate research and data that indicate how

> behavior can be changed without significant use of room time. I look forward to reviewing your plans.

See E.R. 97 (Topic 2). In the same email, Director Harrigfeld also responded to the O&A unit's complaint that their ten hours shifts had been taken away by allowing them to propose a schedule which would allow ten hour shifts and, at the same time, provide adequate staffing. ***See*** E.R. 98 (Topic 5). Harrigfeld also invited employee comment and input regarding the hiring process within the Department. However, she also advised staff of their responsibility to support and work with newly appointed staff. E.R. 98 (Topic 3).

For a period of time thereafter, ten hour shifts were utilized. However, an analysis of the schedule within the O&A unit revealed times when the shifts overlapped and that the facility was overstaffed and, other periods of time when the facility was understaffed. ***See*** E.R. pp. 94 and 106, (Harrigfeld Aff., ¶10, Exb. 3). Because the ten hour shifts did not provide adequate and consistent staffing, the O&A unit was returned to the eight hour shifts that were being used throughout the entire facility. ***Id.***

The safety and security concerns the staff discussed between themselves, and their supervisors involved the policy restricting staff's ability to lock juveniles in their rooms for disciplinary reasons. ***See*** E.R. 794, 471, 1204-05, 1209. (Fordham Dep. 89:4-23; Ledford Dep. 156:6-13; Knoff Dep. 24:10-25:20, 136:7-

25). None of the plaintiffs made any reports or complaints of sexual misconduct of staff towards juveniles. Ms. Ledford specifically testified she did not, at any time, make a report or complaint of that nature. ***See*** E.R. 479-481, (Ledford Dep., p. 215:18-217:7). In fact, Ms. Ledford and Ms. Reyna received letters of reprimand for failing to promptly document and report incidences potentially constituted a PREA violation. ***See*** E.R. 470, 700, 1280-1282, 1299-1301 Exb 15. (Ledford Dep., p. 151:15-22, Exb. 15; Reyna Dep., p. 73:6-13, Exb. 28).

V. ARGUMENT

A. District Court Ruling.

The District Court failed to analyze whether each individual Plaintiffs spoke on a matter of public concern in their capacity as a private citizen. The only discussion regarding whether anyone had spoke on a matter public concern included the following:

> Turning to the first question, plaintiffs allege that defendants retaliated against them for speaking out about corruption, waste, and the danger to juvenile inmates at the Juvenile Corrections Center in Nampa. There are at least questions of fact over whether the subjects are matters of public concern.

See E.R. 2072. The District Court failed to address the actual "content, form and context" of the speech, as required by ***Connick v. Meyers***, 461 U.S. 138, 146, (1983). Accordingly, the District Court's conclusion the Plaintiffs' alleged speech involved matters of public concern cannot be affirmed.

With respect to the District Court's finding the Plaintiffs spoke as private citizens, the court addressed only the claims of Rhonda Ledford. Lacking in the opinion is any discussion of what speech Ray Gregston, Jo McKinney, Shane Penrod, Pam McCormick, Gracie Reyna, Lisa Littlefield, Addison Fordham, Tom DeKnijf or Frank Farnworth engaged in or how their comments could be considered protected citizen speech. Instead the court stated: "plaintiff Ledford did not just follow the internal chain of command in making her complaints about danger to juveniles, but also contacted the Governor's office, . . . and spoke to a State Senator." ***See*** E.R. pp. 2072-2073. This statement ignores the first critical component of any First Amendment claim which requires the court to determine whether the employee speech at issue involved a matter of public concern. ***See Pickering v. Board of Education***, 391 U.S. 563, 568 (1968); ***Connick***, 461 U.S. at 144. Additionally, as discussed below, Ledford's communications were limited to her "personal employment dispute rather than protected speech." ***See Connick***, 461 U.S. at 148 N. 8. The District Court failed to discuss the content or context of Ledford's communications and assumed she was acting as private citizen because she sent an email to a state senator when, in fact, her communications were limited to her ongoing dispute with her employer regarding her request for intermittent FMLA leave.

The District Court also failed to explain how each Plaintiff was deterred from engaging in protected speech. The court generally stated that "plaintiffs have come forward with evidence that at least creates issues of fact on whether they were harassed and threatened by defendants Grimm and Harrigfeld in an effort to suppress their speech, … under ***Coszalter***, that is sufficient to constitute an adverse employment action." ***See*** E.R. 2074. While the court apparently agreed that none of the Plaintiffs suffered an adverse employment action, it failed to identify how any of the individual's protected speech was curtailed and ignores the sworn testimony of the plaintiffs who stated they were commenting on matters involving their jobs and, that neither Harrigfeld or Grimm prevented them from speaking out on matters that concerned them. ***See*** § B.3, infra.

Finally, despite its conclusion that issues of fact exist regarding whether the Plaintiffs were threatened or harassed in an effort to curtail their speech, the District Court failed to explain the actual conduct of Harrigfeld and Grimm which constituted the alleged illegal harassment and, how their actions were inconsistent with existing law. The District Court failed to explain how being provided a list of job expectations constituted conduct on the part of Grimm or Harrigfeld to curtail Ledford's speech. The District Court made no mention of the content of the list of expectations or how such a list could be construed as a campaign of harassment and humiliation designed to chill protected speech or how instruction our employee

regarding their job duties could involve protected speech. ***See*** ***Garcetti v. Ceballos***, 547 U.S. 410, 422 (2006) (recognizing the needs of government employees to manage their operations and restrict employee speech). Moreover, the District Court's implication that Ledford went three months without a paycheck confuses her FMLA claim with her First Amendment claim. The court failed to explain how the lawful grant of Ledford's FMLA request could chill her speech, particularly where the court found the IDJC's conduct in this respect to be proper as a matter of law. E.R. 2081-2083.

The District Court's determination that Reyna's alleged stress from so called hostility constituted a chilling of her speech lacks any indication of what the hostility consistent of or how it chilled her speech. Instead, the court entirely ignores Reyna's sworn testimony that neither Harrigfeld nor Grimm did anything to prevent her from speaking out about any issue involving her job. E.R. 704 (Reyna Dep. 89:8-30).

The District Court's analysis or Mr. Fordham indicates only that he relayed criticisms to his supervisor and "policies and practices" regarding safety and, that he intended those complaints to be passed on to Grimm and Harrigfeld. The District Court cited to no evidence indicating that Grimm or Harrigfeld knew of any Fordham's alleged complaints or that Fordham's employment was ever threatened as a result, particularly where Fordham has never had any form of

discipline during his employment. E.R. 780 (Fordham Dep. 33:9-11). Additionally, the court failed to address how Fordham's criticisms could be considered protected citizen speech involving a matter of public concern.

The District Court's finding that Gregston was threatened with disciplinary action if he continued with his alleged criticisms of Grimm and Harrigfeld is directly contradicted by the fact Gregston admitted he was not prevented from speaking out on hiring matters. He only alleges that he was told not to use a facility wide petition rather than the available grievance or problem solving policies. E.R. 537, 309-310 (Gregston Dep. 82:1-23, Harrigfeld Dep. 120:20-121:10. Even if his allegation were true, it does not amount a campaign of harassment and humiliation designed to chill political expression. At most, it indicates a reasonable limitation on the manner in which employees raised complaints involving the work conditions which, does not involve protected speech. ***See*** ***Weintraub v. Board of Educ. Of City School Dist. Of City of New York***, 593 F.3d 196, 204 (2nd Cir. 2010) (lodging a union grievance is not a form or channel of discourse available to non-employee citizens and, accordingly, is not protected speech). Gregston was still invited to raise any complaints with his supervisors. ***See*** E.R. 542 (Gregston Dep. 96:6-23).

The District Court notes that Penrod alleges he was placed on the graveyard shift two weeks after signing a petition regarding the hiring of Laura Roters. E.R.

2075. However the court ignored the fact the petition was anonymous and fails to consider Penrod's testimony that neither Grimm nor Harrigfeld prevented him from criticizing the IDJC in any way. E.R. 591, (Penrod Dep. 92:4-13). The District Court failed to address the claims of the remaining five Plaintiffs, merely stating, "Each of the other plaintiff have similar allegations…" E.R. 2076.

Through its flawed analysis of the plaintiff's allegations and their sworn testimony, the court erroneously made broad generalized conclusions concerning whether their constitutional rights were violated when it was required to examine the actions of each defendant in light of the facts and circumstances they faced in order to determine whether their actions were objectively reasonable and, immune. ***See Brousseau v. Hagen***, 543 U.S. 194, 198 (2004).

B. Plaintiffs Cannot Establish a First Amendment Claim.

An initial issue in any qualified immunity case requires the court to determine whether the undisputed facts describe a constitutional violation has occurred. ***See Pearson v. Callahan***, 555 U.S. 223, 232 (2009). If the facts establish the plaintiff's constitutional rights were not violated, the qualified immunity analysis ends. ***Id.*** at 236-239. In this case, the District Court erroneously found an issue of fact exists regarding whether each individual plaintiff rights were infringed upon.

Not a single Plaintiff raised a matter of public concern to anyone outside of the IDJC or outside their ordinary duties. The balance between the interests of a public employee, as a citizen, commenting upon matters of public concern and the interest of the State, as an employer in promoting the efficiency of the public services it performs requires courts to consider:

> (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff to spoke as a private citizen or public employee; (3) whether the plaintiffs protected speech with a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech.

Eng v. Cooley, 552 F.3d 1062, 1070 (9th Cir. 2009). "[All] the factors are necessary, in the sense that failure to meet any one of them is fatal to the plaintiff's case." ***Dahlia v. Rodriguez***, 735 F.3d 1060, 1067 (9th Cir. 2013). "A public employee's speech is not protected by the First Amendment when it is made pursuant to the employee's official job responsibilities." ***Id.*** *citing* ***Garcetti v. Ceballos***, 547 U.S. 410 (2006). Conversely, a public employee's speech on a matter of public concern is protected "if the speaker had no official duty to make

the questioned statements,… or if the speech was not the product of performing the tasks the employee was a paid to perform." ***Posey v. Lake Pend Oreille Sch. Dist. No.***, 546 F.3d 1121, 1129 (9th Cir. 2008) (internal quotations omitted). But "speech which 'owes its existence to an employee's professional responsibilities' is not protected by the First Amendment." ***Garcetti v. Ceballos,*** 547 U.S. 410, 421-422 (2006).

1. Ledford's email did not involve matters of public concern.

Ledford's self-interested communication to the State Senator did not involve matters of public concern because it addressed an ongoing FMLA dispute with her employer. "[A] simple reference to government functioning does not automatically qualify as speech on a matter of public concern." ***Desrochers v. City of San Bernardino***, 572 F.3d 703, 711 (9th Cir. 2009). To the contrary, "the content of the communication must be of broader societal concern. The focus must be upon whether the public or community is likely to be truly interested in the particular expression, or whether is more properly viewed as essentially a private grievance." ***Roe v. City of County of San Francisco***, 109 F.3d 578, 585 (9th Cir. 1997). Passing references to public safety which are "incidental to the message conveyed" are not a public concern. ***Desrochers***, 572 F.3d at 711. Courts focus on the "content, form, and context" of the speech at issue "as revealed by the whole record." ***Connick v. Myers***, 461 U.S. 138, 147-148 (1983).

In ***Connick***, the Supreme Court reversed the decision to uphold the reinstatement, back pay, and damages awarded to an assistant district attorney who claimed she was discharged for exercising her right to free speech. The Court found the questionnaire the plaintiff circulated to the staff regarding workplace issues could have been protected if the purpose had been to "bring to light actual or potential wrongdoing or breach of public trust" on the part of her supervisor. ***Id.*** at 148. However, a review of "the content, form, and context" of the questionnaire revealed "the focus of Myer's questions is not to evaluate the performance of the office but rather to gather ammunition for another round of controversy with her superiors. These questions reflect one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celèbre." ***Id***. ***see also*** ***McKinley v. City of Eloy***, 705 F.2d 1110, 1114 (9th Cir. 1983) (speech by public employees "may be characterized as not of 'public concern' when it is clear that such speech deals with individual personnel disputes and grievances and that the information would be of no relevant to the public's evaluation of the performance of governmental agencies.")

Like the employee questionnaire in ***Connick v. Meyers***, Ledford's email was in reaction to a private, personnel decision with which she disagreed. She was

upset because she received continuous FMLA leave rather than intermittent leave.[3] This is evidenced by the fact her email details, at great length, the facts surrounding her FMLA dispute and the financial impact of being on unpaid leave. While the email makes a few passing references to "unethical, misspending, and prohibited practices" it is clear from the "content, form and context" that the focus of the message is her disagreement with her employers' decision to place her on continuous rather than intermittent FMLA leave. The first sentence of the e-mail to Senator Crapo begins, "I am requesting assistance with my recent FMLA." In fact for every vague reference to "facility concerns", Ledford provides ten references to her FMLA leave. Her "facility concerns" give no specific instances and are so vague so as to give the public no basis to evaluate the validity of her comments concerning the Nampa facility. Like the plaintiff in ***Connick v. Meyers***, Ledford was attempting to use her dissatisfaction with her FMLA leave to turn that displeasure into a cause celèbre. Because Ledford was the only plaintiff to

[3] After her request for continuous FMLA leave was approved, Ledford requested intermittent leave which would have allowed her to leave work whenever she experienced severe anxiety. Through her discussions with the human resources officer, Ledford was advised that because her job as a security officer required her to interact directly with juveniles, her request could not be approved. E.R. 131(Cloud Aff., ¶6); ***see also Samper v. Providence St. Vincent Medical Center***, 675 F.3d 1233 (9th Cr. 2012) (requested accommodation allowing a nurse to miss work whenever she felt leave was needed was not, as a matter of law, a reasonable accommodation). Thereafter, Ledford's physician provided a medical certification stating she was "unable to return to work in any capacity due to external stress". E.R. p. 203-204. After her physician released her to return to work, Ledford returned to her original job at the same salary and benefits. ***See*** E.R. 133, 108.

communicate with someone other than a co-worker or supervisor and, because her speech did not involve a matter public concern, her First Amendment claims should have been dismissed.

2. <u>Plaintiffs did not speak as private citizens.</u>

The remaining Plaintiffs' safety concerns which the District Court described as "complaints about danger to juveniles" were brought only to the attention of their co-workers and supervisors and, only in the course of their jobs. "Generally, in a highly hierarchical employment setting such as law enforcement, *Dahlia*, 735 F.3d at 1074 when a public employee raises complaints or concerns up the chain of command at his workplace about his job duties, that speech is undertaken in the course of performing his job". ***Hagen v. City of Eugene***, 736 F.3d 1251, 1258 (9th Cir. 2013), *quoting* ***Davis v. McKinney***, 518 F.3d 304, 313 (5th Cir. 2008). "If, on the other hand, 'a public employee takes his job concerns to persons outside the work place in addition to raising them up the chain of command at his workplace, then those external communications are ordinarily not made as an employee, but as a citizen.'" ***Hagen***, 736 F.3d at 1258 *quoting* ***Davis McKinney***, 518 F.3d 304, 313 (5th Cir. 2008). While the Supreme Court has yet to articulate a comprehensive framework for defining the scope of an employee's duties, "[t]he proper inquiry is a practical one" untied to formal job descriptions." ***Garcetti v Cebellos***, 547 U.S. 410, 424-25 (2006). ***<u>See also</u>*** C. 3-4, infra.

Where a safety officer is required to report safety issues as part of his assigned tasks, concerns to coworkers and superior officers, those communications are not protected speech. ***Hagen***, 736 F.3d at 1258. In ***Hagen***, the police officer began expressing safety concerns following a third police shooting in two years due to accidental discharge. ***Id.*** at 1254. The officer held meetings with his sergeant and sent an e-mail to a number of different sergeants in order to be "as public as possible" and to invite them to discuss how K-9 and SWAT teams could be better equipped and work together. Three days after his e-mail, the chief suspended the team's operations to resolve safety issues. ***Id.*** The SWAT teams were later reactivated and, the plaintiff continued his complaints. His sergeant explained he transferred the plaintiff because he was '"the spokesman for the majority of the complaint,'…and 'repeatedly engaged in what [the sargent deemed] to be passive insubordination'". ***Id.*** Finding the city was entitled to judgment as a matter of law, this court focused on the tasks the plaintiff was paid to perform. ***Id.*** at 1258. The court found that, like the public employee in ***Garcetti***, the plaintiff worked in a hierarchical employment setting and, his concerns were directed to his coworkers and superior officers. ***Id.*** Despite the fact his concerns involved officer safety in general, this court found his complaints stemmed from '"particular incident[s] or occurrence[s]'". ***Id.*** *quoting* ***Dahlia*** 735 F.3d at 1075. The court rejected the plaintiff's argument that he did not actually "report" anything, as that

term was applied in ***Garcetti*** but, instead was discussing a known, dangerous situation. Because the police department's employee manual and general order required him to report unsafe practices and, because he only discussed the issue with co-workers and supervisors, his speech was not protected as a matter of law. ***Id.*** at 1259.

Like the plaintiff in ***Hagen***, the Plaintiffs in this case were charged with the duty of reporting safety concerns. Aside from their duties to submit incident reports, they were specifically instructed to come forward with any all concerns to management. According to an all-staff email from Director Harrigfeld, employees were instructed to voice their concerns and suggestions and, directed staff to provide a "proposal for alterative behavior management." E.R. 97. In addition to safety concerns, Director Harrigfeld instructed staff to come forward with concerns regarding hiring practices and assured them that "we are available to any staff person who has information or suggestions that might improve the operation of JCC Nampa." E.R. 98. Director Harrigfeld also directed staff to provide a proposal to reinstate 10 hour shifts in a way that would not adversely impact coverage, overtime and holidays, noting "we will act promptly to approve or to ask questions." E.R. 98.[4] Thus, in addition to the formal job requirement of

[4] Management implemented the O & A department's suggested schedule utilizing 10 hour shifts for a number of months. Because 10 hour shifts did not provide consistent staff coverage during

maintaining safety and security of juveniles and communicating to other employees, E.R. 135-156 (Cloud Aff. Exbs. 1-5), Plaintiffs were charged with the duty of communicating their concerns regarding safety and security, hiring practices and coverage issues to management. All of Plaintiffs' safety complaints were made within the scope of the employees' duties and, for that reason, did not involve protected citizen speech.

3. Defendants did not take action designed to chill political speech.

Even if one assumed a portion of Plaintiffs' speech involved matters of public concern and involved protected citizen speech, they failed to demonstrate that Harrigfeld or Grimm took action designed to retaliate against, and chill their political expression. ***See Coszalter v. City of Salem***, 320 F.3d 968, 975 (9th Cir. 2003). Having determined that none of the Plaintiffs were subject to a loss of benefits or disciplinary action resulting in a change to job duties or compensation, the District Court relied on ***Coszlater*** concluding an issue of fact existed regarding whether their speech was chilled. E.R. 2073. However, nothing akin to a "severe and sustained campaign of employer retaliation", ***Id.*** at 977, designed to chill political speech could be construed from this record.

Ledford admitted that the only time she was instructed not to speak on any issue is when Grimm told her not to discuss the personnel issues included in her

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some shifts and caused wasteful overlap during others, the O & A unit was returned to the 8 hour shifts that were being used throughout the facility. E.R. 94-95, 106-111 (Harringfeld Aff., ¶10).

problem solving grievance. E.R. 466. (Ledford Dep. 135:15-136:18.) She also admitted she did not stop discussing issues with other staff after she talked to Grimm. E.R. 475. (Id. 173:9-11.) Thus, contrary to the District Court's conclusion, Ledford's speech was not chilled. She continued speaking with co-workers and others on issues concerning her job. Gracie Reyna admitted that neither Harrigfeld nor Grimm did anything to prevent her from speaking out about any issue involving her job. E.R. 704. (Reyna Dep. 89:8-30.)

Addison Fordham alleged he was reluctant to challenge the method of disciplinary action against him or to use the problem solving grievance procedure because of Grimm's statement to the entire O & A unit that they needed to support their supervisor or find another job. E.R. 797. (Fordham Dep. 99:21-24). Challenging the method of discipline and using the problem solving process for personal employment issues are not protected activities where there is no indication those activities involved matters of public concern. ***See Weintraub v. Board of Educ. Of City School Dist. Of City of New*** York, 593 U.S. 196, 204 (2nd Cir. 2010) (lodging a union grievance is not a forum of discourse available to non-employees and, for that reason, is not protected citizen speech). Fordham admits Grimm's statement was made to the entire O & A unit and not to him personally. E.R. 797. (Fordham Dep. 98:17-101:1). Her comments addressed the O & A staff displeasure with the appointment of Laura Roters as their supervisor and, was

intended to advise them they were required to follow the directives and orders of their new supervisor. E.R. 390 (B.Grimm Dep. 169:1-18). ***See also* Mills v. City of Evansville**, 4527 3d 646, 648 (7th Cir. 2006) (employee who spoke at policy formation meetings in opposition to her employer's plans could be fired when management concluded she would try to undermine or fail to reasonably implement those plans.)

Gregston admits he was not prohibited from speaking out on hiring matters. He was asked to utilize the established grievance procedure rather than employee petitions. E.R. 537. (Gregston Dep. 82:1-23.) Gregston was encouraged to come forth with any hiring complaints to his supervisors. He admits he experienced no retaliation because of the petition he was circulating. E.R. 533. (Gregston Dep 66:9-12). Penrod testified that there was nothing that Grimm or Harrigfeld did to prevent him from criticizing the IDJC in any way. E.R. 591. (Penrod Dep. 92:4-13.) McKinney stated that neither Grimm nor Harrigfeld prohibited her from speaking out on anything. E.R. 1174 (McKinney Dep.107:5-7.) DeKnijf admitted that neither Grimm nor Harrigfeld did anything to prevent him from speaking out on any issue. E.R. 844. (DeKnijf Dep. 92:14-20.) Farnworth stated that the issue Harrigfeld told him not to speak about was the suicide of an individual juvenile, although he admitted such information was confidential. He stated that Grimm never told him not to speak out on anything. E.R. 913-914. (Farnworth Dep.

132:23-134:18.) McCormick, who did not work at the Nampa facility, admitted that Harrigfeld never prevented her from making any complaints and that neither Harrigfeld nor Grimm took any action against her. E.R. 651, 657, (McCormick Dep. 78:14-22; 105:6-16.) Littlefield never indicated she was prevented from speaking out. To the contrary, she testified that she spoke to Betty Grimm and Laura Roters upwards of twenty times. E.R. 743. (Littlefield Dep. 62:14-63:1-20.)

Based upon the sworn testimony of the individual plaintiffs, the conclusion of the District Court that Harrigfeld and Grimm's actions were taken to silence protected speech, cannot be sustained. The Plaintiffs have consistently testified their speech was not curtailed and, that neither Harrigfeld or Grimm did anything to discourage or prevent them from speaking out on any issue they desired.

4. No Plaintiff can establish a causal nexus between protected activity and alleged retaliation.

To oppose a motion for summary judgment challenging a First Amendment retaliation claim, each plaintiff must provide evidence their protected speech was a substantial or motivating factor in the adverse employment action they contend was taken because they engaged in protected speech. The only Plaintiff who could allege any change in employment during the relevant time period is Shane Penrod, who, on a temporary basis, worked night shifts. However, Penrod admitted his retaliation claim against Grimm was based on his mistaken assumption that she saw the petition that was circulated by Ray Gregston and assumed Penrod was a

signatory even though his name had been redacted. E.R. 591. (Penrod Dep. 92:14-93:5). It is undisputed the petition was never presented to IDJC management and the version that was delivered to DHR contained no signatures. E.R. 269, 304-305, 373. (Savoie Aff. ¶¶ 6-7; Harrigfeld Dep. 100:10-101:2; Grimm Dep. 102::9-14).

Ledford claims she was denied FMLA because of alleged safety reports. However, her complaint, which occurred in from November of 2011 is clearly time-barred and cannot be an adverse employment action as the District Court has ruled she was not unlawfully denied FMLA leave and entered summary judgment in favor of the defendants on that issue. E.R. 2081-2083. The fact that she received continuous rather than intermittent leave does not constitute adverse employment action and, presents no causal connection to any complaints about staff safety.

C. Harrigfeld and Grimm are entitled to qualified immunity for any constitutional violations that may have occurred.

Even if one assumed the actions of Harrigfeld and Grimm somehow infringed upon the First Amendment rights of any of the individual Plaintiffs, that assumption does not defeat their entitlement to qualified immunity. Qualified immunity generally shields "government officials performing discretionary functions…from liability for civil damages insofar as their conduct does not violate clearly established, statutory or constitutional rights of which a reasonable person would have known." ***Harlow v. Fitzgerald***, 457 U.S. 800, 818 (1982). "The

protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, a mistake of fact, or a mistake based on mixed questions of law or fact.'" ***Pearson v. Callahan***, 555 U.S. 223, 231 (2009). "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments," and "protects 'all but the plainly incompetent or those who knowingly violate the law.'" ***Ashcroft v. al-Kidd***, 131 S. Ct. 2074, 2085 (2011) (quoting ***Malley v. Briggs***, 475 U.S. 335, 341 (1986). "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." ***al-Kidd***, 131 S. Ct. at 2083.

To defeat the qualified immunity defense, a plaintiff must establish that (1) the defendant committed "a violation of a constitutional right" and (2) "the right at issue was 'clearly established' at the time of [the] defendant's alleged misconduct." ***Pearson v. Callahan***, 555 U.S. 223, 232 (2009). The inquiry into whether a right was "clearly established" requires a court to first define the right at the appropriate level of specificity. Framed "as a broad proposition" – for instance, that "the First Amendment prohibits government officials from subjecting an individual to retaliatory actions" for their speech as citizens – any constitutional prohibition would be clearly established, and no official would be entitled to qualified immunity. ***Reichle***, 132 S. Ct. at 2094; ***Wilson v. Layne***, 526 U.S. 603, 615 (1999). Instead, a right must be clearly established "in a 'particularized' sense

so that the 'contours' of the right are clear to a reasonable official." ***Reichle***, 132 S. Ct. at 2094. This requires the court to consider the legal standards existing at the time in conjunction with the circumstances the individual faced in order to determine whether their actions were objectively reasonable and entitled to immunity. ***Saucier***, 533 U.S. at 202. The Supreme Court has "emphasize[d] that" the qualified immunity determination must "be undertaken in light of the specific context of the case, not as a broad general proposition." ***Brosseau v. Haugen,*** 543 U.S. 194, 198 (2004); ***Stanton v. Simms***, 134 S. Ct. 3 (2013); ***Ryburn v. Huff***, 132 S. Ct. 987 (2012); ***Wood v. Moss***, ____ S. Ct. _____ (2014). In other words, "existing precedent must have placed the statutory or constitutional question beyond debate." ***Camreta v. Green***, 131 S. Ct. 2020, 2083 (2011). This requires an examination of the information available to the individual defendant at the time "he made his decision as distinguished from analysis and information brought to light and after the fact and in litigation." ***Rudenbusch v. Hughes***, 313 F.3d 506, 519 (9th Cir. 2002).

1. **Harrigfeld and Grimm did not violate clearly established law.**

The District Court's discussion of the qualified immunity issue is found at pp. 13 and 14 of its Memorandum Decision and Order. ***See*** E.R. 2077-2078. The court discussed this court's holdings in ***Hubbard v. City of Pittsburgh***, 574 F.3d 696 (9th Cir. 2009) and, the more recent decision in ***Dahlia v. Rodriguez***, 735 F.3d

1060 (9th Cir. 2013) concluding the law governing the legal question of whether a public employee is engaging in protected speech as a citizen as opposed to unprotected speech as an employee was, in 2010 and 2011, clearly established. ***See*** E.R. at 2078. The Court's conclusion was based upon contacts between Rhonda Ledford, and a state senator. ***Id.*** However, the District Court failed to discuss the context or the content of Ms. Ledford's communications to determine whether in fact she was engaging in protected speech and, equally important, whether her communications involved matters of public concern. ***See Pickering v. Board of Education***, 391 U.S. 563, 568 (1968); ***Connick v. Myers***, 461 U.S. 138, 144 (1983). The District Court's opinion leaves the false impression Ledford was speaking on behalf of all of the plaintiffs when she communicated with the state senator. In fact, Ledford's communications were limited to her personal complaints relating to her request for FMLA benefits. ***See*** § C.4, infra.

Additionally, the District Court erred by failing to address each of the individual plaintiff's First Amendment claims to determine whether they were engaging in protected speech, whether they experienced unlawful retaliation and, whether Harrigfeld and Grimm's actions were objectively reasonable. Instead, the District Court described and addressed the plaintiff's claims and the legal standards governing Harrigfeld and Grimm's actions on a broad generalized basis rather than examining each of the individual plaintiff's claims. Equally important, the District

Court failed to address the individual defendants' actions in the specific context of the facts and circumstances they were facing when they made their challenged decisions and engaged in the actions which individual plaintiffs contend violated the First Amendment.

To avoid summary judgment, each individual plaintiff was required to establish Harrigfeld and Grimm took specific actions which were intended to prohibit or discourage them from engaging in protected citizen speech. As an example, Gracie Reyna, and Tom DeKnijf were required to provide evidence that Harrigfeld and Grimm prohibited them from speaking out on a particular issue that would be entitled to First Amendment protection. Considering both testified they were not prohibited from speaking out on anything, E.R. 704, 844 (Reyna Dep. 89:8-30; DeKnijf Dep. 92:14-20), it is difficult to identify the basis of the District Court's conclusion that an issue of fact exists concerning whether their speech was, unconstitutionally chilled. ***See*** E.R. 2073-2074.

2. **Rhonda Ledford's email communications involved personal grievances rather than protected speech.**

In its Memorandum Decision, the District Court concluded Rhonda Ledford engaged in protected citizen speech when she communicated with a state senator. ***See*** E.R. p. 2065. In 2011, Ledford requested and was provided FMLA leave. A dispute arose concerning the availability of the intermittent leave she requested.

She then contacted the Governor's office and, sent an email to a State Senator complaining the IDJC had denied her FMLA request. ***See*** E.R. 2017-2021.

To trigger first amendment protection, the public employee's speech at issue must involve a matter of public concern. ***See Connick v. Myers***, 461 U.S. 138 (1983). In ***Connick,*** the Court cautioned against presuming "that all matters which transpire within a government office are of public concern." ***Id.*** at 149. To determine the protected status of an employee's speech, ***Connick*** directed trial courts to scrutinize the employee's comments to assess whether they were intended "to evaluate the performance of the office" or merely "to gather ammunition for another round of controversy" with superiors which would not be entitled to constitutional protection. ***Id.*** at 148. The ***Connick*** court was explicit on this point explaining "when employee's speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view" that the employee's speech addresses solely a private dispute. ***Id.*** at 153. In ***Connick***, the Supreme Court held that the distribution of a questionnaire to office employees was not protected speech when its sole purpose was to bolster the employee's position in a personnel dispute with her employer and, "if released to the public, would convey no information at all other than the fact that a single employee is upset with the status quo." 461 U.S. at 148. Similarly, in ***Havekost v. United States Dept. of the***

Navy, 925 F.2d 316 (9th Cir. 1991) this court held that the circulation of a petition arising from "an internal dispute over the Navy's dress code, scheduling, and responsibility for certain lost commissary profits" were "the minutia of workplace grievances" of no more public concern "as would be the length and distribution of coffee breaks." ***Id.*** at 319. ***See also*** ***McKinley v. City of Eloy***, 705 F.2d 1110, 1114 (9th Cir. 1983) (speech by public employees addressing individual personnel disputes and grievances are not entitled to first amendment protection).

When Ms. Ledford's deposition was taken, she admitted the only retaliation she had experienced was her work environment leading to taking FMLA leave. ***See*** E.R. 453, (Ledford Dep 83:1-17). She admits she was never disciplined for speaking out on safety and security issues. E.R. 466. (***Id.*** 136:14-18) and, she never reported or complained of incidences of sexual misconduct by staff with juveniles. E.R. 479-481. (***Id.*** 215:18 – 217:7). Her communications with the state senator mentioned in the District Court's ruling did not suggest other employees were being denied benefits. Instead, much like the deputy prosecuting attorney in ***Connick v. Myers***, Ledford was publicizing her own personal grievances for the purpose of strengthening her position in the ongoing dispute with her employer concerning the conditions of her own employment. Simply stated, her disagreement and dispute with her employer concerning her entitlement to intermittent FMLA leave involved a personal dispute or workplace grievance

rather than protected speech. ***See*** ***Connick***, 461 at 147-148. The District Court failed to consider whether Ledford's communications with the senator involved matters of public concern. Because her communications in this context did not involve protected speech, they should have not been considered to determine whether Ledford, or any of the other nine plaintiffs were engaging in protected citizen speech and, whether Harrigfeld and Grimm were entitled to qualified immunity.

3. **Citizen v. Employee Speech.**

In ***Garcetti v Cebellos***, 547 U.S. 410 (2006) the Supreme Court addressed the application of the First Amendment in the context of workplace speech holding: "[W]hen 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." ***Id.*** at 421. The District Court acknowledged the unsettled nature of the law on this issue by citing ***Hubbard v. City of Pittsburgh***, 547 F.3d 696 (9th Cir. 2009) and, the subsequent ruling in ***Dalia v. Rodriguez***, 735, F.3d 1060 (9th Cir. 2013) which overruled, in part, the holding in ***Hubbard***. The District Court sought to avoid the conflict between these cases in an attempt to justify its conclusion that the law governing the issue of when a public employee is engaging in protected speech was clearly established. The District Court reasoned the

police officer in ***Hubbard*** was assigned the task of investigating police corruption and, for that reason, the reports he submitted concerning those investigations were made as a public employee and, were not entitled to First Amendment protection. ***See*** E.R. p. 2065. The court then concluded that because the individual plaintiffs were under no duty to investigate Grimm or Harrigfeld, their alleged complaints concerning safety and security or the operations of the Nampa facility constituted protected citizen's speech. ***Id.***

The District Court's legal analysis mistakenly assumes the question of whether an employee's speech is protected "citizen speech", is controlled by specific language in their job descriptions or whether they were assigned a specific task. An individual's job description is not a controlling factor. ***See Garcetti***, 547 U.S. at 425-426. In ***Weintraub v. Board of Education City School District of City of New York***, 593 F.3d 196, (2d Cir. 2010) the plaintiff alleged he was discharged for filing a grievance with his union representative challenging the decision of his assistant principal to not discipline a student who had thrown books at him during class. The plaintiff contended his conversations with the supervisor, which included a threat to file a grievance and, his conversations with other teachers regarding his concerns of the lack of student discipline and safety issues, were protected by the First Amendment. The plaintiff argued the lack of any rule or regulation, job handbook, or job description stating the speech he engaged in was

part of his official duties as a school teacher, rendered his communications protected citizen's speech. ***See*** 593 F.3d at 202. The appellate court disagreed observing "[T]he objective inquiry into whether a public employee spoke 'pursuant to' his or her official duties is a practical one." ***Id.*** The court noted the direction given in ***Garcetti*** and, its recognition that "[f]ormal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for first amendment purposes". ***See Garcetti***, 547 U.S. at 424-425. The ***Weintraub*** court then recognized that "other circuit courts have concluded that speech that government employers have not expressly required may still be 'pursuant to official duties,' so long as the speech is in furtherance of such duties," ***see*** 593 F.3d at 202 *citing* ***Williams v. Dallas Independent School Dist.***, 480 F.3d 689 (5th Cir. 2007) (preparing a memoranda which was not demanded of an employee "does not mean he was not acting within the course of performing his job"); ***Renken v. Gregory***, 541 F.3d 769 (7th Cir. 2008) (complaints to university officials regarding difficulties encountered administering in an educational grant though not a formal requirement of the plaintiff's job was "for the benefit of students" and therefore "aided in the fulfillment of his teaching responsibilities"). The court then concluded:

> We join these circuits and conclude that, under the First Amendment, speech can be "pursuant to" a public employee's official job duties even though it is not required by, or included in, the employee's job description, or in response to a request by an employer. In particular, we conclude that Weintraub's grievance was "pursuant to" his official duties because it was "part and parcel of his concerns" about his ability to "properly execute his duties," ***Williams***, 480 F.3d at 694, as a public school teacher-namely, to maintain classroom discipline, which is an indispensable pre-requisite to effective teaching in classroom learning. ***See e.g. Brammer-Hoelter***, 492 F.3d at 1204 ("[A]s teachers, plaintiffs were expected to regulate the behavior of their students"). As in ***Renken*** and ***Williams,*** Weintraub's speech challenging the school administration's decision to not discipline a student in his class was a "means to fulfill" 541 F.3d at 774, and "undertaken in the course of performing," 480 F.3d at 693, his primary employment responsibility of teaching.

See 593 F.3d at 203. Utilizing a similar analysis, the Seventh Circuit, in ***Mills v. City of Evansville***, 452 F.3d 646, 648 (7th Cir. 2006) concluded a police officer's negative remarks following an official meeting was not protected speech reasoning:

> She spoke in her capacity as a public employee contributing to the formation and execution of official policy. Under ***Garcetti*** her employer could draw inferences from her statements about whether she would zealously implement the chief's plans or try to undermined them; when the department drew the latter inference it was free to act accordingly.

The common theme in these cases is the proposition that, when a public employee speaks on issues related to the performance of their job, their comments

do not implicate the First Amendment. In this case, contrary to the ruling of the District Court, each of the plaintiffs' job duties involved interacting with juvenile offenders. E.R. 136-165. The security officers and rehabilitation technicians provide security services at the facility for the benefit of both juveniles and the staff. E.R. 137-138, 141-143. They also participate in discussions involving rehabilitive considerations for juveniles. ***See*** E.R. 138, 142; (Cloud Aff., Exb. 1). Their complaints or concerns regarding the manner in which juveniles were disciplined or other safety concerns at the facility all involve issues relating to the performance of their everyday job duties. Even if their communications could involve matters of public concern, because those comments involved their responsibility to promote the safety and security of the facility and the services provided to juveniles housed in the Nampa facility, they were speaking as public employees rather than as private citizens.

The District Court erroneously suggested the plaintiffs must be specifically charged with the responsibility of investigating issues of facility safety or other irregularities before they could be considered to have been involved in unprotected employee speech. This conclusion is inconsistent with the holding in ***Garcetti v Cebellos,*** as well as the rulings of other circuit courts. Accordingly, the District Court's ruling should be reversed.

4. Ledford's email to the State Senator did not involve protected "citizen speech".

The email at issue was sent in the fall of 2011. E.R. 2017-2021. At the time, existing case law did not clearly define the scope of the First Amendment with respect to a public employee's workplace complaints. In 1983, the ***Connick*** court held that where the focus of the employee's speech is to contest a superior's employment decision and not to shed light on the performance of the office, the speech is not protected. 461 U.S. at 148. Thereafter, in ***Garcetti***, the Court held that speech which was the product of the duties the employee was paid to perform, was not protected. 547 U.S. at 1960. In 2006, this court ruled a public employee's duties are not limited to those tasks that are specially delineated but found an employee's internal communications regarding sexually abusive behavior in her department were protected because her specific allegations addressed "a matter of acute concern to the entire community." ***Freitag v. Ayers***, 468 F.3d 528, 545 (9th Cir. 2006.) Three years later, in ***Huppert v. City of Pittsburg,*** the court held a police officer's report, filed within the chain of command and concerning investigations to which he had been assigned and involved corruption within city government was not protected. Thereafter, ***Dahlia v. Rodriguez,*** overruled ***Huppert*** to the extent it relied on a generic job description and failed to conduct the "practical," fact-specific inquiry required by ***Garcetti***. 735 F.3d at 1071 (2013).

Of the precedential guidance provided on the issue of private citizen speech on a matter of public concern, only two cases, ***Connick*** **and** ***Freitag***, address the issue raised by Ledford's e-mail. There is no dispute that through her email, Ledford spoke outside of the chain of command about her FMLA leave. The issue is whether the information conveyed in the email involved a personal workplace grievance or addressed a matter of public concern. Like the employee in ***Connick***, Ledford was writing in response to a personnel decision with which she disagreed. In looking to the form, content and context of her e-mail, there was no existing case law which would indicate to Grimm or Harrigfeld that Ledford's disagreement with the manner in which her leave was handled involved protected speech as the email did not attempt to provide the public with specific information regarding how employees and juveniles were being treated. The email clearly advised the reader that Ledford was upset with the department's decision to deny her request for intermittent leave, which the District Court was later ruled was appropriate as a matter of law. ***See*** E.R. 2081-2083. Much like the teacher in ***Weintraub*** or the police officer in ***Mills***, Ledford was communicating complaints concerning employee conduct which she felt was interfering with her job. In that context, she was speaking as a public employee rather than as a citizen. There is no language in ***Freitag*** that establishes Ledford's FMLA complaint involved protected speech. Ledford's personal complaints about her FMLA leave did not

touch upon a matter of "acute concern to the entire community". Indeed, a single employee's complaint about the lawful denial of intermittent leave is, by no stretch of the imagination, a concern to the entire community.

Ledford's incidental and overgeneralized references in her email to "facility concerns," did not involve protected speech. The only applicable Ninth Circuit decision is ***Desrochers***, supra which held that passing references to public safety which are "incidental to the message conveyed" are not a public concern. ***Desrochers***, 572 F.3d at 711. Ninth Circuit case law is otherwise silent as to incidental references to alleged governmental misconduct in employee communications.

In ***Mpoy v. Rhee***, ____F.3d____, 2014 WL 3407531 (D.C. Ct. App. July 15, 2014), a special education teacher alleged First Amendment retaliation after he was terminated for sending an e-mail outside his immediate chain of command to address workplace conditions. Specifically, the e-mail detailed the plaintiff's various classroom problems and his principal's failure to remedy those issues. The lengthy email included a one-sentence reference to the principal's alleged instructions to the plaintiff to falsify the records of special education students in order to make it appear they were meeting academic goals. The court held that even if the report was made outside the chain of command, "98% of the email served no purpose other than reporting interference with his ability to educate his

students,". ***Id.*** For that reason, the email was not made by a private citizen, even though it contained a reference to an event that, by itself, could involve a matter of public concern. ***Id***.

The ***Mpoy*** email is directly analogous to Ledford's communication in that over ninety percent of the issues discussed in her communication is devoted to her complaints stemming from her position as an employee of the IDJC. Because she was speaking as a public employee, her sparse and overgeneralized references to facility safety or ethical concerns do not transform her communication into protected speech. In any event, it was not clearly established that Ledford's communication, though it was made outside of the chain of command, was transformed from unprotected employee speech to protected citizen speech by including a few incidental references to departmental issues. If the email was seen by Harrigfeld and Grimm, they would have reasonably read it as a complaint by Ledford concerning her ongoing dispute regarding her FMLA leave and complaints concerning workplace conditions that were impacting her ability to perform her job. In the context of the facts and circumstances that faced Harrigfeld and Grimm when they denied Ledford's request for intermittent leave, their decisions were objectively reasonable and entitled to qualified immunity. ***See Lane v. Franks***, 134 S Ct. 2369, 2283 (2014) (employer's decision to fire plaintiff

for testifying in criminal proceedings, while violative of the plaintiff's First Amendment rights, was entitled to qualified immunity).

With respect to Ledford's other alleged complaints which she claims to have made to co-workers and supervisors regarding safety issues and time-card padding, her communications again involved unprotected employee speech. In 2009, the case law in the Ninth Circuit indicated that a public officer's report, filed within the chain of command and concerning cases he was assigned to investigate, was not protected speech. ***Huppert***, F.3d at 706. Under the District Court's interpretation of ***Huppert***, unless Ledford's job description, or her assigned duties required her to report safety issues and time-card padding to her co-workers and supervisors, her reports were protected citizen speech. In light of the rulings in ***Connick*** and ***Garcetti***, which require a pragmatic review of the employees communications to determine whether they address issues within the scope of the employee's duties, the District Court's approach is not correct and certainly does not describe a clearly established legal standard. Considering ***Huppert*** was overruled in favor of a more flexible standard which focuses upon a pragmatic set of factors rather than generic job descriptions, demonstrates the error in the District Court's conclusion that the law on this issue was clearly established.

The Ninth Circuit has not articulated a clear standard regarding when internal communications regarding workplace concerns become protected citizen

speech. In ***Weintraub v. Board of Education of City School Dist. of City of New York***, 593 F.3d 196 (2nd Cir. 2010), a teacher's internal grievance regarding violent student assaults in his classroom and his complaint that his supervisor did nothing in response, was not protected speech, although student safety was arguably, an issue of public concern. ***Id***. at 203. Significantly, the court found the teacher's grievance which was pursued through her union, and her complaints to co-workers, had no relevant analogue to citizen speech. The court cited to ***Freitag***, noting that in that case, "there was a relevant citizen analogue to the employee's speech, because the 'the right to complain both an elected public official and to an independent state agency is guaranteed to any citizen in a democratic society regardless of his status as a public employee.'" ***Id***. *citing* ***Freitag***, 468 F.3d at 545. The ***Weintraub*** court reasoned the lodging of a union grievance "is not a forum or channel of discourse available to non-employee citizens, as would be a letter to the editor or a complaint to an elected representative or inspector general" and, for that reason, the speech was not protected. 593 F.3d at 204. The controlling factor is whether Ledford's discussions with her co-workers were related to her job. If they were, she was speaking as a public employee rather than as a citizen.

5. The other plaintiffs' internal communications within their chain of command involved employee speech.

Similarly, the other nine plaintiffs, who admitted they never raised their safety and hiring concerns outside the context of discussions with co-workers and immediate supervisors, did not communicate speech protected under clearly established law. Unless the employee is discussing an issue that is not related to the performance of their job duties, they are not engaged in protected citizen speech. Moreover, unlike Ledford's email, the speech at issue must not involve their disagreement with a management decision or action affecting their workplace with which they disagree. ***See Havekost***, 925 F.2d at 318-319.

Finally, it was certainly not clearly established that one employee's email could serve as the basis for other employees' job related speech becoming protected citizen speech where there is no indication that the employee, in this case Ledford, acted in a representative capacity. The only case to even briefly touch upon protected speech in a representative capacity is ***Eng v. Cooley***, 552 F.3d 1062 (9th Cir. 2009). However, the facts in ***Eng*** are inopposite to this case. There is no indication in Ledford's email that she had the permission, or authority to speak on behalf of the nine other plaintiffs. The fact Ledford was their co-worker does not suggest or create the type of fiduciary relationship that exists within the attorney-client relationship and which would create an inherent right or duty to speak on behalf of a client. ***See Eng***, 552 F.2d at 1076. Moreover, there is no indication in the record the other plaintiffs had any knowledge that Ledford had, or intended to

communicate with the state on their behalf. This is particularly clear considering Ledford was on leave at the time the email was transmitted, had not signed the Gregston petition, E.R. 439 (Ledford Dep. 109:3-5) and did not attend the November 2011 all staff meeting. E.R. 439 (Ledford Dep. 106:1-23). If Ledford's email could be considered protected speech, the existing case law would not have alerted Harrigfeld or Grimm that she was speaking on behalf of the other nine plaintiffs.

VI. CONCLUSION

For the reasons outlined above, the ruling of the District Court denying qualified immunity to Sharon Harrigfeld and Betty Grimm in their individual capacities should be reversed.

VII. STATEMENT OF RELATED CASES

To the knowledge of Appellees' counsel, there are no related cases to this appeal.

DATED this 8th day of September, 2014.

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CERTIFICATE OF COMPLIANCE PURSUANT TO FEDERAL RULE APPELLANT PROCEDURE 32(a)(7)C AND CIRCUIT COURT RULE 32-1

I certify that pursuant to Federal Rule Appellate Procedure 32(a)(7)C and Circuit Rule 32-1, the attached appellant's brief is proportionately spaced, has a type face of 14 points or more and contains 11,588 words.

DATED this 8th day of September, 2014.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 8th day of September, 2014, I served a true and correct copy of the foregoing **APPELLANTS' BRIEF** by delivering the same to each of the following attorneys of record, by the method indicated below, addressed as follows:

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