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-Appellees,

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' REPLY BRIEF

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I.

APPELLEE'S RESPONSE FAILED TO ADDRESS WHETHER THE INDIVIDUAL DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY.

This appeal challenges the ruling of the District Court denying qualified immunity to Sharon Harrigfeld and Betty Grimm in their individual capacities. The appellant's opening brief discussed the legal standards governing qualified immunity and how the District Court failed to apply those standards to the facts of this case.

Lacking in the appellees' response is any substantive discussion of the standards governing qualified immunity. In an effort to avoid the clear message from the Supreme Court that the qualified immunity analysis "be undertaken in light of the specific context of the case, not as a broad proposition", ***see*** ***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), appellees suggest that Fed. R. Civ. Proc. 52(a)(3) relieves the District Court from its obligation to examine and explain how the individual defendants' actions violated the First Amendment of each individual plaintiff and, why their actions were not objectively reasonable in light of the circumstances surrounding the decisions which appellees contend violated the federal constitution. ***See*** Response Brief, p. 16.

Appellants do not suggest the District Court was required to make findings of fact and conclusions of law. However, consistent with the direction provided by the Supreme Court, trial courts cannot deny qualified immunity by resorting to broad generalizations concerning the constitutional principles at issue and, whether the individual defendants' actions were objectively reasonable in light of the facts they faced when they made the decisions that are challenged as being unconstitutional. As stated in ***Plumhoff v. Rickard***, 134 S.Ct. 2012, 2023 (2014), "In addition '[w]e have repeatedly told courts…not to define clearly established law at a high level of generality,' ***id.*** at 2074, since doing so avoids the crucial question whether the official acted reasonably in the particular circumstances that he or she faced." ***See also*** ***Ashcroft v. al-Kidd***, 131 S.Ct. 2074, 2085 (2011). This required the District Court to explain how each individual plaintiff's First Amendment rights were violated by Ms. Harrigfeld and/or Ms. Grimm and, after reaching that initial determination, explain why the individual defendants' actions were not objectively reasonable and entitled to immunity. ***See*** ***Ashcroft***, 131 S.Ct. at 2085; ***Malley v. Briggs***, 475 U.S. 335, 341 (1986).

The individual claims of the ten appellees are factually distinct. For that reason, the District Court should have addressed the claims of each individual to determine whether Harrigfeld or Grimm were entitled to qualified immunity. As one example, in the case of Gracie Reyna, the Court should have addressed (1)

what was the specific speech Ms. Reyna engaged in and, what was the context her allegedly protected speech occurred? (2) Did either Harrigfeld or Grimm have personal knowledge Reyna made the comments she contends are entitled to First Amendment protection? (3) What was Harrigfeld and/or Grimm's reaction to Ms. Reyna's protected speech? (4) How did Harrigfeld and/or Grimm's reaction discourage or prevent Reyna from engaging in protected speech?[1] (5) Assuming Reyna's speech was somehow chilled, were Harrigfeld and Grimm's actions objectively reasonable in light of the existing law and the facts available to them at the time?

These same questions are now before this Court. The answers are critical to determining whether the individual appellee's First Amendment rights were infringed upon and, if so, whether Harrigfeld and/or Grimm are entitled to qualified immunity with respect to one or all of the appellees' claims. Reviewing the District Court's Memorandum Decision, one cannot determine how the Court resolved these questions with respect to Gracie Reyna or any of the other individual appellees. Instead, the District Court engaged in the type of broad generalizations which the United States Supreme Court has cautioned against.

[1] As recognized by the District Court, this case does not involve a situation where a government employer has retaliated by terminating a plaintiffs' employment or imposing a lesser form of discipline. Instead, relying upon ***Coszalter v. City of Salem***, 320 F.3d 968 (9th Cir. 2003) the District Court limited the First Amendment claim to whether the individual defendants' actions deterred the plaintiffs from engaging in protected speech. ***See*** E.R. 2074.

Appellees argue the qualified immunity determination presents factual disputes which can only be resolved by the jury. This argument is inconsistent with Supreme Court precedent and ignores the fact that qualified immunity is not an immunity from liability. It is an immunity from suit which, like an absolute immunity, "is effectively lost if a case is erroneously permitted to go to trial." ***Mitchell v. Forsyth***, 472 U.S. 511, 526 (1985).

A. Appellees suggest the Court should consider alleged incidences they did not report to either Grimm or Harrigfeld in determining whether the defendants are entitled to Qualified Immunity.

In their brief, Appellees admit that none of them "witnessed or reported specific incidences in which juveniles were sexually abused by IDJC employees". ***See*** Appellees Brief, p. 11. Despite this admission, Appellees argue the fact that criminal charges were brought against former employee Julie McCormick are relevant to their First Amendment claims against Harrigfeld and Grimm.[2] Clearly, they are not.

[2] Contrary to Appellees' suggestion, when Ms. Grimm was advised McCormick had, the night before, spent a number of hours alone with the juvenile in her office, McCormick was confronted and asked if she had been in her office with the boy the prior evening. ***See*** E.R. 363, 366 (Grimm dep., p. 61:5-15, 75:25-76:7). Immediately thereafter, Grimm contacted law enforcement. (***Id***. 76:8-17). When Ms. Ledford was questioned on this point, she acknowledged she was unaware of information suggesting sexual misconduct on the part of Ms. McCormick prior to the time Ms. Grimm contacted law enforcement. ***See*** E.R., 479-480 (Ledford dep., p. 215:18-216:2).

In an apparent attempt to confuse the issues involved in this case, Appellees include arguments concerning sexual abuse of juveniles in their response despite the fact they admit they never reported any information to Harrigfeld, Grimm, or anyone else at IDJC concerning those allegations.[3] In the absence of a report that involved protected citizen speech which caused Harrigfeld or Grimm to retaliate against them, a First Amendment claim does not lie. ***See Coszalter v. City of Salem***, 320 F.3d 968, 977 (9th Cir. 2003). The fact Appellees attempt to include irrelevant factual incidences to support their First Amendment claims highlights the importance of the Supreme Court's admonition against resorting to generalizations when examining an individual plaintiff's constitutional claims and, whether the defendant was acting in an objectively reasonable fashion when they took the actions which are challenged as violating the federal constitution.

II.

THE DISTRICT COURT FAILED TO CONSIDER THE CONTENT AND CONTEXT OF EACH PLAINTIFF'S PROTECTED SPEECH TO DETERMINE WHETHER THEIR FIRST AMENDMENT RIGHTS WERE VIOLATED.

[3] Appellees fail to mention the fact that when allegations of sexual misconduct by IDJC staff were raised in this litigation Ms. Harrigfeld requested a criminal investigation by the Idaho State Patrol and the Attorney General's office. E.R. 2048-2049. An investigation occurred and a report was filed by the police. No criminal charges were filed against any IDJC employee. ***Id.***

The starting point for any claim asserting a violation of the First Amendment is an examination of what the plaintiff said or communicated, (the content of the speech) and to whom and under what circumstances it was communicated, (the context of the speech). ***See Connick v. Myers***, 461 U.S. 138 (1983). By doing so, it is then possible to determine whether the plaintiff was speaking on matters of public concern and engaged in protected "citizen speech" as opposed to unprotected "employee speech". ***See Garcetti v. Ceballos***, 547 U.S. 410 (2006).

The District Court short circuited this analysis. The only specific speech identified in its opinion is the email Ms. Ledford sent to a state senator, E.R. 2073 and the anonymous petition circulated by Ray Gregston. E.R. 2075. For the reasons set forth in Appellants' opening brief, the Ledford email did not involve protected speech. ***See*** Appellants' Brief, pp. 16-19. The petition circulated by Gregston likewise involved personal grievances surrounding the promotion of Laura Roters rather than matters of public concern.[4] ***See Havekost v. United States Dept. of the Navy***, 925 F.2d 316 (9th Cir. 1991); ***McKinley v. City of Eloy***, 705 F.2d 1110, (9th Cir. 1983) (speech by public employees addressing individual personal disputes and grievances are not entitled to First Amendment protection.)

[4] Mr. Gregston testified he authored the petition and, that it focused upon the promotion of Laura Roters to a unit manager position. He believed Roters was selected because she is whom Dave Rhorback wanted in that position. E.R. 528, 530 (Gregston dep. 47:1-48:4; 54:1-19). Gregston acknowledged he never reported any concerns of government waste or employee safety. E.R. 544 (***Id.*** 154:24-156:11).

Rather than address what was communicated by each individual, the District Court made generalized conclusions stating the appellees had alleged they suffered retaliation "for speaking out about corruption, waste, and danger to juvenile inmates at the Juvenile Correction Center in Nampa." E.R. 2072. Appellants do not dispute the proposition that an employee complaint alleging corruption or mistreatment of juveniles could, depending upon the actual content of the communication and the circumstances it occurred, describe protected speech. However, that determination must be based upon an examination of the content and context of the speech at issue to determine whether the employee was speaking out as a citizen on a matter of public concern rather than engaging in job related communications or, advancing their own personal grievances. ***See* Connick v. Myers**, 461 U.S. at 147-148. The deficiency in the District Court's ruling is the lack of discussion regarding the specific speech communicated by individuals such as Ms. Reyna which they contend caused Harrigfeld and/or Grimm to retaliate against them. This Court can only speculate regarding what specific speech was being referenced by the District Court. In Ms. Reyna's case the generalized conclusion she reported "corruption, waste, and danger to juvenile inmates", E.R. 2071 is inconsistent with her sworn testimony where she admitted she never made any criticism of the management of the Nampa facility, E.R. 704 (Reyna dep. 88:13-24) had not experienced any retaliation by Harrigfeld or Grimm, and could

not identify anything Harrigfeld had done to her that she does not agree with. E.R. 704 (***Id.*** 89:13-15). The District Court's generalization is, based upon her own testimony, not applicable to Reyna.

Another example is the generalized conclusion that Ms. Ledford's reports of timecard fraud would be entitled to First Amendment protection. The alleged reports involved Dave Rhorback and Roberto Coronado. Ledford admits she never saw the timesheets in question and, has no knowledge regarding whether the entries were improper. E.R. 466-467 (Ledford dep., p. 137:1-138:20). In other words, she did not know whether her statements were factual or slanderous. Additionally, she has no knowledge whether Harrigfeld or Grimm were aware of her statements. E.R. 467 (***Id.***, p. 139:5-18). Her comments concerning Mr. Rhorback were false. Rhorback was a long time IDJC employee who developed serious medical disabilities. Consistent with IDJC's obligations under the American's With Disabilities Act, Grimm accommodated his disability by allowing him to flex his time, work from home when possible, and utilize his accumulated sick leave. E.R. 395 (Grimm dep., p. 189:22-191:10).

Ledford's reckless and false statements concerning Rhorback's time card entries do not describe protected speech. "There is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances societies interest in uninhibited robust, and wide-open debate on public

issues." ***Gertz v. Robert Welch, Inc.***, 418 U.S. 323, 340 (1974). While there is a "very limited" interest in protecting some false statements out of a concern for creating a "breathing space" for public debate, that interest must be weighed against the legitimate interests of the employer. *See* ***Arnett v. Kennedy***, 416 U.S. 134, 162-163 (1974) (stating that the court had no difficulty in concluding that the ***Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty***, 391 U.S. 563 (1968) balancing test weighed in favor of the government in a case in which an employee made recklessly false allegations of bribe taking by his superiors.) While it is clear that no per se rule exists that speech entitled to First Amendment protection must be truthful, ***Johnson v. Multnomah County***, 48 F. 3d 420, 424 (9th Cir. 1995), "it is equally clear that untruthful information about government is not helpful to the public". ***Skaarup v. City of North Las Vegas***, 320 F.3d 1040, 1043 (9th Cir. 2003) (dismissing employee's First Amendment claims stating "[w]hile latitude is extended to inexactitude in political discourse, the public interest in such unsubstantiated rumor is small.")

The District Court's failure to address the content and context of Ledford's alleged time card complaints was error. Lacking in the Court's generalized conclusions is any discussion of why statements which Ms. Ledford knew were unsubstantiated and likely inaccurate, would be entitled to First Amendment protection. Even if Harrigfeld and Grimm were aware of her comments, and took

disciplinary action against her for making false statements, that response would not implicate the First Amendment. However, because the District Court failed to address the content or context of. Ledford's comments or, what specific action Harrigfeld or Grimm took in response, it is difficult to determine the legal and factual basis for the District Court's conclusions.

While Fed. R. Civ. Proc. 52(a) does not require a court to make findings of fact and conclusions of law when ruling upon a motion for summary judgment, where the reasons for the trial court's decision are not clear from the record, this Court may vacate and remand. ***Holly D. v. California Inst. of Technology***, 339 F.3d 1158, 1180 (9th Cir. 2003). Because the District Court failed to identify and discuss the specific speech of each appellee or explain how Harrigfeld and Grimm's reaction to that speech was not objectively reasonable and therefore immune, its order should be vacated.

III.

RETALIATION

According to the District Court, the appellees allege they were subjected to retaliation by Harrigfeld and Grimm for "speaking out about corruption, waste, and danger to juvenile inmates". E.R. 2072. The Court recognized that none of the plaintiffs were subjected to disciplinary actions such as terminations, demotions, or substandard performance evaluations. E.R. 2073-2074. The Court reasoned an

adverse employment action could exist if the defendants' actions were designed to, and would chill protected speech. E.R. 2074.

Coszalter v City of Salem, 320 F.3d 968 (9th Cir. 2003), recognized a "sustained campaign of employer retaliation that was 'reasonably likely to deter' plaintiffs from engaging in speech protected under the First Amendment", described an adverse employment action under the First Amendment. ***See*** 320 F.3d at 977. The employer's actions included unwarranted disciplinary investigations, reprimands containing false accusations, criminal investigations, verbal harassment, threatened disciplinary actions and, unwarranted disciplinary action. ***Id.*** at 976. Unlike the District Court's ruling in this case, in ***Coszalter*** the court described the specific actions taken by the individual defendants which formed the basis of the constitutional violation. Equally important, there was no dispute the individual defendants had personal knowledge of the plaintiffs' protected speech. ***Id.*** at 977.

In contrast, while Harrigfeld and Grimm do not dispute their knowledge of the Ledford email and the existence of the unsigned, anonymous Gregston petition, they had no knowledge of complaints made by Ms. Reyna, Mr. Penrod, or the other appellees. E.R. 95. The appellee's retaliation case requires evidence establishing the protected speech at issue was a substantial or motivating factor in the decisions by Harrigfeld or Grimm to take the actions they now contend

deterred them from engaging in protected speech. ***See*** ***Coszalter***, 320 F.3d at 977; ***Kaiser v. Sacramento City Unified School Dist.***, 265 F.3d 741 (9th Cir. 2001). Additionally, appellees must prove the challenged actions were undertaken with the intent, on the part of Harrigfeld and Grimm, that their speech be chilled. ***Ford v. City of Yakima***, 706 F.3d 1188, 1193 (9th Cir. 2013); ***Lacey v. Maricopa County,*** 693 F.3d 896, 916-917 (9th Cir. 2012) (en banc). Logically, if Harrigfeld or Grimm did not know Mr. Penrod had signed the Gregston petition or had complained to his supervisor of security concerns, neither defendant could have retaliated against him by taking actions intended to deter him from speaking out on issues at the facility. Although plaintiffs need not show their speech was actually suppressed, ***see*** ***Mendocino Environmental Center v. Mendocino County***, 192 F.3d 1462, 1469 (9th Cir. 1999) they must establish the defendants retaliatory actions "would chill or silence a person of ordinary firmness from future First Amendment activities." ***Id.***; ***see also*** ***Lacey v. Maricopa County***, 693 F.3d 896, 916-917 (9th Cir. 2012) (issuing subpoenas and arresting newspaper employees to silence stories adverse to the sheriff.) Considering Penrod has testified he was not deterred from speaking out, E.R. 591 (Penrod dep. 91:21-8), it is difficult to identify the basis for any conclusion that "a person of ordinary firmness" would have refrained from engaging in future First Amendment activities due to the currently unidentified actions Harrigfeld and Grimm allegedly took against him.

The same conclusion is warranted with respect to the remaining appellees who have testified they are unaware if Harrigfeld or Grimm had personal knowledge of the complaints they made to their supervisors.[5] ***See*** E.R. 467, 704, 795, 544, 590-591, 1172-1173, 844, 911, 655, 739 and 743. (Ledford dep., 139:5-18; Reyna dep., 88:13-24; Fordham dep., 91:12 and, 92:15; Gregston dep., 154:24 –156:11; Penrod dep., 87:22-88:9, 92:14-93:5; McKinney dep., 100:3-19, 101:10-17, 103:11-21; DeKnif dep., 90:10-13, 91:15-19; Farnworth dep., 123:13-p. 124:5; McCormick dep., 96:19-98:12). Harrigfeld and Grimm deny having such knowledge. E.R. 95. Additionally, all of the appellees have testified they were not deterred by Harrigfeld or Grimm from speaking out on any issue. E.R. 704, 845, 474-475, 1174, 906, 651, 743, and 798. (Reyna dep., 89:8-30; DeKnif dep., 92:14-20; Ledford dep. 169:21-170:21; McKinney dep., 107:5-7; Farnworth dep., 132:23-134:18; McCormick dep., 78:14-22; 105:6-16; Littlefield dep., 62:14-63:1-20; Fordham dep. 105:2-8). In the case of Mr. Gregston, while he was asked to refrain from utilizing employee petitions, he was encouraged to bring his own or other employees' concerns to the attention of management by utilizing the problem solving grievance procedure. E.R. 537 (Gregston dep., 82:1-23). Thus, contrary to the District Court's generalizations, Mr. Gregston was actually encouraged to

[5] Ms. Littlefield did speak with Ms. Grimm. However, those conversations were limited to grievances concerning shift schedules and management decisions. E.R. 739, 743 (Littlefield dep. 47:4-20; 64:7-17).

pursue workplace complaints or grievances with management. The same conclusion is applicable to the remaining employees' complaints concerning security issues. Following the November 2011 all staff meeting, Harrigfeld circulated an email to the entire staff soliciting their input and comments concerning safety issues, schedules, and hiring practices. E.R. 97-98. These facts fail to suggest a "sustained campaign of employer retaliation" aimed to deter the appellees from engaging in protected speech. ***See Coszalter***, 320 F.3d at 976-977. Contrary to the conclusory statements of the District Court, neither Harrigfeld or Grimm took retaliatory actions which were intended or which deterred any of the plaintiffs from exercising their First Amendment rights. In fact, the plaintiffs' input and comment was solicited and considered.

A. The District Court erroneously engaged in generalizations regarding retaliation without examining whether the plaintiffs had engaged in protected speech.

To support its generalized conclusion that an issue of fact exists with respect to whether defendants took retaliatory actions aimed to suppress the appellees speech, the District Court referenced a (1) list of expectations Ledford received from her supervisor; (2) that Reyna's complaints to her supervisor about juvenile safety caused her to "cough a lot" and lose a "lot of weight"; (3) that Fordham's complaints to his supervisor about the hiring of Laura Roters as the Manager of the Observation and Assessment Unit caused Grimm to threaten discharge if he did not

support his new supervisor. E.R. 2074-2075. Concluding these allegations could describe retaliation, the District Court erroneously failed to describe the speech at issue, examine whether the complaints the appellees made to their supervisors involved speech that would trigger First Amendment protection and, explain why Harrigfeld or Grimm's reaction to their complaints were illegal. Appellees suggest that once a public employee voices their disagreement with management's policies or practices, they are suddenly insulated from future supervision or, appropriate discipline. The District Court's ruling lends support to this argument through its characterization of legitimate supervisory actions surrounding the management of IDJC employees as potential retaliation in violation of the First Amendment. Appellants do not suggest that unwarranted or illegal employment actions, such as those described in ***Coszalter v. City of Salem***, supra, would not evidence illegal retaliation. ***See Coszalter***, 320 F.3d at 976-977. However, a policy intended to improve a juvenile offender's conditions of confinement by restricting the staff's ability to lock them in an 8' x 8' cell for long periods of time, providing an employee with written guidance of areas where their job performance needs improvement or, advising an employee they are expected to cooperate with and follow the directives of a new supervisor the employee does not like, all involved discretionary decisions relating to the management of the workplace that does not implicate the federal constitution. The District Court's approach would create

chaos in the workplace by transforming everyday supervision into potential First Amendment retaliation claims.

The flaw in the District Court's approach is revealed by the Supreme Court's ruling in ***Engquist v. Oregon Dept. of Agriculture***, 553 U.S. 591, 598 (2008) where the Court addressed the…

> crucial difference, with respect to constitutional analysis, between the government exercising "the power to regulate or license, as lawmaker," and the government acting as "proprietor, to manage [its] internal operation." *Cafeteria and Restaurant Workers v. McElroy***,** 367 U.S. 886, 896, 91 S.Ct. 1743, 6 L. Ed. 2d 1230 (1961)". [This distinction has been particularly clear in our review of state action in the context of public employment. Thus, "the government as employer indeed has far broader powers than does the government as sovereign." *Waters v. Churchill*, 511 U.S. 661, 671, 114 S.Ct. 1878, 128 L. Ed. 2d 686 (1994) (plurality opinion). "[T]he extra power the government has in this area comes from the nature of the government's mission as employer. Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible." *Id*. at 674-675, 114 S.Ct. 1878. *See also Connick v. Myers*, 461 U.S. 138, 150-151, S.Ct. 1684, 75 L. Ed. 708 (1983) (explaining that the government has a legitimate interest "in promoting efficiency and integrity in the discharge of official duties, and [in] maintain[ing] proper discipline in the public service."

See 553 U.S. at 598. Addressing the greater leeway given government employers to manage its workforce in the context of employee speech, the Court wrote:

> But "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or

> other concern to the community, government officials should enjoy wide latitude in managing their offices." *Connick*, 461 U.S. at 146, 103 S.Ct. 1684. As we explained, "absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." ***Id.*** at 147, 103 S.Ct. 1684 (citing *Bishop*, supra, at 349-350, 96 S.Ct. 2074).
>
> Our precedent in the public employee context therefore establishes two main principles: First, although government employees do not lose their constitutional rights when they accept their positions, those rights must be balanced against the realities of the employment context. Second, in striking the appropriate balance, we consider whether the asserted employee right implicates the basic concerns of the relevant constitutional provision, and whether the claimed right can more readily give way to the requirements of the government as employer.

See 553 U.S. at 600. While "…[e]mployees reain the prospect of constitutional protection for their contributions to the civil discourse. This prospect of protection, however, does not invest them with a right to perform their jobs however they see fit. ***Garcetti***, 547 U.S. at 422.

Applying these principles, Harrigfeld and Grimm, were given considerable discretion to set policy governing how IDJC employees were expected to perform their jobs. This would include setting policies relating to the manner in which juvenile offenders are treated by IDJC employees, including the appellees.

Ms. Ledford, Ms. Reyna, Mr. Fordham, Mr. Gregston, and Mr. Penrod were not allowed to immunize themselves from supervision or workplace discipline by voicing disagreement or dissatisfaction with management policy and, thereafter, refuse to follow that policy or, take actions intended to undermine policy and management's supervision of the workplace. In ***Mills v. City of Evansville***, 452 F.3d 646 (7th Cir. 2006), an employee who voiced displeasure with her employer's policy was transferred and formally reprimanded because her comments caused her supervisor to conclude she would, in the future, undermine or fail to implement policies with which she disagreed. ***See*** 452 F.3d at 648. A similar conclusion is warranted in this case. The decisions by Harrigfeld and Grimm to restrict the staff's ability to lock juvenile offenders in their rooms or hire Laura Roters as a supervisor are discretionary management decisions the Supreme Court in ***Engquist v. Oregon Dept. of Agriculture,*** and ***Garcetti v. Ceballos*** envisioned would not implicate the federal constitution**.** The fact appellees voiced complaints to co-workers and supervisors regarding those decisions did not involve matters of public concern. The fact Mr. Fordham or any of the other appellees did not approve of Ms. Roters as a new supervisor, did not give them the ability to refuse to follow her orders or undermine her ability to supervise the unit she was assigned to manage. The warning Fordham received from Ms. Grimm simply reminded him of that fact. Similarly, the two lists of expectations received by Ms. Ledford

involved areas where her supervisor sought to improve her performance. E.R. 1267, 1283-1285 (Ledford Dep., Exb. 8 and 16). [6] The issues addressed in the lists do not relate "to any matter of political, social, or other concern to the community" and, for that reason, involve areas where government officials should enjoy with latitude in managing their offices. ***Connick***, 461 U.S. at 146.

The facts of this case cannot be confused with the employer's actions in ***Coszalter v. City of Salem***, supra, where the court found unwarranted disciplinary actions, unfounded disciplinary investigations, reprimands based upon false allegations, criminal investigations and, ongoing verbal harassment which established a "severe and sustained campaign of employer retaliation" that violated the First Amendment. ***See*** 320 F.3d at 976-977. Neither the District Court or the appellees suggest Harrigfeld or Grimm took any unwarranted personnel actions. In fact, the District Court acknowledged that none of the appellees have been subjected to disciplinary actions that affected their job duties or compensation. E.R. 2073-2074. The error of the District Court was its apparent conclusion that legitimate employment actions could be interpreted as a means to deter employees

[6] The two lists of expectations are dated 7/27/11 and 12/17/11. Both address the scheduling of vacation, providing notice of sick leave and having her supervisor preapprove times she works overtime. E.R. 1267 and 1283-1285. The 12/17/11 list addresses her failure to meet those earlier requests. She is also instructed to address her supervisor and all other staff in a friendly courteous manner. E.R. 1283-1285.

from engaging in protected speech and, support a retaliation claim under the First Amendment. This aspect of the District Court's ruling should be reversed.

III.

EMPLOYEE vs. CITIZEN SPEECH

Appellees' argue a public employee's report or complaint concerning broad issues of corruption, waste and violations of law would, in all circumstances, involve protected "citizen speech". They cite ***Marable v. Nitchman***, 511 F.3d 924 (9th Cir. 2007). What this argument fails to address is the content of the complaint, who made the complaint, to whom the complaint was communicated and, the circumstances that caused the complaint to be made. To establish a First Amendment retaliation claim, the appellees are required to establish they spoke as private citizens and, as a result, suffered retaliation at the hands of Harrigfeld and Grimm. ***Garcetti v. Ceballos***, 547 U.S. 410 (2006). "[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 determination of whether the speech at issue is entitled to First Amendment protection involves a practical inquiry and analysis of the plaintiffs' job duties that is "untied to formal job descriptions." 547 U.S. at 424-425.

In ***Marable,*** a ship engineer assigned to a specific ferry, made complaints to the former CEO of the company and its current auditor that certain managers had claimed inappropriate overtime and, had used special projects to inappropriately supplement their personal incomes. ***See*** 511 F.3d at 927. In other words, the plaintiff accused specific managers of stealing from the agency. This Court concluded his complaints were not unprotected employee speech because, as the chief engineer on his ferry, he had no involvement in the financial dealings the managers were corrupting for their own benefit. ***Id.*** at 923.

The holding in ***Marable*** was again explained in ***Hagen v. City of Eugene***, 736 F.3d 1251 (9th Cir. 2013) where a police officer who was part of the SWAT team, made complaints relating to officer safety and the need for policy change and better equipment. ***Id.*** at 1254. Finding the plaintiffs' complaints to be unprotected employee speech, this Court focused upon whether the speech in question involved issues that were related to the performance of the plaintiff's job. City policy required the plaintiff to report safety concerns. The fact his reporting became more persistent when his reports were ignored, did not transform the communications into protected speech. ***Id.*** at 1259. ***See also Dahlia v. Rodriguez***, 735 F.3d 1060, 1076 (9th Cir. 2013). The ***Hagen*** court distinguished its ruling from ***Marable*** by pointing out that, in that case, the plaintiff, an engineer assigned to a specific ferry was not, as part of his routine duties, required to review and report on the financial

matters disclosed in the complaint he claimed formed the basis of his First Amendment claim. Consistent with the standards set forth in ***Garcetti v. Cebellos***, supra, the approach in ***Hagen*** involved a practical inquiry focusing upon the plaintiff's everyday job duties and activities and, whether the speech in question was related to, or involved in those daily activities. In ***Weintraub v. Board of Education of City School District of New York City of New York***, 593 F.3d 196, (2nd Cir. 2010) the court 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 Indep. Sch. Dist.,*** 480 F 3d 689, 694 (5th Cir. 2007). This caused the ***Weintraub*** court to rule that a grievance filed by a plaintiff was not protected speech as his complaints related to his ability to perform his duties as a classroom teacher. ***See*** 593 F.3d at 203.

The facts of this case are analogous to the circumstances addressed in ***Hagen v. City of Eugene,*** and ***Weintraub v. Board of Education of City School Dist. Of the City of New York.*** The plaintiffs are safety officers and rehabilitation technicians who, as part of their day-to-day job duties, interact with juvenile offenders at the Nampa facility. Like the police officer in ***Hagen***, IDJC policy required them to report safety concerns. ***See*** E.R. 135-156. Following the November all staff meeting where the plaintiffs' complaints were initially aired,

Director Harrigfeld, through an email sent to the entire staff, encouraged the appellees who were in attendance, as well as other staff, to forward to herself their concerns and proposals regarding hiring, scheduling, and the safety and security of juveniles. ***See*** E.R. 97. This email specifically addressed the issue of confining juveniles to their cells and the fact the average room time for juveniles at the Nampa facility exceeded national standards. ***Id.*** (Topic 2) Considering the appellee's job duties involved supervising and rehabilitating juvenile offenders, it is difficult to understand the basis of the District Court's conclusion that reporting issues relating to the supervision and treatment of juvenile offenders was not related to appellees' everyday job activities. The fact the appellees may not have agreed with Ms. Harrigfeld's policy or, disapproved of the selection of Laura Roters as a unit manager does not involve protected speech. As an example, in ***Mills v. City of Evansville***, 452 F.3d 646, 648 (7th Cir. 2006) the court concluded a police officer's negative remarks relating to official policy discussed at a meeting was not protected speech. As noted by the court, the employer could "draw inferences from her statements about whether she would zealously implement the chief's plans or try to undermine them; when the department drew the later inference it was free to act accordingly." ***See*** 452 F.3d at 648. Here, the appellees' comments criticizing or stating their displeasure with Ms. Harrigfeld's policy or, the hiring of Laura Roters, is not entitled to First Amendment protection

for similar reasons. In ***Mills***, the plaintiffs' negative comments caused her to be transferred to a less desirable position. While neither Harrigfeld or Grimm took similar action, any response to the appellees criticism of policy or the hiring of Ms. Roters did not, for similar reasons, violate the First Amendment. The District Court erroneously concluded the appellees' complaints regarding safety and security issues, hiring practices, and workplace conditions did not involve issues related to their everyday job duties. Their comments constituted employee speech which was not entitled to protection under the First Amendment.

IV.

THE DISTRICT COURT ERRONEOUSLY DENIED HARRIGFELD AND GRIMM'S MOTION FOR QUALIFIED IMMUNITY

In their opening brief, Appellants' argued the District Court erroneously denied Harrigfeld and Grimm's qualified immunity by resorting to generalized conclusions without describing the specific speech each of the individual plaintiffs allege forms the basis of their First Amendment claims.

"The doctrine of qualified immunity protects government officials '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.'" ***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). The Supreme Court does "not require a case directly on point" before concluding the law is clearly established, "but existing precedent must have placed a statutory or constitutional question beyond debate." ***al-Kidd***, 131 S.Ct. at 2083. The "clearly established" standard protects the balance between vindication of constitutional rights and government officials' effective performance of their duties by ensuring that officials can '"reasonably…anticipate when their conduct may give rise to liability for damages.'" ***Anderson v. Creighton,*** 483 U.S. 635, 639 (1987) (quoting ***Davis v. Scherer,*** 468 U.S. 183, 195 (1984)).

A. Protected Speech

Because the District Court limited its discussion of the specific content of the individual plaintiffs' speech to the email Ms. Ledford sent to a state senator and the petition that was circulated by Mr. Gregston, any discussion of this aspect of the Court's ruling with respect to the remaining plaintiffs requires speculation. The reasons Ledford's email did not constitute protected speech are discussed in Appellants' Opening Brief and, are not contested in appellee's response. Likewise, as discussed in § II, p. 6, supra the Gregston petition did not involve protected speech. Equally important, Mr. Gregston was never dissuaded from presenting his

complaints to management. Instead, he was asked to use the problem solving i.e. grievance procedure, created by IDJC policy.

In ***U.S. v. National Treasury Employees Union***, 513 U.S. 454, 466 (1985) the Court expressed skepticism that speech occurring in the context of an employment grievance proceeding was entitled to First Amendment protection by writing "private speech that involves nothing more than a complaint about a change in the employee's own duties may give rise to discipline without imposing any special burden of justification on the government employer." More recently, in ***Borough of Duryea Pa. v. Guarnieri***, 131 S.Ct. 2488, (2011) the Court held that a "petition filed with an employer using an internal grievance procedure in many cases will not seek to communicate to the public or to advance a political or social point of view beyond the employment context". ***Id.*** at 2501. The mere fact that "the public may always be interested in how government officers are performing their duties…will not always suffice to show a matter of public concern." ***Id.***

These cases address the question of whether Mr. Gregston's petition or, the internal complaints of individuals such as Shane Penrod or Gracie Reyna which were made to their supervisors involving hiring practices or security concerns are entitled to First Amendment protection. Generally, internal complaints that are connected with and relate to the public employee's job duties do not constitute protected "citizen speech". ***See Hagen***, 736 F.3d at 1259. Additionally, internal

complaints involving a plaintiff's workplace grievance or ongoing personnel actions are not considered protected speech. ***Havekost v. United States Dept. of the Navy***, 925 F.2d 316 (9th Cir. 1991). ***McKinley v. City of Eloy***, 705 F.2d 1110 (9th Cir. 1983).

As noted by the District Court, as part of their motion for summary judgment, Harrigfeld and Grimm argued that the law governing the determination of citizen, as opposed to employee speech, was not clearly established in 2010 and 2011 when the events involved in this case occurred. E.R. 2077-2078. Appellants pointed to the fact that ***Hubbard v. City of Pittsburgh***, 574 F.3d 696 (9th Cir. 2009) had been overruled by ***Dahlia v. Rodriguez***, 735 F.3d 1060 (9th Cir. 2013). Appellants argued these cases showed the legal standards involving employee speech were evolving within this Circuit which was a factor that should be considered when determining whether the law governing appellants' actions was clearly established.

The District Court's ruling failed to address the unsettled status of the law governing the question of when an employee is engaged in protected "citizen speech" by committing the same error that caused this Court to overrule, in part, the holding in ***Hubbard v. City of Pittsburg***, supra. Relying upon the individual plaintiffs' job description, the District Court concluded the appellees were not charged with the duty of investigating the practices of Grimm and Harrigfled and,

for that reason, ***Hubbard v. City of Pittsburgh,*** could not be read to protect them from potential liability. ***See*** E.R. 2078. The District Court erroneously treated the Ledford email as protected speech and failed to consider the fact the individual appellees' jobs required them to interact with juvenile offenders and be directly involved in their supervision and rehabilitation. Ms. Harrigfeld's decision to restrict the IDJC staff's ability to confine juveniles in their cells as discipline or, for "staff convenience" was the basis of the plaintiffs' safety and security complaints and also related to their objections to the hiring of Laura Roters as a unit manager. The District Court's analysis cannot be reconciled with ***Dahlia v. Rodriguez,*** supra or ***Garcetti v. Cebellos,*** supra which directed trial courts to refrain from relying upon job descriptions as the controlling basis for determining whether an employees' speech was entitled to First Amendment protection.

In ***Dahlia v. Rodriguez***, supra, this Court established three guide posts for trial courts to consider in determining whether an employee was speaking out as part of their job duties or, engaging in protected citizen speech. First, in a hierarchical employment setting such as law enforcement, communications within the chain of command will, generally, be undertaken pursuant to an employee's duties. ***See*** 735 F.3d at 1074. Second, the subject matter of the communication is highly relevant, and should be examined to determine whether the communication is related to the employee's normal job functions. ***Id.*** at 1074-1075. Third, where

a public employee speaks out in direct contravention of a supervisor's orders, their speech will often fall outside the speaker's professional duties. ***Id.*** at 1075. In this case, the District Court made no attempt to engage in the type of analysis discussed by ***Garcetti*** and ***Dahlia***.

What is undisputed is the fact that, with the exception of the Ledford email, none of the appellees communicated their grievances concerning safety and security, work schedules, government waste, or hiring practices outside their chain of command. In ***Dahlia***, the Court stated "that, generally, '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 scope of his job,'". ***See*** 735 F.3d at 1074. As outlined above, the District Court failed to identify or discuss the specific speech of Gracie Reyna, Shane Penrod, or any of the other individual appellees other than to acknowledge their communications were made internally. Because the Court failed to discuss or identify the speech in question, it is impossible to examine the speech relied upon by the Court for its content and context to determine whether it involved matters of public concern and, whether it involved unprotected employee speech or workplace grievances. The lack of discussion of this issue also makes it difficult to determine whether the Court was relying upon a legal standard which was not clearly established in 2011 when the events involved in this case occurred. For similar reasons it is difficult to examine

whether the individual defendants' actions were objectively reasonable in light of the existing law and the facts they faced when the decisions appellees challenge as being unconstitutional were made. Accordingly, the District Court's ruling denying the individual defendant's qualified immunity should be reversed.

B. Retaliation

The adverse employment actions identified by the District Court involved appropriate supervisory actions which the Supreme Court, in ***Enright v. Oregon Dept. of Agriculture***, supra, and ***Garcetti v. Ceballos***, supra, held would not, in most situations, implicate the federal constitution. The District Court's attempts to identify allegations which it then concluded could have deterred the appellees from engaging in protected speech fails to consider whether the speech that was allegedly suppressed was entitled to First Amendment protection. As an example, Mr. Fordham's complaints and refusal to cooperate with his new supervisor, is a workplace grievance, not protected speech. Similarly, complaints that Ms. Harrigfeld's efforts to restrict the appellees discretion to lock juveniles in their cells did not involve protected speech. It must be noted that Harrigfeld did not discourage employees from voicing their concerns that restricting the staff's ability to punish juveniles by locking them in their cells would impact the safety and security of the facility. In fact, Harrigfeld solicited the staff's input but, at the same time, pointed out the fact that the average room time for inmates at the

Nampa facility exceeded national standards was a condition she intended to change.[7] E.R. 91 (Topic 2). Once Harrigfeld made a policy decision the appellees did not like they engaged in activites in the workplace intended to undermine Harrigfeld's policy decision. ***See*** ***Mills v. City of Evansville***, supra. For the same reasons, they could not refuse to obey or exhibit insubordination towards a new supervisor whom they did not like.

In ***Connick v. Myers***, 461 U.S. 138 (1983) the Court wrote:

> When an employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.

See 461 U.S. at 146. In this case, the suggestion that employees can voice opposition to a decision by management and, thereafter, be insulated from future supervision or, where appropriate discipline, is inconsistent with Supreme Court precedent. The District Court's restriction of an employer's ability to manage its employees is inconsistent with established law. If the District Court's approach is

[7] Contrary to the appellees' complaints, after Harrigfeld's policies were implemented, the number of physical restraints used on juveniles and assaults decreased. E.R. 94 (Harrigfeld Aff ¶8). Thus, it is difficult to identify the negative impact upon facility safety caused by appellees inability to lock juveniles in their rooms where the level of physical violence within the facility was lowered as a result of the policy change.

correct, it clearly involves a legal standard which has not been clearly established. For that reason, the individual defendants are entitled to qualified immunity.

DATED this ____ day of December, 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 Appellants' Reply brief is proportionately spaced, has a type face of 14 points or more and contains 7,759 words.

DATED this 5th day of December, 2014.

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5th day of December, 2014, I served a true and correct copy of the foregoing **APPELLANTS' REPLY 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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