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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

GARY A. AVANT,

Plaintiff - Appellee,

v.

KEN DOKE, individually and in his official capacity as a County Commissioner for Muskogee County,

Defendant - Appellant.

No. 23-7060

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA (D.C. No. 6:20-CV-00067-RAW)

Alison B. Levine (Jordan L. Miller and Andrew A. Artus, with her on the briefs) of Collins Zorn & Wagner, Oklahoma City, Oklahoma, for Defendant-Appellant.

Mark Hammons, Sr. (Amber L. Hurst, with him on the briefs), of Hammons, Hurst & Associates, Oklahoma City, Oklahoma, for Plaintiff-Appellee.

Before **TYMKOVICH**, **MATHESON**, and **BACHARACH**, Circuit Judges.

BACHARACH, Circuit Judge.

This case returns to us to revisit the interplay between the First Amendment and the doctrine of qualified immunity. The First Amendment generally prohibits state officials from firing employees for exercising their freedom of expression on matters of public concern. *Duda v. Elder*, 7 F.4th 899, 910 (10th Cir. 2021). So public officials may incur personal liability when retaliating against employees for exercising a clearly established right to speak on matters of public concern. *See Bailey v. Indep. Sch. Dist. No. 69 of Canadian Cty. Okla.*, 896 F.3d 1176, 1184–85 (10th Cir. 2018).

But what if an employee denies making the statement that led to the firing, exposing ambiguities in the context and purpose of the suspected statement? In the face of those ambiguities, how would a reasonable public official assess the possibility of a public concern?

When the context and purpose are straightforward, the public official might rely on our case law involving actual speech. But these cases supply little guidance to a public official when the employee's perceived statement involves ambiguities in the context and purpose. These ambiguities entitle the public official to qualified immunity in this case.

1. A county official allegedly fires the plaintiff for speech that he denies making.

The plaintiff, Mr. Gary Avant, worked as a truck driver for Muskogee County. County officials believed that Mr. Avant was complaining to other

citizens about the county's road plan and assignment of a county worker. The suspected criticisms involved the county's

- creation of a road plan as a ruse to finance a new fence for someone and
- assignment of a registered sex offender to work near a school.

Mr. Avant met with his supervisor and the county commissioner. In the meeting, the supervisor told Mr. Avant to stop spreading these stories. Months later, the supervisor heard that Mr. Avant hadn't stopped. So the supervisor relayed this information to the commissioner, and he fired Mr. Avant.

The firing led Mr. Avant to sue the commissioner under 42 U.S.C. § 1983, claiming retaliation in violation of the First Amendment. During the litigation, Mr. Avant denied making the statements. So Mr. Avant invoked a theory of *perceived speech*, where public officials fire employees based on the mistaken belief that they had said something. *See Avant v. Doke*, No. 21-7031, 2022 WL 2255699, at *4 (10th Cir. 2022) (unpublished).

The commissioner moved for summary judgment, implicitly arguing in part that the perceived speech hadn't involved a matter of public

concern.[1] The district court denied this part of the motion, and we remanded for the district court to develop the record.

After the remand, the district court again denied summary judgment, prompting the commissioner to appeal again. On appeal, the commissioner argues that

- Mr. Avant hadn't pleaded a claim for perceived speech and
- qualified immunity applies given the lack of precedent on how to assess a public concern for perceived speech.

2. We lack jurisdiction to consider the adequacy of the pleadings.

The commissioner argues that Mr. Avant didn't plead a claim involving perceived speech. But we can't consider this argument because it falls outside our jurisdiction.

As the appellant, the commissioner bears the burden to establish our jurisdiction. *Est. of Ceballos v. Husk*, 919 F.3d 1204, 1223 (10th Cir. 2019). An appellant can satisfy this burden when the district court's order is final. 28 U.S.C. § 1291. But an order generally isn't considered *final* when the district court denies summary judgment. *Dupree v. Younger*, 598 U.S. 729, 733–734 (2023). So we ordinarily lack jurisdiction when the district court denies a motion for summary judgment. *Est. of Valverde ex rel. Padilla v. Dodge*, 967 F.3d 1049, 1058 (10th Cir. 2020).

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[1] The commissioner characterized the perceived speech as personal gossip rather than political activity.

A narrow exception exists under the collateral-order doctrine, which recognizes appellate jurisdiction over collateral legal issues before entry of a final judgment. *Mitchell v. Forsyth*, 472 U.S. 511, 524–25 (1985). But we need not address the collateral-order doctrine because the commissioner hasn't invoked it. *See EEOC v. PJ Utah, LLC*, 822 F.3d 536, 542 n.7 (10th Cir. 2016) (declining to consider whether appellate jurisdiction exists under the collateral-order doctrine because the appellant hadn't invoked this doctrine).

The commissioner instead argues that we implied in the first appeal that we had jurisdiction to consider the adequacy of the pleadings. We reject this argument in light of the arguments presented in the prior appeal. There the commissioner hadn't questioned the adequacy of Mr. Avant's pleadings.[2] So we observed that the commissioner hadn't developed an argument on the adequacy of the pleadings. *Avant v. Doke*, No. 21-7031, 2022 WL 2255699, at *3 (10th Cir. 2022) (unpublished). From this observation, the commissioner infers that the prior panel must have thought that it could consider the adequacy of the pleadings in the course of an interlocutory appeal.

[2] The commissioner concedes that "he did not challenge the recognition or lack of amendment in the first interlocutory appeal." Commissioner's Reply Br. at 5.

But the prior panel didn't discuss jurisdiction over a potential challenge to the pleadings. Without such discussion, we can't assume that the prior panel would have found jurisdiction over a challenge to the pleadings. *See Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011) ("When a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed."); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (stating that we are "not bound by a prior exercise of jurisdiction in a case where it was not questioned and it was passed sub silentio"). So we can't infer appellate jurisdiction from the prior panel's observation about the commissioner's failure to develop a challenge to the pleadings.

3. We must decide qualified immunity based on the district court's universe of facts.

When a district court declines to grant summary judgment based on qualified immunity, we ordinarily confine our review to the district court's universe of facts. *Morris v. Noe*, 672 F.3d 1185, 1189 (10th Cir. 2012). The commissioner argues, however, that we should consider ten other facts:

1. Mr. Avant refused to maintain his trucks and ruined them by failing to maintain them.
2. Mr. Avant destroyed four trucks in six years.
3. Mr. Avant liked to gossip, and his gossip disrupted the workplace.

4. Mr. Avant disliked his supervisor and gossiped about him to foster opposition.

5. The road foreman regarded Mr. Avant as a bad employee and recommended his termination.

6. The foreman also complained to the commissioner about Mr. Avant.

7. The commissioner believed that Mr. Avant had complained about the road project because it cost his son a job building a fence.

8. The commissioner thought that Mr. Avant had known that his remarks were false.

9. The commissioner thought that the remarks had hurt morale.

10. The commissioner and the supervisor had consulted the district attorney before the commissioner decided to fire Mr. Avant.

Though the district court didn't identify these facts, the commissioner argues that we can consider them. For this argument, he points out that we can conduct our own de novo review of the facts when the district court's universe of facts is "blatantly contradicted by the record." *Lewis v. Tripp*, 604 F.3d 1221, 1225–26 (10th Cir. 2010) (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007)).

Though the commissioner argues that the district court's universe of facts is blatantly contradicted, he doesn't explain how. He identifies ten additional facts, but doesn't say how they contradict anything in the district court's universe of facts.

Even with such an explanation, however, we couldn't consider the additional facts. We can conduct a de novo assessment only when the district court's universe of facts is blatantly contradicted by "objective documentary evidence, such as video recordings or photographs"—not merely by contrary testimony. *Vette v. K-9 Unit Deputy Sanders*, 989 F.3d 1154, 1164 (10th Cir. 2021). Because the commissioner relies solely on contrary testimony, we decline to consider his ten additional facts.

4. The district court's universe of facts entitled the commissioner to qualified immunity.

We thus consider whether the district court's universe of facts showed the violation of a clearly established constitutional right. *Pauly v. White*, 874 F.3d 1197, 1203 (10th Cir. 2017); *Morris v. Noe*, 672 F.3d 1185, 1189 (10th Cir. 2012). We answer *no*.

a. We conduct de novo review over the denial of summary judgment.

In addressing the denial of summary judgment, we conduct de novo review, applying the same standard that the district court should apply. *See Grubb v. DXP Enters., Inc.*, 85 F.4th 959, 965 (10th Cir. 2023). Under that standard, the commissioner is entitled to summary judgment if he "shows that there is no genuine dispute as to any material fact and [he] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Because the commissioner asserted qualified immunity, Mr. Avant bears the initial burden of showing (1) a violation of the Constitution and (2) the existence

of a clearly established constitutional violation. *Verdecia v. Adams*, 327 F.3d 1171, 1174 (10th Cir. 2003).

b. The case law didn't clearly establish a public concern underlying the perceived speech.

The commissioner argues in part that he didn't violate the Constitution by firing Mr. Avant. But we need not address that argument because a constitutional violation wouldn't have been clearly established.

We assess the constitutionality of the firing under the so-called *Garcetti/Pickering* test. *Rock v. Levinski*, 791 F.3d 1215, 1219 (10th Cir. 2015). This test has five elements; the element at issue here is the existence of a public concern underlying the employee's speech. *Duda v. Elder*, 7 F.4th 899, 910 (10th Cir. 2021).[3]

Given the dispute over this element, we held in the first appeal that Mr. Avant must show that the case law had clearly established a public

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[3] Four other elements exist for a violation of the First Amendment:

1. The employee's speech does not relate to the employee's official duties.
2. The government's interest in the efficiency of public service doesn't outweigh the employee's interest in free speech.
3. The firing was caused at least in part by the employee's speech.
4. In the absence of the protected speech, the employee wouldn't otherwise have been fired.

Duda, 7 F.4th at 910.

concern. *Avant v. Doke*, No. 21-7031, 2022 WL 2255699, at *5 (10th Cir. June 23, 2022) (unpublished). This showing requires case law that would have put a reasonable official on notice that the perceived speech related to a matter of public concern. *Weise v. Casper*, 593 F.3d 1163, 1167 (10th Cir. 2010).

A reasonable official would have lacked meaningful guidance from the case law. Virtually all of the cases in this area involve actual speech rather than perceived speech. For actual speech, our cases focus on the context, form, content, and purpose. *Rogers v. Riggs*, 71 F.4th 1256, 1259–62 (10th Cir. 2023). This focus might be straightforward when an employee makes statements with an unambiguous context, form, content, and purpose. But this focus could entail uncertainty when the context, form, and purpose are not well-defined.

In considering the context, form, and purpose, we're addressing speech that the employee has denied making. In this setting, the Supreme Court has said that a public employer should be guided by its own motive and its own understanding of the facts. *Heffernan v. City of Paterson, N.J.*, 578 U.S. 266, 272 (2016). So a public official wouldn't violate the First Amendment by firing an employee for a reasonable—but mistaken—belief that the employee's speech had "involved personal matters" rather than "matters of public concern." *Id.*

The commissioner argues that he reasonably believed that Mr. Avant's speech had involved personal matters. The reasonableness of the commissioner's belief entails an issue of law, not fact. *See Keylon v. City of Albuquerque*, 535 F.3d 1210, 1218–19 (10th Cir. 2008) (stating that the objective legal reasonableness of the defendant's action is a question of law). To resolve this legal issue, the commissioner would have lacked guidance from the case law on how to assess the reasonableness of his belief.

Here, for example, the commissioner heard the supervisor tell Mr. Avant to stop spreading stories about the road plan and work assignment near a school. The supervisor later told the commissioner that Mr. Avant had continued telling these stories. The resulting question for the commissioner was whether he could reasonably rely on the supervisor's report that Mr. Avant had continued to spread false stories. To answer that question, the commissioner would have lacked any meaningful guidance from the case law.[4] So a constitutional violation wouldn't have been clearly established.

[4] Mr. Avant argues that the commissioner bore the burden to prove the reasonableness of his belief. We assume for the sake of argument that Mr. Avant is right. Even if he is, however, Mr. Avant would have needed to show that the case law had clearly established the constitutional violation. *Cox v. Glanz*, 800 F.3d 1231, 1245 (10th Cir. 2015).

c. Perceived speech about illegal conduct does not always involve a public concern.

Mr. Avant argues that (1) the perceived speech exposed illegal conduct and (2) illegal conduct always involves a public concern. For this argument, Mr. Avant points out that when we've addressed actual speech (rather than perceived speech), we've held that a statement about "potential illegal conduct by government officials is inherently a matter of public concern." *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1206 (10th Cir. 2007); *see also Rogers v. Riggs*, 71 F.4th 1256, 1260 (10th Cir. 2023) (stating that a public concern usually exists when speech exposes corruption in a public workplace).

But we must consider not only the content, but also the context and purpose. *See* Part 4(b), above. For example, speech that would ordinarily trigger a public concern is not protected if the employee's primary purpose was "to air a personal dispute." *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 602 F.3d 1175, 1188 (10th Cir. 2010). So even when the content might otherwise involve a public concern, an official must determine whether the employee had been trying to expose misconduct or to address a personal dispute. *Id.* Given the inherent uncertainty in that determination, we've held that officials enjoy qualified immunity when they reasonably regard a plaintiff's primary motive as personal even when the content of

the plaintiff's statement involves a public entity's improper conduct. *Singh v. Cordle*, 936 F.3d 1022, 1036 (10th Cir. 2019).

So how would a reasonable commissioner evaluate the primary motive for speech that the plaintiff denies making? At least three sources could inform a reasonable commissioner's evaluation:

1. **The commissioner's viewpoint:** One possibility is to consider the commissioner's viewpoint about Mr. Avant's primary motive. For example, did the commissioner think that Mr. Avant had genuinely believed his stories about the road plan and work assignment of a sex offender?[5]

2. **The commissioner's process:** A second possibility is to consider the commissioner's process when he was told about Mr. Avant's suspected statements. For example, who did the commissioner consult, and what did he learn?

3. **The listener's viewpoint:** A third possibility is to consider the perspective of individuals who reportedly heard Mr. Avant's statements. Here, members of the community told officials about Mr. Avant's stories. Who were these community

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[5] This approach highlights the uncertainty inherent in the district court's universe of facts. For example, the commissioner contends that Mr. Avant knew that the stories were false. If the court were to credit that contention, Mr. Avant's awareness of his own falsehoods would weigh against the existence of a public concern. *See Wulf v. City of Wichita*, 883 F.2d 842, 858 n.24 (10th Cir. 1989) ("It is difficult to see how a maliciously or recklessly false statement could be viewed as addressing a matter of public concern.").

Mr. Avant doesn't address the truth or falsity of the stories because he denies telling them. With the commissioner's contention and Mr. Avant's silence on the issue, the district court didn't say—one way or another—whether a jury could find that Mr. Avant had reasonably believed the stories. Without a finding on this question, a reasonable commissioner might question the existence of a public concern.

> members, and where did they reportedly hear Mr. Avant's speech?

Which approach is correct? Could a reasonable commissioner consider just one perspective or a combination of these? To pick an approach, a reasonable commissioner would have lacked applicable holdings from *any* federal appellate court. And without an applicable holding, the case law provided the commissioner with little help on how to evaluate Mr. Avant's primary motive for the perceived speech. Given the lack of any applicable holdings to assess Mr. Avant's primary motive, the existence of a public concern wasn't clearly established.

5. Qualified immunity doesn't require an investigation.

Despite the lack of meaningful legal guidance bearing on Mr. Avant's primary motive, the district court rejected qualified immunity, reasoning that a public official must conduct a reasonable investigation before firing an employee for suspected statements. So we must determine whether the case law clearly established a requirement for public officials to investigate before firing an employee based on suspected speech.

The district court traced this requirement to a plurality opinion: *Waters v. Churchill*, 511 U.S. 663 (1994). But Mr. Avant concedes that *Waters* didn't clearly establish a requirement to investigate.

Mr. Avant instead points to case law from other circuits. But he didn't rely on that case law in district court or in his appellate response to

the commissioner's opening brief. To the contrary, Mr. Avant pointed to this case law only when we ordered supplemental briefing on the impact of *Waters* as a plurality opinion. Rather than address the impact of *Waters*, Mr. Avant argued for the first time that other circuits require an investigation into the perceived speech. By then, it was too late for us to obtain input from either the district court or the commissioner. We thus conclude that Mr. Avant waited too long to rely on case law in other circuits. *See Okla. Chapter of the Am. Acad. of Pediatrics v. Fogarty*, 472 F.3d 1208, 1216 (10th Cir. 2007) (declining to consider arguments raised for the first time in a supplemental brief); *United States v. Lawrence*, 405 F.3d 888, 908 n.15 (10th Cir. 2005) ("Absent authorization from this court, a party is generally precluded from raising issues in a supplemental brief that were not raised in the opening brief.").

But even if we were to consider Mr. Avant's new citations, they wouldn't clearly establish a requirement for an investigation. Mr. Avant cites seven opinions, arguing that all of them recognized an investigation requirement under *Waters*:

1. *Davignon v. Hodgson*, 524 F.3d 91, 103 (1st Cir. 2008)
2. *Heil v. Santoro*, 147 F.3d 103, 109–10 (2d Cir. 1998)
3. *Salge v. Edna Indep. Sch. Dist.*, 411 F.3d 178, 193 (5th Cir. 2005)
4. *Hughes v. Region VII Area Agency on Aging*, 542 F.3d 169, 187 (6th Cir. 2008)

5. *Wright v. Ill. Dep't of Children & Family Servs.*, 40 F.3d 1492, 1506 (7th Cir. 1994)

6. *Wasson v. Sonoma Cty. Junior Coll.*, 203 F.3d 659, 663 (9th Cir. 2000)

7. *Walden v. CDC & Prevention*, 669 F.3d 1277, 1288 (11th Cir. 2012)

But Mr. Avant overstates the significance of these opinions.

Davignon, *Heil*, and *Salge* don't address a requirement to investigate a matter of suspected public concern, and qualified immunity calls for us to consider whether each element was clearly established.[6] *Avant v. Doke*, No. 21-7031, 2022 WL 2255699, at *5 (10th Cir. June 23, 2022) (unpublished) (collecting cases). So these opinions couldn't have clearly established an investigation requirement. *See Knopf v. Williams*, 884 F.3d 939, 948 (10th Cir. 2018) (stating that a precedent can't clearly establish the law on a separate element of the *Garcetti/Pickering* test); *see also Singh v. Cordle*, 936 F.3d 1022, 1034–35 (10th Cir. 2019) (considering only cases that address a public concern when determining whether the second element of the *Garcetti*/*Pickering* test had been clearly established).

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[6] *Davignon* and *Salge* address the requirement to investigate in relation to the third element of the *Garcetti/Pickering* test: balancing the interests of the employer and employees. *Davignon*, 524 F.3d at 103; *Salge*, 411 F.3d at 194–96. Similarly, *Heil* discusses the need for an investigation in connection with the third element. 147 F.3d at 109.

In addition, *Wasson* and *Walden* don't adopt an investigation requirement for cases involving perceived speech. In *Wasson*, for example, the Ninth Circuit concluded that *Waters* doesn't apply to a claim of perceived speech. *Wasson*, 203 F.3d at 663 ("The facts of *Waters* demonstrate, however, that it does not apply to a situation where the employee denies having spoken at all."). Likewise in *Walden*, the Eleventh Circuit rejected the appellant's use of *Waters*. *Walden*, 669 F.3d at 1288 ("[W]e do not reach *Pickering*'s balancing test and *Waters* is inapposite.").

The only other cited opinions are *Hughes* and *Wright*. Even if they had adopted an investigation requirement, however, they wouldn't "represent the 'clearly established weight of authority of other courts.'" *Panagoulakos v. Yazzie*, 741 F.3d 1126, 1130–31 (10th Cir. 2013) (quoting *Cortez v. McCauley*, 478 F.3d 1108, 1114–15 (10th Cir. 2007) (en banc)) (concluding that a legal standard adopted by two other circuit courts and two district courts hadn't clearly established the underlying right); *accord King v. Riley*, 76 F.4th 259, 269 (4th Cir. 2023) (stating that two out-of-circuit cases were not enough for a clearly established right); *Vincent v. City of Sulphur*, 805 F.3d 543, 549 (5th Cir. 2015) (stating that opinions by two federal appellate courts and an intermediate state appellate court had not "constitute[d] persuasive authority adequate to qualify as clearly established law sufficient to defeat qualified immunity in this circuit"); *Stewart v. City of Euclid*, 970 F.3d 667, 675 (6th Cir. 2020) (stating that

the plaintiff's "reference to two out of circuit cases [did] not provide 'robust consensus' required for the right to be clearly established" (quoting *Latits v. Phillips*, 878 F.3d 541, 552 (6th Cir. 2017))). As a result, the newly cited opinions wouldn't clearly establish a requirement for an investigation.

6. Conclusion

We lack jurisdiction over the commissioner's challenge to the adequacy of Mr. Avant's pleadings. But we do have jurisdiction over the commissioner's argument for reversal based on the absence of a clearly established violation. On the merits, Mr. Avant has not shown that the perceived speech involved a clearly established public concern. The commissioner is thus entitled to qualified immunity, and we reverse the denial of qualified immunity. Given this reversal, we remand for the district court to grant summary judgment to the commissioner in his personal capacity on the First Amendment claim for retaliation based on perceived speech.

23-7060, *Avant v. Doke*
MATHESON, Circuit Judge, concurring:

I concur but write separately to address the case law relevant to clearly established law on element two of the *Garcetti*/*Pickering* test—whether the speech was on a matter of public concern. When he fired Mr. Avant, Commissioner Doke believed Mr. Avant had actually spoken. So case law from both perceived and actual speech cases would have informed a reasonable person in his position whether the firing violated the First Amendment.

Courts analyze qualified immunity in this context on "the facts as the employer *reasonably* found them to be" at the time of the firing. *Waters v. Churchill*, 511 U.S. 661, 677 (1994); *see also Bird v. West Valley City*, 832 F.3d 1188, 1212 (10th Cir. 2016). For clearly established law, Mr. Avant had to show that when he was fired, the law would have "put a reasonable, similarly situated offic[ial] on notice that his conduct . . . was unlawful." *Quinn v. Young*, 780 F.3d 998, 1002 (10th Cir. 2015). When he was fired, Mr. Avant had not yet "denie[d] making the statement[s] that led to the firing." Maj. Op. at 2. Because we consider what the employer knew at that time, Mr. Avant's later denial would not have "expos[ed] ambiguities" that would bear on a similarly situated reasonable official's assessment of whether the speech was on a matter of public concern. *Id.*[1]

[1] Although I agree that Mr. Avant has not shown the law was clearly established here, I note that "the speaker's having a highly personal motive for a disclosure does not necessarily mean that the speech is not a matter of public concern." *Deutsch v. Jordan*,

618 F.3d 1093, 1100 (10th Cir. 2010); *see also Eisenhour v. Weber County*, 744 F.3d 1220, 1228-29 (10th Cir. 2014) ("[A] mixed motive [for speaking] is not fatal to [a First Amendment retaliation] claim.").