WHISTLEBLOWING AND FREE SPEECH: *GARCETTI*'S EARLY PROGENY AND SHRINKING CONSTITUTIONAL RIGHTS OF PUBLIC EMPLOYEES

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INTRODUCTION

"We have been betrayed and the guilty should not go unpunished."[1] This was Senator Strom Thurmond's message in 1948. This mentality is not just a South Carolina relic from more than half a century ago, but now permeates public employment law throughout America. In 2006, the United States Supreme Court embraced this Thurmond doctrine in *Garcetti v. Ceballos*[2] by denying speech protection to a prosecutor who reported police misconduct.[3]

This presentation is dedicated to two great Americans. First is Richard Ceballos, who was an honorable prosecutor with the courage to do what was required of him—report police misconduct.[4] Second is Ms. Shirlie Green, a Chief Jailer in Georgia, who had the

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[1] NADINE COHODAS, STROM THURMOND & THE POLITICS OF SOUTHERN CHANGE 157 (1993).

[2] 547 U.S. 410 (2006).

[3] *Garcetti*, 547 U.S. at 421.

[4] *See id.* at 420-22.

audacity to testify truthfully under oath against her employer who subsequently fired her due to the content of her testimony.[5] In *Green v. Barrett*, the Eleventh Circuit strictly adhered to *Garcetti* and held that the Constitution does not protect Ms. Green for testifying about unsafe conditions in a jail.[6]

The latest trends in public employment cases reveal a steadily shrinking base of available federal constitutional protection. Due process protections have been whittled away. Traditional First Amendment protection for whistleblowers has now been effectively gutted. Equal protection rights remain few and difficult to effectively enforce.[7] These trends have provided many more tools for abusive bureaucrats to retaliate, discriminate and oppress. This Article addresses free speech rights of public employees including the recent retreat of such protection in *Garcetti*.

To establish an actionable public employee First Amendment claim, there must be protected expression and a causally related adverse employment action. Protected expression is expression on a matter of public concern plus a favorable application of the balancing test.[8] Public concern, traditionally, is any matter which relates to a

[5] *See* Green v. Barrett, 226 F. App'x 883, 884 (2007).

[6] *Id.* at 886 ("Green's testimony was given pursuant to her official duties as Chief Jailer. Therefore, it is not protected by the United States Constitution. Barrett's firing of Green did not violate Green's First Amendment right to free speech.").

[7] *See generally* Engquist v. Or. Dep't of Agric., 478 F.3d 985 (9th Cir. 2007), *cert. granted*, 128 S. Ct. 977 (2008) (mem). The Supreme Court granted certiorari in a case where the Ninth Circuit categorically excluded public employment from the reach of the class-of-one equal protection theory. *Id.* All other Circuits who have addressed the issue have held that the class-of-one rule applies to public employment. If the Ninth Circuit is affirmed, another devastating blow will be dealt to public employees.

[8] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (explaining the test requires a balancing between the interests of the public employer in free speech and the interest of the government in ensuring efficiency).

political, social, or other matter of interest to the community.[9]

I. LEADING SUPREME COURT PUBLIC EMPLOYEE EXPRESSION CASES

Courts have developed several different First Amendment tests a struggling public employee must meet to reach that ultimate goal of a jury.[10] They are the public concern test,[11] the balancing test,[12] and the causation test.[13] *Garcetti* added another new test—the official duty test.[14] In *Garcetti*, the Supreme Court issued a revolutionary holding, restricting the constitutional rights to free expression by public employees.[15] In a five-four decision, the majority created a bright line per se rule: public employees do not enjoy protection for expression made pursuant to their official employment duties.[16]

Even before *Garcetti* was decided, there were some general rules in public employee speech cases. An employee may not be discharged or otherwise adversely treated for the expression of ideas on

[9] Connick v. Myers, 461 U.S. 138, 146 (1983).

[10] *See* Guilloty Perez v. Pierluisi, 339 F.3d 43, 50-51 (1st Cir. 2003) (summarizing a public employee's First Amendment rights).

[11] *Pickering*, 391 U.S. at 568 ("The problem in any case is to arrive at a balance between 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.")

[12] *Connick*, 461 U.S. at 147-48 ("Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record.").

[13] Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (explaining the causation test as a burden shifting analysis where the burden is initially placed on the plaintiff to show that her conduct is protected under the constitution and the conduct was the cause of plaintiff's employment termination).

[14] *Garcetti*, 547 U.S. at 421 ("We hold 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.").

[15] *Id.* at 420-23.

[16] *Id.* at 421.

any matter of public concern unless the public employer's interest in the efficient and effective fulfillment of its responsibilities to the public outweighs the employee's interest in free expression of the ideas.[17]

For a public employee to recover for adverse action allegedly in retaliation for exercising the First Amendment right to free speech, the employee must establish: (1) the speech complained of qualified as protected speech or activity[18] and (2) such protected speech or activity was a substantial or motivating cause for the discharge.[19]

Before examining *Garcetti*, this Article discusses a handful of Supreme Court cases which shape the parameters of speech protection for public employees.

A. *Pickering v. Board of Education*

In *Pickering*, the Supreme Court developed the balancing test to determine the scope of First Amendment protection for public em-

[17] *See, e.g.*, Waters v. Churchill, 511 U.S. 661 (1994); Fox v. District of Columbia, 83 F.3d 1491 (D.C. Cir. 1996); Bernheim v. Litt, 79 F.3d 318 (2d Cir. 1996).

[18] The Supreme Court has found certain expressive conduct, beyond verbal or written communication, may constitute speech. *E.g.*, Wooley v. Maynard, 430 U.S. 705 (1977) (indicating silence may constitute speech); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (finding students wearing black armbands in protest of war constituted expressive conduct under the First Amendment); Brown v. Louisiana, 383 U.S. 131, 141-42 (1966) (holding a sit-in protest constitutes symbolic speech); Parate v. Isibor, 868 F.2d 821 (6th Cir. 1989) (finding that the grade a teacher assigns to a student constitutes protected speech).

[19] *See* Moore v. City of Kilgore, Texas, 877 F.2d 364, 369 (5th Cir. 1989); Jurgensen v. Fairfax County, Virginia, 745 F.2d 868, 878 (4th Cir. 1984). *See also* J. Michael McGuinness, *Constitutional Employment Litigation: Trial of the Political Discharge Case*, 43 AM JUR TRIALS 1 (1991) (discussing evidentiary requirements of First Amendment political patronage claims). In *Gerhart v. Hayes*, 217 F.3d 320 (5th Cir. 2000), the Fifth Circuit explained that a First Amendment retaliation claim requires a showing that the plaintiff's speech pertained to a matter of public concern and that the speech was a substantial or motivating factor in the plaintiff's termination. A defendant may argue the termination was nevertheless inevitable despite the plaintiff's speech. *Gerhart*, 217 F.3d at 321.

ployees.[20] The *Pickering* balancing test has been reaffirmed by its progeny and remains the determinative test for deciding what speech by public employees is ultimately protected.

Pickering involved the publication of a letter to the editor in a local newspaper by a school teacher. The teacher's letter was critical of local school board's policy and the superintendent.[21] The letter criticized the handling of bond issues and the allocation of financial resources. The letter also alleged the superintendent "attempt[ed] to prevent teachers . . . from opposing or criticizing the proposed bond issue."[22] After a hearing before the school board, the teacher was dismissed because the letter was found to have been "detrimental to the efficient operation and administration" of the schools.[23] Under *Pickering*, courts must balance the interest of the state in promoting efficiency in its public services against the interest of the employee in commenting upon matters of public concern.[24]

Before announcing the balancing test, the *Pickering* Court observed that "because of the enormous variety of fact situations . . . we do not deem it either appropriate or feasible to attempt to lay down a general standard . . . ."[25] After considering the parties' competing interests the Court observed that a public employee may not be punished for making statements on matters of public concern unless it is established by the employer that the employee's statements caused

[20] *Pickering*, 391 U.S. at 568.
[21] *Id.* at 564-66.
[22] *Id.*
[23] *Id.* 564-65.
[24] *Id.* at 568.
[25] *Pickering*, 391 U.S. at 569.

substantial disruption to or interference with the performance of his own duties or with the proper functioning of the employing public agency.[26]

B. *Mt. Healthy City School District v. Doyle*

In *Doyle*, the Court addressed a First Amendment challenge arising from a school board's refusal to renew a teacher's employment contract.[27] The district court concluded that the teacher's exercise of his right to free speech played a substantial part in the Board's decision not to rehire him.[28] The Court of Appeals affirmed.[29] The Supreme Court held that, although that constitutionally protected conduct played a substantial part of the decision, it did not necessarily constitute a First Amendment violation justifying remedial action.[30]

The Supreme Court held a public employer has a valid defense if it can prove, by a preponderance of the evidence, that it nevertheless would have taken the identical adverse employment action in the absence of the public employee's protected conduct.[31] The Court reasoned it is "necessary to formulate a test of causation which distinguishes between a result caused by a constitutional violation and one not so caused."[32]

The Court summarized the principle from the case as follows:

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[26] *Id.* at 572-73.
[27] *Doyle*, 429 U.S. at 276.
[28] *Id.* at 283.
[29] *Id.* at 276.
[30] *Id.* at 285.
[31] *Id.* at 287.
[32] *Doyle*, 429 U.S. at 286.

The public employee must initially establish that his or her expression was a substantial or motivating factor in the adverse action. Then, a public employer may successfully defend by proving "by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct."[33]

C. *Connick v. Meyers*

Fifteen years after *Pickering*, the Court appears to have lessened the degree of disruption required for a governmental employer to regulate the speech of its employees. In *Connick v. Meyers*,[34] the plaintiff, an assistant district attorney, was told she was being considered for transfer to another section of the criminal court.[35] The employee was concerned that compliance with that order would result in a conflict of interest and she expressed her opposition to the proposed transfer to the employer.[36] Subsequently, a memorandum was issued indicating that the employee was in fact being transferred. That evening, the employee prepared a questionnaire to solicit the views of her fellow assistant district attorneys about the proposed transfer and other matters of internal office policy.[37]

The next day, the employee distributed the questionnaire in the office. The employer decided to terminate Meyers after he received a phone call informing him that Meyers was causing a "mini-

[33] *Id.* at 287.
[34] 461 U.S. 138 (1983).
[35] *Connick*, 461 U.S. at 140.
[36] *Id.* at 141 n.1.
[37] *Id.* at 141.

insurrection" by her circulation of the survey.[38] The employer informed Meyers that she was being terminated because of her refusal to accept the transfer and because he considered the distribution of the questionnaire to have been an act of insubordination.[39]

Meyers filed suit alleging her employment was terminated because she had distributed the questionnaire and that her activity constituted an exercise of free speech protected by the First and Fourteenth Amendments.[40] Although the employer claimed that Meyers was dismissed because of her refusal to accept the transfer, the district court found the questionnaire to be the substantial and motivating factor underlying the discharge.[41] The court applied the *Pickering* balancing test and found that the issues presented in the questionnaire related to the effective functioning of the district attorney's office and therefore touched upon matters of public concern.[42] Meyers' activities were neither substantially nor materially interfered with the employer's interest in the efficient and effective operation of the public services performed by its employees.[43] Accordingly, applying the balancing test, the district court held Meyers' conduct was entitled to constitutional protection.[44]

Having established that Meyers' conduct was protected and constituted a motivating factor in the employer's decision to terminate, the burden then shifted to the employer to prove it would have

[38] *Id.*
[39] *Id.*
[40] *Connick*, 461 U.S. at 141.
[41] *Id.* at 141-42.
[42] *Id.* at 143.
[43] *Id.*
[44] *Id.* at 154.

dismissed Meyers regardless of her circulation of the questionnaire. The court then applied the *Mt. Healthy* test, which places the initial burden upon the employee to establish: (1) that his speech is constitutionally protected and (2) that it was a substantial or motivating factor in the employer's decision.[45] After this initial burden is met, the employer may justify the discharge by showing, by a preponderance of the evidence, that it would have reached the same decision even in the absence of the protected conduct.[46] Because Meyers was unable to satisfy the *Mt. Healthy* burden, the district court granted relief to the employee. The Fifth Circuit affirmed without opinion, but the Supreme Court reversed.

The majority opinion in *Connick* observed that "government offices could not function if every employment decision became a constitutional matter."[47] Justice White's majority opinion distinguished speech concerning matters "inherently of public concern" from speech that gains public concern status upon consideration of the circumstances surrounding the making of the statement.[48] The surrounding circumstances standard takes into account "the content, form and context of a given statement, as revealed by the whole record."[49]

The *Connick* Court concluded that only one question in the employee survey, which dealt with the pressure to work on the politi-

[45] *Connick*, 461 U.S. at 149-50.
[46] *Id.*
[47] *Id.* at 143.
[48] *Id.* at 148 n.8. Justice White distinguished the conduct of the employee in *Connick* from the conduct of the employee in *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410 (1979).
[49] *Connick*, 461 U.S. at 143.

cal campaigns of employer-supported candidates, was matter of public concern.[50] Applying *Pickering*, the employer was given an opportunity to demonstrate that the employee's activity interfered with "the interest of the state, as an employer, in promoting the efficiency of the public service it performs through its employees."[51] The Court found the burden placed upon the employer by the district court was unduly onerous.[52]

D. *Rankin v. McPherson*

In *Rankin v. McPherson*,[53] the Court observed that "whether the employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."[54] The issue before the Court in *Rankin* was whether an employee in a county constable's office was properly discharged for remarking, after hearing of the attempted assassination of President Reagan, "[I]f they go for him again, I hope they get him."[55]

The Court in *Rankin* concluded the speech was constitutionally protected because the employer's interest in discharging the employee did not outweigh the employee's First Amendment rights.[56] *Rankin* represents an expanded view of public concern broadly opening the door for further protection of speech. Despite the unpleasant

[50] *See id.* at 155.
[51] *Id.* at 140.
[52] *Id.* at 149-50.
[53] 483 U.S. 378 (1987).
[54] *Rankin*, 483 U.S. at 384-85.
[55] *Id.* at 379-80.
[56] *Id.* at 388.

content of the speech, it involved a matter of public concern and was therefore protected. *Rankin* explained, "Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse."[57]

E. *Waters v. Churchill*

Waters v. Churchill[58] arose out of the employee's communication about a controversial new nurse staffing program, known as cross-training. Waters was displeased with Churchill's "opposition to the hospital's improper implementation of a nurse cross-training program, which Churchill was convinced was detrimental to the welfare of patients in the obstetrical ward."[59] The Seventh Circuit set out the dangers apparent to Churchill and others from the new nurse staffing plan to demonstrate how the risks Churchill complained of contravened fundamental standards of healthcare organizations.[60]

The precise communication at issue was disputed by the parties. Relying upon unsubstantiated hearsay, the employer perceived that Churchill was "knocking the department."[61] The employer fired Churchill without ascertaining the true facts as to what Churchill actually said.

The Court observed, "We agree that it is important to ensure not only that the substantive First Amendment standards are sound,

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[57] *Id.* at 384.
[58] Waters v. Churchill (*Waters II*), 511 U.S. 661 (1994).
[59] Churchill v. Waters (*Waters I*), 977 F.2d 1114 (7th Cir. 1992).
[60] *Waters I*, at 1116-20, 1122-23.
[61] *Waters II*, 511 U.S. at 665.

but also that they are applied through reliable procedures."[62] The primary legal issues before the Court involved determining what procedural and investigative mechanism, if any, must be followed in determining what work place speech was involved. Before addressing the procedural and investigative issues, the Court reaffirmed the historic free speech protections for public employees.[63] "The First Amendment demands a tolerance of 'verbal tumult, discord, and even offensive utterance,' 'as necessary side effects of . . . the process of open debate.' "[64] The Court went on to explain, "Government employees are often in the best position to know what ails the agencies for which they work; public debate may gain much from their informed opinions."[65]

The *Waters II* Court imposed a good faith standard upon employers for reaching their conclusions about what is said in the work place speech disputes.[66] If a public employer punishes an employee without a reasonable investigation, the employer runs the risk of having to remedy depriving the employee of constitutional rights.[67]

Waters II did not carve out a detailed test for the procedural and investigative standards imposed upon public employers. Rather, the Court's decision provides that a case-by-case basis must be employed to ascertain the extent of the procedural and investigative rights required. This is the difficult part of the Court's opinion. Be-

[62] *Id.* at 669.
[63] *See id.*
[64] *Id.* at 672 (internal citations omitted).
[65] *Id.* at 674 (citing *Pickering*, 391 U.S. at 572).
[66] *Waters II*, 511 U.S. at 677.
[67] *Id.* at 671.

cause the Court did not specify particular procedures, litigation in the lower courts will be necessary to flesh out what is required in particular situations. This determination will likely be addressed with expert testimony from law enforcement labor experts.

Justice Scalia's dissent underscores the extent of the investigative rights enunciated by the Court's opinion. Scalia pointed out that the "right to an investigation before dismissal for speech . . . expands the concept of 'First Amendment procedure' into brand new areas . . . ."[68] Scalia observed the employee rights articulated in the Court's majority decision were not just procedural, but were rather new substantive rights under the First Amendment.

Rather than adopt a general test to determine what procedural safeguards were to be applied, the Court explained that a case-by-case approach would be applied. Thus, the Court enunciated a "reasonableness test" for the employer to meet to avoid infringing upon free speech rights.[69]

Churchill has broad implications. It reaffirms and clarifies the procedural component of the First Amendment which was very unclear for over thirty years and enhances the need for experts to examine the employer's investigative process, to determine if the employer has acted reasonably.

F. *City of San Diego v. Roe*

In *City of San Diego v. John Roe*,[70] the Court addressed a

[68] *Id.* at 688 (Scalia, J., dissenting).
[69] *Id.* at 671 (majority opinion).
[70] 543 U.S. 77 (2004).

First Amendment challenge to the termination of a police officer for selling video tapes which depicted him masturbating.[71] The video tape showed the police officer stripping off a uniform, though that uniform was apparently not the official San Diego Police Department uniform.[72] The officer also sold custom videos on eBay. His eBay user profile identified him as being a police officer, and offered police equipment, including official uniforms of the San Diego Police Department.[73] A police supervisor discovered the officer's activities and conducted a search for other items.[74] The Supervisor then recognized the officer and reported him to the San Diego Police Department.

Initially the San Diego Police Department ordered the police officer to cease displaying, manufacturing, or selling any explicit sexual videos, but he did not fully comply and was terminated accordingly.[75] The District Court concluded the officer had not sufficiently demonstrated that his conduct qualified as protected expression. The Ninth Circuit reversed, holding that the officer's conduct constituted protected expression.[76]

The Supreme Court reversed the Ninth Circuit and concluded that the officer's expression was not protected under the First Amendment.[77] The Court reasoned that the officer took deliberate steps to link his video tapes and other products to his police work in a

[71] *Roe*, 543 U.S. at 78.
[72] *Id.*
[73] *Id.*
[74] *Id.* at 78-79.
[75] *Id.*
[76] Roe v. City of San Diego, 356 F.3d 1108 (9th Cir. 2004).
[77] *Roe*, 543 U.S. at 85.

way that was injurious to his employer.[78] The Court identified several factors to support this conclusion including the officer's use of the uniform, the law enforcement reference in the website, and that the depiction of the officer performing indecent acts while in the course of official duties brought the mission of the police employer and the professionalism of its officers into serious disrepute.[79]

The Ninth Circuit had noted the City conceded that the officer's activities were unrelated to his employment, but interpreted the City's concession as implying the officer's speech was not a comment on the working or functioning of the San Diego Police Department.[80] The Supreme Court found that this was quite a different question than whether the speech was detrimental to the San Diego Police Department. On that score, the City's consistent position had been that the speech is contrary to its regulations and "harmful to the proper functioning of the police force."[81]

The Court thought the matter fell squarely under *Pickering* and *Connick* and applied the traditional public concern test, concluding that the officer's expression did not qualify as a matter of public concern because the officer's "activities did nothing to inform the public about any aspect of the SDPD's functioning or operation."[82] This was unlike the remarks at issue in *Rankin*, where one co-worker commented to another about an item of political news; Roe's expression was "widely broadcast, linked to his official status as a police of-

[78] *Id.* at 81.
[79] *Id.*
[80] *Id.* at 79-80.
[81] *Id.*
[82] *Roe*, 543 U.S. at 84.

ficer, and designed to exploit his employer's image."[83] Further, the speech was more than just exploitive, it was "detrimental to the mission and functions of the employer."[84]

II. *GARCETTI V. CEBALLOS*

In *Garcetti*, the Supreme Court issued a revolutionary decision, which has fundamentally changed the landscape of public employment law for those who might dare report government fraud, waste, corruption, or abuse.[85] The Court held a public employee whistleblower does not enjoy First Amendment protection for reporting governmental misconduct if the report is made within the broad sphere of that employee's official duties.[86]

Justice Kennedy authored the five-four *Garcetti* decision. In Justice Kennedy's America, public employees are no longer protected by the First Amendment for doing their jobs and reporting apparent misconduct.[87] Following *Garcetti*, jailers who testify that their jails are unsafe are now stripped of the protection they have enjoyed for decades.[88]

Richard Ceballos was employed since 1989 as a Deputy District Attorney for the Los Angeles County District Attorney's office. Ceballos, who held a supervisory role, was contacted by a criminal

[83] *Id.*

[84] *Id.* at 85. For subsequent cases relying upon *Roe*, see *Brooks v. Univ. of Wis. Bd. of Regents*, 406 F.3d 476 (7th Cir. 2005) and *Carreon v. Ill. Dep't of Human Servs.*, 395 F.3d 786 (7th Cir. 2005). *See also* Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007 (2005).

[85] *See Garcetti*, 547 U.S. at 421.

[86] *Id.*

[87] *Id.* at 416-25.

[88] *Id.*

defense attorney, who alleged inaccuracies in an affidavit in support of a search warrant in a pending criminal case.[89] The defense attorney informed Ceballos that he had filed a motion to challenge the warrant, but he also requested that Ceballos review the case. Ceballos examined the affidavit, visited the location that it described, and determined that the affidavit contained serious misrepresentations.[90]

Thereafter, Ceballos spoke by telephone with the affiant in support of the warrant, a deputy sheriff, and received an unsatisfactory explanation for the perceived inaccuracies. Consequently, Ceballos relayed his observations to his supervisors and followed up with a written memorandum explaining his concerns and recommending dismissal of the criminal case.[91]

A meeting was scheduled for Ceballos, his supervisors, the deputy sheriff executing the affidavit, and other employees from the Sheriff's Department. The meeting became heated and one lieutenant harshly criticized Ceballos for his handling of the case.[92]

The supervisors decided to proceed with the prosecution and the trial court held a hearing on the motion challenging the warrant. Ceballos was called as a witness by the criminal defendant, and testified to his observations about the affidavit; the trial court rejected the challenge to the warrant.[93]

In the aftermath, Ceballos was subjected to a series of adverse employment actions, which he believed were retaliatory. The actions

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[89] *Id.* at 413.
[90] *Garcetti*, 547 U.S. at 414.
[91] *Id.*
[92] *Id.*
[93] *Id.* at 415.

included reassignment from his calendar deputy position to a trial deputy position, transfer to another court house, and denial of a promotion. After initiating an unsuccessful internal employment grievance, Ceballos filed suit in the federal court alleging retaliation in violation of the First and Fourteenth Amendments.[94]

The district court granted summary judgment for the defendants, reasoning that Ceballos prepared his memorandum pursuant to his official employment duties, which the court reasoned precluded constitutional protection.[95] The Ninth Circuit reversed and held the allegations of wrongdoing constituted protected speech under the First Amendment. In so finding, the Ninth Circuit followed the traditional approach—first analyzing public concern, then applying the balancing test.[96] The Supreme Court granted certiorari and reversed.[97]

The Supreme Court began its analysis by observing that *Pickering v. Board of Education* provides a useful starting point in explaining the Court's doctrine. The relevant speech in *Pickering* was a school teacher's letter to a newspaper addressing issues involving the funding policies of the school board.[98] In *Pickering*, the Court observed the problem in any case is to effectively strike a balance between the interest 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 public services it performs

[94] *Id.*
[95] *Garcetti*, 547 U.S. at 415.
[96] *Id.*
[97] *Id.* at 417.
[98] *Pickering*, 391 U.S. at 564.

through its employees.[99]

The *Garcetti* Court observed that *Pickering* and its progeny provided two inquiries to guide the interpretation of constitutional protection for expression afforded to public employees. The first requires determining whether the employee spoke as a citizen on a matter of public concern. If not, then the employee enjoys no First Amendment protection. If the public concern threshold is satisfied, then the issue becomes whether the government has an adequate justification for treating the employee differently from other citizens, followed by the balancing test which determines whether the speech is constitutionally protected.[100]

In *Garcetti*, the Court made a number of observations regarding factors that were identified as either being not dispositive or dispositive in public employee free expression claims. First, the fact that Ceballos' expressed his views inside his office and privately, rather than publicly, was not deemed to be dispositive by the Court.[101] "[E]mployees in some cases may receive First Amendment protection for expressions made at work."[102] Thus, one can still retain citizen status while at work. That the memorandum concerned the subject matter of Ceballos' employment was also not dispositive.[103] "The First Amendment protects some expression related to the speaker's job."[104] Finally, the Court observed that

[99] *Id.* at 568.
[100] *Id.*
[101] *Garcetti*, 547 U.S. at 411.
[102] *Id.* at 420.
[103] *Id.* at 421.
[104] *Id.*

> the controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy . . . . That consideration—the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case—distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline. We hold 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.[105]

The Court explained the importance of the job-related quality of the memorandum when it noted

> Ceballos wrote his memo because that is part of what he, as a calendar deputy, was employed to do. The significant point is that the memo was written pursuant to Ceballos' official duties. Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as private citizen.[106]

Ceballos did not act as a citizen when he went about conducting his daily professional activities such as supervising attorneys, investigating charges and preparing filings.[107] Similarly, Ceballos did not communicate as a citizen by writing a memorandum that addressed the proper disposition of a pending criminal case.

The Court explained that employees who make public state-

[105] *Id.* (internal citations and quotations omitted).
[106] *Garcetti*, 547 U.S. at 421-22.
[107] *Id.* at 422.

ments outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government.[108] The dispositive point of eliminating constitutional protection is "[w]hen a public employee speaks pursuant to employee responsibilities."[109]

Three separate dissenting opinions were issued. The majority addressed some of the analysis from Justice Souter's compelling dissent, which was joined by Justices Stevens and Ginsburg. Justice Souter stated that he expected

> one response from the Court's holding will be misused by government employers to expand stated job descriptions to include more official duties and so exclude even some currently protectable speech from the First Amendment purview . . . the government may well try to limit the English teachers' options by the simple expedient of defining teachers' job responsibilities expansively, investing them with a general obligation to ensure sound administration of the school.[110]

In the majority opinion, Justice Kennedy, writing for the Court, stated:

> [W]e reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions. The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is ex-

[108] *Id.* at 423.
[109] *Id.* at 424.
[110] *Id.* at 431 n.2 (Souter, J., dissenting).

> pected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.[111]

In *Ceballos*, the Supreme Court enunciated a clear bright line: statements made pursuant to an employee's official duties are not protected under the First Amendment.[112] The point left for interpretation by lower courts appears to be the scope of official duties.

Despite the majority's recognition of the importance of exposing governmental inefficiency and misconduct, the Court in *Garcetti* promulgated a new and significantly more restrictive principle of First Amendment jurisprudence for public employees, which represents a substantial erosion of speech protection for public employees.

III. *GARCETTI*'S EARLY PROGENY

A. *Casey v. West Las Vegas Independent School District*

The Tenth Circuit, in *Casey v. West Las Vegas Independent School District*,[113] exemplifies how *Garcetti* profoundly altered courts' review of First Amendment retaliation claims. Upon becoming the superintendent, Casey assumed responsibility for serving as the chief executive officer of the District's Head Start program, a federally-funded initiative aimed at providing educational opportunities, meals and health care services for low income children between

[111] *Garcetti*, 547 U.S. at 424-25 (majority opinion) (internal citations omitted).
[112] *Id.* at 421.
[113] 473 F.3d 1323 (10th Cir. 2007).

three and five years of age.[114]

Casey learned the "staff had begun to uncover evidence that as many as 50% of the families enrolled in the District's Head Start program appeared to have incomes that were too high for them to qualify for participation."[115] Casey, concerned these issues could put risk future federal funding at risk, reported them to Walter Adams, the President of West Las Vegas School Board. Adams initially responded by telling Casey not to fret.[116] On several more occasions, Casey raised the issue with Adams and in executive sessions with the Board. "Each time, she was told variously not to worry about it, to leave it alone or to not go there."[117] Casey ultimately instructed her subordinate to approach the federal Head Start regional office and relay her findings.

"Casey also informed the Board that it was violating the New Mexico Open Meetings Act by making personnel and other decisions in executive session without proper notice and meeting agendas."[118] Because the School Board members ignored her warnings, "Casey filed a written complaint with the New Mexico Attorney General's office."[119] In response, "the Attorney General's Office wrote to Mr. Adams outlining the particulars of Ms. Casey's complaint, enclosing a copy of complaint, and requesting a response."[120] "[T]he Attorney General's Office determined that the Board had in fact violated the

[114] *Casey*, 473 F.3d 1323.
[115] *Id*. at 1326.
[116] *Id*.
[117] *Id*.
[118] *Id*.
[119] *Casey*, 473 F.3d at 1326.
[120] *Id*.

Open Meetings Act and ordered corrective action."[121] Finally, "Ms. Casey brought to the Board's attention a number of other issues . . . regarding the District's operations that, she believed, violated federal or state laws."[122]

The Tenth Circuit carefully analyzed each of Casey's communications and applied the *Garcetti* rule on a statement-by-statement basis to analyze whether each statement was pursuant to her official duties. The *Casey* court concluded: (1) Casey spoke as an employee rather than a citizen when communicating with the School Board about miscellaneous alleged violations of state or federal law; (2) Casey spoke as an employee when she conveyed to the School Board her concern about the district's lack of compliance with federal regulations governing the Head Start program; (3) Casey spoke as a employee when she instructed a subordinate to contact the federal authorities about illegal enrollments in the district's Head Start program; and (4) Casey spoke as a district employee when she communicated her concerns about the School Board's failure to comply with the state open meetings law; and (5) Casey spoke as a citizen when she wrote to the State Attorney General's office about alleged violations of the state open meetings law.[123]

As the Tenth Circuit explained, "the statements made to the New Mexico Attorney General, however, are another kettle of fish."[124] The court reasoned, "Casey was not speaking to fulfill her

[121] *Id.*
[122] *Id.*
[123] *Id.* at 1329, 1332, 1334.
[124] *Casey*, 473 F.3d at 1332.

responsibility of advising the Board when she went to the Attorney General's office."[125] Rather, just the opposite was the case because she had lost faith that the School Board would listen to advice so Casey took her grievance elsewhere. There was "no evidence in the summary judgment record . . . suggesting that the Board ever . . . assigned Ms. Casey any responsibility for the Board's meeting practices."[126]

Casey offers a highly analytical approach where the court analyzed each communication in connection with whether that communication was pursuant to the employee's official duties, therefore applying the bright line test enunciated in *Garcetti.* The Tenth Circuit remanded for further consideration of interest balancing and causation issues.[127]

B. *Green v. Barrett*

Green v. Barrett is a troublesome unpublished opinion from the Eleventh Circuit.[128] Green worked as a supervisor in a county jail, and testified about various security gaps and unsafe conditions, apparently to the chagrin of the sheriff.[129] The sheriff stated, "I was so concerned about that testimony the chief gave that she was terminated today."[130] The Eleventh Circuit dismissed her claims and, citing *Connick* and *Garcetti*, determined that her testimony was offered

[125] *Id.*
[126] *Id.*
[127] *Id.* at 1334.
[128] *Green v. Barrett*, 226 Fed. App'x at 883. *Cf. Kirby v. City of Elizabeth City*, 388 F.3d 440 (4th Cir. 2005) (refusing to protect truthful testimony).
[129] *Id.* at 884.
[130] *Id.*

as part of her official duties.[131]

C. *Haynes v. City of Circleville*

In *Haynes v. City of Circleville*,[132] the Sixth Circuit addressed a law enforcement officer's free speech and other claims arising out of the officer's communications protesting proposed cutbacks in canine training. Officer Haynes generally asserted that the reduction in training would likely "cause an imminent risk of physical harm to the public."[133] When Haynes learned that the Chief of Police was about to institute a significant reduction in training, he wrote a lengthy memoranda expressing his displeasure at the reduction in training; ultimately, the officer was terminated.[134]

In applying *Garcetti*, the *Haynes* court framed the issue as "whether or not Haynes' expressions were made pursuant to his duties as a canine handler and patrolman for Circleville."[135] The Sixth Circuit characterized the context of the officer's memoranda as that of a "disgruntled employee upset that his professional suggestions were not followed as they had been in the past."[136]

Accordingly, the Sixth Circuit concluded that "[i]n lodging his protest to Chief Gray against the training cutbacks, Haynes was acting as a public employee carrying out his professional responsibilities."[137] Officer "Haynes had developed the standard operating

[131] *Id.* at 886-87.
[132] 474 F.3d 357 (6th Cir. 2007).
[133] *Haynes*, 474 F.3d at 359.
[134] *Id.* at 360.
[135] *Id.* at 364.
[136] *Id*.
[137] *Id*.

procedures for the canine unit and worked with his dog as a part of his day-to-day professional activities."[138] The court found the memoranda to Chief Gray was made pursuant to those professional duties, and was therefore not protected under the First Amendment.[139]

D. *Green v. Board of Commissioners*

The Tenth Circuit, in *Green v. Board of Commissioners*,[140] addressed public employee expression claims which arose out of communications by a drug lab and technician. Green's primary duties were in the drug lab and as a part of her job, she performed drug screening tests.[141] Green became concerned that the Juvenile Justice Center where she worked "did not have a confirmation testing policy, and she raised her concerns to her direct supervisor" and a district judge with administrative authority over the Center.[142] "Neither appeared responsive to the issue, with the Judge" indicating that "if clients did like the results, they could go elsewhere and be tested."[143] Green thereafter suspected that a particular drug test had yielded a false positive.

Acting independently, Green reached out to the testing equipment's manufacturer, seeking information and eventually arranged for independent confirmation testing. The results of the testing indicated the initial test was a false positive. Green communi-

[138] *Haynes*, 474 F.3d at 364.
[139] *Id*.
[140] 472 F.3d 794 (10th Cir. 2007).
[141] *Green*, 472 F.3d at 796.
[142] *Id*.
[143] *Id*.

cated this information to her supervisor, and procedures for additional safeguards and testing were adopted by the center.[144] "Green alleged, that after this episode, her supervisors began treating her less favorably," which ultimately led to a Section 1983 action alleging retaliation against her for her expression.[145]

The Tenth Circuit framed the issue as whether Green, by acting independently in the confirmation testing arrangements, departed from her employment duties and noted that the *Garcetti* Court did not have occasion to articulate a comprehensive framework for defining the scope of an employee's duties.[146]

Much like the Court in *Casey*, the Tenth Circuit in *Green* carefully delineated the speech in issue into four categories:

> 1) communications with the client regarding how to obtain a confirmation test; 2) communications with the testing equipment manufacturer about the confirmation test; 3) communication with another individual to ensure chain of custody for the sample to be used in the confirmation test; and 4) communication with defendants regarding the confirmation test's determination of a false positive.[147]

Next, the court specifically identified the components of the written job description for a drug lab technician.[148] Formal job descriptions are certainly highly relevant, but as *Garcetti* explained, they are not dispositive. The Tenth Circuit concluded Green's com-

144 *Id.*
145 *Id.*
146 *Green*, 472 F.3d at 798.
147 *Id.* at 799.
148 *Id.* at 800.

munications were similar to *Garcetti* and other cases from the Tenth Circuit that rejected protection for the speech in issue.[149]

> Ms. Green was not communicating with newspapers or her legislators or performing some similar activity afforded citizens; rather even if not explicitly required as part of her day-to-day job responsibilities, her activities stemmed from and were the type of activities that she was paid to do.[150]

Each communication was analyzed to determine whether or not it was part of her job. Green's speech was held to be unprotected in light of the new *Garcetti* principle.[151] The test, or at least what the *Green* court considered to be the dispositive language, was whether the communication "stemmed from and were the type of activities that she was paid to do."[152] Applying that test, it appears that most speech that relates to any matter within the broad purview of issues, circumstances and facts within public agencies can be fairly said to stem from the employee's job duties or responsibilities.

E. *Battle v. Board of Regents*

The plaintiff employee, in *Battle v. Board of Regents*,[153] was employed in the office of financial aid and veterans affairs at Fort Valley State University.[154] She suspected fraud in the way the school handled its federal work study program. As part of her employment

[149] *Id.* at 800.
[150] *Id.* at 800-01.
[151] *Green*, 472 F.3d at 801.
[152] *Id.*
[153] 468 F.3d 755 (11th Cir. 2006).
[154] *Battle*, 468 F.3d at 757.

duties, she was responsible for the substantive accuracy of program reports and for reporting any suspicions of fraud. After having some files transferred to her, the plaintiff suspected fraudulent mishandling and mismanagement of federal financial aid funds.[155]

Although Battle never spoke to anyone outside the University about the perceived fraudulent activity, she did confront internal employees about her suspicions and later met with the university's president and informed him that information and documents were being falsified.[156] Battle was later told her contract for her position as financial aid counselor would not be renewed. A state audit later uncovered "serious noncompliance with federal regulations."[157]

The plaintiff initiated a First Amendment retaliation claim.[158] The district court granted summary judgment in favor of the school; the Eleventh Circuit applied *Garcetti* and affirmed, reasoning the plaintiff admitted to an "employment duty to ensure the accuracy and completeness of student files as well as to report any mismanagement or fraud that she encounters in the student financial aid files."[159]

F. *Freitag v. Ayers*

In *Freitag v. Ayers*,[160] the Ninth Circuit addressed a case involving a female corrections officer who alleged a hostile work environment based on failure to stop male prisoners' sexual harassment of

[155] *Id*.
[156] *Id.* at 758-59.
[157] *Id.* at 759.
[158] *Id*.
[159] *Battle*, 468 F.3d at 761.
[160] 468 F.3d 528 (9th Cir. 2006).

female officers and retaliation in violation of the First Amendment.[161]

The plaintiff sent a letter detailing her allegation to a California State Senator who in turn contacted the California Office of the Inspector General and requested an investigation. Following the investigation, the Inspector General published a report of its investigation with findings that were uniformly and pointedly damning.[162] The plaintiff was suspended and later terminated. The jury found in her favor, and the Ninth Circuit concluded there was sufficient evidence for the jury to have found that her speech was a substantial motivating factor in the adverse actions.[163]

Applying *Garcetti*, the Ninth Circuit concluded that the plaintiff acted as a citizen when she communicated with the state senator and the Inspector General regarding her complaints of sexual harassment.[164] The court reasoned that it was "not part of her official tasks to complain to the Senator or the [Inspector General] about the state's failure to perform its duties properly, and specifically its failure to take corrective action to eliminate sexual harassment in the work place."[165] Accordingly, she was found to have spoken as a citizen, and her expression was constitutionally protected under the First Amendment.[166]

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[161] *Freitag*, 468 F.3d at 532.
[162] *Id.*
[163] *Id.* at 543.
[164] *Id.* at 545.
[165] *Id.*
[166] *Freitag*, 468 F.3d at 545.

G. *Skehan v. Village of Mamaroneck*

The Second Circuit, in *Skehan v. Village of Mamaroneck*,[167] addressed a First Amendment retaliation and equal protection challenge to the termination of police officers. The *Skehan* court characterized the case as concerning "charges and counter charges of official misconduct within the municipal police department and an alleged effort by the chief of police and the governing commission to silence subordinates."[168]

The plaintiffs alleged municipal officials "conspired to retaliate against them because the plaintiffs spoke out against what they claimed was a pattern of serious misconduct by fellow officers and subsequent cover-ups by" the chief of police and other high-ranking officers.[169]

The district court refused to grant qualified immunity and the Second Circuit affirmed that denial of plaintiffs' First Amendment retaliation claims.[170] The defendants argued that reports to the District Attorney's office of an arrest made without probable cause and of racially motivated law enforcement decisions were, under *Garcetti*, made pursuant to official duties as a police officer.[171] "Because no factual record had been developed on the scope" of the officers' duties, the Second Circuit expressed no view on this question and left to the district court in the first instance to consider any application of

[167] 465 F.3d 96 (2d Cir. 2006).
[168] *Skehan*, 465 F.3d at 101.
[169] *Id.*
[170] *Id.* at 108.
[171] *Id.* at 106.

Garcetti.[172]

H. *Mills v. City of Evansville*

In *Mills v. City of Evansville*,[173] the Seventh Circuit addressed a police sergeant's communications with her supervisors.[174] Mills was a sergeant with the Evansville Police Department with responsibilities that included supervising crime prevention officers. The Chief of Police decided to move some officers from crime prevention duties to active patrol, and this reduced the number of crime prevention officers under Mills' supervision. After the Chief described his plan for these changes, Mills informed senior managers that the "plan would not work, that community organizations would not let the change happen, and that sooner or later they would have to restore the old personnel assignment policies."[175] Thereafter, a reprimand was placed in Mills' personnel file and she was "removed from her supervisory position and assigned to patrol duties," which caused other losses.[176]

Mills initiated a First Amendment retaliation claim. The district court granted summary judgment for the police and the Seventh Circuit affirmed, relying upon *Garcetti*'s central proposition that, when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment pur-

[172] *Id.*
[173] 452 F.3d 646 (7th Cir. 2006).
[174] *Mills*, 452 F.3d at 647.
[175] *Id.*
[176] *Id.*

poses.[177]

Mills "was on duty," the Seventh Circuit noted, "in uniform, and engaged in discussion with her superiors, all of whom had just emerged from the chief's" briefing regarding his plan.[178] The *Mills* court concluded, "She spoke in her capacity as a public employee contributing to the formation and execution of official policy."[179] Her speech was therefore held to be unprotected.

I. *Bailey v. Department of Elementary and Secondary Education*

In *Bailey v. Department of Elementary and Secondary Education*,[180] the Eighth Circuit addressed a First Amendment retaliation claim by a terminated employee of a state education department who had a contract for consulting regarding state disability benefits claims.[181] In implementing some new procedures, the plaintiff employee "expressed concerns about what he believed to be a quota system, contending that some claimants" were being awarded benefits to which they were not entitled.[182] The employee spoke out to supervisors and managers about his concerns and was ultimately terminated. The jury returned a verdict in the plaintiff's favor, which was set aside by the trial court; the Eighth Circuit affirmed the judgment for the defendants as a matter of law.[183]

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177 *Id.* at 648.
178 *Id.*
179 *Mills*, 452 F.3d at 648.
180 451 F.3d 514 (8th Cir. 2006).
181 *Bailey*, 451 F.3d at 516.
182 *Id.*
183 *Id.* at 517, 522.

J. *Andrew v. Clark*

In *Andrew v. Clark*,[184] the district court addressed a First Amendment retaliation claim by a Baltimore police officer who had served for more than thirty years.[185] The plaintiff was serving as a Major and Commanding Officer when Baltimore police officers shot and killed a man who had barricaded himself inside of his apartment. The officer was disturbed about the manner in which the barricade incident was handled and consequently prepared an internal memorandum outlining the events and then forwarded the memo up the chain of command to the police commissioner.[186] When the commissioner did not respond, Andrew sent a copy of the memo to a Baltimore Sun reporter. After the Sun published a story based on the memo, Andrew was investigated by internal affairs and was charged with releasing confidential information.[187]

Andrew conceded that as a police commander, he was "routinely required to provide an overview, findings and recommendations as to all significant incidents including shootings that occurred within his district."[188] The district court interpreted the claim as grounded upon Andrew's contention that by giving a copy of his memo to the media "he converted what is undeniably speech effected pursuant to his employment duties into 'citizen speech' on a 'matter of public concern.' "[189] The district court found nothing in *Garcetti*

[184] 472 F. Supp. 2d 659 (D. Md. 2007).
[185] *Andrew*, 472 F. Supp. 2d at 659.
[186] *Id.* at 660.
[187] *Id.* at 660-61.
[188] *Id.* (internal quotations omitted).
[189] *Id.* at 662.

or in post *Garcetti* cases to support this view.[190] Applying *Garcetti*, the action was dismissed. "No reasonable juror could reasonably find that the 'internal memorandum' was other than 'speech pursuant to plaintiff's official duties.' "[191]

K. *Benoit v. Board of Commissioners*

In *Benoit v. Board of Commissioners*,[192] a district court addressed a First Amendment retaliation claim involving an attorney who was allegedly retaliated against for writing certain letters.[193] The plaintiff was employed by the New Orleans Levee District as senior counsel to the Board of Commissioners.[194] He gave letters to Governor Kathleen Blanco and United States Senator David Vitter regarding the way state officials in charge of New Orleans' levee system conducted their activities and directed state funds in the period leading up to the massive destruction caused by hurricane Katrina.[195] The letters detailed a nearly $100,000 payment to the Board President. Once the board learned of the letter, Benoit was suspended and eventually his resignation was forced.[196]

The district court found Benoit was acting—and thus speaking—as a citizen when he sent the letters exposing the board's transgressions because exposing the kind of transgressions he reported

[190] *Andrew*, 472 F. Supp. 2d at 662.
[191] *Id.* at 663.
[192] 459 F. Supp. 2d 513 (E.D. La. 2006).
[193] *Benoit*, 459 F. Supp. 2d at 515. The case was before the court on several motions to dismiss by the defendants, all of which were denied. *Id.* at 519.
[194] *Id.* at 516.
[195] *Id.* at 515-16.
[196] *Id.* at 516.

was not technically part of his job.[197]

L. *Shewbridge v. El Dorado Irrigation District*

In *Shewbridge v. El Dorado Irrigation District*,[198] the District Court for the Eastern District of California addressed an alleged retaliation claim by employee who served as an engineer for a municipal water district.[199] Shewbridge's basic job was to ensure a certain district project was re-licensed, a task that gave him access to an enormous amount of government documents. He also believed that "he had a personal and ethical obligation as a professional engineer to report wrong doing by the district and any potential danger to the public."[200]

After complaining of alleged unethical and illegal actions by one official, Shewbridge encountered "negative performance reviews, suspension and eventually termination" allegedly as "a pretext to silence him in retaliation for reporting wrongdoing by management officials."[201] Applying *Garcetti*, the court framed the issue as "whether the plaintiff spoke as a citizen or an employee."[202] After recounting the analysis from *Garcetti* regarding the analysis of job descriptions, the court observed that unlike *Garcetti*, there was "a factual dispute concerning whether the plaintiff's speech was made pursuant to his

[197] *Id.* at 517. The Ninth Circuit appears to have applied similar reasoning in *Freitag*. *See supra notes* 170-77 and accompanying text.
[198] 2006 WL 3741878 (E.D. Cal. 2006).
[199] *Shewbridge*, 2006 WL 3741878 at *1.
[200] *Id.*
[201] *Id.* at *1-3.
[202] *Id.* at *5.

ordinary job duties."[203]

The court emphasized the complete lack of any evidence that Shewbridge was under an official duty to report misconduct, and was unpersuaded by the argument that his subjective beliefs of "an obligation to report wrongdoing" rendered him subject to the *Garcetti* job-description analysis.[204] Shewbridge did not testify that such reporting fell within his job duties; he testified that under California regulations governing engineers, he believed he had a professional and ethical obligation to report wrong doing. "[P]laintiff clearly disputed that his speech in this case fell within any specific job duties that he had for" the district.[205] *Shewbridge* demonstrates how there can be legitimate factual disputes about what is covered by job duties, and unless defendants carry their burden to demonstrate that such speech was pursuant to official duties, summary judgment may be inappropriate.

IV. PRACTICAL ISSUES UNDER *GARCETTI*

Under *Garcetti*, one of the critical questions is determining the employee's official duties. This essentially appears to be a question of fact. The following is a suggested list of items for consideration in addressing this crucial question:

1. *Official Job Description*. This is more theoretical than actual because day-to-day work duties, in many cases, are vastly different from the theoretical structure set forth in a written job description.

2. *Documents Relating to Hiring*. These include, but are not

[203] *Id.* at *6.
[204] *Shewbridge*, 2006 WL 3741878 at *6.
[205] *Id.*

limited to, communications regarding the proposed job, offer and acceptance communications, and any other documents memorializing employment-related matters, such as duties, obligations, and functions.

3. *The Custom and Practice of the Particular Job*. Examining anything that pertains to the actual functions of the particular job is critical, especially anything relating to communications for reporting improper activities. An insightful question appears to be whether the employee would ordinarily communicate on the particular topic that is the subject of the speech dispute.

4. *Other Personnel Documents*. These items may vary but include any action plans, performance evaluation reports, letters of commendation, and any all other documents which might reflect on actual work duties.

5. *Manuals*. Any manual or other documents that memorialize personnel and related policies are essential to consider.

6. *State Administrative Codes or Statutes that Define Job Duties*. Public employees' duties and obligations are often set out, at least in part, in various statutes or administrative codes.

7. *Codes of Ethics*. While some employees are strictly subject to codes of ethics, others appear discretionary and unenforceable. A number of these codes suggest or require the reporting of improper activities and may have implications with respect to an employees' official duties or reporting functions.

From examining all of these documents, the question in light of *Garcetti* is whether there is a duty to communicate by the particu-

lar employee in the area of the speech in question. It may also be helpful to examine whether, in the past, the employer imposed any discipline for not reporting and communicating in the area of inquiry.

V. CONCLUSION

Retaliation has been a longstanding problem in American public bureaucracies. Richard Ceballos and Shirlie Green appear to be two representative examples of honorable public servants who communicated about serious wrongs and were consequently punished. For many decades, the Supreme Court interpreted the First Amendment to afford protection for public employees who communicated about a broad range of misconduct within public agencies. Through those years, the First Amendment was an effective tool to combat retaliation against whistleblowers. *Garcetti* fundamentally changed this settled doctrine. Most whistleblowers must now resort to alternative sources of protection. *Garcetti* is inconsistent with fundamental cornerstones of American constitutional law.

The result of *Garcetti* and its progeny is a more dangerous America. Government corruption and malfeasance will undoubtedly increase. Abusive bureaucrats well understand the *Garcetti* rule. They understand they can likely retaliate against those who might dare disagree with them without having to defend themselves in federal court. The Thurmond doctrine has returned to America through five justices on the Supreme Court. More than 18 million American public employees are now at greater risk of retaliation and are left without First Amendment protection for whistleblowing about a vast range of corruption and malfeasance in America.