STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT III

Case No. 2014AP2479

ERIC N. SODERLUND,

Plaintiff-Appellant,

v.

DAVID B. ZIBOLSKI,

Defendant-Respondent.

APPEAL FROM A JUDGMENT ENTERED
SEPTEMBER 12, 2014, IN THE
MARATHON COUNTY CIRCUIT COURT,
THE HONORABLE GREG HUBER, PRESIDING

BRIEF OF DEFENDANT-RESPONDENT DAVID B. ZIBOLSKI

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INTRODUCTION

Plaintiff-Appellant Eric N. Soderlund, a former employee of the Wisconsin Department of Justice ("DOJ") who worked as a forensic scientist in the Wausau State Crime Lab, brought this action in Marathon County Circuit Court against Defendant-Respondent David B. Zibolski, sued in his individual capacity and in his official capacity as Deputy Director of DOJ's Division of Law Enforcement Services. Soderlund claims, pursuant to 42 U.S.C. § 1983, that Zibolski violated his rights under the First and Fourteenth Amendments to the United States Constitution by initiating an employee disciplinary proceeding against him, allegedly in retaliation for various statements Soderlund had made to DOJ personnel and to a private accrediting organization. Before the disciplinary process was completed, Soderlund resigned from his job and he was subsequently not allowed to withdraw his resignation.

On June 16, 2014, the circuit court held that Soderlund had failed to state an official-capacity claim against Zibolski. Following supplemental briefing, the court further held, on September 12, 2014, that (1) the speech by Soderlund at issue in this case was not protected by the First Amendment; (2) Soderlund did not suffer any adverse action that would deter a person of ordinary firmness from engaging in protected speech; and (3) Zibolski was entitled to qualified immunity from all individual-capacity claims against him. The circuit court then entered a final order

granting judgment on the pleadings to Zibolski and dismissing Soderlund's claims in their entirety. Soderlund appeals from that final order.

ISSUES PRESENTED

1. Was Soderlund's 42 U.S.C. § 1983 claim against Zibolski in his official capacity rightly dismissed, where Soderlund did not plead a claim for prospective relief?

The circuit court answered yes.

2. In concluding that Soderlund's speech was not protected by the First Amendment, the circuit court considered the content of a letter that had not been submitted as an exhibit in this case, but that was extensively referenced in Soderlund's First Amended Complaint and was already in the court's files. Did the court properly rely on that letter without converting Zibolski's motion for judgment on the pleadings into a motion for summary judgment and without giving Soderlund notice of the court's action and an opportunity to respond?

The circuit court did not specifically address this question, but impliedly answered yes.

3. Was Soderlund's speech unprotected by the First Amendment because he spoke as a public employee on a matter of personal concern, rather than as a citizen on a matter of public concern?

The circuit court answered yes.

4. Alternatively, to the extent, if any, that the portion of Soderlund's speech that was about fingerprint identification standards was protected by the First Amendment, has Soderlund alleged any causal relationship between that portion of his speech and the commencement of the disciplinary investigation?

The circuit court did not address this question.

5. Was the commencement of the disciplinary investigation an adverse action that would deter a person of ordinary firmness from engaging in protected speech, where Soderlund resigned before any discipline was imposed and no other adverse action was alleged?

The circuit court answered no.

6. Was Zibolski entitled to qualified immunity from Soderlund's individual-capacity claims because it was not clearly established in the law (a) that Soderlund's speech was protected by the First Amendment; or (b) that the commencement of the disciplinary investigation was an adverse action that would deter a person of ordinary firmness from engaging in protected speech?

The circuit court answered yes.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

Oral argument is not warranted because this appeal can be decided on the basis of the arguments presented in the parties' briefs. Publication is requested because the

court's decision may provide clarification of existing legal principles or helpful guidance on the application of established principles to particular fact situations.

STATEMENT OF FACTS AND OF THE CASE

Prior to his resignation on February 28, 2012, Soderlund was employed by DOJ for 19 years as a forensic scientist in the State Crime Lab in Wausau, Wisconsin (R. 7:2, 17, ¶¶ 401, 448). The facts that led to Soderlund's resignation and gave rise to this litigation relate to a long-running dispute between Soderlund and DOJ that began in 2006.

Some time prior to August 4, 2006, Soderlund failed a footwear identification proficiency test administered by DOJ. On August 4, 2006, Soderlund initiated an internal complaint with DOJ, alleging that his score on the test was a result of unwarranted deviation from DOJ quality assurance standards for footwear identification. On February 5, 2007, Soderlund's supervisor sent a response indicating that no action had yet been taken on his complaint because of a change in administrations at DOJ (R. 7:6-7, ¶ 416).

On April 28, 2008, Soderlund submitted to the Laboratory Accreditation Board of the American Society of Crime Laboratory Directors (hereafter, the "Accreditation Board") a request for an investigation of DOJ's State Crime Labs, alleging that DOJ was failing to adhere to its quality assurance standards regarding proficiency tests and, in particular, footwear analysis on proficiency

tests (R. 7:4, ¶¶ 408-09). Soderlund indicated that his concerns had been discussed in his personal performance evaluations over the previous several years (R. 7:5, ¶ 412). Soderlund also provided a copy of the investigation request to his DOJ supervisor (R. 7:4, ¶ 410).

On April 29, 2008, the Administrator of the State Crime Labs sent an email to DOJ's quality assurance coordinator for the Crime Labs, who was responsible for administering proficiency tests. The email, which was also cc'd to Soderlund, indicated that too much time had been taken up by the proficiency test issues raised by Soderlund and suggested that no more time be spent on the matter (R. 7:4, ¶ 410).

On September 9, 2008, the Accreditation Board sent Soderlund a letter indicating that the issues he had raised did not fall within the Board's purview, but rather were matters between Soderlund and his employer (R. 7:5-6, ¶ 413).

On September 16, 2008, Soderlund filed a complaint with the Accreditation Board, alleging that the Board had erred in its view of his previous investigation request and further alleging that the Board was responsible for investigating Soderlund's allegations and for ensuring that DOJ was following its own quality system requirements and procedures (R. 7:6, ¶ 414).

On November 14, 2008, the Accreditation Board sent Soderlund a letter indicating that his complaint would be investigated (R. 7:6, ¶ 415).

On April 29, 2009, Soderlund sent DOJ's quality assurance coordinator a request for a quality action pursuant to DOJ procedures. Soderlund's request alleged unauthorized deviation from policies for footwear identification and inappropriate delay by DOJ in considering the complaint he had filed on August 4, 2006, "to address the Administration's determination that I failed CTS Impression/Imprint (footwear) Test No. 04-533" (R. 7:7, ¶ 417).

On May 15, 2009, the Administrator of the Crime Labs sent Soderlund a written directive indicating that Soderlund had wasted an extraordinary amount of DOJ personnel time addressing a dispute with his employers over the interpretation of DOJ quality assurance standards for footwear identification. The Administrator ordered Soderlund to stop writing to DOJ personnel regarding his past performance on any proficiency test and indicated that DOJ personnel would no longer respond to correspondence from Soderlund regarding the proficiency test issue (R. 7:7-8, ¶ 418).

On July 17, 2009, the Accreditation Board sent Soderlund a response to his complaint of September 16, 2008, which itself had concerned Soderlund's earlier investigation request of April 28, 2008, regarding DOJ's

alleged failure to adhere to its own quality assurance standards. The Board's response concluded that Soderlund's allegations did not have merit and that DOJ followed its lab policies and procedures and adhered to the Board's accreditation requirements. The Board indicated that its investigation of Soderlund's allegations was closed (R. 7:8-9, ¶¶ 420-21).

Sometime between July 17, 2009, and January 19, 2010, Soderlund sent to the Inter American Accreditation Corporation ("IAAC") copies of the investigation requests he had previously submitted to the Accreditation Board and the Board's responses to those requests (R. 7:13, ¶¶ 435-36).

On January 19, 2010, the IAAC sent Soderlund a letter indicating that his allegations had no relation to the performance of the Accreditation Board as an accrediting body and thus did not constitute a complaint against the Board as an IAAC member (R. 7: 13; ¶ 436).

Sometime during 2010, Soderlund initiated an administrative proceeding under Wisconsin's state employee whistleblower protection law before the Equal Rights Division of the Department of Workforce Development (R. 7:3, ¶¶ 404-05).

On December 22, 2010, The Equal Rights Division dismissed Soderlund's administrative proceeding for failure to state a claim under the state employee whistleblower law (R. 7:3, ¶ 405).

In January 2011, a new Administrator of the State Crime Labs was appointed by DOJ (R. 7:9, ¶ 422).

On February 21, 2011, Soderlund sent an investigation request to the new Crime Labs Administrator, objecting to DOJ's handling of the two prior internal complaints he had filed in August 2006 and April 2009. Soderlund's request alleged that DOJ was not following its quality assurance standards for verification of prints and that DOJ had withheld information from the Accreditation Board (R. 7:9-10, ¶ 423). Soderlund additionally alleged years of unfair treatment by DOJ unfairly questioning his competence as a footwear examiner and other unfair criticisms of his work (R. 7:10, ¶ 424).

On March 1, 2011, DOJ's Crime Labs Administrator sent Soderlund a response to his investigation request of February 21, 2011. The response indicated that previous grievance procedures were followed and that the Administrator considered the matter closed and did not anticipate any further action (R. 7:10, ¶ 426).

On May 2, 2011, the Crime Labs Administrator announced that the Accreditation Board would be conducting an assessment of DOJ originally scheduled for the Fall of 2011 (R. 7:10-11, ¶ 427).

On August 17, 2011, Soderlund wrote to the Crime Labs Administrator and expressed the belief that his previous grievance procedures had been derailed because DOJ had threatened him with discipline if he continued to

pursue the matter. Soderlund requested an investigation of his allegations that DOJ was not adhering to quality assurance standards, with particular reference to his failure of two footwear proficiency tests (R. 7:11, ¶ 428).

On January 4, 2012, the Crime Labs Administrator sent Soderlund a response to his investigation request of August 17, 2011. The Administrator indicated that the matters raised by Soderlund had been concluded under a prior DOJ administration and that no further action was warranted. The Administrator expressed an expectation that Soderlund would direct his energies to his work assignments and the future (R. 7:12, ¶ 429).

On February 13, 2012, Soderlund sent a letter to four Accreditation Board assessors who were scheduled to assess the Wausau Crime Lab in March 2012 (R. 7:12, ¶¶ 430-31). The letter reiterated Soderlund's long-standing allegations that DOJ had not adhered to quality assurance standards (R. 7:13, ¶ 433). Soderlund's letter referred extensively to the response letter the Accreditation Board had sent to him on July 17, 2009, in which the Board had found that his allegations about DOJ were without merit (R. 7:13, ¶ 434).

On February 21, 2012, Zibolski—in his capacity as Deputy Director of DOJ's Division of Law Enforcement Services—sent Soderlund a letter directing him to attend an investigatory meeting regarding possible violations of DOJ work rules (R. 7:14, ¶ 440). On February 22, 2012, Zibolski conducted that meeting. During the meeting, Soderlund

explained statements made in his letter of February 13, 2012 (R. 7:14, ¶ 441). On February 22 or 23, 2012, Soderlund also delivered to Zibolski a document, dated February 22, 2012, which discussed Soderlund's view of various professional and accreditation standards (R. 7:15-16, ¶¶ 442-44).

On February 27, 2012, Zibolski sent Soderlund a pre-disciplinary hearing letter, instructing Soderlund to attend a pre-disciplinary meeting on March 2, 2012. The letter referred to various communications by Soderlund—including, but not limited to, his letter of February 13, 2012—and indicated that Soderlund had violated six DOJ work rules in multiple ways. The letter indicated that the meeting on March 2, 2012, was to provide Soderlund an opportunity to supply new information or mitigating circumstances before DOJ determined the appropriate course of action to take (R. 7:16-17, ¶ 445).

On February 28, 2012, believing he was about to be terminated and wishing to avoid the possibility of losing retirement benefits, Soderlund decided to retire (R. 7:17, ¶¶ 447-48). Soderlund's supervisor then sent him an email offering three options for a resignation date (R. 7:17-18, ¶ 449). Soderlund chose one of the options (R. 19:2, citing R. 3, Attachment B).

On February 29, 2012, Soderlund sent his supervisor an email asking to rescind his resignation and expressing his intention to attend the pre-disciplinary meeting on

March 2, 2012 (R. 7:18, ¶ 450). Soderlund's supervisor responded, denying Soderlund's request to rescind his resignation (R. 7:18, ¶ 451).

On August 17, 2012, Soderlund, acting *pro se*, attempted to commence a lawsuit against Zibolski by submitting certain documents to the Marathon County Circuit Court. Those documents included Soderlund's letter of February 13, 2012, and Zibolski's letter of February 27, 2012 (R. 20:14 and 15, n.5 and 6; R. 22:2 n.1; Brief of Plaintiff-Appellant 21-22). Because Soderlund did not file a summons and complaint at that time, however, no court case was opened. The documents submitted by Soderlund were retained in a file by the circuit court (R. 22:2 n.1).

On December 13, 2012, Soderlund, acting with legal counsel, filed a Summons and Complaint commencing the present case (R. 1). On July 18, 2013, Soderlund filed a First Amended Complaint, which remains his operative pleading (R. 7). The documents Soderlund had submitted on August 17, 2012, were not resubmitted with either the Complaint or the First Amended Complaint, but they had been retained by the circuit court in a separate file (R. 22:2 n.1).

Zibolski answered the First Amended Complaint on August 26, 2013, and filed a motion for judgment on the pleadings on December 17, 2013. Zibolski's motion alleged that (1) Soderlund did not suffer any adverse action that would deter a person of ordinary firmness from engaging in

free speech; (2) Zibolski was entitled to qualified immunity from all individual-capacity claims against him; and (3) Soderlund had failed to state an official-capacity claim against Zibolski.

On June 16, 2014, the circuit court issued a partial decision on Zibolski's motion for judgment on the pleadings. The court held that Soderlund had failed to state an official-capacity claim against Zibolski and ordered supplemental briefing on two issues: (1) whether any of Zibolski's conduct constituted an actionable threat of punishment for future speech; and (2) whether Soderlund's speech was protected by the First Amendment under the principles in *Garcetti v. Ceballos*, 547 U.S. 410, 418-21 (2006).

The parties filed their supplemental briefs on July 16 and 17, 2014. Zibolski's supplemental brief discussed the contents of Soderlund's letter of February 13, 2012, and Zibolski's letter of February 27, 2012, but did not attach copies of those documents, noting that they had already been filed with the court on August 17, 2012 (R. 20:14, 15 n.5 and 6).

On September 12, 2014, the circuit court entered a final decision and order granting judgment on the pleadings in Zibolski's favor and dismissing Soderlund's claims in their entirety. With regard to the remaining issues, the court held that (1) Soderlund's speech was not protected by the First Amendment; (2) Soderlund did not suffer any adverse action

that would deter a person of ordinary firmness from engaging in protected speech; and (3) Zibolski was entitled to qualified immunity from all individual-capacity claims against him because there was no pre-existing law clearly establishing that his conduct was unlawful.

In reaching its decision on the first of those issues, the circuit court relied in part on the content of Soderlund's letter of February 13, 2012 (R. 22:2-3). The court noted that it had reviewed the copy of that letter that had been submitted to the court by Soderlund in August 2012 and attached the 19-page letter as an appendix to the decision, thereby making the letter a part of the record in this case (R. 22:2 n.1 and Appendix).

The present appeal from the final order of September 12, 2014, was filed by Soderlund on October 20, 2014.

STANDARD OF REVIEW

An order granting judgment on the pleadings presents a question of law that is reviewed *de novo*. *Freedom From Religion Found., Inc. v. Thompson*, 164 Wis. 2d 736, 741, 476 N.W.2d 318 (Ct. App. 1991).

ARGUMENT

I. Soderlund's 42 U.S.C. § 1983 claim against Zibolski in his official capacity was properly dismissed because Soderlund did not plead a claim for prospective relief.

Soderlund's First Amended Complaint was directed against Zibolski in both his individual and official capacities (R. 7, Caption). The body of that pleading, however, stated claims against Zibolski for compensatory and punitive damages, but did not purport to state any claim for prospective relief (R. 7:24, ¶¶ 601-02 and Prayer for Relief). Therefore, to the extent the First Amended Complaint stated an official-capacity claim against Zibolski, it was an official-capacity claim for damages, not for prospective relief.

The circuit court correctly held that a claim for damages against a state official in his official capacity cannot be brought under 42 U.S.C. § 1983 (R. 19: 3). It is black letter law that such an official-capacity claim is made not against the official but against his office and, therefore, is not made against a "person" subject to suit under 42 U.S.C. § 1983. *See Burkes v. Klauser*, 185 Wis. 2d 308, 352-53, 517 N.W.2d 503 (1994). Only a claim for prospective relief may be brought against a state official in his official capacity. *See id.*

Here, the circuit court correctly found that Soderlund did not plead a claim for prospective relief (R. 19:3). Soderlund argued that the boilerplate text in his prayer for relief, seeking "such other and further relief as the court

deems just" (R. 7:24, Prayer for Relief), should be construed as requesting an order reinstating him in his former job (R. 17:13 and n.2). The court, however, refused to "rely on that catch-all language to save a claim that was not otherwise pled" (R. 19:3).

On appeal, Soderlund argues that his First Amended Complaint should be deemed amended to conform to the evidence supporting a prospective claim for reinstatement, but that doctrine is not applicable here because it only applies where evidence related to the issue in question has been presented at trial. Under Wis. Stat. § 802.09(2), "[i]f issues not raised by the pleadings *are tried by express or implied consent of the parties*, they shall be treated in all respects as if they had been raised in the pleadings." In this case, there has been no trial of any issues, nor has Zibolski expressly or impliedly consented to the trial of any issues related to reinstatement of Soderlund. The First Amended Complaint, therefore, is not to be treated as if it had raised a reinstatement claim.

At the pleading stage, the applicable statutory provision is Wis. Stat. § 802.02(1), which states:

> A pleading or supplemental pleading that sets forth a claim for relief . . . shall contain all of the following:
>
> (a) A short and plain statement of the claim, identifying the transaction or occurrence or series of transactions or occurrences out of which the claim arises and showing that the pleader is entitled to relief.

> (b) A demand for judgment for the relief the pleader seeks.

The Wisconsin Supreme Court has explained that a complaint must plausibly plead all facts justifying the relief sought, and that bare labels and conclusions are insufficient. *See Data Key Partners v. Permira Advisers LLC*, 2014 WI 86, ¶¶ 21-31, 356 Wis. 2d 665, 849 N.W.2d 693.

Here, the First Amended Complaint did not include either a statement showing that Soderlund is entitled to reinstatement in his former job or a demand for that relief. The First Amended Complaint, therefore, did not plead a claim for the prospective relief of reinstatement.

Of course, at any time during the circuit court proceedings, Soderlund could have moved, pursuant to Wis. Stat. § 802.09(1), for leave to amend the First Amended Complaint to add a reinstatement claim, but he did not do so. It is now too late to ask an appellate court to rescue him from that omission by reading into the complaint a claim that was never pled.

Therefore, as the circuit court correctly concluded, "[b]ecause Soderlund did not plead a claim for injunctive relief, and because he cannot seek any other relief from the defendant in his official capacity, the official capacity claim must be dismissed" (R. 19:3).

II. The circuit court's reliance on Soderlund's February 13, 2012, letter was not reversible error.

The circuit court held in part that the speech at issue in this case was not protected by the First Amendment. In reaching that conclusion, the court considered the content of Soderlund's letter of February 13, 2012, which was referenced and quoted in Soderlund's First Amended Complaint, but which had not been submitted as an exhibit in this case (R. 22:2-3). Soderlund now argues that the letter was a "matter[] outside the pleadings" which, under Wis. Stat. § 802.06(3), the circuit court could not consider without converting Zibolski's motion for judgment on the pleadings into a motion for summary judgment and giving Soderlund a reasonable opportunity to present any additional pertinent materials.

Soderlund's argument fails for two reasons. First, Soderlund has forfeited this issue by not raising it before the circuit court. Alternatively, the court properly relied on the February 13, 2012, letter without converting Zibolski's motion into a motion for summary judgment because Soderlund's First Amended Complaint referred to and quoted from that letter, the letter is central to his claims, and its authenticity is undisputed.

A. Soderlund has forfeited the issue that the court's reliance on the letter was improper, because he failed to raise that issue below.

Appellate courts generally refuse to consider issues raised for the first time on appeal. *See, e.g., Shadley v. Lloyd's of London*, 2009 WI App 165, ¶ 25, 322 Wis. 2d 189, 776 N.W.2d 838. The main reason for this refusal is that failing to raise issues below deprives both the adversary and the circuit court of the opportunity to deal with them. *Terpstra v. Soiltest, Inc.*, 63 Wis. 2d 585, 593-94, 218 N.W.2d 129 (1974).

The party alleging error has the burden of establishing, by reference to the record, that the error was first raised in the circuit court. *Shadley*, 322 Wis. 2d 189, ¶ 26. Even an error alleged not to have occurred until the circuit court's final decision is forfeited if not raised by a motion for reconsideration in that court, if the error alleged is a manifest error that would be apparent to reasonable legal minds. *See Schinner v. Schinner*, 143 Wis. 2d 81, 92-93, 420 N.W.2d 381 (Ct. App. 1988); *see also Armour v. Klecker*, 169 Wis. 2d 692, 696-97, 486 N.W.2d 563 (Ct. App. 1992).

Here, Soderlund had at least two opportunities to bring to the circuit court's attention the fact that the February 13, 2012, letter, in his view was a "matter[] outside the pleadings" under Wis. Stat. § 802.06(3).

First, Soderlund was on notice of this issue from the time when Zibolski filed his supplemental circuit court brief,

which discussed the contents of Soderlund's February 13, 2012, letter and noted that it had previously been filed with the court on August 17, 2012 (R. 20:14-15 n.5). Between the filing of Zibolski's supplemental brief in July 2014 and the court's final decision on September 12, 2014, Soderlund could have alerted the court that, in his view, the court should either not consider the letter or convert the pending motion to summary judgment. Soderlund, however, passed up this opportunity to avoid the error he is now alleging.

Second, even after the circuit court's September 12, 2014, decision, Soderlund could have raised this issue through a motion for reconsideration. He did not give the court that opportunity to correct the alleged error, however, but instead brought his new issue directly to this Court.

Because Soderlund could have, but did not, raise the alleged error below, this Court should decline to consider the issue on the ground that it has been forfeited.

B. The circuit court properly relied on Soderlund's February 13, 2012, letter because Soderlund made that letter central to his claims and its authenticity is undisputed.

Alternatively, if the Court takes up this issue in spite of the fact that it was not raised below, it should conclude that the circuit court properly relied on the February 13, 2012, letter without converting Zibolski's motion into a motion for summary judgment because Soderlund's First Amended Complaint referred to and quoted from that letter,

the letter is central to his claims, and its authenticity is undisputed.

It is true that, in general, when evidence outside the pleadings is considered by a court deciding a motion to dismiss or a motion for judgment on the pleadings, the court is required to convert the motion into one for summary judgment and to give all parties a reasonable opportunity to present all material that is pertinent to the motion. Wis. Stat. § 802.06(2)(b) and (3); *see also* Fed. R. Civ. P. 12(d). The Seventh Circuit and numerous other courts, however, have recognized an exception to this requirement in the incorporation-by-reference doctrine, under which a court may consider a document attached to a motion to dismiss or a motion for judgment on the pleadings without converting the motion into one for summary judgment, if the document was referred to in the plaintiff's complaint, is central to his claim, and its authenticity has not been disputed. *See Brownmark Films, LLC v. Comedy Partners*, 682 F.3d 687, 690 (7th Cir. 2012); *Santana v. Cook Cnty. Bd. of Review*, 679 F.3d 614, 619 (7th Cir. 2012).

In such circumstances, the document is considered to be incorporated by reference into the complaint and thus is not outside the pleadings. *See Menominee Indian Tribe of Wis. v. Thompson*, 161 F.3d 449, 456 (7th Cir. 1998). This doctrine "prevents a plaintiff from 'evad[ing] dismissal . . . simply by failing to attach to his complaint a document that

prove[s] his claim has no merit.'" *Brownmark Films, LLC*, 682 F.3d at 690 (quoting *Tierney v. Vahle*, 304 F.3d 734, 738 (7th Cir. 2002)). Courts in jurisdictions other than the Seventh Circuit have likewise adopted such an exception to the requirement of conversion to summary judgment. *See, e.g.*, *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1996 (3d Cir. 1993); *Romani v. Shearson Lehman Hutton*, 929 F.2d 875, 879 n.3 (1st Cir. 1991); *Branch v. Tunnell*, 14 F.3d 449, 453-54 (9th Cir. 1994); *see also* 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1327, at 438-42 n.7 (3d ed. 2004 & Supp. 2014).[1]

The incorporation-by-reference doctrine is applicable here and should be adopted and applied by this Court. First, the February 13, 2012, letter on which the circuit court relied was referred to in Soderlund's First Amended Complaint (R. 7:12-13, ¶¶ 430-35). Second, it is undeniable that the letter in question is central to Soderlund's First Amendment claim against Zibolski. Third, at no point has Soderlund disputed the authenticity of the document reviewed by the circuit court, which Soderlund himself had

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[1]It appears that, to date, Wisconsin courts have neither adopted nor rejected the incorporation-by-reference doctrine. In *Finch v. Southside Lincoln Mercury, Inc.*, 2004 WI App 110, ¶¶ 8-9 and n.6, 274 Wis. 2d 719, 685 N.W.2d 154, the court referred to the doctrine but did not apply it because it had not been argued on appeal and because the court was able to resolve the issue before it by instead applying principles of estoppel.

supplied on August 17, 2012 (R. 20:14 and 15, n.5 and 6; R. 22:2 n.1; Brief of Plaintiff-Appellant 21-22). The prerequisites for applying the doctrine thus are all present.[2]

Most importantly, the purpose of the general rule requiring conversion to summary judgment is to provide notice to the plaintiff of evidence that the defendant is asking the court to consider as a basis for dismissal. Reference to that evidence in the complaint, however, itself constitutes notice to the plaintiff. *See Tierney*, 304 F.3d at 738. Soderlund's suggestion that the circuit court improperly denied him notice of the factual basis of the dismissal of his claim is thus unreasonable.

The letter in question was written by Soderlund himself and was extensively referenced and even quoted by him in his First Amended Complaint (R. 7:12-13, ¶¶ 430-35). Accordingly, Soderlund cannot plausibly contend that he had no notice of that letter or its contents. In addition, the First Amended Complaint extensively referenced and quoted from Zibolski's related letter of February 27, 2012, including passages that set forth DOJ's interpretation of the contents

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[2]In the present case, unlike the cases discussed above, Zibolski did not attach a copy of Soderlund's February 13, 2012, letter to his submissions in support of his motion for judgment on the pleadings. That was simply a pragmatic choice, however, made in recognition of the fact that Soderlund had already provided the letter to the court on August 17, 2012 (R. 20:14, 15 n.5 and 6). Zibolski's supplemental brief did discuss the contents of Soderlund's letter, which the court already possessed (R. 20:14-15).

of Soderlund's letter of February 13, 2012 (R. 7:18-22, ¶¶ 453-59). In particular, the First Amended Complaint expressly noted that Zibolski's letter accused Soderlund of having represented himself to Accreditation Board assessors in an official capacity as a DOJ employee (R. 7:20-21, ¶ 457)—which was one of the key facts that the circuit court derived from its review of Soderlund's February 13, 2012, letter (R. 22:2-3, 5). Soderlund cannot contend that he had inadequate notice of that fact or its importance to this case when he included it in his own pleading.

Moreover, while Wis. Stat. § 802.06(3), on which Soderlund relies, requires that a plaintiff be given a reasonable opportunity to present any additional pertinent materials, Soderlund has not identified to this Court what additional materials he would have produced had the desired notice been provided. In such circumstances, reversal is not required because any error would be harmless. *See Lazzara v. Howard A. Esser, Inc.*, 802 F.2d 260, 272 (7th Cir. 1986); *Milwaukee Typographical Union No. 23 v. Newspapers, Inc.*, 639 F.2d 386, 391-92 (7th Cir. 1981).

In sum, the circuit court considered the contents of a concededly authentic letter with which Soderlund was intimately familiar and concluded that it established that Soderlund's speech was not protected by the First Amendment. In these circumstances, Soderlund should not be allowed to evade dismissal of his First Amendment claim

simply because he chose not to attach the document which refutes his claim.

For all of these reasons, this Court should apply the incorporation-by-reference doctrine and should conclude that it was permissible for the circuit court to rely on Soderlund's letter of February 13, 2012, without converting Zibolski's motion into a motion for summary judgment.

III. Soderlund's speech was not protected by the First Amendment because he spoke as a public employee on a matter of personal concern, rather than as a citizen on a matter of public concern.

Soderlund's central claim is that Zibolski violated his First Amendment rights by initiating a disciplinary proceeding against him. The proceeding was allegedly in retaliation for various statements Soderlund had made related to a long-standing dispute between Soderlund and his employers regarding DOJ quality assurance standards for footwear identification and analysis on proficiency tests.

To state a claim for First Amendment retaliation under 42 U.S.C. § 1983, a plaintiff must "allege that (1) he engaged in activity protected by the First Amendment, (2) he suffered an adverse action that would likely deter future First Amendment activity, and (3) the First Amendment activity was at least a motivating factor in the defendant's decision to retaliate." *Santana*, 679 F.3d at 622 (internal quotations omitted).

The circuit court held in part that Soderlund failed to state a First Amendment claim against Zibolski because his speech was not protected by the First Amendment. The court reasoned that Soderlund's speech was unprotected because he spoke as a public employee on a matter of personal concern, rather than as a citizen on a matter of public concern (R. 22:4-6) (citing *Garcetti*, 547 U.S. at 418-21).

Soderlund now contends that the circuit court erred because it conflated two distinct components of the First Amendment analysis under *Garcetti* and the earlier decision in *Connick v. Myers*, 461 U.S. 138 (1983). That contention is incorrect. While it is true that the circuit court did not precisely distinguish the issues under *Garcetti* and *Connick*, that fact is inconsequential to the outcome of the First Amendment analysis in this case. Soderlund's claim fails under both cases, and for two independent reasons: based on the subject matter of his speech (*Connick*) and based on his capacity as an employee speaker (*Garcetti*).

Historically, in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), the Supreme Court held that, when a public employee challenges an action of his government employer under the First Amendment, a reviewing court must balance the employee's First Amendment interests against the government's interest as an employer "in promoting the efficiency of the public services it performs through its employees."

In *Connick*, however, the Supreme Court added a threshold requirement by holding that the First Amendment protects speech by a government employee only when she speaks "as a citizen upon matters of public concern," but not when she speaks "as an employee upon matters only of personal interest." *Connick*, 461 U.S. at 147. Under *Connick*, if the *subject-matter* of a public employee's speech cannot fairly be characterized as being of public concern, it is unnecessary for a court to proceed—à la *Pickering*—to balance the employee's free speech interests against the government's interests. *See id*. at 148. This restriction reflects "the common sense realization that government offices could not function if every employment decision became a constitutional matter." *Id.* at 143. "[T]he First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Id.* at 149.

While *Connick* thus focused on the *subject-matter* of a public employee's speech, *Garcetti* added another threshold requirement that examines the *capacity* in which the employee speaks. More specifically, *Garcetti* held that, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti*, 547 U.S. at 421. In other words, *Garcetti* clarified that a public employee's speech made pursuant to his official

duties is spoken as an employee, rather than as a citizen, and thus is unprotected, even if that speech is also about a subject of public concern. *Garcetti* thus requires that, "before asking whether the subject-matter of particular speech is a topic of public concern, the court must decide whether the plaintiff was speaking 'as a citizen' or as part of her public job." *Mills v. City of Evansville*, 452 F.3d 646, 647 (7th Cir. 2006); *see also Chaklos v. Stevens*, 560 F.3d 705, 711-12 (7th Cir. 2009) ("*Garcetti* requires a threshold determination regarding whether the public employee spoke in his capacity as a private citizen or as an employee.").

In the present case, the circuit court concluded that Soderlund's speech was unprotected because he spoke as a public employee on a matter of personal concern, rather than as a citizen on a matter of public concern (R. 22:4-6). In reaching that conclusion, the court relied on *Garcetti* and did not expressly distinguish between the *capacity* analysis under *Garcetti* and the *subject-matter* analysis under *Connick*. A close examination, however, reveals *both* that Soderlund spoke in the capacity of a public employee, rather than as a citizen, *and* that he spoke about matters related to a personal employment dispute, rather than about matters of public concern. Because Soderlund thus failed to state a First Amendment claim under either *Garcetti* or *Connick*, it

is of no consequence that the circuit court was not precise in distinguishing the two tests.[3]

A. Soderlund spoke pursuant to his duties as a public employee because his speech arose from and was inextricably intertwined with his job responsibilities.

Under the *Garcetti* analysis, Soderlund's speech was not protected by the First Amendment because he spoke as a DOJ employee, rather than as a citizen. Soderlund contends that his job responsibilities as a forensic scientist did not include filing grievances against his employer with the Accreditation Board (R. 7:14, ¶ 439). It does not follow, however, that Soderlund's communications about his disagreement with his employer were made in his capacity as a citizen, rather than as a DOJ employee.

Soderlund's characterization of the *Garcetti* standard is too narrow. Contrary to his suggestion, *Garcetti* is not limited only to speech required in performing tasks officially assigned to an employee by his employer. *Fairley v. Andrews*, 578 F.3d 518, 523 (7th Cir. 2009). More specifically, the Seventh Circuit has held that critical statements made by public employees concerning their areas of job responsibility are not protected

[3]It is well established that this Court can affirm on any grounds that support the result reached below, including grounds that were not relied on by the circuit court or raised before that court by the parties. *Correa v. Farmers Ins. Exch.*, 330 Wis. 2d 682, 687, 794 N.W.2d 259 (Ct. App. 2010).

speech. *See Vose v. Kliment*, 506 F.3d 565, 570-71 (7th Cir. 2007) (public employee's commentary about misconduct affecting an area within her responsibility is considered speech as an employee, even where reporting misconduct is not included in her job description or routine duties).

For example, in *Ogden v. Atterholt*, 606 F.3d 355, 358 (7th Cir. 2010), the Seventh Circuit applied the *Garcetti* analysis and dismissed a First Amendment retaliation claim on the ground that the plaintiff state employee—who had written a memo critical of decisions made by his supervisor—had spoken in his capacity as a public employee and pursuant to his official duties. The plaintiff argued that his memo was made as a citizen on a matter of public concern because it alleged his supervisor's possible unethical behavior and official misconduct. *Id.* at 359. The court, however, saw the plaintiff's statement for what it was: a public employee's memorandum related to his job and criticizing his superior. This was "exactly the sort of localized employment-related speech *Garcetti* held was not entitled to First Amendment protection." *Id.* The court was unpersuaded by "Ogden's strained attempt to recast his memo as an exercise in whistle-blowing" and instead concluded that "[t]he specific 'whistle-blowing' allegations that Ogden now relies on to fit himself within *Garcetti's* requirement of private-citizen speech were part and parcel of the rationale he offered 'in support of [his] request' for

departmental reorganization." *Id.* The court thus refused to "divorce" Ogden's charge of official misconduct from his action as an employee. *Id.*

Here, the same can be said about Soderlund's speech. Although he now attempts to recast his speech as a whistle-blowing exposure of unethical behavior within DOJ, it was not that. To the contrary, virtually every statement alleged in the First Amended Complaint was calculated to advance his personal grievance regarding his failure of footwear identification proficiency tests as a DOJ employee.

Throughout the statements alleged in the First Amended Complaint, Soderlund clearly spoke in the voice of an aggrieved DOJ employee, rather than that of a concerned citizen. Even in his February 13, 2012, letter to the Accreditation Board assessors, when he went outside the DOJ supervisory structure, he expressly identified himself as a forensic scientist with DOJ's Wausau Crime Lab (R. 22, Appendix 2, 19).

Likewise, Soderlund's statements embodied a disagreement with his employer over the interpretation of the rules and standards governing his work as a forensic scientist in the Wausau State Crime Lab. The job duties of any employee necessarily include correctly interpreting and applying the employer's standards for the job and communicating with the employer as necessary about the interpretation and application of those standards. Soderlund's communications about the interpretation and

application of the standards applicable to his work as a DOJ forensic scientist thus unquestionably were made pursuant to his job duties. As the Supreme Court noted in *Garcetti*, constitutional protection for contributions to civic discourse does not invest public employees "with a right to perform their jobs however they see fit." *Garcetti*, 547 U.S. at 422.

Under the reasoning of *Garcetti*, DOJ supervisors are entitled to ensure that communications by Crime Lab employees about the forensic standards followed by the Crime Lab are accurate and consistent with the employer's interpretation. *See id.* at 422-23. Misunderstandings and even disagreements about the interpretation of those standards may sometimes arise between employees and their supervisors, but if the misunderstanding or disagreement is not resolved to their mutual satisfaction, the employer, as such, retains the power to require the employee to conform to the employer's interpretation of the rules and standards governing the employee's work. An employee like Soderlund, who persists in insisting on his own interpretation of the standards applicable to his job, is acting as a disgruntled employee, not as a concerned citizen. Under *Garcetti*, therefore, Soderlund's speech was unprotected by the First Amendment.

B. Soderlund spoke about matters related to a personal employment dispute and any purported issues of public concern were raised only as part of that personal dispute.

Under the *Connick* analysis, as well, Soderlund's speech was not protected by the First Amendment because he spoke about matters related to a personal employment dispute and any purported issues of public concern were raised only as part of that personal dispute.

Whether a public employee's speech addresses a matter of public concern is to be determined by "the content, form, and context of a given statement as revealed by the whole record." *Connick*, 461 U.S. at 147-48. This inquiry is one of law, not of fact. *Id.* at 148 n.7.

While the standards for analyzing footprints and fingerprints in criminal investigations may be related to DOJ's efficient performance of its duties with regard to solving crimes, the focus of Soderlund's statements was not to evaluate the performance of criminal investigations by DOJ, but rather was to further his controversy with his superiors regarding his earlier performance on the footwear tests. From beginning to end, Soderlund's allegations against DOJ reflect one employee's dissatisfaction with his test scores and an attempt to turn that displeasure into a public issue. *See also id.* at 148.

As has been shown, the employment dispute began in August 2006, when Soderlund filed a complaint within DOJ, alleging that his failing score on a footwear identification

test was a result of unwarranted deviation from quality assurance standards (R. 7:6-7, ¶ 416). From that time forward, Soderlund repeatedly alleged unauthorized deviations from standards for footwear identification and continued to indicate that the purpose of his complaints was to address DOJ's determination that he had failed a footwear identification test (R. 7:7, ¶ 417). The dispute over the interpretation of standards for footwear identification was also understood by DOJ supervisory personnel as being related to the issue of Soderlund's performance on proficiency tests (R. 7:7-8, ¶ 418). Soderlund's allegations to the Accreditation Board likewise alleged that DOJ was failing to adhere to its own quality assurance standards regarding proficiency tests and, in particular, footwear analysis on proficiency tests (R. 7:4, 13, ¶¶ 408-09, 433-34).

In sum, Soderlund's allegations about DOJ standards for verifying footprints and fingerprints were inseparable from his complaints of unfair treatment by his employer, unfair criticism of his work, and unfair questioning of his competence as a footwear examiner (R. 7:9-11, ¶¶ 423-24, 428). Clearly, the content of Soderlund's speech was related to a personal employment dispute and any purported issues of public concern were raised only as part of that personal dispute. Accordingly, under *Connick*, as under *Garcetti*, Soderlund's speech was unprotected by the First Amendment.

IV. The same analysis applies to Soderlund's speech about fingerprint identification standards; further, even if the fingerprint speech were treated differently, the claim still fails based on a lack of causation.

Soderlund argues that, at a minimum, a subset of his speech was of public concern. He points to statements about fingerprint identification standards and asserts that the fingerprint speech was separate from his dispute with DOJ about footwear identification proficiency tests.

That argument fails because Soderlund's complaints about fingerprint standards were no different than his other complaints. As already shown, (1) even if the operation of the Crime Labs is a matter of public concern, Soderlund still spoke as an employee when he disagreed with his supervisors about the standards applicable to his work; and (2) Soderlund's statements about fingerprint identification standards were part and parcel of his personal controversy with his superiors about his proficiency test scores. For these reasons, all of Soderlund's speech in this case, including his speech about fingerprint standards, is unprotected by the First Amendment.

Alternatively, even if the fingerprint portion of Soderlund's speech was constitutionally protected, Soderlund still has failed to state a First Amendment claim because he has not alleged a causal relationship between that portion of his speech and the commencement of the

disciplinary investigation. *See Data Key Partners*, 356 Wis. 2d 665, ¶¶ 21-31 (a plaintiff must plead all facts necessary to showing that he is entitled to relief; labels and bare legal conclusions are not enough).

In order to state a First Amendment retaliation claim, a public employee plaintiff has the initial burden of alleging facts sufficient to show that his constitutionally protected conduct was a motivating factor in the defendant employer's decision to retaliate. *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 287 (1977). If the employee carries that burden, the employer then has the burden of establishing that it would have taken the same action toward the employee even in the absence of the protected conduct. *Id.*

Soderlund's First Amended Complaint alleges only in broad and conclusory terms that Zibolski had retaliated against him in response to his exercise of his constitutional rights to free expression under the First and Fourteenth Amendments and that the initiation of disciplinary proceedings against him violated those constitutional rights (R. 7:1, 23, ¶¶ 101, 501). Zibolski does not deny that statements made by Soderlund in connection with his dispute with DOJ over footwear identification standards and proficiency test scores were a motivating factor in the decision to commence a disciplinary investigation of Soderlund. There are no facts alleged in the First Amended Complaint, however, which suggest that statements Soderlund made about fingerprint identification standards—

as distinct from the footwear proficiency standard issues—played any motivating role in that decision.

To the contrary, the allegations in the First Amended Complaint strongly indicate that the disciplinary investigation was entirely motivated by Soderlund's repeated efforts to challenge his failure of footwear proficiency tests by again and again disputing his employer's interpretation of the applicable footwear identification standards.

For example, on April 29, 2008, the Administrator of the Crime Labs sent an email indicating that too much time had been taken up by the proficiency test issues raised by Soderlund and suggesting that no more time be spent on the matter (R. 7:4, ¶ 410).

On May 15, 2009, the Administrator sent Soderlund a directive indicating that he had wasted an extraordinary amount of DOJ personnel time on these issues, ordering him to stop writing to DOJ personnel about his past performance on any proficiency test, and indicating that DOJ personnel would no longer respond to correspondence from him about the proficiency test issue (R. 7:7-8, ¶ 418).

On March 1, 2011, the Administrator sent Soderlund a response to a complaint in which Soderlund had alleged years of unfair treatment by DOJ regarding his competence as a footwear examiner in which the Administrator indicated that he considered the matter closed (R. 7:10, ¶ 426).

On January 4, 2012, the Administrator responded to yet another request by Soderlund for an investigation of his allegations that DOJ was not adhering to quality assurance standards, with particular reference to his failure of two footwear proficiency tests. The Administrator again indicated that the matter was closed and advised Soderlund to direct his energies to his work assignments and the future (R. 7:12, ¶ 429).

Finally, Zibolski's pre-disciplinary hearing letter of February 27, 2012, expressly charged Soderlund with insubordination for having intentionally disregarded these earlier directives from his superiors (R. 7:19, ¶¶ 454-55).

It is clear from the above considerations that, even if Soderlund's statements about fingerprint identification standards were found to be protected speech, Soderlund still has not met his burden of alleging facts sufficient to show that those statements—as opposed to Soderlund's statements related to the footwear proficiency test issues—were a motivating factor in the decision to commence a disciplinary investigation. For this reason, too, Soderlund has failed to state a First Amendment retaliation claim against Zibolski.

V. The mere commencement of the disciplinary investigation was not an adverse action that would deter a person of ordinary firmness from engaging in protected speech, where Soderlund resigned before any discipline was imposed.

One of the elements of a First Amendment retaliation claim is that the plaintiff must "allege that . . . he suffered an adverse action that would likely deter future First Amendment activity." *Santana*, 679 F.3d at 622. The alleged adverse action "must be sufficient to deter an ordinary person" from engaging in protected speech in the future. *Id*. This is an objective standard, viewed from the perspective of a person of ordinary firmness. *Pieczynski v. Duffy*, 875 F.2d 1331, 1333 (7th Cir. 1989).

Soderlund claims that the initiation of disciplinary proceedings against him violated his First Amendment rights (R. 7:23, ¶ 501). Under the above standard, that is equivalent to claiming that the commencement of the disciplinary investigation against him was an action that would deter a person of ordinary firmness from engaging in protected speech. The allegations in the First Amended Complaint, however, when viewed in their entirety—including the fact that Soderlund resigned before any discipline was imposed and that no other adverse action has been alleged—do not support such a claim. Under the facts as alleged, Zibolski's actions of commencing a disciplinary investigation and offering Soderlund an opportunity to be

heard were not sufficiently adverse to support a First Amendment retaliation claim.[4]

When this issue was first briefed to the circuit court, the court did not decide whether the commencement of the disciplinary investigation, without more, was sufficient to constitute actionable retaliation for *past* speech, and instead raised the possibility that such an investigation might nonetheless constitute a threat of future discipline that would be actionable as a prior restraint of future protected speech. (R. 19:4-7) (citing *Fairley*, 578 F.3d at 525 ("[B]oth threats designed to deter future speech and penalties for past speech are forbidden.")). The court thus instructed the parties to brief the deterrence of future speech issue.

Unlike in the present case, however, the threat issue in *Fairley* had to do with the timing of the alleged adverse action in relation to the timing of the protected speech at issue. The question was whether a plaintiff's protected utterance could be found to have caused an action that

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[4]The act of sending a pre-hearing notice letter to Soderlund certainly was not, in itself, an adverse action that could support a First Amendment retaliation claim. On the contrary, constitutionally guaranteed principles of procedural due process require that a public employer provide notice and an appropriate opportunity to be heard before taking disciplinary action against an employee who has a property interest in continued employment. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985). The specific retaliation alleged by Soderlund is the "initiation of disciplinary proceedings" (R. 7:23, ¶ 501), rather than the issuance of the pre-disciplinary notice letter of February 27, 2012.

harmed the plaintiff, if the protected utterance did not occur until *after* the harmful action. *See Fairley*, 578 F.3d at 524-25. Faced with that question, the Seventh Circuit correctly concluded that the First Amendment protects against state actions designed to deter future speech, as well as actions designed to punish past speech. *Id.* at 525.

To the extent that there is a threat issue in the present case, however, it is a different issue. The *Fairley* issue does not exist here because it is undisputed that the harmful action alleged by Soderlund—*i.e.*, the commencement of the disciplinary investigation—occurred *after* the speech on which Soderlund bases his First Amendment claim. Unlike in *Fairley*, the issue here has to do not with the *timing* of the harm to Soderlund, but rather with its *severity*.

Soderlund cannot argue that he was terminated because it is undisputed that he retired by his own action (R. 7:17, ¶ 448). Instead, he argues that his retirement nonetheless amounts to constructive termination because, he contends, he was coerced into retiring by the commencement of the disciplinary investigation. Soderlund has not, however, alleged facts showing that his working conditions were so intolerable that a reasonable person in his position would have felt compelled to resign, so he has failed to state a claim for constructive discharge. *See Poole v. Country Club of Columbus, Inc.*, 129 F.3d 551, 553 (11th Cir. 1997).

Soderlund is thus left to argue that the commencement of the disciplinary investigation itself—together with the concomitant *possibility* of future discipline following the conclusion of the investigation—was sufficient to deter a person of ordinary firmness from exercising his free speech rights in the future. Soderlund cites a handful of court decisions from other jurisdictions which establish, at most, that it is possible for there to *sometimes* be circumstances in which the commencement of disciplinary proceedings could be a sufficient adverse action to support a retaliation claim. But it does not follow that merely commencing a disciplinary proceeding is *always* enough to deter a person of ordinary firmness from engaging in protected speech. Under the facts alleged by Soderlund here, his argument fails.

This is not a case in which the employer used an investigation as part of an orchestrated campaign of harassment against an employee. Based on the facts alleged in the First Amended Complaint, DOJ tolerated Soderlund's repeated complaints about his proficiency test issues from August 2006 until May 2009. At that time, DOJ's Crime Labs Administrator indicated to Soderlund that he had wasted an extraordinary amount of agency time with his complaints and ordered him to stop writing to DOJ personnel about his past performance on any proficiency test (R. 7:7-8, ¶ 418). Even after Soderlund disobeyed that order and filed renewed requests for additional investigation

of the same disputes in February and August of 2011, DOJ did not respond with any disciplinary action, but instead sent Soderlund another response, indicating that the matter was concluded, that no further action regarding it was warranted, and that Soderlund should direct his energies to his work assignments and the future (R. 7:12, ¶ 429). It was only after Soderlund disregarded his employer's repeatedly expressed expectations and continued to pursue the same matters in February 2012 that DOJ commenced the disciplinary investigation about which Soderlund now complains. Given the long history of the dispute and Soderlund's failure to comply with his employer's directives, the commencement of a disciplinary investigation by the employer clearly was not any kind of retaliation, but rather was a normal and predictable response to employee recalcitrance.

Under these circumstances, the commencement of the disciplinary investigation of Soderlund, without more, cannot be considered sufficient to deter a person of ordinary firmness from engaging in protected speech. For this reason, too, Soderlund has failed to state a First Amendment retaliation claim.

VI. Zibolski was entitled to qualified immunity from all individual-capacity claims because it was not clearly established in the law that these events violated his rights.

Zibolski was also entitled to judgment on the pleadings because he has qualified immunity from Soderlund's individual-capacity claims for money damages.

Qualified immunity protects officials from suit unless the plaintiff's complaint makes out a violation of a clearly established constitutional or federal statutory right. It "gives public officials the benefit of legal doubts." *Elliott v. Thomas*, 937 F.2d 338, 341 (7th Cir. 1991). The defense provides "ample room for mistaken judgments;" all but "plainly incompetent" public officials or "those who knowingly violate the law" are protected by this defense. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Governmental officials

> are accorded this ample protection not as a license to violate constitutional rights without recourse nor as an excuse to turn a blind eye to the requirements of the law, but to preserve the vigilance of those individuals vested with the obligation to protect the public interest in the face of ambiguity.

Sparing v. Vill. of Olympia Fields, 266 F.3d 684, 688 (7th Cir. 2001) (citation omitted).

When evaluating a qualified immunity claim, a court asks whether "the facts that a plaintiff has alleged . . . make out a violation of a constitutional right," and if so, "whether the right at issue was 'clearly established' at the time of

defendant's alleged misconduct." *Pearson v. Callahan*, 555 U.S. 223, 232 (2009) (citations omitted). To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right. *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012). The court "may address the prongs in whichever order [the court] believe[s] best suited to the circumstances of the particular case at hand." *McAllister v. Price*, 615 F.3d 877, 881 (7th Cir. 2010).

Once the qualified immunity defense is raised, it is the plaintiff's burden to defeat it. *Wheeler v. Lawson*, 539 F.3d 629, 639 (7th Cir. 2008).

Here, Zibolski was entitled to qualified immunity on both prongs of the analysis.

As discussed above, Soderlund has not stated a claim for violation of a constitutional right—much less a clearly established one—under the First Amendment. He has no right to receive constitutional protection from a disciplinary proceeding by his public employer (1) for statements that were made pursuant to his job duties, in his capacity as a public employee, rather than as a citizen; or (2) for statements about a personal employment dispute, rather than about issues of public concern. Nor does he have a right to constitutional protection for portions of his speech that were not a motivating factor in his employer's decision to commence a disciplinary investigation. Finally, he has no constitutional right to be free from a disciplinary investigation that was a

reasonable and justifiable response to a long history of refusals to comply with his employer's job directives or to accept his employer's interpretation of the standards governing his work.

Because Soderlund thus did not state a claim for violation of a constitutional right, he fails the first prong of the qualified immunity test.

Soderlund's complaint fails the second prong of the qualified immunity test, too. For the same reasons that he lacks the constitutional rights he has tried to assert, the circuit court correctly concluded that he also has alleged no "clearly established" constitutional right.

Zibolski thus was entitled to qualified immunity from all of the individual-capacity claims against him.

CONCLUSION

For the reasons discussed above, Zibolski asks that the decision of the circuit court be affirmed.

Dated this 24th day of March, 2015.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 9,936 words.

Dated this _____ day of March, 2015.

_____
THOMAS C. BELLAVIA
Assistant Attorney General

CERTIFICATE OF COMPLIANCE
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I hereby certify that:

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I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this _____ day of March, 2015.

_____
THOMAS C. BELLAVIA
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