FILED
United States Court of Appeals
Tenth Circuit

April 7, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

STEPHANIE L. WRIGHT,

Plaintiff - Appellant,

v.

KAY COUNTY JUSTICE FACILITIES AUTHORITY, d/b/a Kay County Detention Center; DON JONES, in his individual and official capacities,

Defendants - Appellees.

No. 21-6009
(D.C. No. 5:19-CV-01013-C)
(W.D. Okla.)

ORDER AND JUDGMENT*

Before **HOLMES**, Chief Judge, **BALDOCK**, and **BACHARACH**, Circuit Judges.

Plaintiff-Appellant Stephanie Wright was previously employed as a compliance officer at the Kay County Justice Facilities Authority ("Authority") until her termination in August 2018. Ms. Wright filed a complaint alleging, *inter alia*, that the Authority and its director, Don Jones, violated her First Amendment right to free speech by retaliating against her for reporting the Authority's then-deputy

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

director to a state law enforcement agency, the Oklahoma State Bureau of Investigation ("OSBI").

In a January 2021 Order, the district court granted summary judgment for Defendants, finding that Ms. Wright's OSBI report was made pursuant to her official duties. As such, the district court concluded that Ms. Wright's claim failed under the first prong of the *Garcetti*/*Pickering* analysis, and her speech thus was not protected under the First Amendment. *See Garcetti v. Ceballos*, 547 U.S. 410, 417–22 (2006); *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 568–74 (1968); *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1202–04 (10th Cir. 2007) (explicating the *Garcetti*/*Pickering* analysis).

Ms. Wright now appeals from the district court's order, contending that her OSBI report was made as a private citizen and not pursuant to her job duties.[1]

[1] In addition, in her Amended Notice of Appeal, Ms. Wright stated that she was appealing from the district court's earlier discovery order denying her motion to compel production of a "certain email for which the Defendant Kay County Justice Facilities Authority claimed attorney-client privilege." *See* Aplt.'s App. at 1198 (Pl.'s Am. Notice of Appeal, filed Jan. 25, 2021). However, Ms. Wright failed to sufficiently raise the issue in her Opening Brief. As such, we deem the issue waived. *See Becker v. Kroll*, 494 F.3d 904, 913 n.6 (10th Cir. 2007) ("Federal Rule of Appellate Procedure 28(a)(9)(A) requires appellants to sufficiently raise all issues and arguments on which they desire appellate review in their opening brief. An issue or argument insufficiently raised in the opening brief is deemed waived."); *Anderson v. U.S. Dep't of Lab.*, 422 F.3d 1155, 1174 (10th Cir. 2005) ("The failure to raise an issue in an opening brief waives that issue.").

Ms. Wright also included a request for initial hearing en banc in her Opening Brief. She then subsequently filed a petition for initial hearing en banc, which was denied via order entered May 10, 2021. As such, we do not further consider that request.

Unsurprisingly, Defendants disagree with Ms. Wright's contention, and also offer five alternative grounds for affirmance. We **reverse** the district court's grant of summary judgment, concluding that Ms. Wright's OSBI report was not made pursuant to her official duties.

Specifically, when viewing the evidence in the light most favorable to her, Ms. Wright was not an American Corrections Institute ("ACA") compliance officer at the time she made the OSBI report. Furthermore, we decline Defendants' request to affirm the district court's judgment on alternative grounds. Given that the district court did not address these alternative grounds, we are unwilling to consider them for the first time on appeal. As such, we **remand the case** for additional proceedings consistent with this opinion.

I

A

The Authority employed Ms. Wright from March 1, 2011, until August 14, 2018. She worked under the supervision of Don Jones, the Authority's director. In 2016, Ms. Wright became an administrative lieutenant, serving as the compliance officer for the jail. The compliance officer position involved working on ACA accreditation, drafting policies and procedures for the Authority, and handling PREA (i.e., Prison Rape Elimination Act) compliance and related issues. Written in 2016, Ms. Wright's job description stated that she was to perform "facility level operational reviews and audits of all functional areas as required by a published schedule, accurately reporting any findings of noncompliance, and recommending appropriate

corrective actions." Aplt.'s App. at 620 (Accreditation, Standards, and Policy Compliance Officer Job Description).

On or around October 16, 2017, Ms. Wright requested a meeting with Mr. Jones to discuss the allegedly inappropriate behavior of then-Acting Deputy Director Matthew Ware. According to Ms. Wright, she presented Mr. Jones with a formal grievance outlining Mr. Ware's allegedly inappropriate conduct. A day later, Mr. Jones met with Ms. Wright and told her to "[t]hink long and hard about how [she] want[ed] to move forward with the current situation." *Id.* at 13, ¶ 12 (Compl., filed Nov. 5, 2019) (first alteration in original). Mr. Jones told her that such behavior was "unbecoming," and ordered her to bring no further complaints about Mr. Ware. *Id.* Crucially, Mr. Jones also instructed Ms. Wright to stop working on ACA accreditation. *See id.* at 825, 840–41 (Tr. of Stephanie Wright Dep. Test., dated June 19, 2020). As such, from this point onward, Ms. Wright was no longer an ACA compliance officer. *See id.*

Following these discussions, Mr. Jones "became increasingly conformational [sic] and combative towards [Ms. Wright], including but not limited to ignoring [Ms. Wright's] complaints and or questions, regularly denying [Ms. Wright] access to work-related information required for [Ms. Wright] to perform certain job duties, and walking away from [Ms. Wright] during conversations." *Id.* at 13, ¶ 12.

On February 2, 2018, Ms. Wright "was assigned to do security on an inmate . . . who was being hospitalized for final stages of cirrhosis of the liver." *Id.* at 13, ¶ 13; *see id.* at 588–92 (Tr. of Stephanie Wright Dep. Test., dated June 19, 2020). On

February 5, 2018, the female inmate told Ms. Wright that she "had been previously held in a padded cell for approximately forty-two (42) days" without water, a bed, or bathroom facilities. *Id.* at 13–14, ¶ 13; *see id.* at 591. Although the inmate had been diagnosed with mental health issues, Ms. Wright knew that mental health physicians had cleared her to leave the padded cell. Yet, Mr. Ware refused to let staff transfer the inmate to a different cell. Ms. Wright checked the computer system to confirm the truth of the inmate's statements, and also conferred with her husband, who was the Authority's booking supervisor. *See id.* at 592–93.

Then, during a subsequent conversation with her husband, Ms. Wright learned that Mr. Ware had ordered another inmate—who was not combative or aggressive—to "be cuffed and both arms extended out in a crucifixion-type pose for approximately one (1) hour." *Id.* at 14, ¶ 14; *see id.* at 595–97. Ms. Wright looked into the validity of her husband's claims. Specifically, she reviewed video footage of the incidents described to her by her husband and took photographs and videos of the footage with her cell phone. *See id.* at 602–04. Having confirmed her suspicions, Ms. Wright decided to report the misconduct.

The Authority had an internal policy for reporting criminal activity. Specifically, the Authority's policy—in relevant part—provided:

> B. Internal Investigations of Staff
>
> When an internal investigation of a staff member implicates possible criminal activity, the Kay County Detention Center Administrator will advise the Sheriff or Undersheriff who may refer the matter to the District Attorney. The Kay County Detention Center Administrator will determine,

> with the Sherriff's concurrence, what level of cooperation other Kay County Detention Center employees may offer in furthering any such investigation, to include surveillance activities.
>
> When an apparent criminal violation potentially involves the Kay County Detention Center Administrator,[2] any staff member may, as an individual, contact the Administrator, who will confidentially evaluate the information provided and make a determination as to further action, such as referral to local law enforcement authorities.

Id. at 407 ("Reporting Criminal Activity" Policy).

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[2] This appears to be a typo in the policy. The policy provides that "[w]hen an apparent criminal violation potentially involves the *Kay County Detention Center Administrator* [i.e., Mr. Jones], any staff member may, as an individual, contact the Administrator." Aplt.'s App. at 407 (emphasis added). However, that creates a strange outcome in which Authority employees would contact Mr. Jones only when they suspect there is a criminal violation involving Mr. Jones. Furthermore, the policy would provide no other guidance to Authority employees regarding their reporting obligations in instances not involving the Administrator.

A more reasonable reading, which the parties seem to accept, is that when an apparent criminal violation potentially involves the *Kay County Detention Center*, a staff member may contact the Administrator. *See* Oral Argument 9:02–18 ("[Ms. Wright's] ability to report is limited to reporting to the Administrator of the Authority. And then only the Administrator can make a determination about whether that will be carried forward and in what manner."); Oral Argument 37:53–38:00 ("The policy says you must report to the Administrator and the Administrator makes the decision about what happens next."); *see also* Aplt.'s App. at 1017 (Tr. of Stephanie Wright Dep. Test., dated June 19, 2020) ("Q: [The policy] also states . . . that, 'The Kay County Detention Center Administrator' . . . 'is responsible for evaluating all potential referrals for criminal investigation of alleged law violations committed by inmates or Kay County Detention Center employees, whether made by the lieutenant, investigative supervisor, or some other individual.' So, according to this [policy], he's responsible for that? A: Correct.").

However, on February 6, 2018, Ms. Wright went outside of the Authority's chain of command and reported instances of inmate abuse and assaults to the OSBI. *See id.* at 844. Specifically, she turned over the photographs and videotapes depicting inmate abuse to the agency. *See id.* at 611–12.

The OSBI and the district attorney's office thereafter investigated Ms. Wright's report. The OSBI provided its report to the District Attorney, and Mr. Ware was terminated on June 11, 2018. Subsequently, on August 14, 2018, the Authority fired Ms. Wright—claiming that she failed to perform her job duties and exhibited negative behavior at the jail. *See id.* at 773–75 (Termination Letter, dated Aug. 17, 2018).

B

Ms. Wright proceeded to file the instant suit on November 5, 2019. *See id.* at 11–17. Of relevance here, Ms. Wright alleged that Defendants violated her First Amendment right to free speech by retaliating against her for reporting Mr. Ware to the OSBI. Defendants respectively filed motions for summary judgment.

In granting summary judgment for Defendants, the district court found that the First Amendment did not protect Ms. Wright's speech because she made her OSBI report pursuant to her official duties. Specifically, in analyzing the first prong of the *Garcetti*/*Pickering* framework, the district court reasoned that Ms. Wright "was paid to report violations of the type she reported to the OSBI. That she elected to go outside the chain of command and report to the OSBI rather than Defendant Jones, does not alter the fact that her speech was made within the scope of her duties." *Id.*

at 1193 (Mem. Op. and Order, filed Jan. 21, 2021). As such, the district court concluded that Ms. Wright's "speech [was] not protected by the First Amendment and Defendants [were] entitled to judgment on this claim."[3] *Id.* This appeal followed.

II

Ms. Wright appeals from the district court's order, claiming that her OSBI report was made "as a private citizen and not pursuant to her job duties." Aplt.'s Opening Br. at 5. As such, she asserts that the district court erred in finding that her claim failed under the first prong of the *Garcetti*/*Pickering* framework. Defendants argue that the district court did not err, as Ms. Wright "was the compliance officer, and reporting on such alleged inmate abuse was part of her job duties." Aplees.' Resp. Br. at 1 (emphasis omitted). Alternatively, to the extent we are unpersuaded by such an argument, Defendants request that we affirm the district court's judgment on five alternative grounds—which were raised below but not addressed by the district court.

Viewing the evidence in the light most favorable to Ms. Wright, we conclude that Ms. Wright's OSBI report was not made pursuant to her official duties. Specifically, Ms. Wright was not an ACA compliance officer at the time she made the OSBI report, and she violated the Authority's internal policy by unilaterally

[3] After finding that Ms. Wright's claim failed under the first prong of the *Garcetti*/*Pickering* framework, the district court did not analyze any of the remaining prongs. *See* Aplt.'s App. at 1193. Furthermore, the district court did not address the Defendants' alternative grounds for affirmance. *See id.*

deciding to report the alleged criminal activity to the OSBI—an entity not within her chain of command. Furthermore, we are unwilling to affirm the district court's judgment on alternative grounds. Given that the district court did not address these alternative grounds below, we decline Defendants' request to consider them for the first time on appeal.

III

"We review the district court's summary judgment decision de novo, applying the same standards as the district court." *Punt v. Kelly Servs.*, 862 F.3d 1040, 1046 (10th Cir. 2017). "Summary judgment is proper if, viewing the evidence in the light most favorable to the non-moving party, there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Peterson v. Martinez*, 707 F.3d 1197, 1207 (10th Cir. 2013). "An issue is genuine if there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either way," and is "material if under the substantive law it is essential to the proper disposition of the claim." *Becker v. Bateman*, 709 F.3d 1019, 1022 (10th Cir. 2013) (quoting *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998)). "Furthermore, because this case involves the First Amendment, we have an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Rohrbough v. Univ. of Colo. Hosp. Auth.*, 596 F.3d 741, 745 (10th Cir. 2010) (quoting *Brammer-Hoelter*, 492 F.3d at 1201).

"When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom." *Garcetti*, 547 U.S. at 418. "[T]he government as employer indeed has far broader powers than does the government as sovereign." *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality op.). At the same time, however, "[t]he First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Garcetti*, 547 U.S. at 419. Consequently, when government employees speak on matters of public concern, "they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Id.*

In analyzing freedom of speech retaliation claims with the seminal reasoning of the Supreme Court in *Garcetti* and *Pickering* as the central guidepost, we have used a five-step inquiry and referred to it, in shorthand fashion, as the *Garcetti*/*Pickering* analysis. *See Brammer-Hoelter*, 492 F.3d at 1202. First, and of relevance here, we "must determine whether the employee speaks 'pursuant to [his] official duties.'" *Id.* (alteration in original) (quoting *Garcetti*, 547 U.S. at 421). Crucially, "[i]f the employee speaks pursuant to his official duties, then there is no constitutional protection because the restriction on speech 'simply reflects the exercise of employer control over what the employer itself has commissioned or created.'" *Id.* (quoting *Garcetti*, 547 U.S. at 422).

Second, if an employee does not speak pursuant to his official duties, we must then "determine whether the subject of the speech is a matter of public concern." *Id.*

Third, "if the employee speaks as a citizen on a matter of public concern, [we] must determine 'whether the employee's interest in commenting on the issue outweighs the interest of the state as employer.'" *Id.* at 1203 (quoting *Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323, 1327 (10th Cir. 2007)). Fourth, if the employee's interest outweighs that of the employer, "the employee must show that his speech was a 'substantial factor or a motivating factor in [a] detrimental employment decision.'" *Id.* (alteration in original) (quoting *Lybrook v. Members of Farmington Mun. Sch. Bd. of Educ.*, 232 F.3d 1334, 1338 (10th Cir. 2000)). Finally, if the employee is able to make such a showing, "the employer may demonstrate that it would have taken the same action against the employee even in the absence of the protected speech." *Id.* (quoting *Lybrook*, 232 F.3d at 1339).

"The first three steps of the *Garcetti*/*Pickering* analysis are issues of law 'to be resolved by the district court, while the last two are ordinarily for the trier of fact.'" *Rohrbough*, 596 F.3d at 745 (quoting *Brammer-Hoelter*, 492 F.3d at 1203). Nevertheless, we "review disputed facts relevant to step one of the *Garcetti*/*Pickering* analysis in the light most favorable to the non-moving party at the summary judgment stage." *Id.* at 746.

In analyzing the first step of the *Garcetti*/*Pickering* analysis, "we have stated that speech is made pursuant to official duties if it is generally consistent with 'the type of activities [the employee] was paid to do.'" *Brammer-Hoelter*, 492 F.3d at 1203 (alteration in original) (quoting *Green v. Bd. of Cnty. Comm'rs*, 472 F.3d 794, 801 (10th Cir. 2007)). "Consequently, if an employee engages in speech during the

course of performing an official duty and the speech reasonably contributes to or facilitates the employee's performance of the official duty, the speech is made pursuant to the employee's official duties." *Id.* At the same time, "[m]erely because an employee's speech was made at work and about work does not necessarily remove that employee's speech from the ambit of constitutional protection." *Thomas v. City of Blanchard*, 548 F.3d 1317, 1323 (10th Cir. 2008) (emphases omitted). "Rather, it is whether the speech was made pursuant to the employee's job duties or, in other words, whether the speech was 'commissioned' by the employer." *Id.* (quoting *Garcetti*, 547 U.S. at 422).

Put another way, the "critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Knopf v. Williams*, 884 F.3d 939, 945 (10th Cir. 2018) (quoting *Lane v. Franks*, 573 U.S. 228, 240 (2014)). The inquiry is "'a practical one,' and . . . a court cannot simply read off an employee's duties from a job description because 'formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform.'" *Thomas*, 548 F.3d at 1323 (quoting *Garcetti*, 547 U.S. at 424–25). Instead, we have "taken a case-by-case approach, looking both to the content of the speech, as well as the employee's chosen audience, to determine whether the speech is made pursuant to an employee's official duties." *Rohrbough*, 596 F.3d at 746.

"The line between 'official' and 'unofficial' duties is drawn most helpfully in *Casey v. West Las Vegas Independent School District*, 473 F.3d 1323 (10th Cir.

2007)." *Thomas*, 548 F.3d at 1324. In *Casey*, we found that the First Amendment protected an employee's speech when the employee "went beyond her supervisors and reported to someone outside her chain of command about a matter *which was not committed to her care*." *Id.* at 1325 (emphasis added).

A

Ms. Wright first contends that the district court mischaracterized her official duties at the time she made the OSBI report. Specifically, Ms. Wright asserts the district court's reliance on her written job description was improper, as "the written job description [was] untethered to [Ms.] Wright's actual duties." Aplt.'s Opening Br. at 16. Instead, she claims that her "work on ACA accreditation ceased back in October[] 2017, well before she went to the OSBI." *Id.* Thus, while her job "put her in a position to learn about the criminal misconduct in the Authority, there is no evidence that her job gave her either the duty or the power" to correct or report the misconduct to the OSBI—an external law enforcement authority not within her chain of command. *Id.* As such, she argues that the district court erred in concluding that her "speech was unprotected because it was pursuant to her duties as an employee." *Id.* at 13.

Defendants respond by noting that Ms. Wright "was the compliance officer, and reporting on such alleged inmate abuse was part of her job duties." Aplees.' Resp. Br. at 1 (emphasis omitted). As such, Defendants argue that Ms. Wright's OSBI report was made pursuant to her official duties. *See id.* at 14. Consistent with the Defendants' argument, the district court stated that Ms. Wright "was responsible

for ensuring [the Authority] was in compliance with various policies and procedures, accreditation standards, and other laws. [Ms. Wright] was to report any deficiencies or violations." Aplt.'s App. at 1192. Consequently, the district court concluded that "[Ms. Wright] was paid to report violations of the type she reported to the OSBI . . . [t]hus, her speech is not protected by the First Amendment and Defendants are entitled to judgment on this claim." *Id.* at 1193. We conclude, however, that Ms. Wright has the better of this argument—specifically, when the evidence is viewed in the light most favorable to her, the district court mischaracterized Ms. Wright's official duties at the time she made the OSBI report.

It is true that Ms. Wright's formal job description supports the district court's characterization: "Performs facility level operational reviews and audits of all functional areas as required by a published schedule, *accurately reporting any findings of noncompliance*, and recommending appropriate corrective actions." *Id.* at 620 (emphasis added). However, an employee's official job description is not dispositive of the inquiry. *See Garcetti*, 547 U.S. at 424–25 ("Formal 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.").

The parties agree that, as of October 2017, Ms. Wright's "job duties as compliance officer included completing PREA audits, reviewing how the facility was

run day-to-day, determining which ACA guidelines with which the facility was compliant and areas of non-compliance, ensuring the facility became compliant, and updating policies and procedures." Aplt.'s App. at 527, ¶ 3 (Def. Don Jones Mot. for Summ. J. and Br. in Supp., filed Oct. 16, 2020). However, Ms. Wright testified that Mr. Jones—the head of the Authority—told her to stop working on compliance activities related to ACA accreditation in October 2017.[4] *See id.* at 825, 840–41. That meant, at the time of the OSBI report in February 2018, Ms. Wright's official duties no longer included "reporting any findings of noncompliance" with ACA standards. *See id.* at 825 ("Q: Okay. What do you do, as in this [ACA] position, to assist with that? A: Go over how the facility is run. How things are going day-to-day. What falls in what guidelines. What we're not compliant with and making sure those things become compliant. Filing paperwork to become ACA accredited."); *id.* ("Q: Okay. Don asked you to stop? A: Yes. Q: When did that happen? A: After October of 2017."). In other words, Ms. Wright's remaining duties (i.e., completing PREA audits, reviewing how the facility was run day-to-day, updating policies and procedures) did not involve reporting noncompliance with ACA guidelines to anyone—let alone to external authorities. As such, at the time of the OSBI report, Ms. Wright was not acting *pursuant to her official duties*—i.e., as an ACA

[4] Ms. Wright also testified that Mr. Jones explicitly instructed her to bring no further complaints about Mr. Ware—which is exactly what her report concerned here. *See* Aplt.'s App. at 844 ("Q: But you didn't bring that to Don Jones because you assumed that he wasn't going to do anything about it? A: No, not because I assumed, because he told me to stop bringing complaints about Matt Ware.").

compliance officer—when she reported findings of noncompliance with ACA standards to the OSBI.

Furthermore, given her reduced role at the time of the OSBI report, Ms. Wright testified that she was not authorized to retrieve the videotapes or to take videos and photographs of the footage depicting inmate abuse—materials which she ultimately turned over to the OSBI. *See id.* at 605 ("Q: Okay. Do you believe you were authorized or entitled to do what you did, in terms of taking all these photos and images? . . . . A: It's not part of my job, but, yes, I felt like that *needed to be done*." (emphasis added)). Thus, we cannot say that the Authority "commissioned" Ms. Wright's OSBI report or that the report was the kind of speech that ordinarily fell within the scope of her duties. *See Thomas*, 548 F.3d at 1323; *Knopf*, 884 F.3d at 945. As such, Ms. Wright did not act pursuant to her official duties in retrieving the videotapes, taking videos and photographs of the videotapes' content, and delivering those materials to the OSBI.

Finally, Ms. Wright testified that the OSBI was outside of her chain of command.[5] Aplt.'s App. at 844 ("Q: Okay. Why the OSBI? What makes you think to do that? A: Because I wasn't going as part of my job, so I thought about what somebody would do, who I would report that to not involving work."). We have, of course, previously stated that "an employee's decision to go outside of their ordinary

[5] There is no contradictory documentary evidence placing the OSBI anywhere in the chain of command for Authority employees—let alone for Ms. Wright. The only contrary evidence is Mr. Jones's own testimony, which must be disregarded at the summary judgment stage. *See, e.g.*, *Peterson*, 707 F.3d at 1207.

chain of command does not necessarily insulate their speech." *Rohrbough*, 596 F.3d at 747. Nonetheless, while not dispositive, an "employee's chosen audience" is an important factor in determining whether an employee's speech was made pursuant to her official duties. *Id.* at 746. Indeed, we have regularly noted that "speech directed at an individual or entity outside of an employee's chain of command is often outside of an employee's official duties." *Id.* at 747; *see also Thomas*, 548 F.3d at 1325 ("The fact that [plaintiff] threatened to go outside his usual chain of command and report on suspected criminal activity to the OSBI, and not merely to his supervisors or to the state housing inspector, leads us to believe that he was not acting pursuant to his official duties."); *Casey*, 473 F.3d at 1332–33.

Thus, when these factors are taken together, it appears that Ms. Wright "went beyond her supervisors and reported to someone outside her chain of command about a matter which was not committed to her care." *Thomas*, 548 F.3d at 1325. Accordingly, when viewing the facts in the light most favorable to Ms. Wright, we conclude that her speech was not made pursuant to her specific job duties.

B

Ms. Wright also claims that she violated the Authority's internal policy by reporting the alleged criminal activity to the OSBI. As such, she argues that "[v]iolating the policy and her supervisor's instruction to stop talking about [Mr.] Ware's activities, is virtually conclusive that the employee is not speaking pursuant to their official job duties." Aplt.'s Opening Br. at 20 (emphasis omitted).

Defendants argue that even if Ms. Wright was not acting pursuant to her specific job duties, she was acting pursuant to the Authority's policy for reporting criminal misconduct. Specifically, Defendants claim that the Authority's policy "requires every employee of the jail to refer any actions, incidents, and activities occurring in the jail that may constitute a criminal act by an inmate or employee to *an independent outside law enforcement agency*." Aplees.' Resp. Br. at 6 (emphasis added). Thus, Defendants claim that Ms. Wright abided by the policy and "was acting within the scope of her employment when she made her report to the OSBI." *Id.* at 20.

The Authority's policy, in relevant part, provides:

> B. Internal Investigations of Staff
>
> When an internal investigation of a staff member implicates possible criminal activity, the Kay County Detention Center Administrator will advise the Sheriff or Undersheriff who may refer the matter to the District Attorney. The Kay County Detention Center Administrator will determine, with the Sherriff's concurrence, what level of cooperation other Kay County Detention Center employees may offer in furthering any such investigation, to include surveillance activities.
>
> When an apparent criminal violation potentially involves the Kay County Detention Center Administrator,[6] any staff member may, as an individual, contact the Administrator, who will confidentially evaluate the information provided

[6] As we noted, *supra* note 2, we understand this to be a typo and the parties seem to agree: specifically, the word "Administrator" is a mistaken addition; the policy was intended to convey that when an apparent criminal violation potentially involves the *Kay County Detention Center*, a staff member may contact the Administrator.

> and make a determination as to further action, such as referral to local law enforcement authorities.

Aplt.'s App. at 407.

The policy appears to make reporting permissive, as there is no language *requiring* Authority employees to report criminal conduct to either the Administrator or—as Defendants suggest—an external law enforcement agency, like the OSBI. Instead, consistent with Ms. Wright's reading, the policy provides that if an employee chooses to make a report pursuant to the policy, the criminal violation must be reported to *the Administrator* (i.e., Mr. Jones) who has exclusive authority to determine whether the matter should be referred to local law enforcement agencies.[7] Thus, contrary to the Defendants' interpretation, the policy did not "require[]" Ms. Wright to make a report to "an independent outside law enforcement agency." Aplees.' Resp. Br. at 22 (emphasis omitted).

Indeed, not only did Ms. Wright fail to comply with the policy, she affirmatively violated it in two related ways. First, she did not make her report to the Administrator; instead, she made her report to the OSBI, which was in clear

[7] At the very least, Ms. Wright asserts a reasonable interpretation of an ambiguous policy. *See Am. Econ. Ins. Co. v. Bogdahn*, 89 P.3d 1051, 1054 (Okla. 2004) ("The test for ambiguity is whether the language 'is susceptible to two interpretations on its face.'" (quoting *Cranfill v. Aetna Life Ins. Co.*, 49 P.3d 703, 706 (Okla. 2002))). At the summary judgment stage, we must resolve the ambiguity in Ms. Wright's favor. *See Stewart v. Adolph Coors Co.*, 217 F.3d 1285, 1290 (10th Cir. 2000) ("Taking this evidence in the light most favorable to the plaintiff, the waiver was ambiguous and the district court did not err in denying the motion for judgment as a matter of law.").

contravention of the procedure set out by the policy. *See* Aplt.'s App. at 1017. Second, by reporting the conduct, Ms. Wright herself made the determination—not the Administrator—concerning whether "a referral to local law enforcement authorities" should be made. *Id.* ("Q: Okay. Did you purposefully not want to follow these policies? A: I purposefully chose not to follow these policies with Don, yes, because I believed Don would not do anything with the information because it was about [Mr.] Ware."). Neither the policy nor Ms. Wright's job duties delegated such authority to her. Therefore, Ms. Wright was not acting within the scope of her employment when she made her report to the OSBI.

* * *

Given that (1) Ms. Wright was not an ACA compliance officer at the time she made the OSBI report and (2) she violated the Authority's internal policy for reporting criminal activity, we conclude Ms. Wright's OSBI report was not made pursuant to her official duties. Accordingly, we reverse the district court's grant of summary judgment on the first prong of the *Garcetti*/*Pickering* analysis.

IV

Defendants put forth five alternative grounds for affirming the district court's decision. Specifically, Defendants state that we "should affirm on various . . . alternative grounds, including (1) Defendant Jones does not have an official capacity; (2) [Ms. Wright's] speech was not a motivating factor in her termination; (3) [Ms. Wright] would have been terminated regardless of her report; (4) Defendant Jones in his individual capacity is entitled to qualified immunity; and (5) the Kay County

Detention Center did not have a policy of violating employees' First Amendment rights." Aplees.' Resp. Br. at 13–14. While Defendants acknowledge that the district court "never reached the[se] various [alternative] arguments," they claim that we are "nevertheless entitled to affirm the [d]istrict [c]ourt's granting of summary judgment on any of the alternative grounds raised in [their] summary judgment briefing." *Id.* at 25.

We decline Defendants' request to affirm the district court's judgment on alternative grounds. Given that the district court did not address these alternative grounds below, we are unwilling to consider them for the first time on appeal. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."); *Frazier v. Simmons*, 254 F.3d 1247, 1254 n.3 (10th Cir. 2001) ("We will not consider the issue on appeal when it was not passed on below, and we remand the case to the district court to address the . . . issue first."); *N. Tex. Prod. Credit Ass'n v. McCurtain Cnty. Nat'l Bank*, 222 F.3d 800, 812 (10th Cir. 2000) ("The district court did not address this claim in its order granting summary judgment for the defendants, and we decline to consider it on appeal. As a general rule, we do not consider issues not passed on below, and it is appropriate to remand the case to the district court to address an issue first."). On remand, the district court may address these alternative grounds if it deems it appropriate.

V

For the foregoing reasons, we **REVERSE** the district court's grant of summary judgment to Defendants and **REMAND THE CASE** for additional proceedings consistent with this opinion.[8]

Entered for the Court

Jerome A. Holmes
Chief Judge

[8] Because Ms. Wright "articulate[s] a real and substantial interest that justifies depriving the public of access to the records that inform our decision-making process," her unopposed Motion to Seal Appellant's Appendix Volume II is **granted**. *Eugene S. v. Horizon Blue Cross Blue Shield of N.J.*, 663 F.3d 1124, 1135–36 (10th Cir. 2011). The Clerk of Court shall seal Appellant's Appendix—Volume II.