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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

KEITH DUDA and CAITLYN DUDA,

Plaintiffs - Appellees,

v.

BILL ELDER, individually and in his official capacity as Sheriff of the El Paso County Sheriff's Office,

Defendant - Appellant.

No. 20-1416

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:18-CV-02890-RBJ)

Bryan Schmid, (Nathan Whitney with him on the briefs), Office of El Paso County, Colorado, for Defendant – Appellant.

Bradley J. Sherman, (Ian D. Kalmanowitz with him on the brief), Cornish & Dell'Olio, P.C., Colorado Springs, Colorado for the Plaintiffs - Appellees

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Before **HOLMES**, **BALDOCK**, and **MATHESON**, Circuit Judges.

MATHESON, Circuit Judge.

Bill Elder, the elected Sheriff of El Paso County, Colorado, and head of the El Paso County Sheriff's Office ("EPSO"), fired Keith Duda, a patrol sergeant. Mr. Duda contends he was fired for supporting candidate Mike Angley, who challenged Sheriff

Elder's reelection bid, and for giving an interview to a local newspaper about sexual harassment and other misconduct at EPSO. Mr. Duda brought First Amendment retaliation claims under 42 U.S.C. § 1983. At summary judgment, the district court denied qualified immunity to Sheriff Elder. Exercising jurisdiction over this interlocutory appeal under 28 U.S.C. § 1291, we affirm.

I. BACKGROUND

A. *Factual History*

The following relevant facts are drawn heavily from the district court's order because "[t]he district court's factual findings and reasonable assumptions comprise the universe of facts upon which we base our legal review of whether defendants are entitled to qualified immunity." *See Cox v. Glanz*, 800 F.3d 1231, 1242 (10th Cir. 2015) (quotations omitted). Further, on review of a summary judgment order, we "view the facts in the light most favorable to [Mr. Duda] and resolve all factual disputes and reasonable inferences in [his] favor." *Henderson v. Glanz*, 813 F.3d 938, 952 (10th Cir. 2015).

1. Relevant Persons

Keith Duda and Caitlyn Duda are a father and daughter. Both worked at EPSO. Mr. Duda was a patrol sergeant from May 2006 until July 2018, when he was terminated. Ms. Duda was a security technician and a detention specialist.

Sheriff Elder became the Sheriff of El Paso County in January 2015. Under Colorado law, he controls hiring and firing decisions at EPSO. On taking office, he

promoted Bill Huffor to sergeant, and he appointed Mr. Huffor's wife, Janet, to chief of staff. Sheriff Elder later promoted Mr. Huffor to lieutenant.

2. **November 2016 Brunch and Aftermath**

In November 2016, Mr. Duda and Ms. Duda attended a brunch with EPSO employees. A female deputy suggested to them that Lt. Huffor had sexually harassed her at work.

Mr. Duda reported the allegations to Lt. Shane Mitchell and Lt. Scott Deno. An investigation concluded that Lt. Huffor had engaged in conduct "unbecoming" of an EPSO employee, and he received a disciplinary letter.[1]

3. **Mr. Duda's Failed Transfer**

In May 2017, Mr. Duda and another sergeant applied for a new position in the Metro Vice, Narcotics, and Intelligence Unit ("VNI"). On June 9, Mr. Duda learned he would be interviewed several days later. Also on June 9, Ms. Duda filed an internal Title VII complaint against Lt. Huffor and a sergeant, alleging she was frequently disciplined for behavior for which others were not. An investigation found no discrimination or retaliation.

Commander Richard Hatch, who ran the hiring process, informed Lt. Mitchell that Mr. Duda's application would not be progressing. After his interview was cancelled, Mr. Duda filed a complaint with the county attorney alleging he was not selected because he

[1] Mr. Duda does not allege that he was retaliated against in violation of the First Amendment based on this internal complaint about sexual harassment.

had urged Ms. Duda to file the Title VII complaint. An investigation found there had been no retaliation.

4. **Reelection Campaign**

In fall 2017, Sheriff Elder launched his campaign for reelection. Mike Angley entered the race to oppose Sheriff Elder.

a. *Mr. Duda's off-duty support for Mike Angley*

Mr. Duda actively supported Mr. Angley, who posted Mr. Duda's endorsement on his campaign website. It stated that Mr. Duda had joined "Angley's Posse." Mr. Duda volunteered for the campaign by distributing signs, handing out flyers door-to-door, speaking to voters on Mr. Angley's behalf, and attending campaign meetings.

Sheriff Elder learned that Mr. Duda planned to post a billboard advertising a website called dirtyelder.com, which called Sheriff Elder "corrupt." App., Vol. III at 551. The billboard mock-up stated it was "[p]aid for by Deputies currently working for Bill Elder." *Id.*

b. *Mark Flynn investigations and Mr. Duda's on-duty political activity*

In November 2017, the El Paso County Attorney hired Mark Flynn, an independent investigator, to investigate allegations that Mr. Duda engaged in political activities while on duty, including a sergeant's allegation that Mr. Duda made disparaging remarks about EPSO leadership that could be construed as political. Mr. Flynn did not find proof of these allegations by a preponderance of the evidence.

In spring and summer 2018, Mr. Flynn conducted another investigation. A sergeant, Jennifer Vanderpool, had alleged that Mr. Duda made negative statements about

EPSO administration while on duty and asked her whom she and her husband were supporting in the election for sheriff. She alleged Mr. Duda offered to arrange for her and her husband to meet with Mr. Angley. Mr. Flynn found these allegations were proven by a preponderance of the evidence. He also substantiated allegations that Mr. Duda had engaged in on-duty conversations about an upcoming El Paso County Republican Assembly.

Despite Mr. Flynn's second investigation, the district court found a dispute of fact as to whether Mr. Duda actually engaged in on-duty political speech in support of Mr. Angley. Construing the facts in the light most favorable to Mr. Duda on appeal, as we must, *see Henderson*, 813 F.3d at 952, we thus assume that Mr. Duda did not engage in on-duty political speech. But we also recognize that Sheriff Elder, in reviewing Mr. Flynn's report, could reasonably have concluded that Mr. Duda did.

c. *EPSO employees' on-duty support for Sheriff Elder*

Deputy Jennifer Arndt submitted an affidavit stating that she "heard more political talk in [her] ten years at EPSO [from 2007 to October 2017] than [she had] heard in any other work environment." App., Vol. III at 570. Indeed, EPSO employees actively supported Sheriff Elder while on duty. EPSO employees loyal to Sheriff Elder, including Lt. Huffor, Ms. Huffor, and another employee, Jackie Kirby, regularly reported to Undersheriff Joe Breister about campaign matters and about statements by employees like Mr. Duda who were either critical of the EPSO administration or showed support for Mr. Angley. Lt. Huffor also made statements supporting Sheriff Elder's reelection and

criticized EPSO employees for supporting other candidates. For example, he chastised Lt. Mitchell for not attending Sheriff Elder's campaign events.[2]

5. **Mr. Duda's On-Duty Misconduct**

As part of his investigations, Mr. Flynn found that Mr. Duda had failed to respond adequately as a patrol sergeant to critical incidents. He found Mr. Duda did not respond properly to an active shooter and had taken too long to act when a felon was reported as having escaped. He also found that Mr. Duda, while off duty, had called the police dispatcher to obtain names of police officers whom he believed had committed a crime by removing Angley campaign signs from public display.

6. **Expectations Memo**

In the summer of 2018, Sheriff Elder circulated an "Expectations Memo" to EPSO command staff:

> *I expect you to be respectful and insist that other are as well.* ***YOU*** *represent* ***ME*** *not just the Sheriff's Office. Everything you do and say reflects on* ***ME****, not just the Sheriff's Office.* ***You are not free*** *to start rumors, engage in side bar or closed door discussions, or become outwardly critical of me or ANY member of staff.* ***I expect*** *you to be part of the team - act like a team - support the team - help and support your teammates. You are a member of my staff? You owe institutional loyalty. If you can't handle that expectation, if your heart is not in the requirements of this job, if your head is not behind me, it is time for you to step down or maybe even step out. Leave with your integrity intact. If you would rather complain behind closed doors or thru an anonymous website, point fingers,*

[2] Lt. Huffor also made political statements directed at EPSO employees while off-duty. For example, at the El Paso County Republican Party County Assembly in March 2018, he yelled at a sergeant for not being a "true supporter" of Sheriff Elder. App., Vol. III at 553. The sergeant did not cast his ballot.

> *place blame or you do not stop those who do,* ***you are part of the problem****. People inside and outside of this organization see it and talk about it. I hear it, see it and watch it and I am tired of it. If you can't or won't recognize character issues, morality issues, ethical issues, then check out now because you will not survive.* ***I will take the stripes, bars and/or stars back****.*

Id. at 554 (emphasis in original).

7. **Mr. Duda's Termination**

On July 3, 2018, Mr. Duda complained to the El Paso County Attorney that EPSO employees, including Lt. Huffor, engaged in political activity while on duty. Shortly after, Mr. Duda gave an interview to a Colorado Springs newspaper, *The Independent*, about alleged misconduct at EPSO.

On July 11, *The Independent* published an article about misconduct at EPSO based on the interview with Mr. Duda. The article detailed the sexual harassment allegations against Lt. Huffor, Mr. Duda's internal complaint regarding the sexual harassment, the VNI position for which he was not selected, the retaliation complaints filed by him and Ms. Duda, and his claims that he was falsely accused of on-duty political activity while other EPSO employees engaged in on-duty political activity without consequence.

The following day, Sheriff Elder signed a "Notice of Intent to Terminate Mr. Duda," but did not deliver it. Undersheriff Breister told Mr. Duda he was under investigation for a possible violation of confidentiality in disclosing details of internal EPSO management to *The Independent*. Mr. Flynn interviewed Mr. Duda on July 13 about the article. After the interview, Mr. Duda was served an official "Notice of Termination."

Sheriff Elder listed four reasons for terminating Mr. Duda: (1) Mr. Duda's failure to respond appropriately to three on-duty critical incidents; (2) Mr. Flynn's investigation, which revealed Mr. Duda had engaged in on-duty political activity; (3) Mr. Duda's abuse of his position to obtain information from the police dispatcher while off duty; and (4) Mr. Duda's work on a private painting business while on duty. Mr. Duda's employment ended on July 13.

B. *Procedural History*

1. **Complaint**

In the operative complaint, Mr. Duda brought two First Amendment claims against Sheriff Elder. First, Mr. Duda alleged retaliation for protected speech (1) in support of Mr. Angley (the "Angley speech") and (2) about unlawful discrimination, retaliation, and political retribution within EPSO, made during *The Independent* interview (the "reporting speech"). Second, Mr. Duda alleged retaliation for his political affiliation with Mr. Angley.[3]

2. **Motions for Summary Judgment**

The parties both moved for summary judgment. Sheriff Elder argued he was entitled to qualified immunity. Mr. Duda argued he was entitled to judgment on his First Amendment claims. The district court denied both motions.

[3] Mr. Duda and Ms. Duda also brought Title VII retaliation claims. Those claims are pending in the district court and are not at issue in this appeal.

II. DISCUSSION

Sheriff Elder challenges the denial of qualified immunity on the Angley speech and reporting speech claims.[4]

A. *Legal Background*

We provide background on (1) qualified immunity, including our interlocutory jurisdiction and our standard of review; and (2) First Amendment protections for public employees.

1. Qualified Immunity

a. *Qualified immunity standard*

Persons sued under § 1983 in their individual capacity may invoke the defense of qualified immunity. *See Vette v. Sanders*, 989 F.3d 1154, 1169 (10th Cir. 2021). We must grant the defendant qualified immunity unless the plaintiff can show "(1) a reasonable jury could find facts supporting a violation of a constitutional right, which (2) was clearly established at the time of the defendant's conduct." *Henderson*, 813 F.3d at 952.

[4] We refer to Mr. Duda's assertion that he was fired for speech in support of Mr. Angley and his assertion that he was fired for speech reporting on misconduct within EPSO as "claims" even though both derive from allegations contained in Count III of the amended complaint. The district court and the parties treat them separately because Mr. Duda can prevail at trial if he shows that he was fired either because of the Angley speech or the reporting speech.

b. *Interlocutory appellate jurisdiction*

This court has appellate jurisdiction to review "all final decisions of the district courts of the United States." 28 U.S.C. § 1291. "Orders denying summary judgment are ordinarily not appealable final [decisions] for purposes of . . . § 1291." *Roosevelt-Hennix v. Prickett*, 717 F.3d 751, 753 (10th Cir. 2013). But "[t]he collateral order doctrine expands the category of final (and therefore appealable) decisions to include decisions that are conclusive on the question decided, resolve important questions separate from the merits, and are effectively unreviewable if not addressed through an interlocutory appeal." *Sawyers v. Norton*, 962 F.3d 1270, 1281 n.9 (10th Cir. 2020) (quotations and brackets omitted). Under this doctrine, we may review an interlocutory appeal from "[t]he denial of qualified immunity to a public official . . . to the extent it involves abstract issues of law." *Fancher v. Barrientos*, 723 F.3d 1191, 1198 (10th Cir. 2013); *see Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

"When reviewing the denial of a summary judgment motion asserting qualified immunity, we lack jurisdiction to review the district court's conclusions as to what facts the plaintiffs may be able to prove at trial." *Sawyers*, 962 F.3d at 1275 (quotations and brackets omitted). We also lack jurisdiction to review whether the "plaintiff's evidence is sufficient to support a particular factual inference." *Fancher*, 723 F.3d at 1199 (quotations omitted). "[I]f a district court concludes that a reasonable jury could find certain specified facts in favor of the plaintiff, the Supreme Court has indicated we usually must take them as true—and do so even if our own *de novo* review of the record

might suggest otherwise as a matter of law." *Est. of Booker v. Gomez*, 745 F.3d 405, 409-10 (10th Cir. 2014) (quotations omitted).

Thus, even when a defendant "attempts to characterize the issue on appeal as [the plaintiff's] failure to assert a violation of a constitutional right under clearly established law," we will decline to consider the argument if it is "limited to a discussion of [the defendant's] version of the facts and the inferences that can be drawn therefrom." *Castillo v. Day*, 790 F.3d 1013, 1018 (10th Cir. 2015). But we do have jurisdiction to review whether "the district court commits *legal* error en route to a *factual* determination." *Pahls v. Thomas*, 718 F.3d 1210, 1232 (10th Cir. 2013).[5]

c. *Summary judgment and standard of review*

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). We apply the "same legal standard as the district court," and thus "view the evidence and the reasonable inferences to be drawn from the evidence in the light most favorable to the nonmoving party." *Schaffer v. Salt Lake City Corp.*, 814 F.3d 1151, 1155 (10th Cir. 2016) (quotations omitted).

"Within this court's limited jurisdiction, we review the district court's denial of a summary judgment motion asserting qualified immunity de novo." *Sawyers*, 962 F.3d at

[5] We also have jurisdiction to review the factual record de novo if (1) "the district court at summary judgment fails to identify the particular charged conduct that it deemed adequately supported by the record," *Lewis v. Tripp*, 604 F.3d 1221, 1225 (10th Cir. 2010); or (2) "the version of events the district court holds a reasonable jury could credit is blatantly contradicted by the record," *id.* at 1225-26.

1282 (quotations omitted). We may consider "the purely legal questions of (1) whether the facts that the district court ruled a reasonable jury could find would suffice to show a legal violation and (2) whether that law was clearly established at the time of the alleged violation." *Id.* (quotations and brackets omitted).

2. **First Amendment Protections for Public Employees**

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. As applied to the states by the Fourteenth Amendment, the First Amendment prevents state and local governments from "condition[ing] public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression." *Connick v. Myers*, 461 U.S. 138, 142 (1983).

a. Garcetti *and* Pickering

In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), and *Pickering v. Board of Education*, 391 U.S. 563 (1968), the Supreme Court provided a framework to evaluate First Amendment retaliation claims brought by public employees against their employers. Courts apply the familiar five-part *Garcetti*/*Pickering* test:

> (1) whether the speech was made pursuant to an employee's official duties; (2) whether the speech was on a matter of public concern; (3) whether the government's interests, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interests; (4) whether the protected speech was a motivating factor in the adverse employment action; and (5) whether the defendant would have reached the same employment decision in the absence of the protected conduct.

Helget v. City of Hays, 844 F.3d 1216, 1221 (10th Cir. 2017) (quotations omitted). The test balances "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568. To prevail, a plaintiff must show all five elements. *See Helget*, 844 F.3d at 1225. The first three elements concern whether the speech is protected and are "issues of law for the court to decide." *See Trant v. Oklahoma*, 754 F.3d 1158, 1165 (10th Cir. 2014). The last two concern whether an adverse action was taken because of the protected speech and are "factual issues typically decided by the jury." *See id.*

b. Heffernan

In *Heffernan v. City of Paterson*, 136 S. Ct. 1412 (2016), the Supreme Court recognized a narrow affirmative defense to a First Amendment retaliation claim when public employees' political activities are restricted in a neutral and constitutional manner.[6] Although the Court found the plaintiff police officer had established a First Amendment retaliation claim, it remanded the case based on "some evidence in the

[6] For this principle, the *Heffernan* Court cited *U.S. Civil Service Commission v. National Association of Letter Carriers, AFL-CIO*, 413 U.S. 548 (1973). In *Letter Carriers*, the Supreme Court upheld the Hatch Act, which generally prevents civil service employees of the federal government from engaging in certain forms of political activity, against a First Amendment challenge. The Court noted that the Hatch Act rested on a judgment by Congress and the Executive Branch that "partisan political activities by federal employees must be limited if the Government is to operate effectively and fairly." *Id.* at 564. The restrictions on federal employees' partisan activities were "not aimed at particular parties, groups, or points of view, but appl[ied] equally to all partisan activities of the type described." *Id.*

record" that indicated the employer "may have dismissed [the employee] pursuant to a . . . neutral policy prohibiting police officers from overt involvement in any political campaign." *Id.* at 1419. Specifically, the Court instructed the Third Circuit to determine (1) "[w]hether that policy existed," (2) "whether [the employee's] supervisors were indeed following it," and (3) "whether it complies with constitutional standards." *Id.*[7]

In sum, even if a plaintiff shows an adverse action taken because of protected political speech—that is, the plaintiff satisfied the five *Garcetti*/*Pickering* elements—the employer may prevail by satisfying *Heffernan*. When *Heffernan* is satisfied, "[e]ven something as close to the core of the First Amendment as participation in political campaigns may be prohibited to government employees." *See Waters v. Churchill*, 511 U.S. 661, 672 (1994) (plurality opinion).

B. ***Angley Speech Claim***

On Mr. Duda's claim that Sheriff Elder terminated him for speaking in support of Mr. Angley, the district court found a constitutional violation under the *Garcetti*/*Pickering* test, and it found Sheriff Elder could not establish a *Heffernan* defense. Finally, it concluded that terminating Mr. Duda for the Angley speech violated clearly established law.

Sheriff Elder argues the district court erred on both qualified immunity prongs. First, he contends (1) Mr. Duda cannot satisfy the third *Garcetti*/*Pickering* element; and

[7] The Court did not explain what makes a policy comply with constitutional standards. That part of the *Heffernan* defense is not relevant to this case.

(2) he fired Mr. Duda for violating a neutral policy prohibiting on-duty political activity, precluding a constitutional violation under *Heffernan*. Second, he argues the law was not clearly established.

We find that Mr. Duda established a constitutional violation because (1) he satisfied the third *Garcetti*/*Pickering* element as a matter of law; and (2) Sheriff Elder cannot mount a *Heffernan* defense. On clearly established law, (3) we lack jurisdiction to consider Sheriff Elder's argument.[8]

1. **Third *Garcetti*/*Pickering* Element**

On the first prong of qualified immunity, the district court found a constitutional violation under the *Garcetti*/*Pickering* test. On the first element, it determined, and the parties agreed, that Mr. Duda's speech was not made pursuant to his official duties. Though the second and third elements present questions of law, the court concluded that factual disputes existed on the second through the fifth elements.[9] On appeal, Sheriff Elder challenges the district court's handling of the third element only. He has therefore

[8] *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality opinion), and *Branti v. Finkel*, 445 U.S. 507 (1980), govern political affiliation (or association) claims. Applying the *Elrod*/*Branti* test, the district court denied summary judgment to Sheriff Elder on Mr. Duda's political affiliation claim. On appeal, Sheriff Elder does not challenge the district court's application of the *Elrod*/*Branti* test. He has therefore waived review of whether Mr. Duda established a constitutional violation for his political affiliation claim. *See Singh v. Cordle*, 936 F.3d 1022, 1043 (10th Cir. 2019) (stating the appellant waived an argument by failing to make it in the opening brief).

[9] As explained below, the district court erred by failing to resolve the second and third elements as a matter of law.

waived review of the other elements. *See Singh v. Cordle*, 936 F.3d 1022, 1043 (10th Cir. 2019).

a. *Additional legal background*

The third element of the *Garcetti*/*Pickering* test concerns "whether the government's interests, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interests." *Dixon v. Kirkpatrick*, 553 F.3d 1294, 1302 (10th Cir. 2009). We have said the "only public employer interest that outweighs the employee's free speech interest is avoiding direct disruption, *by the speech itself*, of the public employer's internal operations and employment relationships." *Trant*, 754 F.3d at 1166 (quotations omitted). This interest "is particularly acute in the context of law enforcement, where there is a heightened interest in maintaining discipline and harmony among employees." *Moore v. City of Wynnewood*, 57 F.3d 924, 934 (10th Cir. 1995) (quotations and alteration omitted). Relevant considerations include "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192, 1207 (10th Cir. 2007) (quoting *Rankin v. McPherson*, 483 U.S. 378, 388 (1987)). Although the third element must weigh in favor of the plaintiff for the plaintiff to prevail on the First Amendment claim, the employer bears the burden on the third element. *See id.*

In analyzing the employer's interest in avoiding disruption, different standards apply depending on whether the adverse employment action occurred "long after" or "soon after" the employee's protected speech.

First, we require the employer to prove "actual disruption" when the adverse employment action took place "long after" the employee spoke on a matter of public concern. *Bailey v. Indep. Sch. Dist. No. 69*, 896 F.3d 1176, 1183 (10th Cir. 2018) (quotations omitted).

Second, when the adverse action occurred "soon after" the employee's protected speech, we do not require a showing of actual disruption. *See Kent v. Martin*, 252 F.3d 1141, 1146 (10th Cir. 2001). Instead, when the employer's intent in taking an adverse action is "to avoid actual disruption," *id.*, we will "generally defer to a public employer's reasonable predictions of disruption, as long as the predictions are supported by specific evidence," *Deschenie v. Bd. of Educ. of Cent. Consol. Sch. Dist. No. 22*, 473 F.3d 1271, 1279 (10th Cir. 2007) (quotations omitted). This potential-disruption standard reflects that "neither . . . the government, [n]or a police department in particular, have to wait for speech actually to disrupt core operations before taking action." *Moore*, 57 F.3d at 934; *see also Rock v. Levinski*, 791 F.3d 1215, 1220 (10th Cir. 2015).[10]

[10] We have not fixed precise temporal boundaries, but we have found six months falls on the "long after" side of the line. "If there has been no actual disruption justifying termination during the six months following an employee's protected speech, it is nonsensical to rely ex post facto on a 'prediction' of disruption to tip the balance in favor of an employer's interest in an efficient workplace." *Kent*, 252 F.3d at 1146.

b. *Analysis*

The district court found that disputes of fact precluded resolution of the third *Garcetti*/*Pickering* element. It thus construed the disputed facts against Sheriff Elder at summary judgment. But the court's analysis was incomplete because this element should "be resolved by the district court" as a matter of law. *See Rohrbough v. Univ. of Colo. Hosp. Auth.*, 596 F.3d 741, 745 (10th Cir. 2010) (quotations omitted). There may, of course, be "disputed facts relevant" to this element. *Id.* When there are, the court should view them "in the light most favorable to the non-moving party at the summary judgment stage." *Id.* After doing so, the district court must decide whether the government's interests outweigh the employee's free speech interest to determine whether the speech is protected as a matter of law.[11]

We need not remand, however, for the district court to make this legal determination. "Our job in this appeal is to consider the legal question whether the facts that a reasonable jury could find suffice to show a constitutional violation." *Pahls*, 718 F.3d at 1232. Though the district court found genuine disputes of fact on the third *Garcetti*/*Pickering* element, we affirm on the alternative ground that this element supports a constitutional violation as a matter of law. *See Feinberg v. Commissioner*, 916 F.3d 1330, 1334 (10th Cir. 2019) (discussing our "discretion to affirm on any ground adequately supported by the record" (quotations omitted)).

[11] It was also error for the district court to find that genuine disputes of fact established the second *Garcetti*/*Pickering* element, rather than decide that question as a matter of law. Mr. Duda does not challenge that element on appeal.

Taking the facts as the district court found them in the light most favorable to Mr. Duda, we conclude that Sheriff Elder's interests in the internal operations of EPSO did not outweigh Mr. Duda's free speech interests. Although we must accept, based on the district court's findings, that Mr. Duda did not engage in on-duty political activity, we accept for purposes of our review that Sheriff Elder could have formed a reasonable belief that Mr. Duda had done so based on his review of Mr. Flynn's report. *See Heffernan*, 136 S. Ct. at 1418 ("[T]he government's *reason* for [taking an adverse action] is what counts here." (emphasis added)); *Waters*, 511 U.S. at 676 (noting employers are entitled to "rely on hearsay, on past similar conduct, on their personal knowledge of people's credibility, and on other factors that the judicial process ignores"). Even so, Sheriff Elder's decision to terminate Mr. Duda was not based on a reasonable prediction of disruption due to the Angley speech. *See Deschenie*, 473 F.3d at 1279.[12]

First, the tacit permission given to Sheriff Elder's employees to voice political support for him while on duty severely undermines his purported interest in firing Mr. Duda to avoid disruption at EPSO based on his political speech. The record shows that EPSO employees, particularly Lt. Huffor, spoke with impunity in support of Sheriff Elder's reelection bid while on duty. The prevalence of political speech in favor of

[12] Sheriff Elder incorrectly argues the district court erred by applying an "actual disruption" standard. Aplt. Br. at 26. The district court applied both an actual disruption and potential disruption standard. *See* App., Vol. III at 579 ("I find there is a genuine dispute as to whether [Mr.] Duda's political speech and activity—if it even occurred—disrupted *or could potentially disrupt* EPSO operations." (emphasis added)). We need not decide which of the two standards applies. Assuming the potential disruption standard applies, Sheriff Elder still cannot prevail.

Sheriff Elder shows that firing Mr. Duda for on-duty political speech was not based on a reasonable prediction that the speech would "interfere[] with the regular operation" of EPSO. *See Rankin*, 483 U.S. at 388. Rather, the record shows Mr. Duda's termination was based on "[v]iewpoint discrimination," an "egregious form of content discrimination" that occurs "when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995).

Second, the record indicates that "being politically loyal to the Sheriff" was not necessary for Mr. Duda to perform his job as a patrol sergeant. *See Jantzen v. Hawkins*, 188 F.3d 1247, 1253 (10th Cir. 1999). Speech restrictions on "a high-ranking deputy" are more justifiable than on an employee who "serves no confidential, policymaking or public contact role." *See Rock*, 791 F.3d at 1221 (quotations omitted). As a rank-and-file patrol sergeant, Mr. Duda's "employment relationship" with EPSO leadership was not "the kind of close working relationship[] for which it can persuasively be claimed that personal loyalty and confidence are necessary to [its] proper functioning." *See Pickering*, 391 U.S. at 570.

Third, the district court found that, at most, a couple of "employees fe[lt] uncomfortable or offended based on [Mr. Duda's] purported statements" in support of Mr. Angley. App., Vol. III at 579. But there is no evidence showing that Mr. Duda's political speech "threatened any of the work" of EPSO or compromised morale. *See Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323, 1333 (10th Cir. 2007). Sheriff Elder's contention that he fired Mr. Duda for his "purposefully disruptive behavior,"

Aplt. Br. at 26, including his on-duty political activity, concerns the fourth and fifth elements of the *Garcetti*/*Pickering* test.[13]

In sum, Sheriff Elder has not carried his burden on the third *Garcetti*/*Pickering* element to show that his interest in maintaining an efficient workplace, judged according to his reasonable prediction of disruption, outweighed Mr. Duda's free speech interest in voicing political support for a candidate for public office.

2. ***Heffernan*** **Defense**

On appeal, as in the district court, Sheriff Elder argues he fired Mr. Duda for violating a neutral EPSO policy prohibiting on-duty political activity, as permitted by *Heffernan*. Even accepting that EPSO had a neutral policy purporting to prohibit on-duty political activity that complied with constitutional standards, Sheriff Elder did not "follow[] it" because he did not apply it neutrally. *See Heffernan*, 136 S. Ct. at 1419.

The district court found ample evidence in the record that Lt. Huffor and other political supporters of Sheriff Elder were not punished for on-duty political activity:

- Deputy Arndt told Mr. Flynn that she "heard more political talk in my ten years at EPSO than I have heard in any other work environment." App., Vol. III at 570.

[13] Sheriff Elder argues the district court erred by "impos[ing] its own judgment upon the circumstances rather than affording [Sheriff] Elder the deference to which he is entitled as head of a law enforcement agency." Aplt. Br. at 26. He is correct that we defer to reasonable predictions about disruption, particularly in the law enforcement context. But that deference derives from an employer's ability to "articulate[] specific concerns" rooted in proper functioning of a department. *See Moore*, 57 F.3d at 934-35. Sheriff Elder's concerns appear to be rooted in political favoritism rather than a genuine belief about the proper functioning of EPSO.

- Lt. Mitchell reported hearing two employees—Ms. Huffor and Ms. Kirby—stating their support for Sheriff Elder's reelection while on duty. *Id.*
- Lt. Mitchell reported hearing Lt. Huffor frequently engage in political talk at work, including expressing support for Sheriff Elder's campaign and chastising employees for supporting other candidates. *Id.*
- Lt. Huffor chastised Lt. Mitchell at work for not attending political events held for Sheriff Elder. *Id.*
- Lt. Huffor yelled at Sgt. Mike Pitt at work and accused him of not being a "true supporter" of Sheriff Elder. *Id.*

The record shows Sheriff Elder allowed his supporters to engage in political speech on his behalf while on duty, but he punished Mr. Duda for supporting a political rival. Rather than apply a speech-restriction policy neutrally, Sheriff Elder engaged in viewpoint discrimination, which violates the core of the First Amendment. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Because Sheriff Elder did not apply the no-political-speech policy neutrally (assuming it existed), he cannot prevail under *Heffernan*.

Fighting this straightforward conclusion, Sheriff Elder argues "the Policy is unquestionably neutral because it applies equally to all employees, regardless of their political leanings or affiliations." Aplt. Br. at 23. His counsel insisted at oral argument that *Heffernan* requires only that a policy is neutral on its face and that it need not be neutrally applied to all. *See* Oral Arg. at 2:38-4:22.

Heffernan refutes Sheriff Elder's argument. The Supreme Court remanded in *Heffernan* for the Third Circuit to consider whether a neutral policy prohibiting overt involvement in a political campaign "existed" *and* "whether Heffernan's supervisors *were indeed following it.*" *Heffernan*, 136 S. Ct. at 1419 (emphasis added). Sheriff

Elder's argument ignores the requirement that supervisors actually follow the neutral policy by applying it equally to all.

The district court applied *Heffernan* properly.

3. **No Jurisdiction to Review Clearly Established Law**

On the clearly established law prong of qualified immunity, Sheriff Elder argues that not "every reasonable official would have known that terminating a sheriff's deputy for multiple policy violations, including violation of a neutral and constitutional policy prohibiting on-duty political activity, confirmed by an independent investigation, would contravene the First Amendment." Aplt. Br. at 18 (quoting App., Vol. II at 428). We lack jurisdiction to consider Sheriff Elder's argument because he effectively "dispute[s] the facts alleged by the plaintiff" rather than raising a "legal challenge[] to the denial of qualified immunity based on those facts." *Henderson*, 813 F.3d at 948 (quotations omitted).

The district court denied qualified immunity to Sheriff Elder because it found that *Jantzen v. Hawkins*, 188 F.3d 1247 (10th Cir. 1999), provided clearly established applicable law. In that case, three plaintiffs worked in a sheriff's office and actively campaigned for the incumbent sheriff's opponent. *Id.* at 1250. They were fired after the sheriff won reelection. *Id.* We denied qualified immunity to the sheriff because he "should have known that it would be unconstitutional to terminate [the plaintiffs] for affiliating with and/or believing in a particular candidate." *Id.* at 1259.

Our interlocutory jurisdiction would permit consideration of the clearly established law question of whether "the facts that the district court ruled a reasonable

jury could find," taken in the light most favorable to the plaintiff, show a violation of clearly established law under *Jantzen*. *See Sawyers*, 962 F.3d at 1282. Usually, "[w]hether a constitutional right was clearly established at the time an alleged violation occurred is a quintessential example of a purely legal determination fit for interlocutory review." *Fancher*, 723 F.3d at 1200 (quotations omitted). But that jurisdiction is premised on our accepting "the facts we must assume to be true at this stage of the proceedings." *See id.*

On appeal, Sheriff Elder argues that *Jantzen* is distinguishable from his version of the facts. He contends *Jantzen* "did not involve the application of a policy prohibiting on-duty political activity or an independent investigation confirming such a policy violation and other instances of misconduct." Aplt. Br. at 21. As discussed above, the district court found that Sheriff Elder did not neutrally apply a policy prohibiting on-duty political activity. Further, the court found a genuine dispute of fact on the fourth element of *Garcetti*/*Pickering* as to "whether the policy was neutral or uniformly applied," and on the fifth element it found "a jury could also reasonably conclude that [Mr. Duda's] protected speech *did* motivate [Sheriff Elder] to fire him." App., Vol. III at 581, 583. Rather than accept these facts, Sheriff Elder's clearly-established-law argument implicitly disputes them.

Sheriff Elder does not present an argument based on "the facts we must assume to be true at this stage of the proceedings." *See Fancher*, 723 F.3d at 1200. We thus lack jurisdiction to consider Sheriff Elder's clearly-established-law argument, which is "an intertwining of disputed issues of fact and cherry-picked inferences, on the one hand,

with principles of law, on the other hand." *McKenney v. Mangino*, 873 F.3d 75, 84 (1st Cir. 2017) (declining to exercise jurisdiction over a fact-bound clearly-established-law argument). He has otherwise waived any jurisdictionally appropriate challenge to the district court's clearly-established-law holding because he has not made one. *See Sawyers*, 962 F.3d at 1286.[14]

In sum, we lack jurisdiction where, as here, the defendant-appellant's argument "is limited to a discussion of [his] version of the facts and the inferences that can be drawn therefrom." *Castillo*, 790 F.3d at 1018.

* * * *

We affirm the district court's denial of qualified immunity to Sheriff Elder on Mr. Duda's Angley speech claim. The district court did not err in finding a constitutional violation. We lack jurisdiction to consider Sheriff Elder's fact-bound challenge to the district court's clearly-established-law holding.

C. ***Reporting Speech Claim***

Applying the *Garcetti*/*Pickering* test, the district court found a constitutional violation on the reporting speech claim. It further determined the applicable law was clearly established.

On appeal, Sheriff Elder does not contest there was a constitutional violation. Instead, he argues no law clearly established it was unconstitutional to terminate Mr.

[14] We thus need not determine whether the facts, as the district court found them and construed in the light most favorable to Mr. Duda, show a violation of clearly established law under *Jantzen*, or any other case.

Duda for the reporting speech. He contends the district court incorrectly relied on *Wulf v. City of Wichita*, 883 F.2d 842 (10th Cir. 1989), in which we found for the plaintiff, rather than *Woodward v. City of Worland*, 977 F.2d 1392 (10th Cir. 1992), and *Lytle v. City of Haysville*, 138 F.3d 857 (10th Cir. 1998), in which we found for the defendants.

1. **Legal Background**

We provide background on (a) *Wulf*, (b) *Woodward*, and (c) *Lytle*.

a. *Wulf*

Mr. Wulf was a Wichita police officer. *Wulf*, 883 F.2d at 846. He was active in the Fraternal Order of Police ("FOP"). *Id.* at 847. After the relationship between the police chief and the FOP became strained, Mr. Wulf sent a letter to the Attorney General of Kansas requesting an investigation into alleged misconduct at the Wichita Police Department. *Id.* at 847-50. The letter alleged that police employees were pressured to quit their FOP memberships; the police chief withheld prosecution for violations of liquor and gambling laws while taking drastic measures to address an FOP bachelor party involving similar conduct; the chief violated department policies concerning the use of municipal funds; and there had been "[g]ross misconduct on the part of a staff member in the sexual harassment of a subordinate employee." *Id.* at 849-50. The letter provided "specific instances of misconduct" to support these allegations. *Id.* at 850. The chief saw a copy of the letter, as did the Attorney General. *Id.* at 850-51. After no investigation commenced, Mr. Wulf shared a copy of the letter with a local newspaper, which published a story on the allegations. *Id.* at 851-52. Mr. Wulf was terminated. *Id.* at 853.

We affirmed the judgment on Mr. Wulf's First Amendment retaliation claim. We said he had carried his burden to establish the speech was on a matter of public concern because the letter "alleged interference with the right of supervisory police officers to join the FOP; unfair treatment of the FOP private club vis-à-vis other private clubs; misappropriation and misuse of public funds; and sexual harassment of one officer by a supervisor." *Id.* at 857. We noted that "[a]llegations of sexual harassment have been found to involve matters of public concern." *Id.* at 860.

b. *Woodward*

In *Woodward*, the plaintiffs were three female law enforcement employees who complained to their departmental supervisors that officers had sexually harassed them. 977 F.2d at 1394. In their lawsuit, they alleged they were retaliated against for their complaints. *Id.*

We granted qualified immunity to the defendants on the plaintiffs' First Amendment retaliation claim. We first found the plaintiffs' speech was not on a matter of public concern because "the thrust of the . . . speech was that they personally were being subjected to sexual harassment and they wanted it to stop." *Id.* at 1403-04. Neither "the purpose [n]or substance of the complaints [was] to assert that the sexual harassment prevented the [department] from properly discharging its official responsibilities." *Id.* at 1404. We found the "speech was calculated to redress personal grievances" rather than to further "a broader public purpose." *Id.* at 1403.

Though the Supreme Court's decision in *Connick v. Myers*, 461 U.S. 138 (1983), recognized that some speech "on internal employment conditions" could be "regarded as

pertaining to a matter of public concern if it addresses important constitutional rights which society at large has an interest in protecting," we found "no case holding that speech similar to that made by Plaintiffs pertained to a matter of public concern." *Woodward*, 977 F.2d at 1404.

c. *Lytle*

Mr. Lytle was a police officer in Haysville, Kansas. *Lytle*, 138 F.3d at 860. He became convinced that his fellow "officers committed second-degree murder by failing to render emergency aid to the victim of a police shooting." *Id.* He gave a statement under oath to the attorney of the victim's widow. *Id.* at 861. Mr. Lytle did not report his misgivings to the police chief. *Id.* at 861-62. He did testify before a grand jury, and spoke to a local newspaper reporter. *Id.* at 862. After the article was published, department morale "decreased significantly," other officers "distrusted Mr. Lytle and refused to speak with him," and the charges "undermined public trust in the Department, making law enforcement more difficult." *Id.* After reading Mr. Lytle's account in the paper, the chief investigated his allegations. *Id.* Finding them unsupported, the chief terminated Mr. Lytle, citing breach of the department's confidentiality rules. *Id.*

We affirmed the grant of summary judgment to the defendants on the First Amendment retaliation claim. We noted the import of Mr. Lytle's whistleblower status was "substantially diminished by [his] failure to pursue his allegations within the Department and by the unreasonableness of his beliefs about government wrongdoing." *Id.* at 868. We found "Mr. Lytle's limited interests [we]re far outweighed by the

Department's interest in maintaining confidentiality and avoiding workplace disruption." *Id.*

2. **Analysis**

The district court denied qualified immunity to Sheriff Elder on the reporting speech claim, finding *Wulf* clearly established the law. We affirm because *Wulf* is substantially similar to the facts of this case. Under *Wulf*, it was "sufficiently clear that every reasonable official [in Sheriff Elder's position] would have understood" that firing Mr. Duda based on his speech reporting misconduct at EPSO to *The Independent* was unconstitutional. *See Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (per curiam) (quotations omitted). The following reasons support this conclusion.

First, as the district court found, Mr. Duda "was not himself harassed but instead spoke out about alleged sexual harassment to comply with policy and out of concern for EPSO culture and practices." App., Vol. III at 589. After reporting Lt. Huffor's alleged sexual harassment internally, Mr. Duda reported Lt. Huffor's sexual harassment of the female EPSO deputy to *The Independent*. Thus, in both *Wulf* and this case, the allegations of sexual harassment concerned a "broader public purpose" about misconduct within the department rather than "personal grievances." *See Woodward*, 977 F.2d at 1403.

Second, in both *Wulf* and this case, the protected speech that allegedly gave rise to the termination was made to a local reporter.

Third, as in *Wulf*, Mr. Duda's speech to *The Independent* concerned a wide range of alleged misconduct at EPSO, including sexual harassment. He also reported on

political favoritism at EPSO for Sheriff Elder's political supporters and the singling out of Mr. Duda.

Because in both *Wulf* and this case the plaintiffs were terminated after reporting to a local newspaper about misconduct within a law enforcement agency, including sexual harassment directed at someone other than the plaintiff, there is "substantial correspondence between the conduct in question" and *Wulf*, defeating qualified immunity for Sheriff Elder. *See Cummings v. Dean*, 913 F.3d 1227, 1240 (10th Cir. 2019) (quotations omitted). Sheriff Elder's arguments to the contrary are without merit.

First, Sheriff Elder argues this case resembles *Woodward* more than *Wulf* because Mr. Duda's report of alleged sexual harassment was made for purposes of an internal investigation. But although Mr. Duda originally reported Lt. Huffor's alleged sexual harassment internally, his speech to *The Independent* led to his termination.

Second, Sheriff Elder contends that *Lytle* parallels the facts of this case because, "[c]ontrary to the district court's finding, the undisputed fact established that [Mr. Duda], through his attorney, sent a letter to the El Paso County Attorney asking that other deputies be investigated for alleged on-duty political activity less than forty-eight hours before he was interviewed for the Independent news article." Aplt. Br. at 28.

Sheriff Elder's invocation of *Lytle* is misplaced. He focuses on the fact that only 48 hours elapsed between Mr. Duda's letter to the El Paso County Attorney asking for EPSO employees to be investigated for alleged on-duty political activity and his interview with *The Independent*. But *The Independent* article included not just details about Sheriff Elder's alleged unequal application of the EPSO policy prohibiting on-duty

political speech, but also reports about sexual harassment and other malfeasance at EPSO. "It is clear that only a portion of a communication need address a matter of public concern." *Wulf*, 883 F.2d at 860 (quoting *Brawner v. City of Richardson*, 855 F.2d 187, 192 (5th Cir. 1988)). Here, Lt. Huffor's alleged sexual harassment was on a matter of public concern, and more than a year elapsed between Mr. Duda's internal report about it and *The Independent* interview.

Here, *Wulf* placed the "constitutional question beyond debate." *See Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011). It put Sheriff Elder on notice that firing an employee for reporting to a local newspaper about sexual harassment and other misconduct at a law enforcement department is unconstitutional. Thus, *Wulf*—and not *Lytle* or *Woodward*—governs this case. We affirm the denial of qualified immunity to Sheriff Elder on the reporting speech claim.

III. CONCLUSION

We affirm the district court's denial of qualified immunity to Sheriff Elder.[15]

[15] We grant Sheriff Elder's motion to supplement the appendix.

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July 27, 2021

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RE: 20-1416, Duda, et al v. Elder
Dist/Ag docket: 1:18-CV-02890-RBJ

Dear Counsel:

Enclosed is a copy of the opinion of the court issued today in this matter. The court has entered judgment on the docket pursuant to Fed. R. App. P. Rule 36.

Pursuant to Fed. R. App. P. 40(a)(1), any petition for rehearing must be filed within 14 days after entry of judgment. Please note, however, that if the appeal is a civil case in which the United States or its officer or agency is a party, any petition for rehearing must be filed within 45 days after entry of judgment. Parties should consult both the Federal Rules and local rules of this court with regard to applicable standards and requirements. In particular, petitions for rehearing may not exceed 3900 words or 15 pages in length, and no answer is permitted unless the court enters an order requiring a response. *See* Fed. R. App. P. Rules 35 and 40, and 10th Cir. R. 35 and 40 for further information governing petitions for rehearing.

Please contact this office if you have questions.

Sincerely,

Christopher M. Wolpert
Clerk of Court

cc: Ian David Kalmanowitz
Bradley J. Sherman

CMW/na