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Second Circuit Says That Public Employee's Refusal To Falsify A Report Is Constitutionally Protected Speech

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Jackler v. Byrne, 10-0859 (2nd Cir. July 22, 2011)

On July 22, 2011, the Second Circuit reinstated the First Amendment retaliation claims of a former probationary police officer who alleges that he was illegally terminated for refusing to falsify a report.

Jason Jackler, was employed as a probationary police officer in Middletown, New York. While on duty, Jackler witnessed Sergeant Gregory Metakes strike suspect Zachary Jones in the face after Jones referred to Metakes with a vulgarity. Jones was already handcuffed and placed in the rear of a patrol car when the incident occurred. Jones filed a civilian report against Metakes for excessive use of force and identified Jackler as a witness. At the request of his supervisor, Jackler filed a report detailing the interaction between Jones and Metakes. Jackler's report corroborated Jones' version of the incident. Shortly thereafter, Jackler's supervisors attempted to coerce Jackler to alter his report in an effort to conceal the actions of Metakes. Jackler refused to falsify the report and was subsequently terminated.

Jackler's First Amendment retaliation claims brought under 42 U.S.C. § 1983 were dismissed due to the lower court's reliance on the U.S. Supreme Court's ruling in *Garcetti v. Cellabos*, 547 U.S. 410 (2006) and the Second Circuit case *Weintraub v. Board of Education*, 593 F.3d 196 (2010). *Garcetti* and *Weintraub* held that that when a public employee in his official capacity makes statements that have no relevant analogue or equivalence to speech by civilians not employed by the government, the public employee's speech is not protected by the First Amendment.

The Second Circuit reversed the lower court's decision, reasoning that Jackler's refusal to falsify his report has a "civilian analogue" in that Jackler was not merely performing his job duties and is entitled to the same protection as a civilian who refuses to unlawfully file a false report. Thus, the case has been remanded for further proceedings.