Seventh Circuit Review

Volume 5 | Issue 2 Article 6

5-1-2010

Public Employee Free Speech After *Garcetti*: Has the Seventh Circuit Been Ignoring a Question of Fact?

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SEVENTH CIRCUIT REVIEW Volume 5, Issue 2 Spring 2010

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Cite as: Sarah R. Kaplan, Note, *Public Employee Free Speech After* Garcetti*: Has the Seventh Circuit Been Ignoring a Question of Fact?*, 5 SEVENTH CIRCUIT REV. 459 (2010), *at* http://www.kentlaw.edu/7cr/v5-2/kaplan.pdf.

INTRODUCTION

A government employee reports her co-workers' misconduct to her supervisor, and then the supervisor retaliates against her for reporting. This fact pattern gives rise to cases in which public employees argue that their supervisors violated their First Amendment right to free speech.[1] When a government employee exercises her First Amendment right to free speech, federal law protects her from retaliation by her government employer.[2] However, the First Amendment does not protect all speech that a public employee may make. In *Garcetti v. Ceballos*, the United States Supreme Court held

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[1] *E.g.*, Milwaukee Deputy Sheriff's Ass'n v. Clarke, 574 F.3d 370, 372–75 (7th Cir. 2009) (deputy sheriff alleged that sheriff violated his First Amendment rights by reassigning him to a more dangerous patrol in retaliation for criticizing the sheriff's misuse of public resources).

[2] Massey v. Johnson, 457 F.3d 711, 716 (7th Cir. 2006) (stating the elements of a prima facie case for First Amendment retaliation under 42 U.S.C. § 1983).

that when a public employee speaks pursuant to her official duties, she is speaking as a government employee and not as a citizen, and the First Amendment does not protect her speech from employer discipline.[3]

Since *Garcetti*, the Seventh Circuit Court of Appeals has decided the question whether a public employee spoke pursuant to his official duties as a matter of law.[4] The Seventh Circuit has repeatedly held that a public employee's speech was not protected by the First Amendment whenever the employee's job duties arguably included the kind of speech at issue.[5] Treating the question as purely legal is problematic because it hides questions of fact. First, what were the employee's job duties? Second, did the employee speak because of those duties? Because the Seventh Circuit treats this inquiry as purely legal, it has affirmed summary judgment against public employee plaintiffs, even when they argued that their job duties really did not include making the kind of speech at issue or that a jury should decide this question.[6] By treating the matter as a question of law, the Seventh Circuit is depriving plaintiffs of the opportunity to prove facts that are key to protecting their constitutional right to free speech.

The Seventh Circuit's conclusions on this issue also appear questionable. The court's opinions do not always make clear how it came to the conclusion that the employee spoke pursuant to the job. Therefore, a reader of the opinion cannot tell whether the court's assessment of the plaintiff's job duties is correct. By affirming summary judgment against the plaintiff, the court prevents the fact-finding that would answer this question. On the other hand, treating the questions of the scope of a public employee's job duties and whether the employee spoke because of those duties as questions of fact would assure plaintiffs a fair resolution of their claims and would assure the public that the result of these cases is correct. Treating the

[3] 547 U.S. 410, 421 (2006).

[4] *E.g.*, Swearnigen-El v. Cook Cnty. Sheriff's Dept., 602 F.3d 852, 862 (7th Cir. 2010).

[5] *E.g.*, Davis v. Cook Cnty., 534 F.3d 650, 653–54 (7th Cir. 2008).

[6] *E.g.*, *id.*

question as one of fact would not require more of the courts' time in many cases because courts would grant summary judgment against plaintiffs who could not create a genuine issue of material fact on this point.

Because employee free speech cases are brought under 42 U.S.C. § 1983, Part I provides a brief introduction to that statute. Part II summarizes the development of public employee free speech doctrine to show how *Garcetti* changed the inquiry. Part III surveys the reasoning of federal appellate courts, some of which have held that the scope of a public employee's job duties is a question of fact, and some of which have continued to treat the entire inquiry as one of law. Part IV discusses the benefits to be gained by treating the question whether a public employee spoke because of her official duties as a question of fact and suggests a way to reach this result in the Seventh Circuit.

I. 42 U.S.C. § 1983, THE CIVIL REMEDY FOR CONSTITUTIONAL RIGHTS VIOLATIONS

When courts consider the First Amendment rights of public employees, they usually do so in the context of a claim under 42 U.S.C. § 1983.[7] This statute creates a civil cause of action for people whose constitutional or other legal rights have been violated by a state actor apparently acting with official authority.[8] Section 1983 states in relevant part:

> 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

[7] *E.g.*, Garcetti v. Ceballos, 547 U.S. 410 (2006); Connick v. Myers, 461 U.S. 138 (1983).

[8] 42 U.S.C. § 1983 (2006); *see* 1 SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION: THE LAW OF SECTION 1983 § 2:1 (4th ed. 2009).

> laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[9]

For example, the Constitution protects the right to be free of unreasonable searches.[10] Suppose that on-duty police officers search someone's home without a warrant. Those police officers are acting "under color of law." That is, they are misusing the power given to them by law, and they are able to perform this illegal search only because they appear to be acting with the authority of the state.[11] But by searching the home without a warrant, the officers have actually deprived the victim of a Constitutional right.[12] In this situation, § 1983 gives the victim an opportunity to sue the police officers for money damages.[13] These money damages can be nominal, compensatory and/or punitive.[14] Successful plaintiffs may also be awarded attorney's fees.[15]

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[9] 42 U.S.C. § 1983.

[10] U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . .").

[11] United States v. Classic, 313 U.S. 299, 326 (1941).

[12] Groh v. Ramirez, 540 U.S. 551, 559 (2004) (searches and seizures inside a home without a warrant are presumptively unreasonable).

[13] *See* Monroe v. Pape, 365 U.S. 167, 168–172 (1961), *overruled on other grounds by* Monell v. Dept. of Soc. Servs. of N.Y.C., 436 U.S. 658, 694 (1978) (holding that municipalities are not immune from § 1983 liability when their policy or custom violates constitutional or legal rights). In *Monroe v. Pape*, the Supreme Court held that the plaintiffs stated a claim under § 1983 where they alleged that police officers had broken into their home without a warrant, forced them to stand naked in the living room while police ransacked the house and damaged personal property, and detained one of them for ten hours without charging him with a crime. *Id.* at 169.

[14] The amount of money damages in § 1983 cases is generally determined in the same way as in tort cases. Memphis Cmty. Sch. Dist. v. Stachura, 477 U.S. 299, 306 (1986). In order to be awarded compensatory damages, a plaintiff must prove an injury that resulted from the deprivation of rights. Farrar v. Hobby, 506 U.S. 103, 112 (1992). Where the defendant violated the plaintiff's rights but the plaintiff suffered no injury, nominal damages may be awarded. *See id.* Punitive damages may

In § 1983 cases, plaintiffs generally must sue the individual responsible for the violation, not that individual's employer.[16] The doctrine of respondeat superior does not apply in § 1983 cases, so that government bodies are not liable under § 1983 solely because of the conduct of one of their employees.[17] A government body may be liable only if its policy statement, ordinance, regulation, official decision, or custom causes a violation of a constitutional right.[18]

Government employees can and do use § 1983 to seek compensation when they feel that their employers deprived them of their First Amendment right to free speech.[19] Employees of the government, like the general public, have First Amendment rights. As the Seventh Circuit has stated, "a public employee does not shed his First Amendment rights at the steps of the government building."[20] Retaliation by a government employer for an employee's speech has been found to violate the employee's First Amendment rights.[21]

To state a First Amendment retaliation claim under § 1983, a public employee must present evidence that: (1) her speech was protected by the First Amendment, (2) her employer has caused her to suffer a deprivation likely to deter free speech, and (3) her speech was at least a motivating factor in the employer's action.[22] Thus in every § 1983 public employee free speech case, the court must consider whether the speech was protected by the First Amendment.

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be awarded where a defendant intentionally or recklessly disregarded the plaintiff's rights. Smith v. Wade, 461 U.S. 30, 51 (1983).

[15] 42 U.S.C. § 1988(b) (2006).

[16] *See* Monell v. Dept. of Soc. Servs. of N.Y.C., 436 U.S. 658, 691 (1978).

[17] *Id.*

[18] *Id.* at 690–91.

[19] *See* cases cited *infra* note 130.

[20] Vargas-Harrison v. Racine Unified Sch. Dist., 272 F.3d 964, 970 (7th Cir. 2001); Keyishian v. Bd. of Regents, 385 U.S. 589, 605–606 (1967) ("[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.") (internal quotations omitted).

[21] *E.g.*, Massey v. Johnson, 457 F.3d 711, 716 (7th Cir. 2006).

[22] *Id.*

II. HOW *GARCETTI* CHANGED THE INQUIRY

Before *Garcetti*, the settled rule for deciding whether a public employee's speech was protected by the First Amendment was the "*Pickering-Connick* test," from the Supreme Court cases, *Pickering v. Board of Education*[23] and *Connick v. Myers*.[24] In these cases, the Supreme Court sought to balance two competing values: (1) the employee's interest in expressing himself on a matter of public concern, just as any other citizen could, and (2) the public body's interest in providing services as efficiently as possible, which includes controlling how its employees spend their time and how its employees represent it to the public.[25]

In *Pickering*, a teacher was fired for sending a letter to a local newspaper.[26] The letter criticized the School Board's and the Superintendent's spending priorities and their attempts to silence criticism from teachers.[27] The Court began its analysis of the case with this language: "The problem in any case is to arrive at a balance between 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."[28] To balance the interests, the Court considered the content of the letter and whether it dealt with matters of public concern (it did), and whether the speech actually disrupted the functioning of the school or the teacher's job performance (it did not).[29] Concluding that the school district had no legitimate interest in silencing this speech, the Court held that the teacher's letter was protected speech,

[23] 391 U.S. 563 (1968).
[24] 461 U.S. 138 (1983).
[25] *See Pickering*, 391 U.S. at 568.
[26] *Id.* at 564.
[27] *Id.* at 564, 569, 575–78.
[28] *Id.* at 568.
[29] *Id.* at 569–71.

and therefore, the school could not constitutionally dismiss the teacher for writing the letter.[30]

Connick v. Myers was the next step in the development of public employee free speech doctrine.[31] When Myers, an Assistant District Attorney, was told that she was to be transferred to a different section of the criminal court, she told her supervisors that she opposed this transfer.[32] After she was told that she was being transferred anyway, she distributed a questionnaire to fifteen other Assistant District Attorneys.[33] The questionnaire asked for her colleagues' opinions about the transfer policy, office morale, the need for a grievance committee, the level of confidence in several individually named supervisors, and whether the colleagues felt pressured to work in political campaigns.[34] Myers's supervisor considered this an act of insubordination and fired her.[35]

Myers sued her employer, alleging that it had violated § 1983 by retaliating against her for exercising her right to free speech.[36] To determine whether the questionnaire was protected, the Court first asked whether the questionnaire addressed a matter of public concern.[37] The Court held that the First Amendment protects a public employee from employer retaliation when she speaks "as a citizen upon matters of public concern," but not when she speaks "as an employee upon matters only of personal interest."[38] The question whether speech addresses a matter of public concern is to be

[30] *Id.* at 574–75.

[31] *See* Connick v. Myers, 461 U.S. 138 (1983).

[32] *Id.* at 140.

[33] *Id.* at 140–41.

[34] *Id.* at 141, 155.

[35] *Id.* at 141.

[36] *Id.*

[37] *Id.* at 146.

[38] *Id.* at 147; *but see* Rowland v. Mad River Local Sch. Dist., 470 U.S. 1009, 1012 (1985) (Brennan, J., dissenting from denial of certiorari) ("[S]peech even if characterized as private is entitled to constitutional protection when it does not in any way interfere with the employer's business.").

determined by considering the "content, form, and context" of the speech, "as revealed by the whole record."[39]

In *Connick*, the Court held that all but one of the questions in Myers's questionnaire concerned only Myers's own dissatisfaction with her circumstances, which the Court considered private, not public.[40] However, the question whether her colleagues ever felt pressured to work on political campaigns *did* touch on a matter of public concern.[41] With regard to that question, the Court applied the "*Pickering* balance," weighing Myers's interest in distributing the questionnaire against the government's interest in not having the District Attorney's office disrupted.[42] The Court found the employer's interest weightier and held that the First Amendment did not protect Myers from being fired for distributing her questionnaire.[43]

In *Connick*, the Court stated that the "inquiry into the protected status of speech is one of law, not fact." [44] Using the rules from *Pickering* and *Connick* to determine whether public employee speech was protected by the First Amendment, federal courts considered the facts of the case and then decided as a matter of law: (1) whether the speech at issue touched on a matter of public concern, and if so, (2) whether the employee's interest in speaking outweighed the employer's interest in efficient functioning.[45] Both of these questions are the kind that courts answer as a matter of law. In *Garcetti v. Ceballos*, the Supreme Court changed the inquiry by requiring consideration of more facts: what the employee's job duties were, and whether the speech in question was made pursuant to those duties.[46]

[39] *Connick*, 461 U.S. at 147–48.

[40] *Id.* at 148–49.

[41] *Id.* at 149.

[42] *Id.* at 150–54.

[43] *Id.*

[44] *Id.* at 148 n.7.

[45] *See, e.g.*, Spiegla v. Hull, 371 F.3d 928 (7th Cir. 2004) (applying "the Connick-Pickering test"), *rev'd*, 481 F.3d 961 (7th Cir. 2007) (after *Garcetti*, the Seventh Circuit vacated the judgment for plaintiff because the plaintiff spoke pursuant to her job).

[46] *See* 547 U.S. 410, 421 (2006).

In *Garcetti v. Ceballos*, the Court held that a deputy district attorney was not speaking as a citizen when he brought potential police misconduct to the attention of his superiors.[47] Ceballos, a Deputy District Attorney, was asked by a defense attorney to review an affidavit that the police had used to get a search warrant critical to a pending case.[48] Ceballos concluded that the affidavit contained serious misrepresentations.[49] For example, after he visited a road referred to in the affidavit, Ceballos doubted that the affiant could have seen tire marks because of the texture of the road surface.[50] He told his supervisors what he thought was false about the affidavit, and then he wrote a disposition memorandum recommending that the case be dismissed.[51]

Ceballos's supervisors decided to proceed with the case, and Ceballos testified in court about his personal observations, which differed from the statements in the affidavit.[52] After these events, Ceballos was reassigned to another position, transferred to another courthouse, and denied a promotion.[53] Ceballos sued his supervisors, alleging that they violated § 1983 by retaliating against him for his disposition memorandum, which he claimed was protected by the First Amendment.[54]

The Supreme Court held that public employees are *not* speaking as citizens for the purpose of First Amendment protection when they speak pursuant to their official duties.[55] Ceballos did write his memorandum pursuant to his official duties, which included the duty to make recommendations about how to proceed with pending cases.[56]

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[47] *Id.*
[48] *Id.* at 413.
[49] *Id.* at 414.
[50] *Id.*
[51] *Id.*
[52] *Id.* at 414–15.
[53] *Id.* at 415.
[54] *Id.*
[55] *Id.* at 421.
[56] *Id.*

Therefore, regardless of any personal reasons Ceballos might have had for writing the memorandum the way he did, his § 1983 claim failed.[57]

After *Garcetti*, circuit courts have developed rules to define the meaning of "pursuant to their official duties"[58] as applied to new circumstances.[59] A detailed discussion of the various circuit courts' rules is beyond the scope of this Note. Generally, several circuit courts have stated that speech made pursuant to an employee's official duties is speech that "owes its existence to a public employee's professional responsibilities."[60] Several circuit courts have defined this standard broadly, holding that an employee speaks pursuant to his job when he speaks because of any of his job duties, even one that is "an unusual aspect of an employee's job that is not part of his everyday functions."[61] The Seventh Circuit asks whether an employee spoke pursuant to her official obligations, "including both her day-to-day duties and her more general responsibilities."[62]

Federal courts have stopped short of holding that all speech by public employees that could conceivably promote the interests of their employers is made "pursuant to their official duties." For example, an employee's filing a grievance could potentially help the employer by pointing out systemic problems that, if solved, would make the employer more effective. However, where there is no specific requirement to report, courts generally do not find that filing an employee grievance is speech made pursuant to the job.[63] The Tenth Circuit explained that to consider a generalized grievance policy to be

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[57] *See id.* at 426.

[58] *Id.* at 421.

[59] *E.g.*, Trigillo v. Snyder, 547 F.3d 826, 829 (7th Cir. 2008).

[60] *E.g.*, Weintraub v. Bd. of Educ., 593 F.3d 196, 201 (2d Cir. 2010) (quoting *Garcetti*, 547 U.S. at 421); Huppert v. City of Pittsburg, 574 F.3d 696, 704 (9th Cir. 2009) (same); Abdur-Rahman v. Walker, 567 F.3d 1278, 1285 (11th Cir. 2009) (same); *cf.* Fairley v. Andrews, 578 F.3d 518, 523 (7th Cir. 2009) (holding that a public employee's speech was not protected because it was "part of the job").

[61] Chavez-Rodriguez v. City of Santa Fe, 596 F.3d 708, 714 (10th Cir. 2010).

[62] *Trigillo*, 547 F.3d at 829.

[63] *E.g.*, Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1204 (10th Cir. 2007).

an official duty would "eviscerat[e] *Garcetti* and the general constitutional principle that public employees do not surrender all their First Amendment rights by reason of their employment."[64]

The remainder of this Note focuses on *how* courts determine what speech is made pursuant to a public employee's official duties. The Supreme Court left that question open in *Garcetti*.[65] In *Garcetti*, the Court needed no help from a fact-finder to determine the scope of Ceballos's job duties and whether the speech fell within that scope because Ceballos agreed that he did write the memorandum pursuant to his job duties.[66] Justice Kennedy, writing for the majority, noted that the Court "ha[d] no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate."[67]

Justice Kennedy seems to have implied that fact-finding would be needed in future cases where parties do dispute the employee's job duties and whether the employee spoke because of those duties.[68] He wrote that the Court rejected the idea that employers could insulate themselves from free speech retaliation cases simply by writing excessively broad job descriptions.[69] Rather, "[t]he proper inquiry is a practical one."[70] The Supreme Court has not yet indicated whether the question is legal or factual (or both) because a dispute over whether a public employee's duties included making the speech at issue has not yet reached the Court.

[64] *Id.* (internal quotation omitted).
[65] Garcetti v. Ceballos, 547 U.S. 410, 424 (2006).
[66] *Id.* at 421, 424.
[67] *Id.* at 424.
[68] *See id.*
[69] *Id.*
[70] *Id.*

III. THE CIRCUIT COURTS DISAGREE ON WHETHER THE QUESTION IS ONE OF FACT OR LAW.

Most Circuit courts treat the entire inquiry into whether the First Amendment protects speech as purely legal, but the Ninth and Third Circuits recognize that the inquiry includes a question of fact.

A. Question of Fact

The Third and Ninth Circuits have held that the inquiry into whether a public employee's speech is protected can contain factual questions that will be submitted to a jury.

At the time of this writing, the Ninth Circuit was the only circuit to have discussed in depth the question "whether the inquiry into the protected status of speech remains one purely of law as stated in *Connick*," or whether *Garcetti* has introduced a question of fact into the inquiry.[71] In *Posey v. Lake Pend Oreille School District No. 84*, the Ninth Circuit held that the "scope and content of a plaintiff's job responsibilities" is a question of fact.[72]

In this case, Posey was a "security specialist" at a high school.[73] After the school cut back his responsibilities, he wrote a letter to the School District expressing his concerns that its safety and emergency policies were inadequate to prevent an emergency, such as a student's bringing a gun to school.[74] At the end of that school year, Posey's job was consolidated with other jobs to form a new position.[75] Posey applied for that position but was not hired.[76]

[71] Posey v. Lake Pend Oreille Sch. Dist. No. 84, 546 F.3d 1121, 1127–29 (9th Cir. 2008). The Ninth Circuit reiterated this view in later cases, including Robinson v. York, 566 F.3d 817, 823 (9th Cir. 2009).

[72] *Posey*, 546 F.3d at 1129.

[73] *Id.* at 1123–24.

[74] *Id.* at 1124.

[75] *Id.* at 1125.

[76] *Id.*

Posey argued that his responsibilities were limited to "discrete tasks such as ensuring that the parking lot remained orderly at the end of the school day," and therefore he wrote his letter as a citizen and not in his capacity as a security specialist.[77] The school district argued that Posey's responsibilities included providing "reports and information about security matters at the high school," and therefore, Posey wrote the letter pursuant to his official duties.[78] The Ninth Circuit concluded that the dispute required the court to decide whether the question at hand was a question of law or fact.[79]

The Ninth Circuit held that the question whether Posey's job duties included making the kind of report he made in his letter was a question of fact.[80] The court found that there was a genuine issue of material fact concerning the scope of Posey's job and reversed the grant of summary judgment for the school district.[81]

The court reasoned that the scope and content of a plaintiff's job responsibilities can be found through the usual method of fact-finding, that is, by applying "ordinary principles of logic and common experience."[82] Therefore, courts must reserve judgment until the facts are found by a fact-finder.[83] The court called the question of the scope of a plaintiff's job responsibilities "concrete and practical rather than abstract and formal."[84] It also noted that the Supreme Court in *Garcetti* anticipated a factual inquiry when it said that "[t]he proper inquiry is a practical one" in which the employee's actual job duties would be more important than a formal job description.[85]

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[77] *Id.*

[78] *Id.*

[79] *Id.* at 1127.

[80] *Id.* at 1129.

[81] *Id.* at 1131.

[82] *Id.* at 1129 (quoting Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 501 n.17 (1984)).

[83] *Id.*

[84] *Id.*

[85] *Id.* (quoting Garcetti v. Ceballos, 547 U.S. 410, 424–25 (2006)).

In defense of its holding, the court pointed out that not all cases will require a trial, even where there is a factual dispute over whether speech was made pursuant to official job duties.[86] Summary judgment would still be proper where the speech did not address a matter of public concern, or where the government's interest in efficient functioning outweighed the employee's interest in speaking.[87]

The Third Circuit has held that the question whether a public employee spoke pursuant to his official duties is a mixed question of fact and law.[88] A mixed question of fact and law has been defined as a "question[] in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated."[89] For this reason, the Third Circuit has required the facts in public employee free speech cases to be established before it would decide whether or not a public employee spoke pursuant to his job duties.[90]

The Third Circuit first discussed this issue in *Foraker v. Chaffinch*, where it explained that the question "whether a particular incident of speech is made within a particular plaintiff's job duties" involves a fact-intensive inquiry.[91] The court reasoned that a court can determine whether the plaintiff spoke pursuant to his job duties only after the facts regarding the speech and the plaintiff's job duties have been found.[92] In this case, the facts were presented in detail at a jury trial, and the appellate court considered the record "comprehensive."[93] With complete factual information available, the Third Circuit determined that the plaintiffs had spoken within their official duties

[86] *See id.* at 1129.

[87] *See id.* at 1123, 1129.

[88] Foraker v. Chaffinch, 501 F.3d 231, 240 (3d Cir. 2007).

[89] Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982).

[90] *See* Reilly v. City of Atlantic City, 532 F.3d 216, 227 (3d Cir. 2008); *Foraker*, 501 F.3d at 240.

[91] *Foraker*, 501 F.3d at 240.

[92] *See id.*

[93] *Id.*

and affirmed the district court's grant of judgment as a matter of law to the defendants.[94] The Third Circuit also suggested that because of the nature of the question whether a public employee spoke pursuant to his job, appellate courts should defer to district courts to resolve this question because district courts are more familiar with the evidence.[95]

In *Reilly v. City of Atlantic City*, the Third Circuit reiterated its holding that the question is a mixed question of fact and law.[96] In that case, a police officer alleged that his superiors retaliated against him for his part in an investigation of another police officer, including testifying against him at trial.[97] The trial took place before the Supreme Court decided *Garcetti*, and none of the fact-finding focused on whether the plaintiff's speech was made pursuant to his job.[98] The court stated that the record contained insufficient factual details about the plaintiff's participation in the investigation and his related job duties, so that the court could not determine whether that speech was made pursuant to his official duties without more factual findings.[99]

B. Question of Law

The First, Second, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh and D.C. Circuits have treated the question whether a public employee spoke pursuant to her official duties as a question of law.

The Fifth Circuit case, *Charles v. Grief*, illustrates such treatment.[100] In that case, Charles was a systems analyst for the Texas Lottery Commission.[101] He sent an e-mail to high-ranking

[94] *Id.* at 247.

[95] *Id.* at 240–41.

[96] 532 F.3d 216, 227 (3d Cir. 2008).

[97] *Id.* at 224.

[98] *Id.* at 225, 227.

[99] *See id.* at 227–28 ("We agree that some aspects of [plaintiff's] speech in the context of the . . . investigation require further factual development by the District Court.").

[100] *See* 522 F.3d 508, 512, 513 n.17 (5th Cir. 2008).

[101] *Id.* at 509–10.

Commission officials complaining about racial discrimination occurring at the Commission.[102] A month later, he had received no response.[103] Charles then sent the e-mail to members of the Texas Legislature who had supervisory authority over the Commission.[104] He also sent the legislators e-mail messages in which he accused the Commission of violating the Texas Open Records Act and other misconduct.[105] Charles was fired two days later.[106] He sued Mr. Grief, the supervisor who had fired him, alleging that Grief had retaliated against him for exercising his First Amendment rights.[107]

The District Court denied Grief's motion for summary judgment.[108] On appeal, the Fifth Circuit held that as a matter of law, Charles's speech was not made pursuant to his official duties.[109] The magistrate judge's report, on which the district court had relied, found that the question whether Charles's e-mails had been written as a citizen or as a Commission employee was "a material issue of genuine fact [sic] properly resolved at trial."[110] The Fifth Circuit disagreed, holding that "even though analyzing whether *Garcetti* applies involves the consideration of factual circumstances surrounding the speech at issue, the question whether Charles's speech is entitled to protection is a legal conclusion properly decided at summary judgment."[111] The court considered the facts in the record before it, including that Charles had communicated directly with legislators rather than using an internal grievance process, and that Charles's job was to maintain the Commission's computer network.[112] The court concluded that

[102] *Id.* at 510.
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] *Id.*
[109] *Id.* at 514.
[110] *Id.* at 513 n.17.
[111] *Id.*
[112] *Id.*

Charles's complaint about racial discrimination and other misconduct could not be related to "any conceivable job duties" of a computer systems analyst.[113]

The opinion includes no discussion of why the Fifth Circuit considers the question to be one of law.[114] It simply states that the question whether speech is protected is a purely legal one, and cites *Connick* (an important pre-*Garcetti* decision) and an earlier Fifth Circuit case that similarly provided no discussion of this issue.[115]

The Tenth Circuit made a similar decision in *Brammer-Hoelter v. Twin Peaks Charter Academy*.[116] In that case, the Tenth Circuit stated that the question whether an employee's speech was made pursuant to his official duties is a question of law.[117] The court did not discuss its reasoning on this point.[118] It simply stated that the question is a legal one, and cited a pre-*Garcetti* Tenth Circuit case for support.[119] The court then decided as a matter of law which of several complaints by teachers were made pursuant to the teachers' official duties. [120]

The Tenth Circuit upheld its conclusion that the question is a legal one in several later cases.[121] Some of these cases provide clues about the Tenth Circuit's reasoning. In *Thomas v. City of Blanchard*, the court stated that in First Amendment cases, the court has "an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden

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[113] *Id.*

[114] *See id.* at 512–14.

[115] *Id.* at 512 n.7 (citing Connick v. Myers, 461 U.S. 138, 148 n.7 (1983) and Williams v. Dallas Indep. Sch. Dist., 480 F.3d 689, 692–94 (5th Cir. 2007)).

[116] 492 F.3d 1192 (10th Cir. 2007).

[117] *Id.* at 1203 (stating that the whether the employee spoke pursuant to her official duties is "to be resolved by the district court," not the trier of fact).

[118] *Id.*

[119] *Id.* (citing Cragg v. City of Osawatomie, 143 F.3d 1343, 1346 (10th Cir. 1998).

[120] *Id.* at 1203–05.

[121] Rohrbough v. Univ. of Colo. Hosp. Auth., 596 F.3d 741, 745 (10th Cir. 2010); Thomas v. City of Blanchard, 548 F.3d 1317, 1322 (10th Cir. 2008); Hesse v. Town of Jackson, Wyo., 541 F.3d 1240, 1249 (10th Cir. 2008).

intrusion on the field of free expression."[122] The court did not apply this principle specifically to the question whether a public employee's speech was made pursuant to his official duties but rather to the entire inquiry into whether speech is protected.[123]

The Eighth Circuit held that the entire inquiry into whether a public employee's speech is protected is a legal one in *McGee v. Public Water Supply*.[124] The D.C. Circuit agreed in *Wilburn v. Robinson*,[125] and the First Circuit agreed in *Curran v. Cousins*.[126] Without stating explicitly that the question was a legal one, the Second Circuit held as a matter of law that a public employee spoke pursuant to her employment in *Huth v. Haslun*.[127] The Sixth Circuit did the same in *Haynes v. City of Circleville, Ohio*,[128] as did the Eleventh Circuit in *Boyce v. Andrew*.[129]

[122] *Thomas*, 548 F.3d at 1322 (quoting Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984)).

[123] *See id.*

[124] 471 F.3d 918, 920 (8th Cir. 2006); *see* Benjamin M. Smith, Note, *Transforming the Public Employee Speech Standard in* Posey v. Lake Pend Oreille*: More than Meets the Eye*, 2010 BYU L. REV. 285, 295, 295 n.70 (2010) (discussing the circuit split and listing *McGee* and more recent Eighth Circuit cases that treat the question as one of law).

[125] 480 F.3d 1140, 1149 (D.C. Cir. 2007) (stating that the question whether a public employee spoke as a citizen on a matter of public concern is a question of law for the court, and citing for support Tao v. Freeh, 27 F.3d 635, 639 (D.C. Cir. 1994)).

[126] 509 F.3d 36, 45 (1st Cir. 2007) (quoting *Connick*, 461 U.S. at 148 n.7 for the proposition that "[t]he inquiry into the protected status of speech is one of law, not fact").

[127] 598 F.3d 70, 74 (2d Cir. 2010) ("We have no difficulty concluding that [the] speech was made not as a 'citizen' but, rather, pursuant to [plaintiff's] official duties . . . .").

[128] 474 F.3d 357, 364 (6th Cir. 2007).

[129] 510 F.3d 1333, 1346 (11th Cir. 2007).

C. The Seventh Circuit

As of this writing, the Seventh Circuit has decided the question whether a public employee had spoken pursuant to his job duties as a matter of law in nineteen cases since *Garcetti*.[130] At first, the Seventh Circuit decided this question as a matter of law without explicitly stating that it was doing so.

Mills v. City of Evansville, Indiana, decided in 2006, was the first Seventh Circuit case to follow *Garcetti*.[131] In that case, the court held as a matter of law that when a police sergeant spoke to her superiors in the lobby of a police department building and criticized a plan to change the duties of some police officers, she did so pursuant to her official duties.[132] The court stated, "*Garcetti* … holds that before asking whether the subject-matter of particular speech is a topic of public concern, *the court must decide* whether the plaintiff was speaking 'as a citizen' or as part of her public job."[133] If one were reading this opinion without the purpose of discovering whether the Seventh Circuit considers the question one of law or fact, and without the emphasis, one might not notice the implication of this language.

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[130] Swearnigen-El v. Cook Cnty. Sheriff's Dept., 602 F.3d 852, 862 (7th Cir. 2010); Bivens v. Trent, 591 F.3d 555, 560 (7th Cir. 2010); Fairley v. Andrews, 578 F.3d 518, 523 (7th Cir. 2009); Matrisciano v. Randle, 569 F.3d 723, 731 (7th Cir. 2009); Chaklos v. Stevens, 560 F.3d 705, 712 (7th Cir. 2009); Nagle v. Vill. of Calumet Park, 554 F.3d 1106, 123 (7th Cir. 2009); Houskins v. Sheahan, 549 F.3d 480, 491 (7th Cir. 2008); Trigillo v. Snyder, 547 F.3d 826, 830 (7th Cir. 2008); Renken v. Gregory, 541 F.3d 769, 775 (7th Cir. 2008); Davis v. Cook Cnty., 534 F.3d 650, 653-54 (7th Cir. 2008); Tamayo v. Blagojevich, 526 F.3d 1074, 1092 (7th Cir. 2008); Callahan v. Fermon, 526 F.3d 1040, 1045 (7th Cir. 2008); Vose v. Kliment, 506 F.3d 565, 572 (7th Cir. 2007); Morales v. Jones, 494 F.3d 590, 597 (7th Cir. 2007); Sigsworth v. City of Aurora, 487 F.3d 506, 510 (7th Cir. 2007); Spiegla v. Hull, 481 F.3d 961, 965 (7th Cir. 2007); Piggee v. Carl Sandburg Coll., 464 F.3d 667, 672 (7th Cir. 2006); Fuerst v. Clarke, 454 F.3d 770, 774 (7th Cir. 2006); Mills v. City of Evansville, Ind., 452 F.3d 646, 648 (7th Cir. 2006).

[131] *See Mills*, 452 F.3d at 647.

[132] *Id.*

[133] *Id.* at 647 (emphasis added).

There is no indication that the plaintiff in *Mills* argued that her statements were *not* made pursuant to her job.[134] Rather, because *Garcetti* was decided while this case was under advisement, it appears that neither plaintiff nor defendants had any opportunity to argue this point.[135] Based on its own assessment of the facts, the Seventh Circuit held that the speech was not protected and affirmed summary judgment for the defendants.[136]

The Seventh Circuit first stated that the inquiry is one of law in *Spiegla v. Hull*, decided in 2007.[137] In *Spiegla*, the plaintiff was a correctional officer who guarded the front gate of an Indiana prison.[138] The plaintiff saw two other correctional officers transfer bags from their personal vehicles into a state vehicle in the parking lot outside of the main gate.[139] The officers then drove the state vehicle to the plaintiff's security post.[140] Although the prison's policy was to search all entering vehicles without exception for contraband, the plaintiff did not search this vehicle because her supervisor told her not to.[141] Later that day, the plaintiff reported this apparent breach of prison policy.[142] She was then transferred to a less desirable shift.[143]

The plaintiff's appeal turned on whether her reporting was protected speech.[144] The Seventh Circuit stated that the "inquiry into the protected status of speech is one of law, not fact."[145] Besides

[134] *See id.* at 647–48.

[135] *See id.* at 647.

[136] *See id.* at 648.

[137] 481 F.3d 961, 965 (7th Cir. 2007).

[138] *Id.* at 962.

[139] *Id.* at 962–63.

[140] *Id.* at 963.

[141] *Id.*

[142] *Id.*

[143] *Id.*

[144] *Id.* at 965 (because *Garcetti* was decided while this case was under consideration, the Seventh Circuit reconsidered whether the plaintiff's speech was protected in light of *Garcetti*).

[145] *Id.* (quoting Connick v. Myers, 461 U.S. 138, 148 n.7 (1983)).

quoting *Connick*, the court offered no support for this conclusion.[146] Because the plaintiff was specifically required to report all breaches of security procedures, the court held that the speech at issue was made pursuant to her official duties, and it directed the district court to grant judgment for the defendants.[147]

Like most of the other circuits, the Seventh Circuit has not explicitly discussed why it holds that the inquiry remains purely legal after *Garcetti*. In three cases after *Spiegla*, the Seventh Circuit again stated that the question whether a public employee's speech is protected is a purely legal question.[148] In each of these cases, the court phrased the question as whether the speech was protected by the First Amendment, not specifically whether the public employee spoke pursuant to his official duties.[149] In each of these cases, the court cited as authority only *Connick*, *Spiegla* (which cited only *Connick*), and another pre-*Garcetti* Seventh Circuit case.[150] In the remaining public

[146] *See id.*

[147] *Id.* at 967.

[148] Davis v. Cook Cnty., 534 F.3d 650, 653 (7th Cir. 2008); Houskins v. Sheahan, 549 F.3d 480, 489 (7th Cir. 2008); Matrisciano v. Randle, 569 F.3d 723, 730 (7th Cir. 2009).

[149] *Davis*, 534 F.3d at 653 ("[T]he inquiry into the protected status of speech is one of law, not fact."); *Houskins*, 549 F.3d at 489 ("While we owe deference to the jury's resolution of the contested factual issues, the determination of whether speech is constitutionally protected is a question of law for the court."); *Matrisciano*, 569 F.3d at 730 ("Whether the First Amendment protects the speech is a question of law that we review de novo."). The Ninth Circuit claimed that the Seventh Circuit implicitly sided with the circuits that hold that whether speech is made pursuant to a job is a question of fact. Posey v. Lake Pend Oreille School Dist. No. 84, 546 F.3d 1121, 1128 (9th Cir. 2008). In *Posey*, the Ninth Circuit pointed out that in *Davis*, the Seventh Circuit held that summary judgment was appropriate because "no rational trier of fact could find" that Davis's speech had been made in her capacity as a private citizen. *Id.* (citing *Davis*, 534 F.3d at 653). However, the Seventh Circuit used that wording only to refute Davis's claim that the question should be decided by a jury. *See Davis*, 534 F.3d at 653.

[150] *Davis*, 534 F.3d at 653 (citing *Connick*, 461 U.S. at 148 n.7); *Houskins*, 549 F.3d at 489 (citing *Connick*, 461 U.S. at 150 n.10 and *Spiegla*, 481 F.3d at 965); *Matrisciano*, 569 F.3d at 730 (citing Williams v. Seniff, 342 F.3d 774, 782 (7th Cir. 2003)).

employee free speech cases that the Seventh Circuit has decided as of this writing, the court has decided whether the speech at issue was made pursuant to the employee's job as a matter of law without indicating that it was doing so.[151]

The Seventh Circuit may not have addressed the argument at least in part because no public employee free speech case has presented the court with a genuine issue of material fact as to whether the employee spoke because of his duties. Most of the cases in which the Seventh Circuit has had to decide whether a public employee's speech was protected by the First Amendment were before that court on appeal from summary judgment.[152] In these cases, the court found either that the speech was clearly outside of the scope of the employee's job,[153] or that the plaintiff had failed to provide any evidence that she had not spoken because of her job duties.[154]

Even when plaintiffs have argued that their speech should be protected because it was not made pursuant to their official duties, they have made legal arguments, but not factual ones. Plaintiffs have argued that they were speaking as citizens and have characterized the speech as going beyond the requirements of the job, but they have failed to make specific factual allegations about what people in their

[151] *E.g.*, Swearnigen-El v. Cook Cnty. Sheriff's Dept., 602 F.3d 852, 862 (7th Cir. 2010). At least one district court in the Seventh Circuit has treated the issue as a mixed question of fact and law. In *Fulk v. Village of Sandoval*, the Southern District of Illinois denied the defendant's motion for summary judgment because it found the plaintiff had created a genuine issue of material fact as to whether at least some of his reporting of the defendant's misconduct was made as a citizen outside of his official duties. No. 08-843-GPM, 2010 U.S. Dist. LEXIS 26355, at *13 (S.D. Ill. Mar. 19, 2010).

[152] *See* cases cited *supra* note 130.

[153] *E.g.*, Piggee v. Carl Sandburg Coll., 464 F.3d 667, 672 (7th Cir. 2006) ("Piggee's 'speech,' [which included placing an anti-gay religious pamphlet in the apron pocket of a gay student,] was not related to her job of instructing students in cosmetology.").

[154] Tamayo v. Blagojevich, 526 F.3d 1074, 1092 (7th Cir. 2008) ("Ms. Tamayo cannot escape the strictures of *Garcetti* by including in her complaint the conclusory legal statement that she testified 'as a citizen . . . outside the duties of her employment.'").

positions were and were not expected to do. For example, in *Bivens v. Trent*, the plaintiff argued only law, not facts.[155]

Bivens was an Illinois State Police officer stationed at an indoor firing range.[156] After a blood test revealed that Bivens had an elevated level of lead in his blood, Bivens complained to his supervisors about his exposure to lead at his workplace, and he filed a grievance with the state police union.[157] He later sued his supervisors, alleging that they retaliated against him because of his complaints about the lead.[158]

The defendants argued that Bivens's job duties included telling his employer about any unsafe conditions, and that this included the complaint at issue.[159] Bivens did not argue that expressing concerns about the safety of his workplace was not part of his job.[160] Instead, he argued that the district court had improperly expanded *Garcetti*'s "pursuant to" language when it found that his speech was not protected because it was "related" to his duties.[161] Bivens's brief included the statement that "[t]here is nothing in the record that suggests that Bivens is somehow obligated to make a union grievance" about the safety of his work conditions.[162] However, this sentence was part of an argument that the district court had erred when it held as a matter of law that his speech was made pursuant to his job.[163] Bivens did not argue that there was a genuine issue of material fact regarding the scope of his job duties that should preclude summary judgment.[164]

Bivens also argued that summary judgment should be granted cautiously because questions of the employer's *intent* and *motivation*

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[155] *See* Initial Brief and Required Short Appendix of Plaintiff-Appellant, Jimmy W. Bivens, Bivens v. Trent, 591 F.3d 555 (7th Cir. 2010) (No. 08-2256).

[156] Bivens v. Trent, 591 F.3d 555, 557 (7th Cir. 2010).

[157] *Id.*

[158] *Id.* at 558–59.

[159] *Id.* at 559.

[160] *See* Initial Brief of Jimmy W. Bivens, *supra* note 155.

[161] *Id.* at 13, 20.

[162] *Id.* at 22.

[163] *Id.* at 18–23.

[164] *See id.*

are inherently fact-based.[165] He asked the court to preserve the right to a trial by jury despite the pressure of the expanding judicial caseload.[166] Bivens related this argument only to questions of fact about employer intent.[167] Though he could have argued that the question of the scope of an employee's job duties is inherently fact-based, he made no mention of the scope of job duties or the *Garcetti* inquiry during the course of his argument.[168] He did not argue that there was a question of fact as to the scope of his job duties and whether he had complained pursuant to those duties.[169] Thus, it is not surprising that the Seventh Circuit responded with the legal conclusion that Bivens's complaints made to his superiors were made pursuant to his official responsibility to oversee the safety of the firing range.[170]

IV. THE SEVENTH CIRCUIT SHOULD TREAT THE ISSUE WHETHER A PUBLIC EMPLOYEE SPOKE AS PART OF HIS JOB DUTIES AS A QUESTION OF FACT.

The Seventh Circuit's treatment of the entire inquiry as purely legal leads to some unsound decisions. This is because in order to determine whether or not speech was made pursuant to a plaintiff's job, a court must know what the plaintiff's official duties were. The Seventh Circuit has decided whether the plaintiff's speech was protected even in cases where the plaintiff's official duties may not have been clearly established. In such cases, the court has extrapolated.

For example, in *Bivens v. Trent*, the court reasoned that because Bivens was responsible for overseeing the safety of his workplace, he

[165] *Id.* at 13.

[166] *Id.* at 15–17.

[167] *Id.*

[168] *See id.* at 13–17.

[169] *See id.* at 15–23.

[170] *See* Bivens v. Trent, 591 F.3d 555, 560 (7th Cir. 2010). The court concluded that the union grievance did not address a matter of public concern, and it therefore did not reach the question whether the union grievance was made pursuant to Bivens's official duties. *Id.*

must have been acting pursuant to that responsibility when he reported his concerns about his own exposure to lead.[171] In *Vose v. Kliment*, the court reasoned that because Vose, a police supervisor, had a responsibility to make sure his own unit's work was effective, he must have been acting pursuant to that responsibility when he reported suspected misconduct of police officers in another unit, even though Vose argued that he was not expected to oversee officers outside of his own unit.[172]

One of the Seventh Circuit's most questionable decisions on this issue is *Davis v. Cook County*.[173] In that case, the plaintiff, Tonya Davis, was a nurse in the emergency room at John H. Stroger, Jr. Hospital.[174] Davis felt harassed by some of her colleagues, and she wrote a memorandum to the Hospital's Employee Assistance Counselor and several hospital officials alleging that she had been harassed and abused by various colleagues.[175] On appeal from the grant of summary judgment against her, Davis argued that the question whether she had written that memorandum pursuant to her job duties should be decided by a jury.[176]

However, the Seventh Circuit decided that question on its own and affirmed the grant of summary judgment against Davis.[177] It stated that Davis "admit[ted]" that her memorandum addressed "the operation of the ER" and her concern that "the ER was operating without any team-work and professionalism."[178] Davis's uncontested job description stated that she must "take care of the patients, expedite the patients through the system and act as an advocate, working with physicians to give the best possible care."[179] From this job description,

[171] *Id.* at 560.
[172] 506 F.3d 565, 570 (7th Cir. 2007).
[173] 534 F.3d 650 (7th Cir. 2008).
[174] *Id.* at 651.
[175] *Id.* at 652.
[176] *Id.* at 653.
[177] *Id.* at 653, 654.
[178] *Id.* at 653.
[179] *Id.*

the court concluded that Davis wrote her memorandum as part of her duty to advocate for patients.[180]

This conclusion is far from obvious. Another equally plausible conclusion is that nurses at Stroger Hospital are expected to advocate on behalf of their patients within the system but are not expected to complain about problems with the system itself.[181] In the absence of any evidence that Davis's job responsibilities included the duty to report problems with the work environment or with the Hospital's functioning, the court's conclusion appears unsupported.

The extrapolations that the Seventh Circuit made in these examples may or may not be correct. Federal judges cannot be expected to know precisely what job responsibilities are assigned to every public employee in their jurisdiction. In some cases, the court's conclusion appears to be based on the court's notion of what the plaintiff's job duties *should* include rather than on the employer's actual expectations of the employee.[182]

Treating the question as purely legal at the summary judgment stage deprives some plaintiffs of the opportunity to prove that their job duties really did not include making the kind of speech at issue. Given the opportunity, Davis may have been able to show that emergency room nurses at Stroger Hospital are not expected to make the kind of speech that she made.[183] If the court ever concludes incorrectly that a plaintiff spoke pursuant to her job, then it will have deprived that plaintiff of a fair resolution of her claim, leaving that plaintiff frustrated and distrustful of the court system.

The Seventh Circuit's conclusions in this area of law are problematic also because they are not convincing to a member of the public who reads the opinion. A reader who does not have the benefit of the entire record is left wondering whether the plaintiff's job

[180] *Id.*

[181] *See* Doggett v. Cook Cnty., 255 F. App'x 88, 89 (7th Cir. 2007) ("[N]othing in the record suggests that reporting perceived errors in the hospital's administration is part of an [emergency room technician's] official duties.").

[182] *See, e.g.*, Vose v. Kliment, 506 F.3d 565, 570 (7th Cir. 2007).

[183] *See Davis*, 534 F.3d at 653–54.

actually included the duty to make the kind of speech at issue. Without the record or a factual finding about the plaintiff's job duties, one cannot tell whether the court's conclusion was correct. Therefore, it appears to the reader that the court's conclusion could be incorrect, and that the court precluded the opportunity for the fact-finding that would have found the correct answer. This makes the court's method of reaching its conclusion appear infirm. For these reasons, the Seventh Circuit would benefit its public employee free speech jurisprudence by recognizing that the question of what an employee's job duties were is a question of fact.

Contrary to what the Seventh Circuit has implied,[184] the *Garcetti* Court did not hold that the question whether speech is made pursuant to an employee's official duties is a question of law.[185] Rather, in *Garcetti*, the Supreme Court did not need to decide whether the plaintiff's speech was made pursuant to his job because the plaintiff agreed that it was.[186] The Court noted that this case did not provide an "occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate."[187] That the Court might articulate such a framework in the future does not necessarily mean that that "framework" would be purely legal.

The Court stated:

> The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is

[184] Mills v. City of Evansville, Ind., 452 F.3d 646, 647 (7th Cir. 2006) ("*Garcetti* . . . holds that before asking whether the subject-matter of particular speech is a topic of public concern, *the court must decide* whether the plaintiff was speaking 'as a citizen' or as part of her public job." (emphasis added)).

[185] *See* Garcetti v. Ceballos, 547 U.S. 410, 424–25 (2006).

[186] *Id.* at 424.

[187] *Id.*

> within the scope of the employee's professional duties for First Amendment purposes.[188]

The reference to what an employee "actually is expected" to do suggests that the question of whether or not speech is protected could turn on the factual question of what an employee's superiors expected of him. This is far from holding that a "court must decide" the question with no help from a fact-finder.[189]

The Supreme Court has called the distinction between questions of fact and questions of law "vexing"[190] and "elusive."[191] In one case, the Court stated that there was no "rule or principle that will unerringly distinguish a factual finding from a legal conclusion."[192] In distinguishing facts from law, the Court has described fact as that which can be found by "application of ordinary principles of logic and common experience which are ordinarily entrusted to the finder of fact."[193] Justice Frankfurter defined facts as "basic facts . . . in the sense of a recital of external events and the credibility of their narrators. . . ."[194] Although the distinction is difficult to describe, reasonable people can generally tell the difference between what happened and the legal meaning of what happened. A jury finds the former, a court the latter. Whether or not a particular duty was part of an employee's job is a question more like the former.

The Seventh Circuit has consistently interpreted *Garcetti*'s rule to mean that public employee speech is not protected if it was made as "part of" the job.[195] According to this formulation, an employee spoke pursuant to his job where it was the employee's duty to make the kind

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[188] *Id.* at 424–25.

[189] *See* Mills v. City of Evansville, Ind., 452 F.3d 646, 647 (7th Cir. 2006).

[190] Pullman-Standard v. Swint, 456 U.S. 273, 288 (1982).

[191] Miller v. Fenton, 474 U.S. 104, 113 (1985).

[192] Pullman-Standard, 456 U.S. at 288.

[193] Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 501 n.17 (1984).

[194] Brown v. Allen, 344 U.S. 443, 506 (1953) (opinion of Frankfurter, J.).

[195] *E.g.*, Tamayo v. Blagojevich, 526 F.3d 1074, 1091 (7th Cir. 2008).

of speech at issue. For example, an employee's job duties might include the duty to write memoranda, make statements, or report suspected misconduct. Under this formulation, employee speech is also made pursuant to the job where the employee spoke in order to further any of the employee's other duties. Therefore, the factual questions are: (1) what were the plaintiff's job duties?; and (2) did the employee speak because of those duties? A jury could easily find the answer to both of these questions. Ordinary people can understand that while someone may not have had a specific duty to make a particular statement, the person may have made the statement *because of* his job duties.

In some cases, this change would affect only the reasoning of the opinion, not the outcome. As discussed above, in several public employee free speech cases, the Seventh Circuit may have come to its conclusion because the plaintiff employee failed to create a genuine issue of material fact on the issue of whether the plaintiff spoke pursuant to his job. Treating the question as a legal one, the court has stated that "it is clear" that the plaintiff spoke pursuant to his job.[196] Because it is not necessarily clear without factual findings, the court should state that it finds no genuine issue of material fact that would preclude summary judgment. This language would instruct litigants on what they must do to prevent summary judgment against them. This language would also alleviate the concern that the court may be jumping to incorrect factual conclusions.

Even if the Seventh Circuit does not make this change on its own, litigants could lead the court to do so. A plaintiff who seeks to convince the Seventh Circuit that a question of fact exists should focus on presenting evidence that the job duties did not include making the speech at issue. The plaintiff should clearly identify what speech caused the retaliation and what the plaintiff's job duties were. The plaintiff should bring to the court's attention facts supporting the assertion that the speech did not help to fulfill any of the plaintiff's job duties. This evidence should tend to show what was actually expected of the plaintiff. This could include evidence of the plaintiff's daily

[196] *E.g.*, Bivens v. Trent, 591 F.3d 555, 560 (7th Cir. 2010).

activities as well as activities he performed infrequently; testimony that colleagues in the same position did not think that the plaintiff had a duty to make the kind of speech at issue; and statements by superiors that would show what the superiors expected.

Armed with factual allegations that could prove that the speech was not made because of the plaintiff's job duties, the plaintiff could convincingly argue that a court should not foreclose this factual question by granting summary judgment to the defendant. Faced with a dispute over specific facts, the Seventh Circuit might see the need to separate the factual question of what the job duties were from the larger question of whether the speech is protected. A factual dispute would remove the temptation for the court to draw its own conclusion from the facts.

The court may hesitate to treat the question as a factual one because of the concern that introducing another factual question will lead to more trials, costs, and use of court resources.[197] However, the resolution of the question of the plaintiff's job duties using the fact-finding process is worth the cost. Plaintiffs are not precluded from proving other kinds of facts simply because trials are expensive and hearings require court resources. This, just like any other kind of fact, must be found by giving both sides a fair opportunity to prove the facts on which their cases depend.

The Seventh Circuit could hold, as the Tenth Circuit may have done, that the question whether a public employee spoke pursuant to his official duties is for the court to decide because it is a "constitutional fact."[198] The constitutional fact doctrine refers to a rule that an appellate court may make its own assessment of the facts when necessary to protect a constitutional right, even if that means disregarding a trial court's finding of fact.[199] The United States Supreme Court has stated that "in cases raising First Amendment issues . . . an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the

[197] *See* Smith, *supra* note 124, at 293.

[198] *See supra* text accompanying notes 121–23.

[199] BLACK'S LAW DICTIONARY 354 (9th ed. 2009).

judgment does not constitute a forbidden intrusion on the field of free expression."[200]

A holding that courts should decide this issue as a constitutional fact would explain the court's reason for deciding this issue itself. This would be an improvement over an unexplained holding that the question is one of law apparently based on pre-*Garcetti* authority.[201] However, it is not clear that the constitutional fact doctrine applies to the public employee free speech cases that the Seventh Circuit has decided so far. First, the purpose of the appellate court's independent assessment of the facts is to *protect* constitutional rights. This purpose does not explain the Seventh Circuit's independent assessment of the facts in order to conclude that the speech at issue is *not* protected. Second, in cases where the Supreme Court has applied the constitutional fact doctrine, it independently assessed facts that had been found at trial.[202] In contrast, the Seventh Circuit has frequently decided that a plaintiff's speech was not protected at the summary judgment stage.[203] The problem here is not that the appellate court might disagree with the factual finding of a lower court; it is that the appellate court is making its assessment based on insufficient facts, and in doing so, it is foreclosing the opportunity for fact-finding.

The better view is to treat the plaintiff's job duties as a question of fact for a fact-finder because in order to make a constitutional judgment, a court must know what the facts are—in this case, what duties the plaintiff was actually expected to do.

CONCLUSION

After the Supreme Court's decision in *Garcetti v. Ceballos*, public employees have no First Amendment right to free speech when they

[200] Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499 (1984) (internal quotations omitted).

[201] *See supra* text accompanying notes 146–150.

[202] *See, e.g.*, *Bose Corp.*, 466 U.S. at 493–98; Connick v. Myers, 461 U.S. 138, 141–42 (1983).

[203] *See* cases cited *supra* note 130.

speak pursuant to their official duties. When a government employer punishes an employee because of her speech, the employee must establish that she was not speaking pursuant to her official duties in order to succeed in a § 1983 case against her employer. In the Seventh Circuit, public employees in this situation have faced a high hurdle because the Seventh Circuit has repeatedly decided that the speech at issue was made pursuant to the employee's official duties as a matter of law, in the course of affirming summary judgment against the plaintiff. This reasoning fails to recognize the factual question of what exactly the employee's job duties were. At the summary judgment stage, a plaintiff whose speech arguably was made pursuant to his job duties should take care to present the Seventh Circuit with evidence that will create a genuine issue of material fact as to whether he spoke pursuant to his job duties. When a plaintiff does present the Seventh Circuit with such evidence, the court should hold that a fact-finder should resolve questions about the scope of the employee's job.