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### Completing Government Speech's Unfinished Business: Clipping Garcetti's Wings and Addressing Scholarship and Teaching

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# Completing Government Speech's Unfinished Business: Clipping *Garcetti*'s Wings and Addressing Scholarship and Teaching

by EDWARD J. SCHOEN\*

## Introduction

In *Garcetti v. Ceballos*,<sup>1</sup> the Court held that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”<sup>2</sup> In making this decision, the Court stated government speech trumps government employee speech whenever the employee’s expression “owes its existence to [the] employee’s professional responsibilities,”<sup>3</sup> and is created pursuant to the duties the employee is actually expected to perform.<sup>4</sup>

The language quoted above has triggered a surge of circuit court decisions dismissing 42 U.S.C. § 1983 employment retaliation claims, because the courts usually determined the expression was derived from the government employees’ actual duties. The U.S. Supreme Court recently

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1. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

2. *Id.* at 421.

3. *Id.* at 421–22.

4. *Id.* at 424–25. In *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015), the U.S. Supreme Court expanded the role of government speech to cover specialty license plates issued by the Texas Department of Motor Vehicles (“DMV”). The Sons of Confederate Veterans asked the DMV to issue a specialty plate featuring the Confederate battle flag. When DMV refused to approve the specialty plate, the Sons of Confederate Veterans sued, claiming its First Amendment rights had been violated. The U.S. Supreme Court ruled that specialty license plates are a form of government speech, because, in approving specialty plates, the state is engaging in expressive conduct, and, when the government speaks, “it is not barred by the Free Speech Clause from determining the content of what it says.” *Walker*, 135 S. Ct. at 2246; David L. Hudson, Jr., *October 2014 Term: First Amendment Review*, 42 A.B.A. PREVIEW 282, 282 (2015).

addressed this issue in *Lane v. Franks*,<sup>5</sup> and decided that a government employee's expression is not automatically protected government worker speech simply because the government employee acquired the information through the course of public employment. Rather, the speech at issue must ordinarily be made within the scope of the employee's duties to fall under the umbrella of government worker speech.<sup>6</sup>

*Garcetti* triggered a second development by disclaiming whether government speech applies "in the same manner to a case involving speech related to scholarship or teaching."<sup>7</sup> This disclaimer has created inconsistency and doubt in assessing § 1983 public worker employment retaliation claims pursued by faculty members at public colleges and universities.

The purpose of this article is to assess the status of these two developments. Part I of this article examines the evolution of the *Pickering/Connick/Garcetti* test for determining whether government worker speech is protected by the First Amendment. Part II of this article examines multiple circuit court decisions following the *Garcetti* application to § 1983 government worker employment retaliation claims, and demonstrates that, if the U.S. Supreme Court's purpose in deciding *Garcetti* was the elimination of § 1983 government worker employment retaliation claims, it has been wildly successful. Part III of this article examines the U.S. Supreme Court decision in *Lane*, and subsequent appellate decisions, to determine how *Lane*'s qualifications of *Garcetti* are playing out. Part IV of this Article examines several appellate court cases dealing with § 1983 government worker employment retaliation claims pursued by public college and university professors to determine whether academic freedom in teaching and research plays a role in providing First Amendment protection of speech following the *Garcetti* disclaimer.

### **I. Evolution of the *Pickering/Connick/Ceballos* Test**

Almost fifty years ago in a landmark decision, *Pickering v. Board of Education*,<sup>8</sup> the U.S. Supreme Court ruled that the First Amendment provides limited protection of government workers' expression. Marvin Pickering, a high school teacher, wrote a letter criticizing the school board's allocation of funds between academic and athletic programs. The letter was published in a local newspaper in the middle of a campaign by the school board to gain voter approval of a tax increase, and the school

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5. *Lane v. Franks*, 134 S. Ct. 2369 (2014).

6. *Id.* at 2379.

7. *Garcetti*, 547 U.S. at 425.

8. *Pickering v. Board of Education*, 391 U.S. 563 (1968).

board fired Pickering in retaliation.<sup>9</sup> The U.S. Supreme Court noted that the government funding of education is a matter of public concern, that teachers, as members of the community, have informed opinions on how school funds should be spent and should be able to speak freely on such questions without fear of retaliation, and that teachers' expression on matters of public concern must be given First Amendment protection, even if it contains factual errors.<sup>10</sup> In deciding that the school board's decision to terminate Pickering's employment violated his First Amendment rights, the U.S. Supreme Court balanced "the interests of the teacher, 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."<sup>11</sup> Because Pickering's letter did not disrupt the harmony of his workplace or affect the delivery of educational services, because Pickering did not have a close working relationship with either school board members or the superintendent at whom his criticisms were directed, and because Pickering's letter addressed and informed a matter of public concern best resolved through open debate, his dismissal from public employment violated the First Amendment.<sup>12</sup> In short, "to the extent the employee's speech contributes to debate about issues of public concern without negatively impacting the government workplace or operations, it should be permitted; in contrast, to the extent the employee's speech interferes with efficient delivery of public services by the government agency or department and fails to contribute to public debate about issues of public concern, it can be restrained."<sup>13</sup>

In 1983, the U.S. Supreme Court modified the *Pickering* balancing test in *Connick v. Meyers*.<sup>14</sup> Advised she would be transferred to a different section of criminal court, Assistant District Attorney Sheila Myers distributed a questionnaire to fifteen other assistant district attorneys seeking their views about the transfer policy, office morale, grievance procedures, confidence in superiors, and pressure to work in political campaigns. District Attorney Harry Connick learned of the survey and fired Myers. Myers filed suit under 42 U.S.C. § 1983,<sup>15</sup> contending her

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9. *Id.* at 564.

10. *Id.* at 571–72, 574–75.

11. *Id.* at 568.

12. *Id.* at 569–70, 572–74.

13. Edward J. Schoen and Joseph S. Falchek, *Garcetti v. Ceballos: Government Workers, Whistleblowing, and the First Amendment—Let the Leaks Begin*, 17 S. LAW J. 131, 135 (2007).

14. *Connick v. Meyers*, 461 U.S. 138 (1968).

15. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the

employment was terminated in retaliation for her exercising her First Amendment rights.<sup>16</sup> In applying the *Pickering* balancing test, the U.S. Supreme Court declared that the court must preliminarily determine whether or not the government worker's expression addressed a matter of public concern by examining the expression's content, form and context.<sup>17</sup> The Court decided that, with one exception, Myers' inquiries were designed to fuel her dispute with her superiors, which was an internal personnel matter without public interest. Because one aspect of Myers' questionnaire—pressure to work on political campaigns—addressed a matter of public concern, the district attorney was required to justify the termination of Myers' employment so that the Court could balance the First Amendment value of the expression and its impact on the delivery of government services.<sup>18</sup> The Court then easily concluded that Myers' expression had little value as a matter of public concern and that its limited value was overwhelmingly outweighed by the survey's negative effects: disrupting office operations, undermining the district attorney's authority, and straining office working relationships. Hence Connick's firing of Myers did not violate the First Amendment.<sup>19</sup>

Over the next two decades, the *Pickering/Connick* test—determining whether the worker's expression addressed a matter of public concern and, if so, weighing the First Amendment value of the public employee's expression as a citizen and the interest of the government to promote efficiency in delivery of public services—prevailed in ascertaining whether negative employment actions by employers in retaliation for the public employees' expression violated the First Amendment.<sup>20</sup> That balancing test, however, would be undermined in 2006 by the U.S. Supreme court decision in *Garcetti v. Ceballos*.<sup>21</sup>

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party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia." 42 U.S.C. § 1983 (R.S. § 1979; Pub. L. No. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284; Pub. L. No. 104-317, Title III, § 309(e), Oct. 19, 1996, 110 Stat. 3853.).

16. *Myers*, 461 U.S. at 141.

17. *Id.* at 146–47.

18. *Id.* at 150.

19. *Id.* at 154.

20. See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284 (1987); *Rankin v. McPherson*, 483 U.S. 378 (1987); *Waters v. Churchill*, 511 U.S. 661 (1994) (plurality opinion); *San Diego v. Roe*, 543 U.S. 77 (2004) (*per curiam*); and *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668 (1996).

21. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

In *Garcetti*, the U.S. Supreme Court held that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”<sup>22</sup> Richard Ceballos, a deputy district attorney for Los Angeles County, concerned about the accuracy of an affidavit used to obtain a search warrant, recommended to his superiors that a case assigned to him be dismissed and, when called as a witness by defense counsel, recounted his observations about the affidavit at a hearing on a motion to traverse.<sup>23</sup> The trial court rejected the defendant’s challenge to the warrant, and Ceballos was demoted from calendar deputy to trial deputy, transferred to another courthouse, and denied a promotion. Claiming these actions were retaliatory, Ceballos pursued a claim under 42 U.S.C. § 1983 for violation of his First Amendment rights.<sup>24</sup>

The U.S. Supreme Court rejected Ceballos’ claim, concluding “the First Amendment does not prohibit managerial discipline based on an employee’s expressions made pursuant to official responsibilities.”<sup>25</sup> The Court emphasized two factors: Ceballos prepared his memoranda recommending the dismissal of the case as part of his official duties as a calendar deputy, and in carrying out his professional duties, Ceballos was acting as a government employee, not a citizen.<sup>26</sup> In rejecting Ceballos’ claim, the Court insisted that government employers must have discretion to manage their operations and are entitled to control government employee speech made in their professional capacity in order to insure that “official communications are accurate, demonstrate sound judgment, and promote the employer’s mission.”<sup>27</sup> Providing First Amendment protection of government employees’ speech made in their professional capacity “would

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22. *Id.* at 421.

23. *Id.* at 415. A motion to traverse is employed to attack the truth of the information contained in the warrant affidavit. The burden of proof imposed on the defendant in such a motion is steep. “Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant’s request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit’s false material set to one side, the affidavit’s remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the fact of the affidavit.” *Franks v. Delaware*, 438 U.S. 154, 155–56 (1978).

24. *Garcetti*, 547 U.S. at 415.

25. *Id.* at 424.

26. *Id.* at 421–22.

27. *Id.*

commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their supervisors in the course of official business” and “demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.”<sup>28</sup> Indeed, the Court noted, “[r]estricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.”<sup>29</sup>

Two major issues emerged from *Garcetti*. First, in deciding government speech trumps government employee speech whenever the employee’s expression “owes its existence to [the] employee’s professional responsibilities”<sup>30</sup> and is created pursuant “to the duties the employee is actually expected to perform,”<sup>31</sup> the U.S. Supreme Court triggered a torrent of circuit court decisions dismissing § 1983 employment retaliation claims because the courts usually determined the expression was derived from the government employees’ actual duties. These decisions effectively eviscerate the *Pickering/Connick* protection of any government employee speech whenever the expression is related to their employment responsibilities,<sup>32</sup> a matter the U.S. Supreme Court recently addressed in *Lane v. Franks*,<sup>33</sup> which is discussed more fully below in Part III. Second, the Court disclaimed whether the *Garcetti* analysis applied “in the same manner to a case involving speech related to scholarship or teaching.”<sup>34</sup> This disclaimer has created inconsistency and doubt in assessing § 1983 public worker employment retaliation claims in college and university settings.

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28. *Id.* at 423.

29. *Id.* at 421–22.

30. *Id.*

31. *Id.* at 424–25.

32. Mary-Rose Papandrea, *The First Amendment Rights of Government Employees Subpoenaed to Testify About Information Learned on the Job*, 41 ABA PREVIEW 298, 299 (2014) (“[T]he *Garcetti* court stated that government employees have no First Amendment rights with respect to speech ‘that owes its existence to a public employee’s professional responsibilities.’ Some courts and scholars have relied on this language to argue that employees have no First Amendment right to repeat information they learned only about a result of their job duties.”).

33. *Lane v. Franks*, 134 S. Ct. 2369 (2014).

34. *Garcetti*, 547 U.S. at 425.

## II. Section 1983 Public Worker Employment Retaliation Claims after *Garcetti*

If the U.S. Supreme Court's purpose in deciding *Garcetti* was a sharp diminution of § 1983 government worker employment retaliation claims, it has been wildly successful. Most circuit court decisions have dismissed those claims on the grounds that the expression was employee speech, not citizen speech. A sampling of those decisions follows.

### A. First Circuit

In *Foley v. Town of Randolph*,<sup>35</sup> the Chief of the Fire Department in Randolph, Massachusetts, expressed his concern about inadequate funding and staffing of the Randolph fire department in a press conference at the scene of a fatal fire, one in which two children were trapped in a second story bedroom and died. He asked the reporters to bring this matter to the attention of the public. He also confronted James Burgess and spoke to Maureen Kenney, Randolph Selectmen, about the manpower cuts in the fire department. Subsequently, the department brought disciplinary charges against Foley, and the hearing officer concluded that Foley inappropriately initiated physical contact with Burgess and made intemperate and misleading statements to the media during the press conference. The officer also recommended a fifteen-day suspension without pay. The Randolph Board of Selectmen approved the report and Foley's suspension. The court noted that Foley's job performance criteria included effective interaction with the media, and Foley had conducted at least one other press conference, responded to media inquiries, and made comments to the media as part of his employment duties.<sup>36</sup> The Court concluded that Foley had addressed the media in his official capacity as Fire Chief while on duty in uniform at the fire scene. While his comments were directed to the public, the circumstances in which they were made caused them to appear to be official communications which related entirely to Fire Department matters. Hence, Foley was speaking as an employee, not a citizen, and was not entitled First Amendment protection.<sup>37</sup>

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35. *Foley v. Town of Randolph*, 598 F.3d 1 (1st Cir. 2010).

36. *Id.* at 3–4.

37. *Id.* at 8–9. *Accord* *Alberti v. Carlo-Izquierdo*, 548 F. App'x 625, 638–39 (1st Cir. 2013) (University of Puerto Rico nurse practitioner's complaint about her student's violation of the Health Insurance Portability and Accountability Act to the Chancellor of the University's Medical Science Campus was expression as a government employee, not a private citizen, and her termination as a tenure track associate professor of nursing did not violate the First Amendment); *Curran v. Cousins*, 509 F.3d 36, 39–43 (1st Cir. 2007) (a corrections officer employed by the Essex County Sheriffs Department posted two rambling messages to the union discussion board; the first employed an analogy to Nazi slaughter of Jews and the disciplinary actions taken against the corrections officer, and threatened aggressive action to protect the officers; the second



## B. Second Circuit

*Jackler v. Byrne*<sup>38</sup> is one of the circuit court decisions giving a government worker First Amendment protection against retaliatory employment actions. Jason Jackler, a probationary police officer with the Middletown, New York police department, filed a report accusing another police officer, Gregory Metakes, of punching Zachary Jones in the face after he had been arrested, handcuffed and placed in the back seat of a police car, contrary to a written policy prohibiting the use of unjustified force. The police chief, Matthew Byrne, and two other police lieutenants, Paul Rickard and Patrick Freeman, attempted to convince Jackler to replace his report with a new one exonerating Metakes. Jackler refused to alter his report and was terminated as a probationary officer upon the recommendation of the Police Chief and Freeman's doctored performance evaluation of Jackler. The court noted that citizens have the right, and sometimes the duty, to provide truthful reports on criminal conduct and can

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extended the Nazi analogy, complained that disciplinary actions were unfairly taken against department employees, and urged department administrators to oppose those actions; in response to these postings, the Department conducted a disciplinary hearing, after which the Sheriff terminated Curran's employment; Curran pursued a § 1983 action, contending he was fired for exercising his First Amendment rights; the district court granted the defendants' motion for judgment on the pleadings, concluding the disruption caused by Curran's posts outweighed their value as expression; the First Circuit affirmed, concluding that, while Curran's messages raised the issue of political favoritism in making personnel decisions, which was a matter of public concern, the messages urged insubordination, insulted the integrity of department administrators, and posed a substantial risk of disrupting department operations, impairing discipline by superiors, creating disharmony and friction in working relationships, and undermining confidence in administrators; hence, the potential damage caused by the postings outweighed their limited First Amendment value); and *Foote v. Town of Bedford*, 642 F.3d 80, 81–82, 85 (1st Cir. 2011) (when his membership on the Bedford Recreation Commission ("BRD"), an unpaid, advisory body charged with making recommendations on recreational facilities, was not renewed, William Foote claimed his nonrenewal was retaliation for his opposition to a proposed project and advocacy of use impact fees to fund the project; Foote pursued § 1983 claim against the Town of Bedford and four members of the Bedford Town Council who voted to deny his appointment; the federal district court granted summary judgment in favor of defendant, and the First Circuit affirmed, ruling that Foote's role on BRD, albeit as an unpaid volunteer, was to make recommendations on policy matters, and hence his speech emanated from and was part of his duties as a member of the Commission and was not protected by the First Amendment). See *Decotiis v. Whittemore*, 635 F.3d 22, 27–28 (1st Cir. 2011) (Ellen Decotiis, who provided speech and language therapy and evaluation services under contracts with various regional child development services ("CDS") sites, encouraged the parents of the children she was treating in the CDS-Cumberland to contact advocacy groups to challenge an arbitrary reduction in speech and language services to their children; CDS-Cumberland thereafter informed Decotiis that her contract would not be renewed, and Decotiis pursued a § 1983 action against CDS-Cumberland and its director; the district court granted defendants' motion for judgment on the pleadings, and the First Circuit reversed, ruling the pleadings provided little or no information about the circumstances, location, timing, source of information and context of her communications to the parents, and hence could not determine whether or not it occurred within the scope of her contractual duties).

38. *Jackler v. Byrne*, 658 F.3d 225 (2d Cir. 2011).

be punished for submitting false reports, and that use of excessive force by police officers is a matter of public concern.<sup>39</sup> Crucially, the court also determined that Jackler's speech had a clear civilian counterpart in that private citizens who file complaints of police brutality are protected under the First Amendment against threats from police to withdraw their truthful reports and submit false statements.<sup>40</sup> Hence, even though Jackler submitted his report as part of his official duties, his refusal to alter that report has a "clear civilian analogue," giving Jackler a First Amendment right to refuse to retract a truthful report and replace it with false report.<sup>41</sup>

### C. Third Circuit

In *Reilly v. City of Atlantic City*,<sup>42</sup> Robert Reilly, an Atlantic City police officer in the vice and intelligence units, was charged with engaging in sexual harassment of a subordinate. The hearing officer found that Reilly had engaged in such conduct but that his conduct was mitigated by surrounding circumstances and that Reilly should be suspended for four days without pay, rather than dismissed or reduced in rank. Unhappy with the hearing officer's recommendation, Robert Flipping, the Director of

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39. *Id.* at 241.

40. *Id.*

41. *Id.* at 241–42. *Contra* *Ruotolo v. City of New York*, 514 F.3d 184, 186–89 (2d Cir. 2008) (Angelo Ruotolo, a retired police officer who prepared a report in his capacity of Safety Officer claiming contamination from underground gasoline storage tanks threatened the health of residents in the area, including police officers and employees in his precinct, claimed he suffered ongoing retaliation in response to his report; two weeks prior to the scheduled trial on his complaint, the U.S. Supreme Court decided *Garcetti*, and defendants moved to dismiss the complaint; the district court dismissed Ruotolo's complaint because he prepared the report as part of his official duties; the Second Circuit affirmed, ruling the subject matter of the report was not a matter of public concern and Ruotolo's lawsuit sought to redress personal grievances rather than to advance a public purpose). *Cf.* *Weintraub v. Bd. of Educ. of the Sch. Bd. of the City of N.Y.*, 593 F.3d 196, 204 (2d Cir. 2010) (David Weintraub, a public school elementary teacher, pursued a § 1983 claim against school officials for taking retaliatory employment actions against him, because he filed a grievance complaining about the school administration's refusal to discipline a student who threw a book at him during class; the Court ruled Weintraub was not protected by the First Amendment, because there was no civilian analogue to a union grievance, and he voiced his grievance through internal dispute resolution channels in his capacity as a teacher, rather than as a citizen). *See* *Ezuma v. City University of New York*, 367 F. App'x 178, 180 (2d Cir. 2010) (faculty member's expressed dissatisfaction with selection of a department chair who lacked the doctorate was a matter of concern within the academic community and not the public at large, did not pertain to a matter of public concern, and was not protected by the First Amendment). *See also* *Zelnik v. Fashion Inst. of Technology*, 464 F.3d 217, 227–28 (2d Cir. 2006) (denial of emeritus status to Martin Zelnik, a retired professor in the Interior Design Department, as retaliation for his opposition to the partial closing of a street on which the professor and his partner owned a building in which they conducted their architecture and interior design practice, was not a violation of Zelnik's First Amendment rights, because emeritus status is merely honorific and carries little or no value, and its denial does not constitute adverse employment action).

42. *Reilly v. City of Atlantic City*, 532 F.3d 216, 219, 225, 232 (3d Cir. 2008).

Public Safety, engaged in a smear campaign against Reilly, and advocated he be suspended for ninety days and demoted in rank from sergeant to patrolman. Flipping then approached Reilly's attorney and offered to have Reilly retire immediately at the rank of sergeant. After brief negotiations, Reilly signed a consent agreement implementing his retirement and giving him his pension and a lump sum payment. Reilly then pursued § 1983 action for employment retaliation, claiming that Flipping was seeking revenge for Reilly's prior trial testimony provided as part of police corruption investigations on Flipping. The district court denied Flipping's motion for summary judgment.<sup>43</sup> The district court's decision preceded the U.S. Supreme Court's decision in *Garcetti*, and Flipping appealed to the Third Circuit contending *Garcetti* provided him with qualified immunity against Reilly's claim as a matter of law.<sup>44</sup> The Third Circuit concluded Reilly's trial testimony was sufficiently developed in the appeal record to permit the court to consider whether Reilly's sworn trial testimony was provided pursuant to his official duties as a matter of law.<sup>45</sup> The Third Circuit Court affirmed the district court, reasoning that every citizen owes a duty to society to provide testimony aiding the enforcement of the law, and held that a government employee who so testifies does so as a citizen and a government employee, and therefore is protected by the First Amendment.<sup>46</sup>

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43. *Id.* at 219–27.

44. *Id.* at 225–27.

45. *Id.* at 227–28.

46. *Id.* at 232. *Contra* *Kimmet v. Corbett*, 554 F. App'x 106, 107–10, 112–13 (3d Cir. 2014) (Thomas Kimmet, the supervisor of the Administrative Collections Unit in the Financial Enforcement Section ("FES") of the Office of Attorney General ("OAG"), discovered mismanagement and improprieties in the FES and the Department of Revenue ("DOR"), with which he worked to collect outstanding debts owed to the Commonwealth of Pennsylvania; Kimmet reported these problems both up and outside his chain of command; when he was not selected for position of Chief of FES and was removed from a large software project he had headed, Kimmet filed a federal complaint alleging retaliation for his complaints of wrongdoing in the collection process; Kimmet's second annual evaluation criticized his job performance and provided a remedial plan for improvement; Kimmet strenuously objected to the evaluation and remedial plan, causing his superiors to conclude that he was unwilling to accept supervision and improve his performance, and to terminate his employment; Kimmet amended his complaint to include these actions as additional retaliatory employment actions; following discovery, the district court concluded that, while parts of Kimmet's of speech were made as a citizen and addressed matters of public concern, the OAG's interest in workplace harmony outweighed the value of that speech, and granted defendants' motion for summary judgment; the Third Circuit affirmed, ruling (1) Kimmet's disclosures of improprieties in the collection process related, and were made pursuant, to his employment duties, and (2) Kimmet's employment retaliation lawsuit, while addressing a matter of public concern, created significant disruption in the OAG, impaired the ability his superiors to supervise his work, and detrimentally affected working relationships which required personal trust and confidence); *Kocher v. Larksville Borough*, 548 F. App'x 813, 815–18 (3d Cir. 2013) (when his investigation disclosed that allegations in a part-time patrolman's incident report, which described the patrolman's encounter with the Borough

#### D. Fourth Circuit

In *Lee v. York County School Division*,<sup>47</sup> William Lee, a Spanish teacher at Tabb High School in Yorktown, Virginia, posted religious materials on the bulletin boards of his classroom. A private citizen complained about the materials to the School Board, which asked Crispin Zanca, the high school principal, to investigate. Zanca went to Lee's classroom to discuss the matter. Lee was absent from school that day, and Zanca examined the materials, determined they were inappropriate, and removed them. Lee's subsequent request to repost the materials was denied by the superintendent following an investigation by the Board's attorney. Lee then pursued a § 1983 claim against the school board and superintendent.<sup>48</sup> The district court granted summary judgment in favor of the school board, and the Fourth Circuit affirmed, ruling that the posted materials were curricular in nature and did not constitute speech concerning a public matter.<sup>49</sup> Further, the court noted, public schools have the right to regulate speech occurring in a compulsory classroom setting to insure educational objectives are achieved, thereby disqualifying it as speech on matters of public concern.<sup>50</sup> Since the posted materials were curricular in nature, they did not qualify for First Amendment protection, and the dispute over their removal was "nothing more than an ordinary employment dispute."<sup>51</sup>

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mayor, were false, the Police Chief recommended the patrolman be fired; the Borough Council terminated the patrolman's employment, and the patrolman pursued a § 1983 retaliatory employment claim, alleging he lost his job because he complained about the mayor's conduct; the district court granted summary judgment in favor of the defendants, and the Third Circuit affirmed, ruling the patrolman's incident report was written while he was on duty, in response to his supervisors' suggestions, and on the official incident report form, and was posted to a password-protected police department computer, and hence was made pursuant to his official duties); and *Taylor v. Pawlowski*, 551 F. App'x 31–32 (3d Cir. 2013) (state police officer's objections to the institution of an "illegal quota system for traffic stops" made to superior officers, the Commissioner of the State Police, and Internal Affairs were made through his chain of command, were required by the State Police field regulations, and were part of his responsibilities as a public employee). See also *Foraker v. Chaffinch*, 501 F.3d 231, 242–43 (3d Cir. 2007), abrogated on other grounds by *Borough of Duryea v. Guarnieri*, 131 S. Ct. 2488 (2011) (police officers' statements concerning hazardous conditions at a firing range were not protected by the First Amendment, because they were made within their official duties since they were obligated to report that type of information up the chain of command), and *Gorum v. Sessoms*, 561 F.3d 179, 184 (3d Cir. 2009), discussed more fully *infra* in Part IV.

47. *Lee v. York Cty. Sch. Div.*, 484 F.3d 687 (4th Cir. 2007).

48. *Id.* at 689–92.

49. *Id.* at 694.

50. *Id.* at 695–98.

51. *Id.* at 700. *Accord* *Brooks v. Arthur*, 685 F.3d 367, 369–70, 372–75 (4th Cir. 2012) (James Brooks and Donald Hamlette were employed as corrections officers at the Rustburg Correctional Unit in Rustburg, Virginia; Brooks discussed the possibility of pursuing employment discrimination claims with his superiors, and Hamlette filed a discrimination complaint

## E. Fifth Circuit

identifying Brooks as a potential witness; on the day before the witness responses were due, the prison superintendent issued employment termination notices to Brooks and Hamlette; Brooks and Hamlette challenged their terminations, and the Virginia Department of Employment limited their punishments to ten-day suspensions, reinstated their employment, and awarded them back pay; Brooks and Hamlette then pursued § 1983 actions; the district court concluded Brooks and Hamlette failed to demonstrate their speech addressed a matter of public concern, and granted summary judgment in favor of defendants; the Fourth Circuit affirmed, ruling (1) that Brooks' and Hamlette's discrimination complaints dealt with purely personal grievances, were not a matter of public concern, and were pursued exclusively through internal grievance procedures, and (2) that Brooks' additional claim he was disciplined because he agreed to be a witness in Hamlette's claim was without merit, because Hamlette's claim solely addressed personal grievances and Brooks' involvement in that complaint does not give rise to a First Amendment claim); and *Shenoy v. Charlotte-Mecklenburg Hospital Authority*, 521 F. App'x 168, 170–71 (4th Cir. 2013) (M. Vittal Shenoy and his partner operated Medical Laboratory Consultants of Charlotte ("MLCC") to provide pathology services to Carolinas Healthcare Systems ("CHS") at its two campuses in Charlotte and Pineville; seeking to consolidate its pathology services, CHS issued a request for proposals, and MLCC and another competitor, Carolinas Pathology Group ("CPG") responded; CHS chose CPG for the pathology contract and CPG ultimately offered employment to Shenoy to provide the pathology services at Pineville; Shenoy accepted employment with CPG and became chairman of the hospital's peer review committees, a voluntary assignment without compensation, to review incidents of patient death or injury from medical care; in that role, Shenoy became increasingly critical of CHM-Pineville's standard of care, as a consequence of which CHM prevailed upon CPG to terminate Shenoy's employment; Shenoy instituted a § 1983 claim against CHS and CPG for First Amendment retaliation; the district court granted summary judgment in favor of CHS and CPG; the Fourth Circuit affirmed, ruling Shenoy's statements during the peer review committee's deliberations were not made in public, were made within the chain of command, and were undertaken as part of his employment duties). *Accord* *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2501 (2011) ("petition filed with an employer using an internal grievance procedure in many cases will not seek to communicate to the public or to advance a political or social point of view beyond the employment context" and, while "the public may always be interested in how government officers are performing their duties . . . that will not always suffice to show a matter of public concern.") *Contra* *Smith v. Gilchrist*, 749 F.3d 302, 305–07 (4th Cir. 2014) (during his political campaign for district judge of Mecklenburg County, assistant district attorney Sean Smith criticized a defensive-driving course offered to ticketed drivers, which reduced the number of cases handled by the district attorney's office; Peter Gilchrist, the district attorney, discussed the matter with Smith who reiterated his objection to the program; the following day, Gilchrist fired Smith as assistant district attorney; Smith filed a § 1983 action, claiming his employment as district attorney was terminated because of his criticism of the defensive-driving course as part of his political campaign; the record established Smith's duties as assistant district attorney had nothing to do with traffic court, and Gilchrist conceded Smith was speaking as a citizen on a matter of public concern and Smith's speech outweighed the government's interest in deliver of public services; the district court granted Gilchrist's motion for summary judgment, concluding Gilchrist was entitled to qualified immunity, because Gilchrist could reasonably have concluded Gilchrist's interest as an employer in suppressing Smith's speech outweighed Smith's interest in speaking as a citizen on a matter of public concern; the Fourth Circuit reversed, ruling there was no evidence whatsoever indicating Smith's speech negatively impacted the efficiency and operations of the district attorney's office; hence, a reasonable district attorney "in Gilchrist's position would have known he could not fire an assistant district attorney running for public office for speaking publicly in his capacity as a candidate on matters of public concern"). *See also* *Adams v. University of North Carolina-Wilmington*, 640 F.3d 550 (4th Cir. 2011), discussed below in Part IV.

In *Williams v. Dallas Independent School District*,<sup>52</sup> Gregory Williams, the Athletic Director and Head Football coach at Pinkston High School in Dallas, Texas, wrote a series of memoranda addressed to the school office manager, and copied to the school principal, requesting information on the school's athletic account. After receiving no response, Williams sent a memorandum to the school principal objecting to the reallocation of gate receipts from athletic events to other sports programs. Four days later, the school principal removed Williams as Athletic Director and placed him on administrative leave. The Dallas Independent School District ("DISD") subsequently decided not to renew William's contract as athletic director. Williams pursued a § 1983 action against DISD and the district court entered summary judgment in favor of DISD.<sup>53</sup> Noting that *Garcetti* has shifted the focus from the content of the speech to the role of the speaker, the Circuit Court concluded that Williams' memoranda to the office manager and principal were written in the course of performing his job as Athletic Director.<sup>54</sup> Because Williams' speech took place in his role as an employee, not a private citizen, it was not protected by the First Amendment.<sup>55</sup>

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52. *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689 (5th Cir. 2007).

53. *Id.* at 690–91.

54. *Id.* at 692.

55. *Id.* at 694. *Accord* *Elizondo v. Parks*, 431 F. App'x 299, 304 (5th Cir. 2011) (*per curiam*) (discussions between Arthur Elizondo, a Business Development Specialist for Minority Business Development Center at the University of Texas at San Antonio, about his temporary reassignment to the Small Business Development Center because of a budget shortfall, and his contention the temporary transfer was fraudulent, despite the approval of the Small Business Administration, were made pursuant to his employment duties and not protected by the First Amendment). *Cf.* *Charles v. Grief*, 522 F.3d 508, 514 (5th Cir. 2008) (emails sent by Shelton Charles, a systems analyst employed by Texas Lottery Commission, to high ranking Commission officials and members of the Texas Legislature raising concerns about racial discrimination and retaliation against him and other minority employees had nothing to do with his employment duties, and was private speech protected by the First Amendment); and *Davis v. McKinney*, 518 F.3d 304, 307–10, 314–16 (5th Cir. 2008) (complaint letter sent by Cynthia Davis, an IS Audit Manager of the at the University of Texas Health Science Center in Houston, Texas ("the Center"), up her chain of command to the University of Texas Chancellor and to the FBI and EEOC, in which she alleged that her investigation, establishing extensive employee access of pornography through their company computers, was swept under the rug, that the Center failed to discipline offending employees, that she was required to view "horrific" pornography during the course of her investigation, that white employees were treated more leniently than black employees, that her male superiors excused the offending employees' behavior, and that the Center created highly compensated upper management positions and engaged in favoritism to white men and persons with political connections in filling those positions, presented a "mixed" speech case requiring the court to address each component of the complaint letter; the Court concluded her complaint about the inadequate response to the pornography investigation throughout the chain of command up to the Chancellor were made as part of her duties as an employee and were not protected by the First Amendment, but her complaints about fiscal mismanagement and her complaints sent to the FBI and EEOC had nothing to do with her job duties, were not employee speech, and were protected by the First Amendment).

## F. Sixth Circuit

In *Kingsley v. Brundige*,<sup>56</sup> Kay Kingsley, a former administrative law judge (“ALJ”) at Ohio’s State Employment Relations Board (“SERB”), was assigned to an unfair labor practice claim pursued by the Municipal Construction Equipment Operators Labor Council (“the Union”) against the City of Cleveland. She issued a discovery order in favor of the Union, and the City of Cleveland appealed to the three-member SERB Board, which remanded the matter to James Sprague, Chief ALJ, and Kingsley for further review. Contemporaneously, the SERB board ordered the declassification of SERB ALJs as civil service positions and empowered SERB’s Chairperson to hire and fire ALJs. Shortly thereafter Sprague approached Kingsley and asked her to change her discovery order, and Kingsley refused. On the following day, SERB’s executive director notified Kingsley that she was being laid off. The layoff was confirmed by letter dated October 26, 2009, stating her lay off would take effect on October 30, 2009. Kingsley’s appeal to the State Personnel Board of Review (“SPBR”) was denied because Kingsley was an unclassified employee, depriving SPBR of subject-matter jurisdiction. The Ohio Court of Appeals dismissed Kingsley’s request for a writ of mandamus and the Ohio Supreme Court affirmed. Kingsley filed an action in federal district court claiming that her First Amendment rights were violated.<sup>57</sup> The district court dismissed Kingsley’s complaint, and, after noting it did not endorse the defendants’ actions in the case, the Sixth Circuit affirmed, determining “Kingsley was acting pursuant to her official duties as ALJ when she refused to retract the discovery order and substitute an order reaching a different result” and there was “no civilian analogue to her speech.”<sup>58</sup> Hence her expression was made as a government employee, rather than a citizen, and she was not protected by the First Amendment.<sup>59</sup>

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56. *Kingsley v. Brundige*, 513 F. App’x 492 (6th Cir. 2013).

57. *Id.* at 494–95, 497–98.

58. *Id.* at 499.

59. *Id.* *Accord* *Evans-Marshall v. Bd. of Ed. of the Tipp City Exempted Village Sch. Dist.*, 624 F.3d 332, 343 (6th Cir. 2011) (while the choice of classroom materials by a high school English and creative writing teacher is a matter of public concern, and while her in-class speech as a teacher outweighs the school board’s interest in efficiently delivering educational services, the selection of pedagogical strategies and educational materials at the primary and secondary school levels constitutes curricular speech which is not protected by the First Amendment); *Fox v. Traverse City Area Pub. Sch. Bd. of Educ.*, 605 F.3d 345, 351 (6th Cir. 2010) (complaints by elementary school special education teacher about the size of her caseload are made pursuant to the teacher’s official duties and constitute speech as a government employee, which is not protected by the First Amendment; hence her § 1983 claim of retaliatory employment action stemming from the nonrenewal of her contract was dismissed); and *Haynes v. City of Circleville, Ohio*, 474 F.3d 357, 364–65 (6th Cir. 2007) (former police officer’s objections to funding cuts for canine training contained in a memo addressed to the police chief were made pursuant to his

### G. Seventh Circuit

In *Fairley v. Andrews*,<sup>60</sup> Roger Fairley and Richard Gackowski, prison guards at the Cook County jail in Chicago, reported abusive treatment of prisoners by other prison guards, in response to which the prison guards taunted and threatened them. When the abused prisoners filed suit, Fairley and Gackowski told prison guards that, if subpoenaed, they would testify to what they had seen and heard. The other prison guards were infuriated, threatened to kill Fairley and Gackowski, subjected them to taunts and physical assault, posted pornographic cartoons, and denied them the right to use restrooms.<sup>61</sup> The Sixth Circuit ruled that Fairley and Gackowski were required by their employment duties to report the abusive treatment of prisoners and hence were not protected by the First Amendment.<sup>62</sup> To the extent the other prison guards threatened and bullied Fairley and Gackowski not to provide deposition testimony in the prisoners' lawsuit, however, such conduct "falls outside *Garcetti*" and is protected by the First Amendment, because "courts rather than employers are entitled to supervise the process,"<sup>63</sup> and the government "cannot tell its employees what to say in court . . . nor can it prevent them from testifying against it."<sup>64</sup>

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professional duties as a canine handler and constitute government employee speech not protected by the First Amendment). See also *Savage v. Gee*, 665 F.3d 732 (6th Cir. 2012), discussed below in Part IV.

60. *Fairley v. Andrews*, 578 F.3d 518 (7th Cir. 2009).

61. *Id.* at 520–21.

62. *Id.* at 522.

63. *Id.* at 525.

64. *Id.* Accord *Morales v. Jones*, 494 F.3d 590, 592–95, 598 (7th Cir. 2007) (in conducting their investigation and arrest of Vincent Ray on outstanding felony warrants, police officers Alfonso Morales and David Kolatski learned that Ray may have been harbored by his sister, Deputy Chief Monica Ray, and Police Chief Arthur Jones; Morales and Kolatski included this information in an internal arrest report and shared it with the district attorney; subsequent investigation by the district attorney's office determined that the harboring charges against Jones and Ray were false; Jones transferred Morales and Kolatski to night shift patrol duty in other districts, and Morales provided deposition testimony accusing Jones of retaliation in another officer's civil action for retaliatory job transfer; the Morales and Kolatski matter went to trial, the jury awarded compensatory (\$20,000) and punitive (\$65,000) damages in favor of the plaintiffs, and the district court denied post-trial relief; the Seventh Circuit ruled Morales and Kolatski's actions in including the harboring charge in the internal report and reporting it to the district attorney were made pursuant to their official employment duties and were not protected by the First Amendment; however, Morales' deposition testimony, given in a civil lawsuit, did not fall within the scope of his employment duties and was protected by the First Amendment; hence the Seventh Circuit reversed the district court's denial of post-trial relief with respect to Morales and Kolatski's claim concerning the reporting of the harboring charges, but, because it was unclear whether the jury's verdict in favor of Morales was made on the basis of the harboring charge or the deposition testimony, remanded the matter to the district for a new trial on Morales' claim.) See also *Abcarian v. McDonald*, 617 F.3d 931, 933–35, 937 (7th Cir. 2010) (Herand Abcarian, a physician and Head of the Department of Surgery at the University of Illinois College of Medicine at Chicago ("the University"), engaged in a series of disputes with the University and



## H. Eighth Circuit

In *Bonn v. City of Omaha*,<sup>65</sup> Tristan Bonn, Public Safety Auditor for the City of Omaha, was fired after she published a report entitled “Anatomy of Traffic Stops,” in which she describes citizens’ traffic stop complaints, analyzes the practices of police that give rise to the community’s repeated complaints, and recommends how police officers could improve its relationship with “the communities of color.”<sup>66</sup> As Public Safety Auditor, Bonn’s job was to review and audit citizen complaints about police officers and firefighters and to speak with media organizations to disseminate her findings. Bonn commented in her report that the Omaha Police Department was unsuccessful in recruiting a diverse workplace, that young members of the community who experienced poor policing tactics do not select policing as a career, and that Omaha residents would like to see more diversity in the police forces in their neighborhoods. After the report was published, she commented on her report on a local radio show and spoke to the *Omaha World Herald* newspaper, which published an article entitled “Mayor Sides with Police After Report.”<sup>67</sup> Bonn pursued a § 1983 action against the City of Omaha, and the district

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its employees over a variety of issues, such as risk management, faculty recruitment, compensation and fringe benefits; in 2005, the University executed a settlement agreement to end a potential lawsuit against Abcarian by the estate of John Behzad, a former patient; Abcarian contended the University and its employees conspired to ruin his reputation and destroy his career by settling the case; pursuant to the settlement, the estate initiated a lawsuit against Abcarian in state trial court, informed the court the matter had been settled, and asked that it be dismissed; when the state trial court did so, Abcarian filed a petition to vacate the dismissal; the University intervened to oppose his petition, and the state trial court vacated the dismissal order but not the settlement agreement; the Behzad estate voluntarily dismissed his lawsuit with prejudice, and the state trial court’s order was affirmed on appeal; Abcarian then pursued a § 1983 action against the University and individual defendants, claiming they retaliated against him for exercising his freedom of speech; the district court dismissed the constitutional claims against the individual defendants for failure to plead a claim on which relief can be granted, because Abcarian’s speech was undertaken in the course of his official duties as a public employee; Abcarian appealed to the Seventh Circuit, which ruled Abcarian’s speech covered topics which directly affected the surgical department he headed and fell within the broad scope of his responsibilities, and affirmed the district court.) See also *Sigsworth v. City of Aurora, Ill.*, 487 F.3d 506, 511 (7th Cir. 2007) (Police Detective Martin Sigsworth’s report to his supervisors that members of a criminal task force leaked word of a pending arrest to several suspects enabling them to avoid arrest was made pursuant to his official duties, and was not protected by the first amendment); and *Spiegla v. Hull*, 481 F.3d 961, 965–66 (7th Cir. 2007) (correctional officer Nancy Spiegla, who was responsible for maintaining the security of a prison by regulating and monitoring vehicle and foot traffic through the prison’s main gate, spoke pursuant to her official duties and was not protected by the First Amendment when she reported her immediate supervisor’s breach of prison security policy to another supervisor). See also *Meade v. Moraine Valley Cmty. Coll.*, 770 F.3d 680 (2014), *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667 (7th Cir. 2006), and *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008), which are discussed more fully below in Part IV.

65. *Bonn v. City of Omaha*, 623 F.3d 587 (8th Cir. 2010).

66. *Id.* at 589–90.

67. *Id.* at 590.

court granted summary judgment in its favor, because her published report and statements to the media were not protected by the First Amendment.<sup>68</sup> The Eighth Circuit agreed, ruling that Bonn admitted her report was prepared as part of her official duties and, accordingly, Bonn was not speaking as a citizen when she published her report and was not protected by the First Amendment.<sup>69</sup>

### I. Ninth Circuit

In *Marable v. Nitchman*,<sup>70</sup> Ken Marable, the senior chief engineer of the Washington State Ferries (“WSF”), reported corrupt and wasteful “pay padding” practices he observed among WSF management in assigning and

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68. *Id.*

69. *Id.* at 592. *Accord* *Buehrle v. City of O’Fallon*, 695 F.3d 807, 809–12 (8th Cir. 2012) (David Buehrle, a City of O’Fallon police officer, was placed on special assignment to conduct corruption investigations of city employees at the request of the major, and reported on his findings at a closed-door meeting of the City’s Board of Alderman at the request of the City Administrator; the report angered the City Administrator, who prevailed upon the Police Chief to deny promotion to Buehrle; because Buehrle’s speech was delivered as part of his official duties, it was employee speech not protected by the First Amendment and could not support his § 1983 claim); *Anderson v. Douglas Cty. Sch. Dist.* 0001, 342 F. App’x 223, 224 (8th Cir. 2009) (*per curiam*) (reporting of possible pay irregularities, invalid service contracts, and a discrepancy in budgetary funds made by Gary Anderson, the coordinator of technical support for information management services, were made in the course of his duties as a government employee and were not protected by the First Amendment); *McCullough v. Univ. of Ark. for Medical Sciences*, 559 F.3d 855, 867 (8th Cir. 2009) (counter claims of sexual harassment filed by Al McCullough, a Computer Project Program Director for the University of Arkansas for Medical Services (“UAMS”) in response to employee complaints of sexual harassment and at the request of UAMS as part of its investigation, were prepared as part of his employment duties and in his own self-interest in preserving his job, and were not protected by the First Amendment); *Cf. Lindsey v. City of Orrick*, 491 F.3d 892, 898 (8th Cir. 2007) (while the duties of Charles Lindsey, public works director of the City of Orrick, included attending city council meetings and reporting about public works issues, his public chastisement of city council for violating the requirements of Missouri’s open meetings law at four meetings of city council and his announced intention of bringing the matter to the attention of the attorney general, which led to his being fired from his job, was deemed to be citizen speech protected by the First Amendment, there being no evidence indicating open meetings law compliance was part of his employment duties); *Davenport v. Univ. of Ark. Bd. of Trustees*, 553 F.3d 1110, 1113 (8th Cir. 2009) (statements by Alfonso Davenport, a public safety officer in the University’s Department of Public Safety (“DPS”) accusing DPS Chief of misuse of resources and complaining about lack of DPS equipment, uniforms and parking were not made as part of his official duties and were protected by the First Amendment; Davenport’s statement to an Arkansas State Police investigator interviewing university employees about DPS Chief’s private investigation firm were made as part of his official duties and were not protected by the First Amendment). *Contra* *Rynders v. Williams*, 650 F.3d 1188, 1191, 1194–95 (8th Cir. 2011) (Buddy Rynders, an employee of the Garland County Road Department, pursued criminal charges against two other members of the Department and wrote a letter published in the local newspaper objecting to the withholding of wage increases; because these activities were possibly undertaken in his role of citizen and material issues of fact existed concerning the actual reason for Rynders’ employment termination, entry of summary judgment in favor of defendants was erroneous.).

70. *Marable v. Nitchman*, 511 F.3d 924 (9th Cir. 2007).

claiming overtime compensation to enhance their pay. In response, Marable was subjected to retaliatory employment actions, including disciplinary proceedings, suspension from work, and, despite his repeated requests that it be removed, prolonged exposure to a product called “Oil eater 99,” which triggered an allergic reaction. Marable pursued a § 1983 action against his supervisors. The federal district, concluding Marable’s expression was employee speech unentitled to First Amendment protection, granted summary judgment to the defendants.<sup>71</sup> The Ninth Circuit reversed, ruling that reporting corruption of higher level officials did not fall into his responsibilities as chief engineer, namely, making sure the physical machinery on his ferry operated safely and properly, and Marable was not responsible for ensuring his superiors did not engage in corrupt financial schemes.<sup>72</sup>

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71. *Id.* at 927–29.

72. *Id.* at 932–33. *Accord* *Ellins v. City of Sierra Madre*, 710 F.3d 1049, 1054–56, 1058–60 (9th Cir. 2013) (John Ellins, a City of Sierra Madre, California, police officer, who was also the President of the Sierra Madre Police Association (“SMPA”), the recognized collective bargaining unit for all classified employees of SMPA, successfully led a no-confidence vote of the police officers’ union against Marilyn Diaz, the Chief of Police; Police Chief Diaz delayed approving Ellins for an Advanced Peace Officer Standards and Training (“P.O.S.T.”) certificate, which would have provide him with a five percent salary increase, and Ellins filed a § 1983 First Amendment retaliatory employment action; the federal district court granted summary judgment in favor of the City of Sierra Madre because Ellins failed to present evidence showing his leadership in the no-confidence vote was citizen speech; the Ninth Circuit reversed, ruling that the no-confidence vote could make it difficult to recruit and retain officers, and hence was a matters of public concern, and that Ellins’ employment responsibilities did not include serving as union president or leading no-confidence votes, and hence a fact finder could determine his expression was undertaken as a private citizen); *Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1066–67, 1072 (9th Cir. 2012) (Martha Karl, the Confidential Administrative Assistant to Scott Smith, the Chief or Policy of the City of Mountlake, California, provided deposition testimony in a federal civil rights suit by a former police officer against Smith, after which she was transferred to a probationary, part-time “records specialist” position, received unsatisfactory job performance evaluations, and was later terminated; the district court ruled Karl’s deposition testimony was given in her capacity as a private citizen, and the Ninth Circuit affirmed, noting that Karl’s testimony was not “commissioned or created” by the City.); *See also Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014); which is discussed more fully below in Part IV; *Cf. Dahlia v. Rodriguez*, 735 F.3d 1060, 1077–78 (9th Cir. 2013) (Angelo Dahlia, a detective with the City of Burbank Police Department, filed internal reports and informed the Los Angeles County Sheriff’s Department (“LASD”) about the physical abuse of arrested suspects and, despite a campaign of threats and intimidation by other officers, participated in interviews by Internal Affairs (“IA”) as part of its investigation; following his interviews with IA, and upon learning of an FBI investigation, officers incessantly threatened and harassed Dahlia to cease providing information; the district court ruled Dahlia’s actions were undertaken as part of his official responsibilities and were not protected by the First Amendment; the Ninth Circuit reversed, ruling that, while his internal reports were been part of his official duties, his interviews with IA and his reports to the LASD were citizen speech, rather than employee speech, and were protected by the First Amendment.); *Freitag v. Ayers*, 468 F.3d 528, 545–46 (9th Cir. 2006) (reports of sexual exhibitionist behavior by inmates submitted by Deanna Freitag, a correctional officer employed by the California Department of Corrections and Rehabilitation (“CDCR”), were ignored by her superiors, she complained to the associate warden, the warden, the director of CDCR and a California state

## J. Tenth Circuit

In *Rohrbough v. University of Colorado Hospital Authority*,<sup>73</sup> Lisa Rohrbough, who served as the “Transplant Coordinator” for the University of Colorado Hospital’s Heart Transplant Unit. She worried that staffing shortages delayed lab and medical tests, prevented timely update of patient charts, and caused negative patient outcomes. She discussed her concerns with nurses, her day-to-day supervisor, her manager, the director of the Heart Transplant Unit, the vice president for patient services, the chief nursing officer, the Hospital’s executive vice president and President, and, at the suggestion of the President, with the Risk Management unit to which she submitted eleven incident reports. Then, Rohrbough learned of a possible heart misallocation and cover-up at the Hospital, which she reported to the United Network for Organ Sharing (“UNOS”), the organization she contacted to place and remove patients on transplant lists, and to a reporter for the *Denver Westword*, a weekly newspaper. Following a negative performance evaluation, the Hospital placed Rohrbough on administrative leave, reinstated her, and, when her performance did not improve, terminated her employment. Alleging the Hospital retaliated against her for exercising her First Amendment rights, Rohrbough pursued a § 1983 action against the Hospital.<sup>74</sup> The district court granted summary judgment in favor of the Hospital, and the Tenth Circuit affirmed, ruling Rohrbough’s reports of the alleged staffing crisis, instances of substandard care contained in her incident reports, and heart misallocation concerns “were all within the scope of her official duties,” and were unprotected by the First Amendment.<sup>75</sup>

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senator; her reports to her superiors, associate warden, and warden were performed pursuant to her official duties and were not protected by the First Amendment; her reports to the CDCR director were not clearly within her official duties and the Court remanded the case to make that determination; her reports to the state senator constituted speech undertaken as a citizen and was protected by the First Amendment).

73. *Rohrbough v. Univ. of Colo. Hosp. Auth.*, 596 F.3d 741 (10th Cir. 2010).

74. *Id.* at 743–44.

75. *Id.* at 748–51. *Accord* *Oleynikova v. Bicha*, 453 F. App’x 768, 770–72, 775 (10th Cir. 2011) (Taissiya Oleynikova, an Information Technology Professional employed by the Colorado Department of Human Services (“DHS”) Office of Information Technology Services (“OITS”) became embroiled in a dispute between her immediate supervisor, Chuck Chow, and Meggin Bennabhaktula, an outside contractor hired to implement software in the unit in which Oleynikova and Chow worked; Oleynikova sided with Chow and opined in emails to Galina Krivoruk, Chow’s supervisor, that Bennabhaktula was not performing her duties and was wasting taxpayer money; Oleynikova’s applications for promotion were denied, and Oleynikova claimed Krivoruk thwarted her promotion because Krivoruk sided with Bennabhaktula in her dispute with Chow; Oleynikova filed a § 1983 retaliation action against the hospital, and the district court granted the hospital’s motion for summary judgment; the Tenth Circuit affirmed, ruling Oleynikova’s statements about Bennabhaktula occurred as part of an intra-departmental personnel dispute, were motivated by a personal grievance, addressed her own career advancement, and did

not rise to the level of public concern); *Chavez-Rodriguez v. City of Santa Fe*, 596 F.3d 708, 711–12, 714, 716 (10th Cir. 2010) (Patricia Chavez-Rodriguez, director of the Santa Fe’s Division of Senior Services, which provides meals, transportation and health care services to elderly city residents, and which faced significant budget cuts, voiced her concerns about the effect of these cuts directly to government officials and at the annual Volunteer Appreciation Banquet honoring senior volunteers; Chavez-Rodriguez was subsequently removed from her position and reassigned to a lower level position at a community center; the District Court ruled Chavez-Rodriguez’s efforts to rescind the budget cuts were undertaken as part of her employment duties and were not entitled to First Amendment protection; the circuit court affirmed because the nature of Chavez-Rodriguez’s speech indicates it was undertaken in her role of director of Senior Services and not as a private citizen.). *Contra Trant v. Okla.*, 426 F. App’x 653, 656–57, 660–61 (10th Cir. 2011) (Collie Trant, who was appointed Chief Medical Examiner by the Oklahoma Board of Medicolegal Investigations (“the Board”), made the following reports: (1) he informed the Board that some OCME employees had given false accounts of sexual harassment by a former co-worker; (2) he informed the Board that a grand jury indictment of an employee for sexual harassment was based on false testimony provided by some OCME employees; (3) he warned the board he planned to hire a lawyer to report the wrongdoing with the grand jury investigation; and (4) through his lawyers, he announced to the media he had spoken to the attorney general and planned to contact the FBI about the irregularities he discovered; the Ninth Circuit ruled that the first two reports were made pursuant to Trant’s official duties, but the third and fourth reports fell outside his duties and were protected by the First Amendment.); *Deutsch v. Jordan*, 618 F.3d 1093, 1096–98, 1101–02 (10th Cir. 2010) (Robert Deutsch, police chief for the City of Laramie, Wyoming, provided testimony in his civil lawsuit for defamation in small claims court against a private citizen, who claimed Deutsch improperly used petty cash to buy a laptop computer; Janine Jordon, the city manager, attended the trial, listened to Deutsch’s testimony, and concluded Deutsch did not testify truthfully; Jordan and Deutsch met a few days later, and Jordan fired Deutsch; Deutsch pursued a § 1983 action against the City and Jordan alleging he was fired for providing testimony in his defamation action; the district court decided his testimony was not part of his official duties, and denied Jordan’s motion for summary judgment; the Tenth Circuit affirmed, ruling Deutsch provided his testimony for the private purpose of clearing his name and responding to a charge of public corruption, and hence was a matter of public concern protected by the First Amendment.); *Reinhardt v. Albuquerque Pub. Sch. Bd. of Educ.*, 595 F.3d 1126, 1129–31, 1136–37 (10th Cir. 2010) (Janet Reinhardt, a speech-language pathologist (“SLP”) employed by the Albuquerque Public Schools Board of Education (“APS”) on an extended contract at Rio Grande High School, regularly complained to APS that she received inaccurate and untimely list of students needing speech and language services, thereby depriving students of needed services; receiving no response from APS, Reinhardt hired an attorney and filed a complaint with the New Mexico Public Education Department (“NMPED”) against APS; the state conducted an investigation and ordered APS to take corrective action; thereafter the Assistant Principal reduced Reinhardt’s caseload below that required for a full-time SLPs and converted her contract from an extended contract to a standard contract, thereby reducing her compensation; Reinhardt pursued a § 1983 action against APS; the district court granted APS’s motion for summary judgment on her First Amendment retaliation claim, because Reinhardt’s communications were made pursuant to her official duties; the Tenth Circuit reversed, ruling Reinhardt was hired to provide speech and language services to special education students, but not to consult with an attorney and file a report with a state agency to ensure special education students eligible for speech and language services receive them.). *Thomas v. City of Blanchard*, 548 F.3d 1317, 1319–22, 1324–26 (10th Cir. 2008) (Ira Thomas, building code inspector for the City of Blanchard, was fired from his job after he discovered a signed and completed certificate of occupancy for a home constructed by the mayor, even though Thomas had neither made the final inspection of the home nor approved the certificate; Thomas stormed into a meeting and angrily shouted his denunciation of the certificate at the City Clerk, reported the matter to the Oklahoma State Bureau of Investigation, and was fired from his job ten days later; concluding Thomas’s speech was made pursuant to his official duties and hence was unprotected employee

### K. Eleventh Circuit

In *Battle v. Board of Regents for the State of Georgia*,<sup>76</sup> Lillie Battle, a financial aid counselor in the Office of Financial Aid and Veterans Affairs (“OFA”) at Fort Valley State University (“FVSU”), discovered what she thought were improprieties in some student files previously handled by her supervisor, Jeannette Huff. Battle confronted Huff about the improprieties, but was rebuffed. Battle then reported her concerns to FVSU President Oscar Prater. Thereafter, Battle’s performance evaluations declined, she was transferred to a different department, and, when no position was available in that department, Battle was notified her employment would be terminated. Battle appealed the nonrenewal of her contract, but the grievance committee upheld the decision not to renew. Battle then met with the Department of Education to report her findings, supported by 61 pages of documents showing potential fraud and a thirty-two page analysis of student files. The Georgia Department of Audit conducted an independent annual audit of FVSU, and uncovered serious noncompliance with federal regulations and risk factors for fraud. Similar problems were discovered in subsequent audits. FVSU reached a \$2,167,941 settlement with DOE to resolve questioned costs identified by the state auditors. Huff pursued a § 1983 action in federal district court, claiming she was fired in violation of her First Amendment rights to report her concerns about fraud. The district court granted defendant’s motion for summary judgment.<sup>77</sup> The Eleventh Circuit affirmed, ruling Battle’s employment duties, confirmed by her own admissions, required her to ascertain student files were accurate and complete, and DOE guidelines mandated she report fraud she discovered in financial aid files.<sup>78</sup> Hence, her reports of inaccuracies and fraud in student files were made pursuant to her official employment duties and were not protected by the First Amendment.<sup>79</sup>

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speech, the district court granted defendants’ motion for summary judgment; the Tenth Circuit disagreed, ruling Thomas, in his capacity of building inspector, was expected to report fraudulent issuances of certificates of occupancy to those higher up in his chain of command, but not to outside state agencies, because Thomas was employed by the city to inspect houses not to assist state agencies in their enforcement of criminal statutes aimed as public officials.)

76. *Battle v. Bd. of Regents for the State of Ga.*, 468 F.3d 755 (11th Cir. 2006).

77. *Id.* at 757–59.

78. *Id.* at 761.

79. *Id.* at 761–62. *Accord* *Abdur-Rahman v. Walker*, 567 F.3d 1278, 1280, 1283–86 (11th Cir. 2009) (Daisy Abdur-Rahman and Ryan Petty were employed as compliance inspectors in the Department of Public Works of DeKalb County, Georgia, and were directed to prepare ordinances about the disposal of fat, oil and grease; those duties were later expanded to determine whether grease disposal was the cause of sanitary sewer overflows; Abdur-Rahman and Petty investigated two sewer overflows, became concerned that sewer overflows were not properly reported and bioremediated as required by state and federal laws, and included these concerns in reports to their supervisors; their employment was subsequently terminated, and Abdur-Rahman

## L. District of Columbia Circuit

and Petty initiated a § 1983 action against their supervisors; the district court granted defendants' motion for judgment on the pleadings, and the Eleventh Circuit affirmed, ruling Abdur-Rahman and Petty's reports are not protected under the First Amendment, because their reports about sewer overflows were based the information they requested and inspections they conducted in fulfilling their job duties and were undertaken as part of their expanded responsibilities to examine the effect of grease on sewer overflows.); *D'Angelo v. Sch. Bd. of Polk Cty.*, 497 F.3d 1203, 1206–07, 1210–11 (11th Cir. 2007) (Michael D'Angelo, the principal of Kathleen High School, confronted by mediocre scores on the Florida Comprehensive Assessment Test and denial of requests for additional staff and funding, actively supported the school's conversion to a charter school; when the initial vote by the faculty on the conversion failed, D'Angelo proposed to convert part of the high school to charter status, but that endeavor was torpedoed by the school superintendent, and D'Angelo was fired; D'Angelo pursued a § 1983 action, relying on Florida law providing "[n]o district school board, or district school board employee who has control over personnel actions, shall take unlawful reprisal against another district school board employee because that employee is either directly or indirectly involved with an application to establish a charter school." Fla. Stat. § 1002.33(4); The Circuit Court ruled that D'Angelo's statements seeking to convert Kathleen High School to a charter school were made pursuant to his duties as a principal, not as a citizen, and were not protected by the First Amendment, because he pursued his campaign to convert to a charter school in his role as high school principal and stated he did so to fulfill his professional responsibilities.); *Akins v. Fulton County*, 278 F. App'x 964, 966–67, 971 (11th Cir. 2008) (*per curiam*) (Plaintiffs, former employees in the purchasing department of Fulton County, Georgia, reported bidding irregularities to the Fulton County Commissioner; claiming they were constructively discharged from their jobs in retaliation for their reports, they pursued § 1983 actions against the County; the district court determined plaintiffs regularly communicated bid concerns to the commissioners as part of their routine employment duties, and therefore were not protected by the First Amendment; the Eleventh Circuit affirmed, ruling that, even though plaintiffs had a duty to report bid irregularities to their supervisor but had no affirmative duty to go outside the chain of command and report the irregularities to the commissioners, their doing was nonetheless pursuant to their official duties and therefore was government employee speech not entitled to First Amendment protection.); *Boyce v. Andrew*, 510 F.3d 1333, 1336–41, 1343–47 (11th Cir. 2007) (*per curiam*) (Plaintiffs, Clarinda Boyce and Katina Robinson, were case workers in the Child Protective Services Investigations Unit of the Division of Family and Children Services ("DFCS") of the Georgia Department of Human Resources ("DHR")); during the period 2002–2004 DFCS had difficulties in managing the caseloads of case managers because of the extremely high number of cases assigned to them and employee turnover; although steps were taken to assist case managers reduce their caseloads, Boyce and Robinson frequently complained about the size of their caseloads verbally and via email messages sent to their supervisors and in "Assignment Despite Objection" ("ADO") forms provided by their union; Boyce and Robinson were unsuccessful in closing assigned cases, objected to the assignment of additional cases, and failed to meet work performance plans for closing cases that were overdue; DFCS terminated Boyce's employment because of her lack of productivity, and transferred Robinson to a different job with lower pay in another division; Boyce and Robinson pursued § 1983 actions against their supervisors; the district court ruled defendants lacked qualified immunity and they filed an interlocutory appeal; the Eleventh Circuit reversed, ruling that (1) Boyce and Robinson's complaints were designed to have their caseloads reduced and hence related to their employment responsibilities rather than raising public awareness about child abuse caseloads, (2) the decisions to fire Boyce and transfer Robinson were internal employee matters undertaken to enable DFCS to accomplish its work, and (3) Boyce and Robinson's verbal, email and ADO caseload complaints were communicated through internal channels in the normal course of their duties, addressed personal grievances and frustrations with their jobs, and have no civilian analogue; hence Boyce and Robinson's expression is employee speech not entitled to First Amendment protection, without which their supervisors are protected by qualified immunity.).

In *Bowie v. Maddox*,<sup>80</sup> David Bowie, a former official in the District of Columbia Office of Inspector General (“OIG”), claimed he was fired because he refused to sign an affidavit prepared by OIG in response to a subordinate’s employment discrimination claim. Bowie instead wrote his own affidavit criticizing the manner in which OIG’s terminated the subordinate. Bowie initiated a § 1983 action against OIG; the district court granted summary judgment in favor of OIG,<sup>81</sup> and the D.C. Circuit affirmed.<sup>82</sup> Bowie petitioned for rehearing, claiming *Garcetti* did not bar his claim even though his speech was ordered by OIG, because private citizens can provide testimony to the EEOC as part of an employment discrimination claim and hence there was an analogue to civilian speech. In making his argument, Bowie relied on *Jackler v. Byrne*,<sup>83</sup> the Second Circuit decision discussed above in Part II B, which found that Jackler’s speech was protected by the First Amendment, even though it was provided as part of his employment duties, because there was a civilian analogue in the form of First Amendment protection of individuals who file complaints about police brutality. The D.C. Circuit rejected this argument, stating the Second Circuit “gets *Garcetti* backwards.”<sup>84</sup> The D.C. Circuit reasoned that providing First Amendment protection to a civilian’s refusal to withdraw his complaint does not convey First Amendment protection to a police officer who refuses to withdraw his report accusing other officers of excessive force.<sup>85</sup> Rather *Garcetti* requires different treatment of government workers when their speech arises out of their official capacities, and government worker utterances are unprotected even if the same utterances by private individuals would be protected as citizen speech.<sup>86</sup> Because Bowie spoke as a government employee, the district court’s ruling was correct, and the petition for rehearing was denied.<sup>87</sup>

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80. *Bowie v. Maddox*, 653 F.3d 45 (D.C. Cir. 2011).

81. *Id.* at 46.

82. *Bowie v. Maddox*, 642 F.3d 1122, 1134 (D.C. Cir. 2011).

83. *Jackler v. Byrne*, 658 F.3d 225 (2d Cir. 2011).

84. *Bowie*, 653 F.3d at 48.

85. *Id.* at 48.

86. *Id.*

87. *Id.* *Accord* *Winder v. Erste*, 566 F.3d 209, 211–12, 215 (D.C. Cir. 2009) (Alfred Winder, the general manager of the transportation division of the District of Columbia Schools (“DCPS”), was responsible for transportation services for special education); *Petties v. District of Columbia*, 2009 U.S. Dist. LEXIS 127505 (D.D.C. Oct. 20, 2009) (class action law suit brought by parents of special education students mandated exacting standards for that transportation and oversight by a special master, with whom Winder regularly communicated; Winder believed his supervisors were undermining his efforts to comply with the *Petties* orders and he frequently reported his frustrations to the special master, straining his working relationship with his superiors; problems intensified when the school bus drivers walked off the job to protest a cut in benefits; Winder and his superiors attended a meeting of the D.C. Council Committee on



### M. Summary

The interesting array of circuit court decisions reviewed above demonstrates that *Garcetti* has triggered the dismissal of a significant majority of § 1983 claims by government workers and, because the focus is on the employee's duties in formulating and communicating the expression, has produced a number of anomalies:

- Providing policy recommendations as a member of an unpaid, advisory board is unprotected speech within the scope of employment (*Foote*, 1st Cir.), but changing the rules of membership on those bodies may trigger violation of First Amendment rights of members (*LeFande*, D.C. Cir.);
- Testimony before the city council is within the employees' duties and is not protected by the First Amendment (*Winder*, 1st Cir. and *Buehre*, 8th Cir.), but criticizing city council for

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Education, Libraries, and Recreation scheduled to address the walkout, but *Winder* did not sit with them at the witness table; dissatisfied with his superiors' answers, a councilman called *Winder* to the table, and *Winder*'s responses angered his superiors; *Winder* filed a complaint with the D.C. Inspector General against his superiors, claiming they interfered with his job duties, filed false affidavits, blocked compliance with *Petties* orders, and harassed him; while *Winder* was on an approved medical leave, DCPS notified him he was fired from his job; *Winder* pursued a § 1983 actions against their supervisors, and the district court granted their motion for summary judgment on *Winder*'s First Amendment claim; the D.C. Circuit affirmed, ruling *Winder*'s stream of complaints to the special master, his complaint to the D.C. Inspector General, and his testimony to the D.C. Council about the DCPS bus drivers were provided in fulfillment of, and therefore pursuant to, his employment duties to comply with the *Petties* orders, and were not protected by the First Amendment.); *Wilburn v. Robinson*, 480 F.3d 1140, 1141–42, 1150–51 (D.C. Cir. 2007) (Nadine Wilburn, interim director of the District of Columbia Office of Human Rights ("OHR"), who pursued a § 1983 First Amendment retaliation claim against the District and the OHR chief of staff, alleging she was not selected for the permanent OHR director position in retaliation for her complaints about D.C. salary policies; the district court granted summary judgment in favor of the defendants; the D.C. Circuit affirmed, ruling Wilburn's objections to the D.C. salaries "easily" fell within her employment responsibilities, which included authority to handle all personnel matters in her agency and to eliminate employment discrimination in the District government, and hence were not protected by the First Amendment.). *Contra* *LeFande v. District of Columbia*, 613 F.3d 1155, 1157-58, 1161 (D.C. Cir. 2010) (Matthew LeFande, a member of the Metropolitan Police Department ("MPD") Reserve Corps, a body of unpaid volunteers who assist the police in delivering law enforcement services, was featured in a front-page article in the Washington City Paper criticizing the Reserve Corps; the Reserve Corps suspended LeFande's membership, and LaFance sued the District; LeFande was reinstated when that lawsuit was settled; the Reserve Corps subsequently changed its rules to permit Reserve Corp members to serve at the pleasure of the Police Chief, and LeFande filed a class action lawsuit challenging the legality of the rule change; the district court dismissed LeFande's claims, and, while the matter was on appeal, the Police Chief fired LeFande; LeFande then filed a § 1983 First Amendment retaliation claim, which the district court dismissed, because LeFande's claim did not relate to a matter of public concern; the D.C. Circuit disagreed, ruling LeFande's allegations of procedural irregularities by the Police Chief may be a matter of public concern even if it relates to a personnel matter, because it implicates a matter of concern to the community.).

failing to comply with open meeting laws is protected (*Lindsey*, 8th Cir.);

- Pursuing claims of employment discrimination and serving as a witness in a coworker's claim of discrimination is not protected speech (*Brooks*, 4th Cir.), but a systems analyst's sending emails state legislators to report employment discrimination is (*Charles*, 5th Cir.);
- An administrative law judge's refusal to alter a discovery order is not protected by the First Amendment (*Kingsley*, 6th Cir.), but the refusal of police officers to back off of their reports of excessive force employed against arrested suspects is (*Jackler*, 3d Cir.);
- Complaints by case workers over excessive assignment of child abuse cases (*Boyce*, 11th Cir.) and by teachers over their excessive case load of special education students (*Fox*, 6th Cir.) are not protected by the First Amendment, but a teacher's complaints over the untimely reports of students needing special education services (*Reinhard*, 10th Cir.) and a contract service provider's encouragement of parents to pursue advocacy group support to reinstate special education services may be (*Decotiis*, 1st Cir.);
- Public safety officers' responses to a state police investigation inquiry about a police chief's investigation firm (*Davenport*, 8th Cir.) and interviews of Burbank police detective with the Los Angeles County Sheriff's Department are protected by the First Amendment (*Dahlia*, 9th Cir.), but reports of improper bidding procedures to the county commissioners are not (*Akins*, 11th Cir.); and
- Giving deposition testimony is deemed protected speech (*Deutsch*, 10th Cir.; *Karl*, 9th Cir.; *Fairley*, 7th Cir.; and *Morales*, 7th Cir.), but serving as a witness in a coworker's employment discrimination claim is not (*Brooks*, 4th Cir.).

While most of the anomalies cited above can be resolved by a close reading of the cases in question,<sup>88</sup> one difference cannot: The Second Circuit in *Jackler* ruled that government employee speech emanating from

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88. See Robert J. Tepper and Craig G. White, *Speak No Evil: Academic Freedom and the Application of Garcetti v. Ceballos to Public University Faculty*, 59 CATH. U. L. REV. 125, 171 (2009) (“*Garcetti* does create some anomalies. The capacity in which the employee complains becomes all-important, and those complaints made outside of one’s job responsibilities—and about which the speaker would presumably have less knowledge—are more likely to be protected than complaints by a person in a position to know about the situation by virtue of job responsibilities.”).

their employment duties but nonetheless addressing significant issues of public concern are protected First Amendment. Other circuits, strictly adhering to *Ceballos*'s edict that government employees' speech arising out of their employment duties, did not. The U.S. Supreme Court granted certiorari in *Lane v. Franks* to resolve a part of their differences.<sup>89</sup>

### III. *Lane v. Franks*

In 2006, Edward Lane was hired as director of Community Intensive Training For Youth ("CITY"), a statewide program for underprivileged youth, offered by the Central Alabama Community College ("CACC"). Because CITY faced substantial financial problems, Lane carefully reviewed the program's expenses and discovered that Suzanne Schmitz, an Alabama State Representative on CITY's payroll, had not reported to work or performed any services for the program. Lane twice instructed Schmitz to report for work, but she refused, and Lane fired her. Publicity about Schmitz's termination attracted the attention of the FBI, which initiated an investigation into Schmitz's CITY employment. Subpoenaed before a federal grand jury in November 2006, Lane explained his reasons for firing her. In January 2008, the grand jury indicted Schmitz on four counts of mail fraud and four counts of theft of federal funds. In August 2008, Lane testified under subpoena during Schmitz's trial about his reasons for firing her, but the jury failed to reach a verdict. About six months later, Lane again testified under subpoena during Schmitz's second trial, and the jury convicted her of three counts of mail fraud and four counts of thefts of federal funds.<sup>90</sup>

In January 2008, Steve Franks became the president of CACC. CITY continued to experience financial difficulties stemming from budget cuts, and Lane recommended that Franks consider layoffs of CITY employees to address the shortfall. Franks did so, and in January 2009, he terminated twenty-nine probationary employees, including Lane. When he later discovered twenty-seven of the terminated employees were not probationary, Franks rescinded their terminations. Only Lane's and one other employee's terminations were not rescinded. In September 2009, CACC eliminated the CITY program and terminated all remaining CITY employees.<sup>91</sup>

Lane filed suit against Franks under 42 U.S.C. § 1983, claiming Franks violated Lane's First Amendment rights by firing him in retaliation for his testimony against Schmitz. Relying on *Garcetti*, the District Court

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89. *Lane v. Franks*, 134 S. Ct. 2369, 2377 (2014).

90. *Id.* at 2375–76.

91. *Id.* at 2376.

granted summary judgment in favor of Franks, because Lane learned the information he testified about while working as director of CITY and he provided testimony as part of his official job duties.<sup>92</sup> Hence, Lane was not speaking as a citizen and was not entitled to First Amendment protection.<sup>93</sup> The Eleventh Circuit, also relying on *Garcetti*, affirmed in a per curiam decision.<sup>94</sup> It reasoned that Lane's speech owed its existence to his professional responsibilities and was a product Lane created in his capacity of director of CITY.<sup>95</sup> Hence Lane spoke as an employee, not a citizen, in giving his testimony, even if that testimony was provided pursuant to a subpoena.<sup>96</sup>

Because, as noted *infra* in Part II, there was a split among the circuit courts, the U.S. Supreme Court granted certiorari to “resolve discord among the Courts of Appeals as to whether public employees may be fired—or suffer other adverse employment consequences—for providing truthful subpoenaed testimony outside the course of their ordinary job responsibilities.”<sup>97</sup>

The U.S. Supreme Court held that “the First Amendment protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities.”<sup>98</sup> In doing so, the Court employed the two-step analysis formulated in *Garcetti*: (1) whether Lane's subpoenaed testimony at Schmitz's trials is speech as a citizen on a matter of public concern, and (2) whether the government had adequate justification for treating Lane differently from other members of the general public based on the government's needs as an employer.<sup>99</sup>

In answering the first inquiry, the Court noted initially that “[t]ruthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes.”<sup>100</sup> Lane's speech was “far removed from the speech in *Garcetti*,” and, unlike Cabello's speech in *Garcetti*, was not ordinarily within the scope of Lane's

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92. *Id.*

93. *Id.* at 2376; Lane v. Central Ala. Community College, 2012 WL 5289412, at\*6 (N.D. Ala. 2012).

94. *Lane*, 134 S. Ct. at 2376.

95. *Id.*

96. *Id.*; Lane v. Cent. Ala. Comty. Coll., 523 F. App'x 709, 710 (11th Cir. 2013) (*per curiam*).

97. *Lane*, 134 S. Ct. at 2377; See also Ruth Major, *The Battle Between a Public Employee's Right to Free Speech and a Public Employer's interest in Protecting Its Operations Returns to the Supreme Court for Another Round*, 61 FED. LAW 17, 18 (MAY/JUNE 2014).

98. *Lane*, 134 S. Ct. at 2378.

99. *Id.*

100. *Id.*

employment duties.<sup>101</sup> Further, because the speech in question was related to the investigation of public corruption, testimony by public employees is critically important to successful prosecutions and constitutes speech as a citizen, although it consists of information learned on the job.<sup>102</sup> Likewise, Lane's testimony qualifies as speech "on a matter of public concern," because its content exposes misuse of state funds, a matter of great public concern, and it is delivered in a judicial proceeding.<sup>103</sup> Hence, Lane's speech passed the first of the two tests.<sup>104</sup>

In approaching the second test, the Court initially cautioned that a public employee's expression "is not categorically entitled to First Amendment protection simply because it is speech as a citizen on a matter of public concern."<sup>105</sup> Rather, the court must resolve the question posed in *Garcetti*: "whether the government had 'an adequate justification for treating the employee differently from any other member of the public' based on the government's needs as an employer," such as enhancing

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101. *Id.* at 2379. In reaching this conclusion, the Court utilized a convoluted distinction that inadequately demonstrates why Lane's speech was "far removed" from Ceballos's speech. Lane conducted his audit, learned of the payments to a no-show state legislator, prepared his report to the community college president, cooperated with the FBI investigation, and provided subpoenaed testimony before the grand jury and criminal trials precisely because he was the director of the CITY program. Ceballos conducted his investigation, prepared his report for the district attorney, spoke and provided exculpatory evidence to counsel for defendant, and testified as a witness called by defense counsel precisely because he was calendar deputy assistant district attorney. The Court erroneously claims that *Garcetti* "said nothing about speech that simply related to public employment or concerns information learned in the course of employment." On the contrary, Ceballos' report clearly owed its existence to his professional responsibilities, and *Garcetti* emphasized that Ceballos' speech could not be considered citizen speech because he prepared his memorandum as part of his official duties and was paid for the tasks he performed. In slipping by this inconvenient language, the Court relies on language in *Garcetti* stating "its holding did not turn on the fact that the memo at issue 'concerned the subject matter of [the prosecutor's] employment,' because '[t]he First Amendment protects some expressions related to the speaker's job.'" This unconvincing maneuver enabled the Court to conclude (1) "the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech," and (2) the "critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties." *Id.* at 2379.

102. *Id.* at 2380.

103. *Id.*

104. *Id.*

105. The Court took the narrower of two paths in deciding *Lane*, noting the "importance of public employee speech is especially evident in the context of this case: a public corruption scandal." *Id.* at 2380. See also Papandrea *supra* note 32, 300 ("The court could issue a relatively narrow decision limited to the facts of the case." Alternatively, the Court "could base its decision on the broader argument that the First Amendment provides categorical protection for testimony under oath, even when made within the scope of employment duties and perhaps even when the employee appears voluntarily, rather than subject to a subpoena.").

efficiency in delivery of government services and maintaining discipline in the workplace.<sup>106</sup> Answering that question was easy:

[T]he employer's side of the *Pickering* scale is entirely empty: Respondents do not assert, and cannot demonstrate, any government interest that tips the balance in their favor. There is no evidence, for example, that Lane's testimony at Schmitz' trials was false or erroneous or that Lane unnecessarily disclosed any sensitive, confidential, or privileged information while testifying.<sup>107</sup>

Hence, the U.S. Supreme Court ruled that Lane's testimony was entitled to First Amendment protection.<sup>108</sup>

Even though the logic supporting them is questionable, two statements in *Lane* are significant: (1) "the mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech," and (2) the "critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."<sup>109</sup> These statements eliminate the confusion created by *Garcetti* that equated information in reports prepared as part of the employee's duties as government employee speech not entitled to First Amendment protection, and provides an important and additional consideration in deciding whether the speech is citizen speech, namely whether the government worker ordinarily provides testimony as part of the job. The latter consideration may effectively exclude the court testimony of employees who ordinarily testify as part of their employment duties from First Amendment protection.<sup>110</sup>

A handful of appellate decisions following *Lane* demonstrate how these changes are playing out. In *Mpoy v. Rhee*,<sup>111</sup> Bruno Mpoy, a District of Columbia probationary, elementary, special education teacher, was hired on a provisional teaching license through The New Teacher Project into an educational setting, which, if Mpoy's allegations are true, was designed to

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106. *Lane*, 134 S. Ct. at 2380–81 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006)).

107. *Id.* at 2381.

108. *Id.*

109. *Id.* at 2379.

110. See Papandrea, *supra* note 32 at 300 ("Depending on how the Court frames its holding, it potentially would protect even those employees who testify within the range of their job duties, like police officers, as well as those who appear in litigation that does not involve a matter of public concern, including testimony in non-work related disputes.").

111. *Mpoy v. Rhee*, 758 F.3d 285 (D.C. Cir. 2014).

fail. Mpoy claimed his classroom was dirty and lacked needed books and materials; his teaching assistants were hostile, refused to help him, and undermined his efforts to provide instruction; his complaints and inquiries to his principal were ignored; his principal directed him to falsify reports to show his students were making acceptable progress, and when Mpoy refused, enlisted two other teachers to falsify the records of Mpoy's students' progress; his principal prepared negative performance evaluations and refused Mpoy's requests for an explanation; his principal suspended him for five days for tardiness and failing to follow lesson plans, issued a warning letter accusing Mpoy of failing to monitor his students and follow fire drill procedures, and issued a second five day suspension for Mpoy's refusal to follow classroom observation instructions, and ignored Mpoy's request for an explanation of those actions. Frustrated, on June 2, 2008, Mpoy sent a lengthy email to the chancellor, Michelle Rhee, complaining about the principal's actions. One sentence of that email referred to the principal's falsification of records of Mpoy's students' progress. Two days later the principal called Mpoy to his office, and without providing an explanation told Mpoy his teaching position would not be renewed. On June 13, 2008, the principal issued a negative evaluation of Mpoy's performance during the previous year and, on July 9, 2008, personnel in the chancellor's office informed Mpoy he would receive a termination letter. Claiming retaliation for exercising his First Amendment rights, Mpoy sued The New Teacher Project, the District of Columbia, his principal, and Rhee under 42 U.S.C. § 1983. In ruling on a motion for judgment on the pleadings, the district court dismissed Mpoy's claim against The New Teacher's Project, but permitted his claim for retaliation against the principal and Rhee to proceed but only in their personal capacity. Mpoy did not appeal that ruling.<sup>112</sup> Deciding that Mpoy was speaking pursuant to his official duties rather than as a private citizen and that the principal and Rhee were entitled to qualified immunity, the district court subsequently granted the motion for judgment on the pleadings filed by Rhee, the principal, and the District of Columbia.<sup>113</sup> On appeal, Mpoy conceded that, except for the sentence accusing the principal of falsifying records of Mpoy's students' performance, his email message contained speech uttered in his capacity as an employee. The D.C. Circuit Court decided that, because the key sentence referred only to Mpoy's own students, and not the students of other teachers, and because the email was sent through the established chain of command, the sentence was prepared as part of Mpoy's official duties as a teacher to report problems he encountered in his

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112. *Id.* at 289.

113. *Id.* at 287–89.

classroom and was not entitled to First Amendment protection.<sup>114</sup> While the Circuit Court recognized *Lane*'s qualifier that employee speech uttered within the employee's ordinary duties was unprotected,<sup>115</sup> it sidestepped that issue by determining the principal and Rhee were entitled to qualified immunity, because "it surely would not have been unreasonable for [the principal and Rhee] to believe" that they were lawfully entitled to fire Mpooy for sending the email.<sup>116</sup>

In *Dougherty v. School District of Philadelphia*,<sup>117</sup> Francis Dougherty, Deputy Chief Business Officer for the Philadelphia School district, prepared a proposal and implementation plan for the installation of security cameras in nineteen persistently dangerous schools. Because the procurement process was to be completed within thirty to sixty days precluding the use of normal competitive bidding processes, Dougherty was required to select a prequalified contractor that had an existing contract with the School District. Dougherty chose Security and Data Technologies, Inc. ("SDT"). School Superintendent Arlene Ackerman rejected the selection of SDT and insisted the contract be awarded to IBS Communications, Inc. ("IBS"), a minority owned firm that was not a prequalified contractor. Ackerman submitted the IBS implementation plan to the School Reform Commission ("SRC"), which ratified the proposal and transferred oversight of the contract to another department. Dougherty then met with reporters for *The Philadelphia Inquirer* and informed them of the improperly awarded contract. The *Inquirer* ran a story under the headline "Ackerman Steered Work, Sources Say." The next day Ackerman threatened to fire Dougherty for leaking the information to the press, and, following Ackerman's directive, the School District's most senior human resources executive, suspended Dougherty. The SRC subsequently terminated Dougherty's employment with the School District, and Dougherty pursued a § 1983 claim against the School District and Ackerman. Finding that Dougherty's allegations were sufficient to establish a First Amendment retaliation claim, the district court denied motions for summary judgment filed by the School District and Ackerman, and an interlocutory appeal was taken to the Third Circuit.<sup>118</sup> Viewing the facts in the light most favorable to Dougherty, the Court of Appeals decided Dougherty did not speak pursuant to his employment duties when he disclosed the information to the *Inquirer*, because his position had nothing to do with communications to the press and the School District's

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114. *Id.* at 292–94.

115. *Id.* at 294–95.

116. *Id.* at 295.

117. *Dougherty v. Sch. Dist. of Phila.*, 772 F.3d 979 (3d Cir. 2014).

118. *Id.* at 982–85.



Code of Ethics discouraged such conduct.<sup>119</sup> Further, the Court rejected the School District's argument that Dougherty's expression was employee speech, because it "owes its existence to a public employee's professional responsibilities."<sup>120</sup> Such a standard, the Court reasoned, went too far and "would eviscerate citizen speech by public employees simply because they learned the information in the course of their employment."<sup>121</sup> This decision was buttressed by the U.S. Supreme Court decision in *Lane*, which emphasized that the acquisition of information by virtue of public employment does not transform speech into employee speech.<sup>122</sup> Rather the critical inquiry is "whether the speech at issue is itself ordinarily within the scope of the employee's duties, not whether it merely concerns those duties."<sup>123</sup> Hence, the Third Circuit ruled, *Lane* rejects the School District's contention that Dougherty's speech owed its existence to his employment duties.<sup>124</sup>

*Gibson v. Kilpatrick*<sup>125</sup> involved alleged retaliation by Jeffrey Kilpatrick, the mayor of the City of Drew, Mississippi, against Drew's Chief of Police, Anthony Gibson, for Gibson's investigation into Kilpatrick's misuse of the city's gasoline credit card for personal use, and reporting that misuse to the Federal Bureau of Investigation ("FBI"), Drug Enforcement Agency ("DEA"), the Mississippi Office of the State Auditor ("OSA"), and the Mississippi Attorney General's office. An investigation ensued and OSA determined Kilpatrick misused the card and ordered him to repay approximately \$3,000 to the City of Drew for unauthorized use of the card. Nine months later, Kilpatrick entered a series of written reprimands into Gibson's personnel file and made several requests to the Board of Aldermen to remove Gibson as police chief on the grounds he was insubordinate, lacked visibility in the community, and failed to work sufficient hours. Gibson pursued a § 1983 action against Kilpatrick for violation of his First Amendment rights. The district court reserved judgment on whether Kilpatrick violated Gibson's First Amendment rights and also whether he was entitled to qualified immunity.<sup>126</sup> Kilpatrick moved for reconsideration of his qualified immunity defense, and the district court determined he was not entitled to qualified immunity because Gibson's speech was protected under the First Amendment and that right

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119. *Id.* at 987.

120. *Id.* at 989.

121. *Id.*

122. *Id.*

123. *Id.* at 990.

124. *Id.*

125. *Gibson v. Kilpatrick* ("Gibson II"), 773 F.3d 661 (5th Cir. 2014).

126. *Id.* at 665.

was clearly established.<sup>127</sup> The Fifth Circuit decided that Gibson's speech was not protected by the First Amendment and reversed the district court.<sup>128</sup> The U.S. Supreme Court granted certiorari, and remanded the case to the Fifth Circuit for reconsideration under *Lane*.<sup>129</sup> Upon remand, the Fifth Circuit decided that Gibson failed to meet his burden of proof to demonstrate reporting Kilpatrick's misuse of the credit card was part of his ordinary and official duties.<sup>130</sup> The Court noted several factors in the record indicated Gibson acted within the scope of his ordinary duties: he reported the credit card misuse to law enforcement officials he met in the course of his official duties; he was required as police chief to detect and prevent crime; as chief law enforcement officer, he had control over and supervised all of the city's police officers; he had no one beyond the Board of Aldermen in a chain of command to which he would report the credit card misuse; he conducted his investigation and reported the credit card misuse during hours he worked as police chief, rather than on his personal time after work. With respect to OSA, Gibson met with the OSA investigator in Gibson's office, coordinated the department's resources with OSA, and directed his employees to assist in the investigation. With respect to the Attorney General, Gibson reported the credit card misuse to the Attorney General in person while attending a Chief of Police Conference. With respect to the FBI and DEA, the record showed Gibson reported the credit card misuse to agents he previously met through his official duties and conceded in a letter he wrote to the Kilpatrick and the Board of Aldermen he worked with those agencies to reduce crime within the City of Drew.<sup>131</sup> The Court also noted that the record was silent with respect to whether Gibson spoke to the FBI and DEA agents during working hours, wore his uniform, and offered the assistance of the Drew police department, and that the lack of such evidence clarifying Gibson's role when he reported the credit card use to the FBI and DEA caused the Court to conclude Gibson failed to meet his burden of proof to provide evidence showing (1) his reports were made as a citizen rather than in his official capacity, and (2) Kilpatrick was not entitled to qualified immunity.<sup>132</sup> Because there was no genuine dispute as to the facts appearing in the record and the court is required to take the record as it is,

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127. *Id.* at 666.

128. *Gibson v. Kilpatrick* ("Gibson I"), 734 F.3d 395, 398 (5th Cir. 2013).

129. *Gibson v. Kilpatrick*, 134 S. Ct. 2874 (2014).

130. *Gibson II*, 773 F.3d at 672.

131. *Gibson II*, 773 F.3d at 671–72.

132. *Id.* at 672.

the Court concluded Gibson failed to produce evidence to establish his constitutional rights were violated.<sup>133</sup>

In *Burnside v. Kaelin*,<sup>134</sup> Thomas Burnside, a sergeant in the Neuces County Sheriff's Department ("the Department") assigned to the patrol division, also served as chairman of a law enforcement political action committee ("the PAC"), a role he kept separate and apart from his Department responsibilities. Burnside alleged in his complaint that, in January 2012, Jim Kaelin, who served as sheriff in the Department, was up for reelection. Kaelin approached Burnside while he was on duty and told him the PAC should support Kaelin's reelection campaign. Burnside deferred saying that decision would have to be made by the vote of the PAC's members. A few days later, Kaelin informed Burnside he would be moved to jail duty if the PAC did not support Kaelin's candidacy. Burnside supported Kaelin's opponent in the election, the PAC did not endorse or support Kaelin, and Kaelin was aware of both of these matters. Shortly after the PAC failed to endorse Kaelin, Kaelin transferred Burnside from the patrol position to jail duty, a much less desirable job. The transfer was viewed as a demotion by the members of the Department. Burnside continued to work at the jail for more than a year and, in March 2013, he was fired because of the dissemination of a recording containing a threat by Kaelin against another officer. Burnside alleged Kaelin violated his First Amendment rights and pursued a § 1983 action against him and the Department. Kaelin and the Department filed motions to dismiss the complaint without answering it; the magistrate judge recommended the denial of those motions; the district court adopted the magistrate judge's recommendation; and Kaelin pursued an interlocutory appeal challenging the denial of qualified immunity.<sup>135</sup> The Fifth Circuit ruled: (1) Burnside's allegations of the retaliatory, demotion-like job transfer following his refusal to endorse Kaelin's political campaign were certainly sufficient to constitute a violation of Burnside's First Amendment rights of free speech and association, but (2) Burnside's allegations of his employment termination because of the dissemination of the tape recording of Kaelin's threat against another officer were insufficiently developed to state a prima facie case of retaliation, and (3) the PAC's refusal to support Kaelin's reelection occurred thirteen months prior to Burnside's termination and no facts were alleged demonstrating a causal link between the two events, without which Kaelin is entitled as a matter of law to qualified immunity

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133. *Id.* The Court emphasized that it did not decide his report of criminal activity to outside agencies was part of his official duties, but decided only that Gibson "failed to come forward with evidence showing that his clearly established constitutional rights were violated." *Id.*

134. *Burnside v. Kaelin*, 773 F.3d 624 (5th Cir. 2014).

135. *Id.* at 625–26.

on the termination claim.<sup>136</sup> Hence the Fifth Circuit reversed the district court denial of qualified immunity as to the termination claim and affirmed the denial of qualified immunity as to the transfer claim.<sup>137</sup>

In *Cutler v. Stephen F. Austin State University*,<sup>138</sup> a staff member in the office of U.S. Representative Louie Gohmert asked Christian Cutler, the Director of Art Galleries at Stephen F. Austin State University (“SFA”), to curate and judge a high school art exhibition and contest hosted by Gohmert. Cutler conducted internet research on Gohmert, concluded he did not want to be associated with Gohmert, and so informed the staff member. Representative Gohmert sent a letter to Cutler expressing his disappointment that Cutler did not want to be involved with Gohmert and stated he would not bother Cutler in the future. Gohmert sent a copy of the letter to Baker Pattillo, the President of SFA, who in turn asked the Provost, Richard Berry, to look into the matter. Berry asked the Dean of the Fine Arts College, Addison Himes, to ascertain Cutler’s story. Himes then recruited Scott Robinson, the Director of the School of Art Galleries and Cutler’s boss, to assist. Robinson telephoned Cutler that evening and took notes of their conversation. The next morning, Robinson, Himes and Berry met to discuss the telephone call and review prior reports of Cutler’s conduct. The following day, Cutler sent an email to Patillo, Hines, and Robinson explaining the incident. The next day, Cutler met individually with Himes and Berry, and Berry asked Himes to fire Cutler. Four days later, Himes presented Cutler with a termination letter from Berry, and Cutler accepted an invitation to resign immediately. Cutler pursued a § 1983 action against Pattillo, Perry, Himes, and Robinson claiming retaliation in violation of his First Amendment rights. Following discovery, the defendants moved for summary judgment. The district court denied the motion, concluding genuine issues of material fact existed with respect to who exerted influence over the ultimate decision, whether defendants conducted a reasonable investigation, whether Cutler or the Defendants reasonably believed Cutler’s response to Gohmert’s invitation was undertaken as a private citizen or public employee, and whether defendants were protected by qualified immunity.<sup>139</sup> The Fifth Circuit affirmed the denial of summary judgment, ruling (1) defendants should have had a clear warning terminating Cutler would violate his First Amendment rights, because Cutler explained why he declined the invitation to host an exhibition which was not within the scope of his job; (2) defendants failed to undertake a sufficient investigation prior to firing

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136. *Id.* at 629.

137. *Id.*

138. *Cutler v. Stephen F. Austin St. U.*, 767 F.3d 462 (5th Cir. 2014).

139. *Id.* at 466–67.

him because evidence in the record demonstrated defendants ignored Cutler's explanation and focused on the SFA's relationship with Gohmert, Berry directed Himes to fire Cutler before Cutler spoke to Berry, and Himes admitted there wasn't an investigation per se; (3) defendants should have known their investigation was inadequate because they prepared no report, operated in an ad hoc manner, conducted only two interviews, and acted hastily firing Cutler; and (4) their investigation was not conducted in good faith.<sup>140</sup> The Fifth Circuit affirmed the district court's decision to deny defendants' motion for summary judgment, noting that their decision did not preclude defendants from establishing qualified immunity at trial.<sup>141</sup>

In *Flora v. County of Luzerne*,<sup>142</sup> Albert Flora, Jr., the Chief Public Defender for the Luzerne County Office of the Public Defender ("the Office"), engaged in a protracted battle with the County to appropriate additional funding to enable the Office provide adequate legal representation to indigent criminal defendants. Unsuccessful in obtaining the requested funding, Flora initiated a class action lawsuit against Luzerne County seeking a writ of mandamus compelling the County to provide adequate funding, office space and attorney staffing. The state court granted Flora's petition for mandamus, ordered the County to provide adequate funding and staff to the Office, and directed the parties into mediation. While the mediation proceeded, the County amended the Office's budget making the Chief Public Defender's position full-time and maintaining a part-time Assistant Public Defender. Contemporaneously, the Luzerne County "Kids for Cash" scandal unfolded, revealing that between 2003 and 2008, approximately fifty percent of juvenile offenders in Luzerne County appeared in court without legal representation, about ten times the state average. Virtually all of them were adjudicated delinquent and sent to for-profit juvenile detention facilities. A federal investigation revealed that two Luzerne County judges accepted kickbacks from the for-profit detention facilities for sending the juveniles to those facilities. The Pennsylvania Supreme Court responded to these revelations by appointing a Special Master, who recommended the expungement of the delinquency adjudications. The Pennsylvania Supreme Court approved his recommendation and ordered the expungement. Flora subsequently learned that over 3,000 adjudications had not been expunged, and brought that matter to the attention of the County, the district attorney, the court administrator, the public interest law firm, which represented the juveniles, and the Special Master. Roger Lawton, the County Manager, who was angry Flora reported the expungement matter to the Special Master,

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140. *Id.* at 473–75.

141. *Id.* at 475.

142. *Flora v. Cty. of Luzerne*, 776 F.3d 169 (3d Cir. 2015).

subsequently interviewed Flora for the full-time Chief Public Defender position, but recommended that a different attorney be appointed to the position. Lawton's recommendation was approved by the County Commissioners, and Lawton informed Flora on April 17, 2013, that he was relieved of his duties as Chief Public Defender. Flora pursued a § 1983 action against Lawton and Luzerne County, claiming his termination was in retaliation for his efforts to secure adequate funding for the Office and his reporting noncompliance with the expungement order. The district court concluded those actions "related to his official duties as Chief Public Defender" and therefore were not protected by the First Amendment under *Ceballos*, and dismissed Flora's complaint.<sup>143</sup> The Third Circuit reversed. The Court noted that *Lane* was decided after the district court reached its decision and that *Lane* requires a determination that Flora's actions were within his ordinary job duties, rather than merely being related to those duties, in order to take those actions outside the ambit of First Amendment protection.<sup>144</sup> The Court then examined Flora's allegations and determined a "straightforward application of *Lane* leads us to conclude that . . . Flora's speech with respect to both the funding litigation and the expungement problems was not part of his ordinary responsibilities."<sup>145</sup> Flora's ordinary job duties required him to represent indigent defendants in criminal court, not to institute litigation to obtain adequate funding for his office or publically report lingering effects from government corruption.<sup>146</sup> Hence Flora's complaint should have survived the motion to dismiss.<sup>147</sup>

As the above noted circuit court decisions indicate, post-*Lane* consideration of § 1983 claims requires closer consideration of the relationship between the employee's speech and the employee's ordinary duties. Instead of merely examining whether the information included in the speech was gathered in the course of, or somehow related to, the employee's job duties, courts are required to examine whether engaging in the speech was part of the ordinary duties the public employee performs. In *Mpoy*, the D.C. Circuit recognized it was required to determine whether Mpoy's speech was undertaken as part of his ordinary duties as a teacher, but avoided resolving that issue by deciding the school principal and superintendent were entitled to qualified immunity. In *Dougherty*, the Third Circuit examined Dougherty's ordinary employment duties and, following *Lane*, decided his speech fell outside those duties and was entitled to First Amendment protection. In *Gibson*, the Fifth Circuit closely

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143. *Id.* at 171–74.

144. *Id.* at 179.

145. *Id.* at 180.

146. *Id.*

147. *Id.* at 179–80.

examined the circumstances in which Gibson gathered and reported evidence of the mayor's misuse of the city's gasoline credit card for personal use and concluded Gibson could not survive defendant's motion for summary judgment because Gibson failed to produce evidence demonstrating his reporting of the credit card misuse was undertaken outside of his ordinary employment duties. In *Burnside*, the court examined Burnside's duties as a police officer and as chairman of a political action committee, determined they were wholly separate, and ruled the sheriff's demotion of Burnside to a different position was in violation of the First Amendment. In *Cutler*, the Fifth Circuit determined that the actions of the defendants undertaken in response to Cutler's expressed disdain for a U.S. congressman demonstrated Cutler's speech was outside his ordinary employment duties. In *Flora*, the Chief Public Defender's action in initiating a class action lawsuit to obtain adequate funding and reporting the noncompliance with the Pennsylvania Supreme Court order to expunge juvenile adjudication records were deemed outside the ordinary scope of his duties and hence may be protected by the First Amendment. In short, while four decisions determined the employee speech was entitled to First Amendment Protection and two did not, all six addressed the issue of the employee's ordinary employment duties.

#### IV. *Garcetti* and Scholarship and Teaching

As noted above in Part I, the U.S. Supreme Court disclaimed whether the *Garcetti* applied "in the same manner to a case involving speech related to scholarship or teaching"<sup>148</sup> in public institutions of higher education,

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148. *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006). This disclaimer is not surprising in light of Justice Souter's concerns in his dissenting opinion about the impact of the majority decision's on the "teaching of a public university professor" and the nation's commitment to safeguarding academic freedom, *id.* at 438, and the prior, vociferous statements of the U.S. Supreme Court urging strong First Amendment protection of academic freedom. See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools (citation omitted). 'The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'"); *Sweezy v. N.H.*, 354 U.S. 234, 250 (1957) ("The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new

leaving that issue for another day. To date, the U.S. Supreme Court has not addressed the question, permitting the circuit courts to fend for themselves in resolving § 1983 retaliation claims by university professors. A review of the decisions by the circuit courts addressing § 1983 claims pursued by college and university faculty members indicates the circuit courts have taken different routes: some have applied *Garcetti* without addressing academic freedom; some have considered whether the faculty member's speech falls within the realm of academic freedom and determined it is employee speech not protected by the First Amendment; and some have determined that *Garcetti* should not be applied to faculty member's speech which falls within the realm of academic freedom.

In *Piggee v. Carl Sandburg College*,<sup>149</sup> Martha Louise Piggee, a part-time instructor of cosmetology at Carl Sandburg College, a public community college located in Galesburg, Illinois, learned that Jason Ruel, a student who had taken several of her classes, was gay. Piggee placed two religious pamphlets in Ruel's smock during clinical instruction time in a combined classroom and clinical lab which made to look like a beauty salon open to the public, and asked him to read and discuss them with her. The pamphlets, which used a comic book format to condemn homosexuality as an abomination, insulted and offended Ruel, who filed a written complaint with various college officials. The College investigated Ruel's complaint and Piggee affirmed Ruel's account. In a memo addressed to Piggee, the College directed her to cease all proselytizing activities. In a subsequent letter sent to Piggee, the College informed her that her contract would not be renewed for the Spring semester. Piggee

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maturity and understanding; otherwise our civilization will stagnate and die."); and Shelton v. Tucker, 364 U.S. 479, 486 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. 'By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation. Such unwarranted inhibition upon the free spirit of teachers . . . has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers.' (cit. omitted). 'Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate.'"). The following publication provides an extremely helpful discussion of academic freedom following *Garcetti*: Patrick P. Schaffer, *A Guide to Academic Freedom*, C.U.N.Y BULLETINS (Jan. 2, 2012), [http://www1.cuny.edu/mu/vc\\_la/2012/01/02/a-guide-to-academic-freedom/](http://www1.cuny.edu/mu/vc_la/2012/01/02/a-guide-to-academic-freedom/). The following article provides an excellent example of the importance of academic freedom in protecting faculty members who conduct research in politically charged subject areas: Paul Voosen, *Fracking Researchers Under Pressure*, THE CHRONICLE OF HIGHER EDUCATION (Jan. 30, 2015), <http://chronicle.com/article/When-Science-Becomes-a/151501>.

149. *Piggee v. Carl Sandburg Coll.*, 464 F.3d 667 (7th Cir. 2006).



pursued a § 1983 action against the College and the district court entered summary judgment in favor of defendants.<sup>150</sup> In affirming the district court, the Seventh Circuit assumed that Piggee's proselytizing speech qualified as a matter of public concern, even though "it certainly had nothing to do with how to style hair," and focused on the second threshold question: Whether the College had the right to insist Piggee refrain from engaging in that particular speech while providing instruction in cosmetology.<sup>151</sup> Piggee's speech occurred in the instructional area provided by the College for her course, in which students received classroom instruction and engaged in hands-on clinical work under their instructors' supervision. Piggee admitted in her testimony that she gave various religious pamphlets to other students as part of her "witness" activities, and made religious comments to her students during class. Indeed, several of her students complained about her doing so in their student evaluations. Under these circumstances, the Seventh Circuit ruled, it would certainly be within the College's prerogative "to direct its instructors to keep personal discussions about sexual orientation or religion out of a cosmetology class or clinic."<sup>152</sup> In reaching this conclusion, the Court acknowledged that applying *Garcetti* "to the educational setting requires an appreciation of the way in which teachers, professors or instructors communicate with their students" and that "academic freedom has two aspects," the right of faculty members to pursue and discuss ideas and to engage their students in the classroom free from government-sponsored orthodoxy, and the right of the university to establish its curriculum.<sup>153</sup> These two aspects intersect, the court noted, because the university in setting its curriculum may insist the faculty members teach and conduct research as part of their official duties, while at the same time protecting the faculty members' freedom to express views on the assigned course.<sup>154</sup>

In *Renken v. Gregory*,<sup>155</sup> Kevin Renken, a professor of engineering at the University of Wisconsin-Milwaukee, applied for and received a grant in the amount of \$66,499 from the National Science Foundation ("NSF") to enhance the education of engineering undergraduates by adding laboratory components to certain courses in their curriculum. The grant proposal included provisions for released time for Renken to manage the grant as principal investigator, salaries for student workers, and the university's

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150. *Id.* at 668–69.

151. *Id.* at 671.

152. *Id.* at 671–73.

153. *Id.* at 670–71.

154. *Id.* at 761.

155. *Renken v. Gregory*, 541 F.3d 769 (7th Cir. 2008).

cost-sharing funds in the amount of \$222,667. Renken and William Gregory, the Dean of the College of Engineering and Applied Science, disagreed about the application of the university's cost-sharing funds and Renken filed complaints against Gregory with the University Committee and the Board of Trustees, contending conditions Gregory imposed on the cost-sharing funds violated NSF matching funds regulations. When their dispute could not be resolved, the university returned the NSF funds. Renken pursued a § 1983 action against Gregory, contending his pay was reduced and his grant was terminated in retaliation for his exercise of his First Amendment rights in criticizing the university's proposed use of the grant funds. The district court granted the university's motion for summary judgment, concluding Renken's complaints were raised as part of his official employment duties and did not relate to a matter of public concern.<sup>156</sup> The Seventh Circuit affirmed, noting that the NSF grant, designed to benefit undergraduate student education, fulfilled his teaching responsibilities and that his complaints about the misuse of cost-sharing funds were made pursuant of his role as a faculty member administering the grant.<sup>157</sup> Hence, the First Amendment did not protect his statements.<sup>158</sup> While the Court determined Renken's speech was undertaken as part of his employment duties as a teacher, the Court simply applied *Garcetti* to Renken's actions and did not address whether they fell into the realm of academic freedom.

*Gorum v. Sessions*<sup>159</sup> presented a very different scenario. An audit undertaken by the Registrar's Office of Delaware State University revealed that Wendell Gorum, Professor of Communications and Chair of the Department of Mass Communications at Delaware State University, had improperly changed the grades of 48 students in the Mass Communications Department from withdrawals, incompletes, and failing, to passing grades, and Allen Sessions, President of Delaware State University, initiated dismissal proceedings against Gorum. The matter was referred to an Ad Hoc Disciplinary Committee under the collective bargaining agreement, which concluded that Gorum acted wrongfully in effecting the grade changes, condemned his actions, and recommended a two-year unpaid employment suspension rather than termination of employment. Sessions disagreed, proceeded with the termination action, and urged the Board of Trustees to fire Gorum.<sup>160</sup> The Board agreed and voted to dismiss Gorum. Gorum filed suit in federal district court, contending Sessions' actions to

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156. *Id.* at 771–73.

157. *Id.* at 773–74.

158. *Id.* at 773–75.

159. *Gorum v. Sessions*, 561 F.3d. 179 (3d Cir. 2009).

160. *Id.* at 182–83.

have his employment terminated were undertake in retaliation to three incidents: (1) Gorum publicly opposed the selection of Sessions as the president of Delaware State University; (2) Gorum was zealous in his defense of a football player accused of weapons violations; and (3) Gorum revoked an invitation to Sessions to speak at the Alpha Phi Alpha fraternity's Martin Luther King, Jr. Prayer Breakfast.<sup>161</sup> The district court granted summary judgment in favor of Sessions, concluding all three of Gorum's cited speech incidents occurred within his official duties and were not protected by the First Amendment.<sup>162</sup> The Third Circuit affirmed, ruling Gorum's speech was not protected by the First Amendment, because (1) Gorum spoke as an employee not a citizen in providing assistance to the student athlete and serving as an advisor to the fraternity, and his speech was not a matter of public concern, and (2) Sessions would have recommended Gorum's termination whether or not he engaged in protected speech, because Gorum's disregard for the academic integrity of the university was reprehensible and warranted dismissal.<sup>163</sup> In reaching its conclusion, the Court acknowledged that a question existed regarding the application of *Garcetti* to "academic scholarship or classroom instruction," but decided Gorum's "actions clearly were not speech related to scholarship and teaching" and disciplining him for his actions did not "imperil First Amendment protection of academic freedom in public colleges and Universities."<sup>164</sup>

In *Adams v. University of North Carolina-Wilmington*,<sup>165</sup> Michael Adams, Associate Professor of Criminology at the University of North Carolina-Wilmington, was denied promotion to Full Professor, because his department chair, in consultation with the senior faculty members in his department, concluded his scholarship was insufficient to warrant promotion. Four years before applying for promotion to Full Professor, Adams converted to Christianity and, in the process, transformed his ideological views. Adams became increasingly vocal about his conservative political and religious beliefs and expressed them in columns in Townhall.com and commentary on radio and television broadcasts. He published a book entitled *Welcome to the Ivory Tower of Babel: Confessions of a Conservative College Professor*. The materials Adams assembled in his promotion application included not only descriptions of his refereed, scholarly publications but also citations of his external writings and his *Tower of Babel* book publication, his assistance to student

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161. *Id.* at 183–84.

162. *Id.* at 184.

163. *Id.* at 185–88.

164. *Id.* at 186.

165. *Adams v. Univ. of N.C.-Wilmington*, 640 F.3d 550 (4th Cir. 2011).

Christian groups through his columns, positive comments from a syndicated talk show host, and frequent speeches on conservative issues to various organizations and universities and on radio and television. Denied promotion, Adams pursued a § 1983 claim against the University, claiming that his First Amendment rights had been violated. Following discovery, the district court granted summary judgment in favor of the defendants as to all claims, including Adams' First Amendment claim.<sup>166</sup> The district court concluded that, because Adams referenced his columns, publications, and public appearances in his promotion application, he acknowledged those activities were undertaken as part of his duties as a university professor, and hence he did not speak as a private citizen and was not protected by the First Amendment.<sup>167</sup> Observing that Adams' columns, publications and public appearances were certainly protected by the First Amendment when originally made, the Fourth Circuit was puzzled how that district court could retroactively strip them of that protection upon a later reading of Adams' speech, albeit in a different context,<sup>168</sup> and decided "that *Garcetti* would not apply in the academic context of a public university as represented by the facts of this case."<sup>169</sup> *Garcetti* should not apply to the academic work of a faculty member at a public university, the Fourth Circuit insisted, because it would eliminate First Amendment protection given to "many forms of public speech or service a professor engaged in during his employment," and because "Adams' speech was not tied to any more specific or direct employee duty than the general concept that professors will engage in writing, public appearances, and service within their respective fields."<sup>170</sup> Hence, Adams' speech was "that of a citizen speaking on a matter of public concern," and was protected by the First Amendment.<sup>171</sup> Notably, then, *Adams* found that it was inappropriate to apply *Garcetti* to the research record of academics and thereby strip their publications of First Amendment protection.<sup>172</sup>

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166. *Id.* at 553–56.

167. *Id.* at 561.

168. *Id.* at 561–62.

169. *Id.* at 562.

170. *Id.* at 564.

171. *Id.* at 565.

172. See Kerry Brian Melear, *Garcetti, Faculty Speech, and the Official Duties Standard in Higher Education: Analysis of the Fourth Circuit's Decision in Adams v. University of North Carolina-Wilmington*, 274 ED. LAW REP. 353, 367 (2012) ("The Fourth Circuit's decision in *Adams* . . . found that *Garcetti* was inapplicable to the faculty speech at question. However, the gradient issue at play in that case involves the fact that the speech involved did in fact involve publications and presentations, albeit not directly bound to the academic area in which the faculty member worked.").

*Savage v. Gee*<sup>173</sup> arose out a dispute in selecting a book to be assigned to all incoming freshmen which escalated into the resignation of Scott Savage, the Head of Reference and Library Instruction at Ohio State University's Bromfield Library, and his subsequent § 1983 claim for constructive discharge in retaliation for engaging in protected speech "related to academic scholarship or classroom instruction."<sup>174</sup> The district court ruled that, while Savage's speech addressed a matter of public concern, it was made as part of his official duties and was not protected by the First Amendment.<sup>175</sup> The Sixth Circuit agreed, ruling that Savage's speech as a committee member commenting on a freshman book selection was not made pursuant to classroom instruction or academic scholarship, but was made pursuant to the librarian's official duties, and hence was not protected by the First Amendment.<sup>176</sup> In reaching its decision, the Sixth Circuit addressed neither the *Garcetti* disclaimer nor the issue of academic freedom accorded teaching and research.

In *Meade v. Moraine Valley Community College*,<sup>177</sup> Robin Meade, an adjunct faculty member employed by Moraine Valley Community College (MVCC), wrote a letter to the League for Innovation in the Community College complaining about MVCC's poor treatment of adjunct faculty members. She signed the letter in her capacity as president of the MVCC Adjunct Faculty Organization, the union representing the adjunct faculty at MVCC. MVCC fired Meade two days later, citing her letter as the reason for her termination. Meade pursued a § 1983 claim against MVCC, contending it retaliated against her for exercising her First Amendment rights.<sup>178</sup> The Seventh Circuit agreed that the content of Meade's letter addressed matters of public concern and was protected by the First Amendment.<sup>179</sup> In reaching this decision, the Seventh Circuit does not address the issue of academic freedom accorded teaching and research.

In *Demers v. Austin*,<sup>180</sup> David Demers, an associate professor of communications in the Edward R. Murrow College of Communication ("Murrow College") at Washington State University, also owned and operated Marquette Books, an independent publishing company.<sup>181</sup> Demers prepared and distributed a two-page plan to restructure the Murrow

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173. *Savage v. Gee*, 665 F.3d 732 (6th Cir. 2012).

174. *Id.* at 738.

175. *Id.*

176. *Id.* at 739.

177. *Meade v. Moraine Valley Cmty. Coll.*, 770 F.3d 680 (7th Cir. 2014).

178. *Id.* at 682.

179. *Id.* at 686.

180. *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014).

181. *Id.* at 406.

College by separating the Mass Communications faculty, who had a more practical, professional orientation, from the Communications Studies faculty, who had a more traditional academic orientation, appointing a director of the Mass Communication faculty, and giving faculty with professional backgrounds more prominence.<sup>182</sup> Demers posted the plan on the Marquette Books webpage, gave copies to various administrators, Washington state journalists, and the Murrow College advisory board, but did not give the plan to the “Structure Committee,” which was reviewing and deliberating on proposals to restructure the Murrow College, or to the Interim Director of the Murrow College.<sup>183</sup> Demers concurrently prepared drafts of the introduction and some chapters of a book entitled *The Ivory Tower of Babel*, and submitted copies of these materials in his 2006 annual faculty report and his 2007 application for sabbatical leave. Demers claimed his book demonstrated that social science plays an insignificant role in solving social problems and was critical of academic institutions, including Washington State University.<sup>184</sup> Pursuing a § 1983 action, Demers claimed the defendants retaliated against him for distributing copies of the plan and *The Ivory Tower of Babel* materials in violation of his First Amendment rights. These retaliatory actions include spying on his classes, keeping him off certain committees, initiating two internal audits, excluding him from heading the journalism program, and lowering his performance evaluations in 2006, 2007, and 2008, thereby cutting his compensation and injuring his reputation. The district court determined that the plan and the *Ivory Tower of Babel* materials were written pursuant to Demers’ official duties and hence were not protected by the First Amendment, and granted summary judgment in favor of the defendants.<sup>185</sup> The Ninth Circuit agreed that Demers was acting in his capacity and pursuant to his duties as a Washington State University professor when he prepared and distributed the plan.<sup>186</sup> He solicited comments from his colleagues on the plan; he was a member of the Structure Committee when he sent the plan to the President and Provost; he cited the plan as an accomplishment in his annual report.<sup>187</sup> The Ninth Circuit disagreed, however, that *Garcetti* applied to teaching and academic writing; rather, those activities were protected by the First Amendment under the two-part analysis established in *Pickering*: (1) the employee must show his speech addressed a matter of public concern, and (2) the employee’s interest in

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182. *Id.* at 407.

183. *Id.* at 408.

184. *Id.*

185. *Id.* at 408–09, 414.

186. *Id.* at 410.

187. *Id.*

commenting matters of public concern outweighs the interest of the state, as an employer, in promoting the efficiency of public services it provides.<sup>188</sup> Because Demers did not include a copy of the *Ivory Tower of Babel* materials in the record, the Ninth Circuit could not determine those materials triggered the acts of retaliation alleged by Demers.<sup>189</sup> Nevertheless, the Ninth Circuit decided (1) the plan distributed by Demers was related to teaching or scholarship, because, if adopted, it would have altered the nature of what was taught in the program and the faculty teaching in it;<sup>190</sup> and (2) the plan addressed matters of public concern, because it proposed a change in the basic direction and focus of the communications program, addressed the same topic for which the “Structure Committee” had contemporaneously been assembled, and was widely distributed both within and outside the university.<sup>191</sup> Notably, then, the Ninth Circuit addressed the disclaimer in *Garcetti*, and ruled that, while *Garcetti* requires the court to determine whether the speech was undertaken pursuant to the employee’s duties, *Garcetti* does not determine whether the speech is protected by the First Amendment; rather, that role is played by *Pickering*.<sup>192</sup>

As the above noted circuit court decisions indicate, two circuit court decisions (*Piggie* and *Gorum*) addressed the issue of academic freedom in reaching their decisions that the faculty members’ speech was not protected by the First Amendment. Three decisions (*Renken*, *Savage*, and *Meade*) determined the faculty members’ speech was part of their ordinary duties and was not protected by the First Amendment, but did not address the issue of academic freedom. Two decisions (*Adams* and *Demers*) decided that *Garcetti* should not be applied to the speech of faculty members when

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188. *Id.* at 412.

189. *Id.* at 414.

190. *Id.* at 415.

191. *Id.* at 416–17. The Ninth Circuit did not address the second *Pickering* inquiry. The Ninth Circuit’s determination the attribution of First Amendment protection to Demers’ speech should be determined by *Pickering*, not *Garcetti*, was a pyrrhic victory for Demers, however, because the Ninth Circuit also ruled the defendants were entitled to qualified immunity against Demers’ First Amendment claim. *Id.* at 417. See *Ninth Circuit Finds Garcetti Official Duty Rule Inapplicable to Professorial Speech in Public-University Context*, 127 HARV. L. REV. 1823, 1826 (2014).

192. See Oren R. Griffin, *Academic Freedom and Professorial Speech in the Post-Garcetti World*, 37 SEATTLE U. L. REV. 1, 41 (2013) (“A view of post-*Garcetti* jurisprudence suggests that lower courts are prepared to determine that academic speech outside of teaching or scholarly functions, but within the scope of a faculty member’s professional duties, may be beyond the protective reach of the First Amendment. However, when the speech at issue is related to scholarship or teaching, the *Pickering-Connick* analytical framework shall remain applicable to resolve public sector free speech claims.”). See also Arthur Willner, *Ninth Circuit Upholds Professor’s First Amendment Claim in Demers v. Austin*, 15 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS 40 (2014).

their speech falls into the realm of academic freedom. This array of decisions underscores the need for clarification with respect to the application of *Garcetti* to public college and university faculty members.<sup>193</sup>

### Conclusion

This article has attempted to examine two major developments stemming from the U.S. Supreme Court decision in *Garcetti*: (1) the surge of circuit court decisions dismissing § 1983 employment retaliation claims because the courts determined the expression was derived from the government employees' actual duties; and (2) the Court's disclaimer as to whether the *Garcetti* analysis applied "in the same manner to a case involving speech related to scholarship or teaching."

The U.S. Supreme Court addressed the first development in *Lane*, and decided the mere fact the government employee acquired the information included in the employee's expression through public employment does not transform that expression into government employee speech, and the speech at issue must ordinarily be made within the scope of the employees' duties to fall under the umbrella of government worker speech. That this qualification may restore First Amendment protection so some government worker speech is seen by an examination of circuit court decisions following the U.S. Supreme Court decision in *Lane*.

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193. See Larry D. Spurgeon, *The Endangered Citizen Servant: Garcetti versus the Public Interest and Academic Freedom*, 39 J.C. & U. LAW 405, 466 (2013) ("Though fixing the *Garcetti* problem for public employee speech mitigates the harm to academic freedom, it does not address the fundamental problem that speech in the public arena is very different from academic speech. Therefore, the Court should exempt academic speech from the public employee speech doctrine once and for all . . . . In addition, the Court should apply its tradition of deference to the college or university, not as a corporeal entity, but to the community of scholars, for expression by faculty within their academic disciplines. To ensure the autonomy granted to college or universities is not abused, the Court should also grant constitutional protection to the shared governance activities of faculty."). See also Bridget R. Nugent & Julee T. Flood, *Rescuing Academic Freedom from Garcetti v. Ceballos: An Evaluation of Current Case Law and A Proposal for the Protection of Core Academic, Administrative, and Advisory Speech*, 40 J.C. & U. LAW 115, 157–58 (2014) ("*Garcetti*, if applied to core academic speech, portends an ominous future for public college and university professorial expression. It is imperative that the Supreme Court, drawing on its reservation in *Garcetti*, craft an exception to the public employee speech doctrine for the speech of academics and address the parameters of such an exception. If it does not do so, lower courts will increasingly diverge in their application of *Garcetti* to various types of academic speech, thus chilling the speech of professors who are unable to guess the framework that will be applied to the facts of their particular situations. Core academic speech is special; when professors speak within the realm of academic disciplines, they are pushing inquiry forward and furthering the public interest. It is the kind of speech the First Amendment is designed to protect because the role of a professor in teaching or researching is one in which intellect must be free to safely range and speculate. Academic speech should not be suppressed because of its content.").



The second development is the inconsistency among the circuit courts in assessing § 1983 public worker employment retaliation claims pursued by faculty members at public colleges and universities. A review of the circuit court decisions made after the U.S. Supreme Court decision in *Garcetti* indicates the circuit courts have taken different routes: some have applied *Garcetti* without addressing academic freedom; some have considered whether the faculty member's speech falls within the realm of academic freedom and determined it is employee speech not protected by the First Amendment; and some have determined that *Garcetti* should not be applied to faculty member's speech which falls within the realm of academic freedom. Hopefully the U.S. Supreme Court will ultimately resolve this inconsistency.

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