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# WHEN ARE PUBLIC EMPLOYEES NOT REALLY PUBLIC EMPLOYEES?

## IN THE AFTERMATH OF *GARCETTI* v. *CEBALLOS*

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In business schools the corporate model of employment reigns, job performance and business efficiency are considered as the ultimate goals, and deference to the employer is understood as the norm. Business students (perhaps mirroring views of a broader public) often gripe about government waste and inefficiency. They are happy that they will be working in the private sector, where they assume that all rewards are merit-based and they will undoubtedly display the merit necessary to achieve personal success. Students often assume that public and private employees face the same issues and concerns. These students do not reflect on the reasons why the public workplace might be qualitatively different from the private one.<sup>1</sup> Instead, private and public

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1. There are certainly differences between the private and public sectors that could justify different human resource practices. For example, the public sector is neither profit-oriented nor competitive, as is the private sector. Thus, it would be possible that efficiency in employment costs would be less likely to be realized in the public sector, as is the myth or stereotype. This notion is based on the idea that public employees are overly motivated by a need for job security (regardless of their level of performance) and do not seek or obtain the high levels of achievement and performance that private employees do. An early study by Charles T. Goodsell demonstrated that these views are unlikely to be true. Thus, even though there may be rationales for business students' (and others') perceptions that public employment is less efficient or satisfying, there is at least some data that suggest that these perceptions are mere negative stereotypes. See generally CHARLES T. GOODSSELL, *THE CASE FOR BUREAUCRACY: A PUBLIC ADMINISTRATION POLEMIC* (1983) (demonstrating that public employees, contrary to misconception, were not driven by job security needs to the extent that private employees were, were less motivated by

employees are viewed as essentially fungible in the roles that they perform.<sup>2</sup> The entire concept of a public employee as playing a dual role—worker and societal/public watchdog—is virtually never considered unless I raise it as part of a class discussion. (And, without an increased emphasis on the teaching of ethics in business schools, the “public watchdog” role that even private employees should be viewed as playing in society may be overlooked by these students.)

In *Garcetti v. Ceballos*,<sup>3</sup> the Supreme Court, like a typical business student, similarly fails to consider the important distinctions between private and public employment. The decision in *Garcetti v. Ceballos*, involving a calendar deputy<sup>4</sup> who was allegedly retaliated against for bringing to the attention of his supervisors a potential deficiency in an affidavit underlying a search warrant,<sup>5</sup> demonstrates more of a concern with job performance and business efficiency than with the important societal role that public employees, or at least some public employees, play. Importantly, by issuing a bright-line rule as to when public employees lose First Amendment free speech protection,<sup>6</sup>

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pay and benefits than private employees, and were more concerned generally with self-actualization than private sector employees); James W. Driscoll et al., *Private Managers and Public Myths—Public Managers and Private Myths*, 21 SLOAN MGMT. REV. 53 (1979) (finding that most public-sector managers approach their jobs in the same manner as private-sector managers would and that stereotypes of the two groups tend to frustrate business-government relations). Of course, Goodsell’s findings could be the result of rationalization to avoid cognitive dissonance—i.e., knowing they are compensated less, the public employees that he studied might have developed beliefs that they were not motivated by compensation but instead obtained intangible rewards from their employment that somehow “made up” for their lack of pay. Or, Goodsell’s findings could suggest that at least some individuals may seek public employment precisely because they are actually motivated to seek self-actualization (e.g., via public service) instead of higher pay. See *infra* notes 41, 48.

2. Except, of course, business students believe that they will make much more money in the private sector, which they often link with greater job and life satisfaction.

3. 547 U.S. 410 (2006).

4. A calendar deputy aids the clerk of the court in all duties, especially filing papers in legal actions and proceedings and helping to maintain records of the court history.

5. *Garcetti*, 457 U.S. at 414-15.

6. *Id.* at 421.

the Court creates an artificial dichotomy between the status of official job duties or responsibilities and other important duties or responsibilities that a public employee must provide.<sup>7</sup>

My article is not about First Amendment protections *per se*, but is instead about the employment issues raised by the *Garcetti* decision. Because the *Garcetti* case has been summarized at length in this symposium issue as well as in other arenas,<sup>8</sup> I will not undergo a lengthy summarization here. Instead, I will simply state the result in Section A, indicating how it differs from prior decision-making regarding public employee speech protection. In that section I will also raise three concerns or issues that arise in conjunction with interpretation of the bright-line ruling: (1) the construction of a citizen/employee dichotomy, (2) the problem of determining when speech is compelled in the workplace, and (3) the importance of considering to whom speech related to job duties is addressed. I will then indicate in Section B why I believe that this decision leaves public employees in a legal position

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7. For example, public employees may help to keep the public informed of wrongdoing in governmental organizations or may assist the governmental organization itself to be aware of mismanagement or inefficiencies in service provision. Postal carriers may assist in the redesigning of routes and provide ideas for mail handling, even though their official job duty is to deliver the mail. University professors may influence the myriad ways in which a university operates, even though their official job duties are to teach classes and engage in research. In this article I do not question or evaluate the important functions that public employees play in alerting the public to matters of public concern such as fraud, waste, or other misconduct; instead, I take it quite for granted.

8. See the articles in this symposium issue. See generally, Patrick M. Garry, *The Constitutional Relevance of the Employer-Sovereign Relationship: Examining the Due Process Rights of Government Employees in Light of the Public Employee Speech Doctrine*, 81 ST. JOHN'S L. REV. 797 (2007) (arguing that due process rights of public employees should hinge on whether employee is acting as employee or as citizen after *Garcetti*); Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of Garcetti v. Ceballos*, 42 U. RICH. L. REV. 561 (2008) (concluding that *Garcetti* is flawed in over-protecting government as employer); Joseph O. Oluwole, *Eras in Public Employment-Free Speech Jurisprudence*, 32 VT. L. REV. 317 (2007) (examining the whistleblowing rights of teachers in light of recent Supreme Court jurisprudence); Julie A. Wenell, *Garcetti v. Ceballos: Stifling the First Amendment in the Public Workplace*, 16 WM. & MARY BILL RTS. J. 623 (2007) (criticizing the *Garcetti* decision as unduly restricting public employees' First Amendment rights).

similar to that of private employees, the latter being a group that is known to have little protection for speech in the workplace. Finally, Section C demonstrates how limiting the *Garcetti* decision can be for public employees, restricting them to only statutory remedies. In general, statutory remedies have been particularly limited for private employees in recent years. First, the Supreme Court has generally indicated a hostility toward litigation in the employment arena.<sup>9</sup> Second, federal courts tend to show deference to private employers when it comes to determinations of job responsibilities and duties and employee rights.<sup>10</sup> Thus, one implication of Section C is that by increasing their resemblance to private employees, the Supreme Court has also limited statutory remedies for public employees.

#### A. THE *GARCETTI* DECISION AND PROBLEMATIC ISSUES FOR INTERPRETATION

The Supreme Court held in *Garcetti* that although public employees have a First Amendment right to make “contributions to the civic discourse[.]”<sup>11</sup> First Amendment protection disappears when they instead speak in accordance with their official job duties.<sup>12</sup> Prior to *Garcetti*, courts analyzed public employee speech by first determining whether the speech was offered as a private citizen on a “matter[.] of public concern . . . .”<sup>13</sup> If it was, then the *Connick/Pickering* balancing test required that the speech be protected unless the employer “had an adequate justification for treating the employee differently from any

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9. See, e.g., *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 600 (2004) (holding that there is no age discrimination under the Age Discrimination in Employment Act when older workers are treated better than younger workers within the protected class); *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162, 2169 (2007) (holding that for pay discrimination cases, the filing deadline begins when the pay decision is made instead of seeing each paycheck as a new, actionable wrong under Title VII); *Smith v. City of Jackson*, 544 U.S. 228, 239 (2005) (holding that the disparate impact theory of discrimination applies under the Age Discrimination in Employment Act, but holding that the neutral practice in question need only be reasonable instead of justified by business necessity).

10. See *infra* notes 32-33.

11. *Garcetti*, 547 U.S. at 422.

12. *Id.* at 421.

13. *Id.* at 419.

other member of the general public.”<sup>14</sup> As a result of *Garcetti*, courts must first decide whether the speech is made as a result of the official, specific job duties of the public employee—not whether the employee is speaking in the role of a “citizen.” Neither the fact that the speech occurs at the workplace, nor that it addresses work-related issues, is dispositive.<sup>15</sup> Certain public employee speech is rendered unprotected if it is spoken “pursuant to” the employee’s official responsibilities.<sup>16</sup>

A few problematic interpretive concerns are immediately raised by this bright-line ruling. First, the Court creates an artificial dichotomy between two “roles” that a public employee plays. Although it is clear that when a person becomes “employed” he or she is an “employee” by definition, it is not clear that speech by that employee can easily be separated into two meaningfully distinct categories—that of a “citizen” (who is nonetheless still an employee) alerting the public to, or protecting the public from, the problematic inner workings of a federal, state, or local employer, and that of an employee (who is nonetheless still a citizen) performing his or her official job duties. Simply because speech may fulfill the latter does not mean that it cannot fulfill the former. Certainly it is the content and nature of the speech that should determine its value under the First Amendment, and not whether it is offered by a public employee qua employee or qua citizen.<sup>17</sup>

In *Garcetti*, Ceballos’ speech served both to alert his employer to potential problems with a search warrant and simultaneously to protect the public from a district attorney’s office that allegedly based a search warrant on a perjured affidavit.<sup>18</sup> There are many constituencies or

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14. *Garcetti*, 547 U.S. at 418 (discussing both *Connick v. Myers*, 461 U.S.138 (1983) and *Pickering v. Board of Ed. of Twp. High School Dist.* 205, 391 U.S. 563 (1968)). The *Connick/Pickering* balancing test consists of two inquiries: first, was the public employee speaking as a citizen on a matter of public concern? If the answer is yes, then the courts must also consider the second inquiry: did the governmental employer have an adequate justification for the manner in which it treated the employee?

15. *Id.* at 420-21.

16. *Id.* at 421.

17. Justice Stevens adopted this view in his dissenting opinion. *Id.* at 427 (Stevens, J., dissenting) (noting that “it is senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description”).

18. In fact, even though the trial court rejected the challenge to the warrant, Ceballos’ concerns about the affidavit gave rise to a hearing to challenge the

stakeholders that may have an interest in a public employee's speech, even when it is made pursuant to official job duties. Indeed, that is the essence of the "matter of public concern" test traditionally governing public employee speech—the general public can be an interested stakeholder.<sup>19</sup> In *Garcetti*, the general public had an interest in knowing about inappropriate or illegal conduct in the district attorney's office; Garcetti's speech served the purpose of protecting the public from reliance on perjured documents. The fact that his speech was "official" did not strip it of its relevance to the general citizenry; the speech still focused on a matter of public concern. The fact that Garcetti was an employee did not reduce his speech to a trivial workplace complaint. Nor did the fact that he was an employee suggest that he could not be speaking as an interested private citizen himself.<sup>20</sup> As long as the general citizenry represents an interested stakeholder, speech made in the performance of official job duties should not lose First Amendment protection—it is in furtherance of the public good.

Second, *Garcetti* does not provide sufficient guidance on the meaning of "duty" for purposes of determining how an employee's speech is a part of his or her job. Employees may speak on a variety of topics, but some of that speech is discretionary. Official job duties do not necessarily *compel* speech on a particular topic. For example, Ceballos may not have been *required* to report irregularities in the basis for obtaining the search warrant, even though speech regarding the search warrant was within the purview of his job duties and thus made "pursuant to" them. He could have simply remained quiet or perhaps declined to review the search warrant issue raised by the defense attorney<sup>21</sup> (and in this case, presumably the district attorney's office

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warrant. *Id.* at 414-15. The fact that the trial court rejected the challenge does not diminish the fact that Ceballos' efforts were serving the public interest.

19. See *Garcetti*, 547 U.S. at 419; see also *supra* text accompanying note 13.

20. To be deserving of First Amendment protection, the public employee's speech traditionally had to be offered in the employee's role as a private citizen. *Id.*

21. In *Garcetti*, Ceballos acknowledged that "it was not unusual for defense attorneys to ask calendar deputies to investigate aspects of pending cases." *Id.* at 414. Both sides conceded that Ceballos' investigation and challenge of the search warrant were part of his official job duties, so there was no discussion of the degree of discretion Ceballos might have had. *Id.* at 424.

would have preferred he take that route).<sup>22</sup> Similarly, the treasurer of a public agency may choose to express a concern about the fact that expenditures are accruing more rapidly in March than in February, but he or she may not be required to report this information on a monthly basis—the speech is discretionary, even if he or she is at some point required to give such an accounting.<sup>23</sup> Many employees, including public employees, enjoy a certain amount of discretion in their jobs. Although the Court indicates that speaking about the subject matter of the job is not dispositive, it is unclear as to whether speech pertaining to the subject matter of the job is actually a duty in the ordinary and legal sense of the word as an obligation unless there is a finding of *required speech* within the official job duties. Thus, the Court could be using the word “duty” more broadly than in the sense of a compelled activity or obligation,<sup>24</sup> leaving the door open for lower courts to do the same.

Instead of imposing such a broad conception of a public employee’s job duties, reviewing courts should consider the amount of discretion a public employee is allowed to exercise in deciding to speak. The more discretion the employee has, the less the speech should look like it was “made pursuant to” or in accordance with official job *duties* because it is less likely that such speech was actually compelled. This consideration could remove much employee speech from the sweep of *Garcetti*, so that a lack of precision in the Court’s holding may actually render *Garcetti* less restrictive of First Amendment protections than it might otherwise be.

Third, the decision raises the issue of to whom the speech must be addressed to be seen as falling within the public employee’s official job

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22. If the district attorney’s office took the position that Ceballos should not have questioned the search warrant and/or should have declined to investigate, then arguably it was not a requirement of his job that he do so.

23. For example, he or she may be required to produce quarterly reports, not monthly ones. Nonetheless, his or her comments would be made “pursuant to” official job duties—as treasurer, he or she would have access to this information in a way that no other agency official would and it would be considered a function of his or her job to report expenditures.

24. According to the American Heritage Dictionary, a duty is, *inter alia*, “[a]n act or a course of action that is required of one by position . . .” or “[a] service, function, or task assigned to one . . . .” AMERICAN HERITAGE DICTIONARY 431 (2d College ed. 1991).



duties—i.e., is speech to be considered as part of official job duties when it is offered “unofficially”?<sup>25</sup> When Ceballos notified his supervisors of the problems that arose with the affidavit, he was logically, and perhaps as required, reporting within the chain of command. Suppose Ceballos had instead expressed his concerns to a coworker, who then discussed them with Ceballos’ supervisors. Because Ceballos himself would not have engaged in the speech with his supervisors, would he still have lost his First Amendment protection? Or would his speech then not have been made within the requirements of or “pursuant to” his official job duties since the concerns would have only been expressed voluntarily and informally? Similarly, would the treasurer of the public agency receive First Amendment protection for any comments about expenditures if they were made to another employee of the agency who was not in the reporting chain of command, but who subsequently repeated the attributed comments to the relevant oversight committee? Speech concerning official job duties need not be made directly to persons in supervisory or managerial positions within the organization. Employees may instead vet their concerns or complaints with other members of their social network, particularly coworkers who may share similar concerns or be subject to similar work experiences. Most speech that managers would consider undesirable or disruptive probably circulates in this manner. In addition, employees may direct their speech to coworkers first, before offering it to supervisors. At what point would the public employee lose protection for the speech—when voluntarily offered to coworkers, or when directly given to supervisors? The Supreme Court did not provide guidelines for *when* speech could be found to be “pursuant to” that employee’s official job duties. Because this issue did not arise in *Garcetti*, but could reasonably be expected to arise in subsequent cases, there remains uncertainty regarding the effect of more casual employee discussion in public organizations. This uncertainty will likely produce a chilling effect on social interaction and

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25. In *Garcetti*, the only situation considered by the Court involved a calendar deputy speaking to his supervisors. The Court did not face the issue of whether speech made pursuant to official job duties—speech that would otherwise be recognized as falling within the purview of the employee’s job—could consist of conversations with persons internal to the organization but outside of the supervisory chain of command.

collegiality among coworkers due to fears that mere rumor or innuendo could result in job loss.

In summary, the lack of a clear definition of what constitutes speech made pursuant to official job duties makes the scope of *Garcetti*, and its impact on the lower courts, difficult to determine. *Garcetti* leaves us without a clear understanding of when employee speech is part of or sufficiently relates to performance of official job duties so as to lose First Amendment protection. The resulting uncertainty regarding which speech is undeserving of protection, coupled with *Garcetti*'s explicit restrictions on public employee speech, have a chilling effect on speech, speech that has the potential to be beneficial to the public more generally. Further, this chilling effect is similar to that felt by private employees, as discussed below.

#### B. PUBLIC EMPLOYEES AS PRIVATE EMPLOYEES

In *Garcetti*, the Supreme Court saw issues of efficiency, employer control, and employee discipline as paramount to even the public workplace, noting that although public employees may at times contribute to public discourse, they are not allowed to “perform their jobs however they see fit.”<sup>26</sup> This concern for the public employer’s right to maintain efficiency was coupled with a judicial hostility toward allowing federal courts to intrusively interfere or second guess the public employer’s judgments regarding how best to achieve that efficiency in public functioning.<sup>27</sup> Although the Court cloaked this animosity toward judicial oversight in the language of federalism and separation of powers<sup>28</sup>—a concern related only to public employers<sup>29</sup>—the truth is that federal courts indicate the same level of hostility toward intruding into *private* employer’s domains to set behavioral standards and determine

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26. *Garcetti*, 547 U.S. at 422.

27. *Id.*

28. The Court indicated a disdain for a “new, permanent, and intrusive role” that would “mandat[e] judicial oversight of communications between and among government employees and their superiors in the course of official business.” *Id.* at 423.

29. The Court appeared to be concerned with federal overreaching into those areas reserved to state and/or local governments. *Id.*

workplace efficiency. For example, the Seventh Circuit has often stated that courts should not second guess private employer's personnel judgments,<sup>30</sup> and it is not alone.<sup>31</sup> Considerable deference is given to private employers—and presumably will be given to public employers—to establish conduct standards as requirements of the job, and these conduct standards may well implicate speech.<sup>32</sup>

As has been well-discussed elsewhere, private employees have very few speech rights in the workplace.<sup>33</sup> For example, the public policy exception to employment-at-will virtually never reaches private employee speech because the speech is viewed as a “private concern” between the employer and the employee.<sup>34</sup> Few explicit statutes govern private whistleblowers, and the statutory exceptions are numerous and vary state to state.<sup>35</sup> For the most part, then, private employees may be dismissed if they engage in unacceptable speech in the workplace. Their consolation prize is that they may still be allowed to receive unemployment benefits.<sup>36</sup>

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30. *See, e.g.,* *Cardoso v. Robert Bosch Corp.*, 427 F.3d 429, 435 (2005) (noting under Title VII that “[a]s we have often stated—to a host of deaf ears, it often seems—the court is not a super-personnel department intervening whenever an employee feels he is being treated unjustly”) (internal quotations omitted).

31. *See, e.g.,* *Peterson v. Scott County*, 406 F.3d 515, 523 (8th Cir. 2005) (noting under the Age Discrimination in Employment Act that “courts do not review the wisdom or fairness of employers’ business judgments”); *Mason v. Avaya Communications, Inc.*, 357 F.3d 1114, 1122 (10th Cir. 2004) (noting that “[i]n cases arising under the ADA, we do not sit as a super personnel department that second guesses employers’ business judgments”) (internal quotations omitted).

32. This deference is quite broad, encompassing the spectrum of federal anti-discrimination law. *See supra* notes 30-31.

33. For an overview, see RICHARD A. BALES ET AL., *UNDERSTANDING EMPLOYMENT LAW* 88 (2007); STEVEN L. WILLBORN ET AL., *EMPLOYMENT LAW: CASES AND MATERIALS* 225 (4th ed. 2007) [hereinafter WILLBORN].

34. *See, e.g.,* *Foley v. Interactive Data Corp.*, 765 P.2d 373, 380 (Cal. 1988) (noting that “[w]hen the duty of an employee to disclose information to his employer serves only the private interest of the employer, the rationale underlying the *Tameny* cause of action is not implicated”).

35. For a quick discussion, see WILLBORN, *supra* note 33, at 149-52.

36. *See, e.g.,* *Meehan v. Lull Corp.*, 466 N.W.2d 14, 15 (Minn. Ct. App. 1991) (machinist who called the corporation “brain dead” not disqualified from receiving unemployment benefits because his conduct was considered neither willful nor wanton).

Public employees in professional managerial and/or supervisory roles, where job descriptions indicate a responsibility to speak about issues pertaining to the workplace, are at greatest risk from the *Garcetti* decision and therefore most strongly resemble private employees. In private employment, managerial and supervisory employees are recognized as having relatively ill-defined job duties, usually involving a fair amount of discretion, and therefore they are difficult to monitor and their performance levels are difficult to measure. As a result, they are often compensated with what are known as efficiency or above-market wages in order to provide incentives for them to monitor themselves, avoid slacking, and in general achieve high levels of performance.<sup>37</sup> There are two ways to interpret this form of compensation. First, as private employers and economists would argue, and as stated above, higher-than-normal wages provide incentives for these supervisory and high-level employees to perform their jobs in ways that are consistent with organizational efficiency. Second, however, these higher wages may also be intended to create disincentives for private employees to speak out in ways that the organization would find unacceptable, because the higher wages make job loss more costly. In other words, managerial and supervisory employees are arguably paid not just to be high-performing, but also to “keep their mouths shut” about problems within the organization.

This creates a Catch-22 for higher-level private employees. Although it can be argued that they are compensated for the risk they take when they engage in speech about private workplace problems—speech that might be part of their official job duties, and thus speech that should be encouraged—they also have disincentives to engage in such speech, particularly if it is likely that the organization would be displeased with what they have to say. Thus, as long as these employees

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37. See generally Peter Cappelli & Keith Chauvin, *An Interplant Test of the Efficiency Wage Hypothesis*, 106 Q.J. ECON. 769 (1991) (finding that efficiency wages are associated with lower levels of shirking or other unproductive behaviors); David Charny & G. Mitu Gulati, *Efficiency-Wages, Tournaments, and Discrimination: A Theory of Employment Discrimination Law for “High-Level” Jobs*, 33 HARV. C.R.-C.L. L. REV. 57 (1998) (examining efficiency wages as an “attractor” for certain types of employees in the context of understanding employment discrimination law).

have discretion about what to say and/or how to frame their remarks, the fear of losing their job may actually keep them from speaking about important workplace issues. There is a chilling effect on speech associated with efficiency wages that may parallel the chilling effect on public employee speech that is found to be made pursuant to their official job duties.

It is unclear how these chilling effects compare. Perhaps the Supreme Court's decision can be viewed as equalizing the risk of speaking for high-level private and public employees.<sup>38</sup> But what if the risk of job loss for public employees is now actually greater as a result of *Garcetti*? And, given the chilling effect of higher-than-market wages, any attempt to compensate public employees for the risk of job-related speech created by *Garcetti* could result in *less* speech from public employees—a clearly undesirable outcome. What *is* clear is that public employees pre-*Garcetti* were not being compensated for any risk that *Garcetti* has since created. These issues were not considered by the Supreme Court, but the potential value to the public of public employee speech, even when it is pursuant to official job duties, requires careful consideration of the relative chilling effects on private and public employee speech. It would certainly be ironic if a greater chilling effect exists for high-level public employees.

Indeed, public employees in general may never have been compensated sufficiently for the broad tasks that they perform. It may well be that part of the more profound motivation for seeking and holding a position in the public sector is, as noted by Justice Souter, to

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38. Relative levels of pay between private and public employees would be a consideration here. It seems likely that public employees make less than their private counterparts due to lack of resources, restrictive pay grades, promotion policies, etc. However, one study has indicated that there is actually higher pay in the public sector for employees having higher education levels, but that employees having lower levels of education receive more pay in the private sector. Rebecca M. Blank, *An Analysis of Workers' Choice Between Employment in the Public and Private Sectors*, 38 INDUS. & LAB. REL. REV. 211, 213 (1985). Thus, it is possible that higher-level public employees actually earn more than their private sector counterparts, but it would be premature to conclude this based on one rather dated study.

seek “to unite . . . avocation and . . . vocation.”<sup>39</sup> Public *employment* may be viewed as public *service*; the importance of speaking critically from the insider’s perspective may be what leads at least some people to public employment in the first place. Many public employees feel a strong commitment to providing the services that only governmental agencies and organizations seem to make available.<sup>40</sup> The *Garcetti* decision is in conflict with the public employee as public servant metaphor, putting these employees in a particular bind—the public service aspect of the jobs that they perform has now become a very real private hazard.<sup>41</sup>

One argument that is commonly given for private employer control of employee speech is that employers require loyalty from their employees, and therefore employers discipline those workers who engage in “disloyal” speech.<sup>42</sup> This is an interesting, though I believe disingenuous argument. The issue is not loyalty per se. Today private employers make only short-term commitments to their employees, so that the need for “loyalty” in the traditional sense of keeping employees on the job is greatly attenuated.<sup>43</sup> What private employers really seek is

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39. *Garcetti v. Ceballos*, 547 U.S. 410, 432 (Souter, J., dissenting) (quoting ROBERT FROST, *Two Tramps In Mud Time* (1934), reprinted in COLLECTED POEMS, PROSE, & PLAYS 251, 252 (Richard Poirier & Mark Richardson eds., 1995)).

40. It may be true that many individuals are better suited to work in the public sector for that reason. For one individual’s description of what it was like to leave public employment as a city manager to enter the managerial ranks of the private sector, see Dave Millheim, *Public or Private Sector Work: The Eternal Question*, PUB. MGMT., June 1999, at 18 (discussing pros and cons of public versus private sector employment).

41. Note that the public service aspect of a public employee’s job is not solely exemplified by external speech. Being able to speak internally about mismanagement or other problems can be more efficient in producing change. When internal speech is successful in eliminating fraud, waste, or other organizational difficulties, the public benefits even though it may not have been aware of the problems a priori.

42. What constitutes “disloyal” speech, is, of course, decided by the private employer because the private employee has so few free speech rights. Disloyalty could refer to speech that derogates the employer or the employer’s activities, either internally or externally to the organization. Or, it could be speech that the employer views as disruptive to workplace activities or the workday schedule.

43. For a discussion of the “new” employment relationship between private employees and their employers, see KATHERINE V.W. STONE, FROM WIDGETS TO

sufficient commitment from their employees so that they will perform at high levels while employed and make the employer productive and profitable over that relative short-term. Performance is viewed in much broader terms than ever before, generally including both contextual as well as task performance—i.e., “good citizen” behaviors as well as job performance behaviors.<sup>44</sup> These “good citizen” behaviors could easily include “appropriate” speech, speech that represents the private employer’s values and furthers the needs or goals of the private employer’s inner or outer workings. Undesirable speech, or speech that somehow interferes with the private employer’s values, goals, or needs, can readily be viewed as coming from uncommitted or disaffected employees and can be labeled as counterproductive or even deviant behavior.<sup>45</sup> Even if the “good citizen” behaviors are excluded from performance appraisal, as is sometimes claimed by human resource managers,<sup>46</sup> so that no explicit “brownie points” are given for them, problematic and undesirable speech can easily earn performance demerits and be the basis for discipline or dismissal. Exercising freedom of speech is frequently synonymous with being unemployed in the private sector. This is not about employee loyalty per se, but about the private employer’s desire for economic efficiency and workplace control.

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DIGITS (2004) (examining adequacy of employment and labor laws in the context of the modern, less long-term, relationship between employer and employee).

44. Contextual performance (sometimes referred to as organizational citizenship behaviors) reflects those tasks that an employee performs that although not required, are nonetheless beneficial to the organization. *See, e.g.*, ANGELO S. DENISI & RICKY W. GRIFFIN, *HUMAN RESOURCE MANAGEMENT* (2d ed. 2005) at 303-04. Of course, it could be argued that private employers sometimes make contextual performance an implicit part of an employee’s official job duties, thereby affecting performance appraisal and other outcomes that result (such as pay, promotion, etc.). Although human resource specialists may argue that it is unreasonable to expect contextual performance from all employees, employers certainly benefit substantially from employees that go “the extra mile” to aid the organization, making it likely that engaging in contextual performance can result in more favorable appraisals for employees. *See id.*

45. The scholarly management literature abounds with articles discussing various types of undesirable employee behavior, ranging from the merely “uncivil” to “counterproductive” to “deviant.” For a review, see Ricky W. Griffin & Yvette P. Lopez, “*Bad Behavior*” in *Organizations: A Review and Typology for Future Research*, 31 *J. MGMT.* 988 (2005).

46. *See id.*

Public employers, on the other hand, may not have the same concerns about loyalty *or* commitment. What motivates people to work in the public sector in the first place—a desire, at least in part, to provide public service—may be sufficient to guarantee loyalty and/or commitment.<sup>47</sup> Thus, even if private employers may sanction employee speech in the interest of promoting greater commitment, public employers arguably do not have this same need. Public employees who seek to serve the public may also be seeking to perform their jobs at a high level because to accomplish one, they must do the other. The two interests may be aligned. Although accomplishing this dual goal may, at times, involve speaking out about problematic inner workings of the government entity, as it did in *Garcetti*, there was no claim that Ceballos was not being conscientious in the performance of his duties or that he was not a competent calendar deputy.<sup>48</sup> Although the Court suggests that what happened to Ceballos was simply a matter of performance

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47. Unfortunately, there are no recent, comprehensive studies of differences in personal characteristics of those who choose public versus private employment in the United States. A 1982 study by Barry Z. Posner and Warren H. Schmidt found that public administrators emphasized instrumental values such as capability, cheerfulness, helpfulness, and imagination more than private sector administrators did. Barry Z. Posner & Warren H. Schmidt, *What Kind of People Enter the Public and Private Sectors?*, HUM. RESOURCE MGMT. Summer 1982, at 35, 39. Public administrators also placed more emphasis on terminal values such as world peace, equality, and freedom than did private sector administrators. *Id.* However, the rank order of the values was quite similar for public and private sector administrators, suggesting more overall similarity than difference. *Id.* at 40. Personality profiles for the two sets of administrators in the study were remarkably similar. *Id.* Of particular interest were two key differences between public and private administrators reflecting the importance of occupational values: being recognized for their work and performing work that contributed to the overall societal good were more important for public administrators. *Id.* This latter finding supports the notion that public employees may be motivated by a desire for public service.

Additionally, the study by Blank, *supra* note 38, found that veterans and persons of racial minority status were more likely to be employed in the public, as opposed to the private, sector. They were also more likely to be employed in federal, as opposed to state, government. *Id.* at 219. Because important social policies may be more easily enforced at the federal level, Blank suggests that this may be an important source of attraction for these workers. *Id.* at 216.

48. According to the Supreme Court's recounting, the district attorney's office cited "legitimate reasons such as staffing needs" as the reasons for the actions taken against Ceballos. *Garcetti v. Ceballos*, 547 U.S. 410, 415 (2006).



evaluation,<sup>49</sup> the facts seem to indicate that his job periodically required him to investigate the circumstances underlying a warrant and make recommendations based on his investigations. He certainly complied with this requirement. Any negative performance evaluation would therefore seem to have been based on the manner in which he engaged in private sector notions of contextual performance—he was not being a “good citizen” of the district attorney’s office when he expressed opinions contrary to those of his supervisor. In other words, the private employment model was sanctioned by the Court, without adequate questioning of whether it actually should apply. The “good citizen” from an external, public sector perspective may not be the “good citizen” from an internal, private sector perspective.

The Court’s focus may have been less on the public employee’s performance appraisal per se and more on the public employer’s right to speak as it wishes, a right that allows a public employer to control what it has “commissioned or created.”<sup>50</sup> Protection of governmental entity speech is, in fact, the first rationale presented by the Supreme Court for its holding.<sup>51</sup> Thus, the district attorney’s office may have had the right to present a unified position on the adequacy of the search warrant and whether to proceed with criminal prosecution. The irony is that this perspective should be related to limiting a public employee’s right to engage in speech *external* to the public entity instead of *internal* to it. Instead, the Supreme Court’s holding in *Garcetti* would appear to apply primarily to internal speech, because it is when speaking internally that

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49. *Id.* at 422 (“The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.”).

50. *Id.*

51. *Id.* The Court then addresses public employers’ rights to control their operations, but notes as well that public employers have the right to guarantee that “official communications are accurate, demonstrate sound judgment, and promote the employer’s mission.” *Id.* at 423 (emphasis added). Thus, a strong parallel is created between the degree of workplace control held by private and public employers.

most public employees would be engaging in speech pursuant to their official job duties.<sup>52</sup>

Had Ceballos discussed his concerns about the affidavit underlying the search warrant in a letter to the local newspaper, his speech would have been akin to that of a private citizen and therefore potentially deserving of First Amendment protection.<sup>53</sup> But it is precisely that type of speaking out that could thwart the efforts of the district attorney to present a unified front regarding, and gain public support for, a particular criminal prosecution. Ceballos instead spoke only internally about his concerns, in a way that did not appear to affect the district attorney's public "speech" about the prosecution, if there was any, and in doing so lost First Amendment protection. Contrary to the Court's concern regarding external governmental entity speech, day-to-day control of internal workplace operations, a major private employer concern, was made of primary importance to public employers.

In summary, the Supreme Court decision in *Garcetti* treats public employees as though they are private employees, applying the notion of private employer control of the workplace to the public sector. Public employees no longer will feel more freedom than private employees to speak internally about wrongdoing or inequities in their workplaces. "Managerial discretion," a term often used in private employment law cases, is now the mantra for public employment law cases as well.<sup>54</sup>

### C. PUBLIC EMPLOYEES AND STATUTORY REMEDIES

Without First Amendment protection for speech made pursuant to their official job duties, public employees now enjoy only the types of protections that private employees enjoy for their undesirable workplace speech. For example, they may be protected by the law regarding wrongful dismissal (contractual or tort), intentional infliction of

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52. The Court did not directly address the issue of public employees who are required, as part of their official job duties, to make public statements. The *Garcetti* holding would appear to apply to these public employees as well, however.

53. There is no indication in the case that Ceballos was required, as part of his official job duties, to communicate with the public.

54. *Garcetti*, 547 U.S. at 422 (discussing giving "government employers sufficient discretion to manage their operations").

emotional distress, and statutory laws regarding whistle-blowing or retaliation.<sup>55</sup> In particular, the law of retaliation may be one of the most fruitful routes for a public employee to take, because many substantive statutory protections include anti-retaliation provisions within them. For example, Title VII contains an anti-retaliation provision that the Supreme Court, quite uncharacteristically of late, has construed rather broadly.<sup>56</sup>

Consider the case of Deanna Freitag, who worked at the Pelican Bay State Prison, a maximum security prison, in Crescent City, California.<sup>57</sup> Freitag was employed as a correctional officer in the Secure Housing Unit (SHU), known for housing some of the state's most violent criminals.<sup>58</sup> Throughout her career at the SHU, Freitag was repeatedly subjected to sexually derogatory obscenities by the inmates, as well as their exhibitionist masturbation, either in the yard surrounding the control tower or in the shower area. The inmates continually ignored her orders to stop.<sup>59</sup>

Freitag made various attempts to discipline the errant inmates. First, she completed a 115 Form disciplinary report on an inmate who yelled sexual obscenities at her and threatened to kill her, despite the fact that her direct supervisor advised her not to complete the report.<sup>60</sup> She also completed several 128 Forms for a variety of incidents of inmate exhibitionist masturbation, including one when an inmate ejaculated on a tray she was attempting to clear.<sup>61</sup> Although she attempted to discipline one inmate with ten days of escort status, which had been approved by the supervising captain, another lieutenant discarded the relevant 128 Form and ordered her not to do so, claiming that Freitag was the only

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55. The majority opinion in *Garcetti* also notes that a variety of whistleblower and labor laws could be available for public employees. *Garcetti*, 547 U.S. at 425. See generally WILLBORN, *supra* note 34 (suggesting legal protections available to employers).

56. *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006) (interpreting Title VII's anti-retaliation provision, 42 U.S.C. § 2000e-3(a) (2000)).

57. *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006).

58. *Id.* at 533.

59. *Id.* at 533-34.

60. *Id.* at 533. The 115 Form in this circumstance charged the inmate with threatening a public official.

61. *Id.* The 128 Forms typically did not form the basis for disciplinary action but instead are placed in inmates' files. *Id.*

officer who had problems with the inmate, and in any event “it [was] only sex.”<sup>62</sup>

Her problems with the inmates continued, and she repeatedly filled out forms, charging at least one of the inmates with indecent exposure on multiple occasions.<sup>63</sup> However, she believed that her forms were either discounted or discarded and that the violations she was charging were being dropped or lessened. At one point she notified the warden at Pelican Bay that her “authority and discretion [were being] undermined.”<sup>64</sup> Later, she notified the associate warden in charge of the SHU that her supervisors were dragging their feet in responding to the sexual abuse she was enduring, requesting that the California Department of Corrections and Rehabilitation (CDCR) policy of prosecuting repeat offenders be implemented.<sup>65</sup>

Finally, she wrote a letter to the director of CDCR, alleging that she was working in a hostile work environment and blaming her supervisors for their lack of support and unwillingness to stop the harassment.<sup>66</sup> The associate warden and another official of the prison informed her approximately one week later that she was being relieved of duty at the SHU pending a psychiatric evaluation and that the evaluation was necessitated by her “incoherent” allegations regarding harassment by the inmates.<sup>67</sup> The associate warden threatened to terminate Freitag.<sup>68</sup> Instead, however, Freitag was eventually deemed fit to return to duty, where she was immediately subjected to exhibitionist masturbation by one of the problematic inmates. She again filed a 115 Form and wrote a letter to the Pelican Bay Warden requesting additional training for dealing with inmate behavioral problems.<sup>69</sup> Within two weeks, the warden had authorized an internal affairs investigation of Freitag, claiming that she had made “slandorous accusations against other staff.”<sup>70</sup>

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62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 534.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

Freitag then filed a formal complaint under Title VII for sexual harassment and retaliation.<sup>71</sup> She also sent a letter to Richard Polanco, a California state Senator, in which she complained about the sexually abusive climate in the SHU and the lack of official support, followed by another letter to both Polanco and the Director of the California Department of Corrections, further describing the mistreatment she had received by both the inmates and staff.<sup>72</sup> Finally, the California Office of the Inspector General (IG) began an investigation based on the allegations in Freitag's letters, and Freitag cooperated fully in this investigation.<sup>73</sup>

The IG ultimately published a damning report, finding that female correctional officers were routinely subjected to lewd, exhibitionist masturbation and that the supervisors and administrators at Pelican Bay had neither responded appropriately to complaints nor stopped the inappropriate behavior.<sup>74</sup> The report criticized administrators up the chain of command, noting that the warden had taken no actions to stop the sexual harassment and that the prison's EEOC coordinator had even remarked that the "reason the inmates hit on [the female correctional officers] is that they're a bunch of lesbians."<sup>75</sup> Prior to the issuance of the IG report, internal affairs continued to investigate Freitag, finding that she had made false accusations.<sup>76</sup> This led to her termination shortly before the IG report was issued.<sup>77</sup>

At trial for her Title VII claims and a First Amendment claim for retaliation, a jury unanimously found for Freitag, awarding her \$500,000 in economic damages, \$100,000 in non-economic damages, and \$100 in punitive damages against the warden and other named individuals, all of whom were found jointly and severally liable for the entire amount of the compensatory damages.<sup>78</sup> For our purposes, given *Garcetti*, we are concerned in particular with her First Amendment retaliation claim. The

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71. *Id.*

72. *Id.* at 535.

73. *Id.*

74. *Id.*

75. *Id.* (internal quotations omitted).

76. *Id.* at 535-36.

77. *Id.* at 536.

78. *Id.* at 537.

*Freitag* defendants challenged their liability under this claim, in particular claiming that her speech was not deserving of First Amendment protection.<sup>79</sup>

The appellate court remanded *Freitag's* case to the district court, holding that in light of *Garcetti*, the jury may not have received proper instructions as to which speech was covered by the First Amendment.<sup>80</sup> First, the court noted that certain aspects of her speech were clearly protected by the First Amendment—namely, her speech that participated in the IG's investigation, her speech that reported problems to the IG, and her speech that informed the state senator of circumstances at Pelican Bay.<sup>81</sup> This speech, consisting of complaints to a public official and an independent state agency, was conducted in her role as a private citizen, and addressed a matter of public concern, according to the appellate court.<sup>82</sup> The court noted that it was not her official duty, but her duty "as a citizen" to subject this form of malfeasance in the prison system to broader public scrutiny.<sup>83</sup> Additionally, the court believed that the public interest was great in this case, noting that "[a] vast majority of our state's prisoners will reenter the general population some day . . . . It certainly would be of grave concern if those inmates were being released into our neighborhoods from an environment in which the State of California condoned sexually abusive behavior and the harassment of women."<sup>84</sup>

Not all of *Freitag's* speech was deemed worthy of First Amendment protection, however. The internal forms that she prepared and her complaints to the associate warden, the warden, and other prison personnel were made pursuant to her official job duties as a correctional officer, according to the appellate court.<sup>85</sup> Thus, this speech should have been excluded from the jury instruction on the First Amendment issue.<sup>86</sup> Finally, the letter that *Freitag* wrote to the Director of the California

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79. *Id.* at 543.

80. *Id.* at 543-46.

81. *Id.* at 545.

82. *Id.*

83. *Id.* (emphasis omitted)

84. *Id.* at 545-46.

85. *Id.* at 546.

86. On remand, the district court must make a determination of whether its inclusion constituted harmless error. *Id.*

Department of Corrections had ambiguous status with regard to First Amendment protection; using the *Garcetti* standard, the appellate court was unsure whether it was “expected” that a correctional officer “may” or “must” air a sexual harassment grievance to the level of the Director.<sup>87</sup> On remand, the district court would have to address this issue.<sup>88</sup>

Thus, the portions of Freitag’s speech that were made internally—those that addressed the administrative officers of the prison itself, including the associate warden and warden, were found to be speech without First Amendment protection. Only if they can receive protection under her other claims—e.g., her Title VII claim of retaliation—can she receive remedy for them.<sup>89</sup> With regard to this speech, she is in no better legal position than that of a private employee.

But why must she complain to political or other outside governmental officials in order to preserve her First Amendment claims? Like Ceballos, she was attempting to protect the public from an allegedly corrupt governmental entity by working to fix the problems within the entity herself. In Ceballos’ case, overreaching by the district attorney’s office could have led to more improperly issued search warrants and easy (but inappropriate) conviction, something that the public has a right to be concerned about. In Freitag’s case, failure to prosecute inappropriate sexual behavior by inmates and failure to take claims of sexual abuse seriously could have led to the ultimate release of prisoners who would be ill-prepared to adapt to the norms of a civilized society, particularly with regard to its treatment of women. Regardless of the positions taken by either public employer, the public service performed by both Ceballos and Freitag was conscientious and noteworthy, helping to protect the public from potential misconduct. The public was an interested stakeholder in both cases. There was no assessment in either case of the amount of so-called “disruption” that may have occurred in their respective workplaces, because *Garcetti* does not require any such

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87. *Id.*

88. *Id.* Note that the appellate court did not provide clear guidance on what is meant by “made pursuant to official job duties.” Words like “expected” and “may” do not suggest that “pursuant to official job duties” be restricted to *required* speech, but could in fact be broader.

89. Here, the internal speech itself would have to be found causally linked to her dismissal.

finding. Instead, the *potential* for such disruption—the theoretical possibility of loss of employer control—implies that speech made in pursuit of official job duties no longer merits First Amendment protection.<sup>90</sup>

Additionally, even in *Freitag* there was no clear delineation of whether Freitag's speech was compelled or discretionary or to whom it had to be made to be considered "pursuant to official job duties." She certainly had the right to initiate discipline for inmates that engaged in inappropriate sexual behavior, but whether she was required to do so is unclear.<sup>91</sup> Soliciting the aid of appropriate supervisory personnel was undoubtedly within her job description, and may have been required if inmates disregarded her other attempts to control them. There was no discussion of which personnel were "appropriate" for this purpose, however. Her complaints to the associate warden and warden that nothing was being done and that her authority was undermined were arguably not required, even if these were the appropriate personnel to receive such complaints. She was not reporting inmate behavior per se; she was lamenting the lack of follow-through and support from prison officials. Instead, these complaints can be viewed as taking important steps to protect herself in the event of a sexual harassment lawsuit. Nonetheless, all of Freitag's internal speech was viewed as being made pursuant to official job duties.

In Ceballos' case, because all of his discipline appeared to be based on unprotected speech of this type, he had no recourse.<sup>92</sup> In

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90. The Supreme Court noted that speech can be restricted by the employer when it "has some potential" to effect the operation of the public employer. *Garcetti*, 547 at 418. Justice Stevens, in his dissenting opinion, noted that he did not consider Ceballos' speech "inflammatory or misguided," which suggests that it was not disruptive but merely undesired. *Id.* at 426 (Stevens, J., dissenting) (referring to the majority opinion, *id.*, at 423). Note the similarity with private employment situations, where "disloyal" speech could be speech that an employer considers to be disruptive. *See supra* note 43.

91. In fact, one lieutenant ordered her not to initiate discipline in at least one instance. *See supra* note 61 and accompanying text.

92. The majority did not mention some of Ceballos' other activities, which could also have given rise to his alleged discipline. For example, Ceballos had spoken at the Mexican-American Bar Association meeting about misconduct in the Sheriff's Department and problems with policies in the District Attorney's office. *Garcetti*, 547 U.S. at 443 (Souter, J., dissenting). Whether any of this additional



Freitag's case, because she persistently presented her case to elected officials, some of her speech maintained First Amendment protection. However, the fact that she sought a remedy within the SHU and Pelican Bay prison system meant that she could potentially be terminated for *that* speech.<sup>93</sup>

### CONCLUSION

The *Garcetti* case, although representing a line of employer-oriented Supreme Court cases that demonstrate hostility toward interference with even a public employer's business judgment, goes even further in suggesting that there is a bright-line between public employee speech offered in pursuit of official job duties and other speech that public employees might offer. I have suggested in this article that the Supreme Court is looking through the lens of a typical business student, failing to understand the important service role attached to public employment. In doing so, the Supreme Court has allowed the loss or at least devaluation of an important aspect of public employment which should be of concern to all of us as citizens—the ethical, public watchdog role that public employees are in a unique position to provide. Speech made pursuant to official job duties could address “official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety,”<sup>94</sup> but it would no longer be protected by the First Amendment when it is made internally.

*Garcetti* imposes the private employment model for workplace speech on the public sector. Although this model appears to provide for greater employer control of speech, and thus greater employer control of workplace functioning, it does not necessarily lead to enhanced

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speech could have been found to have resulted in any disciplinary measures, and whether it would have been protected under a statute such as Title VII, is unclear.

93. Because she brought a claim of retaliation under Title VII, her speech found to have been made pursuant to her official job duties—regarding sexual harassment and the lack of the prison's willingness to address it—may also be found to have led to her dismissal in violation of Title VII's anti-retaliation provision. 42 U.S.C. § 2000e-3(a) (2000).

94. *Garcetti*, 547 U.S. at 435 (Souter, J., dissenting). Here, Justices Souter, Stevens, and Ginsberg suggest that the *Pickering* test could be used in a manner such that only these types of comments could favor the employee.

workplace efficiency. To the extent that the organization itself is in the best position to correct problematic workplace issues, it is more efficient to have speech directed internally, to the personnel that need to be aware of wrongdoing or dangerous situations and are able to address it swiftly and effectively. This avenue now seems to be foreclosed for public employees who speak pursuant to their official job duties. Only by speaking outside of their official job duties, or by speaking to external audiences, can public employees receive First Amendment protection for speech that their employers find problematic, threatening, or disruptive.