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Public Employees' First Amendment Rights in the Wake of *Garcetti v. Ceballos*

Employee Perspectives

by Stephen A. Yokich

I. Introduction

One of the bedrock principles of our democracy is the right to disagree and to engage in open and robust debate about the public issues of the day. Often, those in power respond by claiming that too much dissent undermines our shared purposes. These same conflicts arise in public sector employment. Over the past forty years, federal courts have been called upon numerous times to weigh the rights of employees to dissent against the need of public officials to implement the programs they were elected to put in place.

The Supreme Court's recent decision in *Garcetti v. Ceballos*,[1] substantially changes the analysis advocates must use when they determine litigation strategy. This article will review the law that led to *Garcetti*, the *Garcetti* decision itself, and many post-*Garcetti* decisions. It will offer some arguments that can counter *Garcetti's* impact.

II. The *Pickering/Connick* Balancing Test

A. *Pickering v. Board of Education*[2]

Marvin Pickering was discharged after he wrote a letter to the local newspaper criticizing the Board of Education's handling of referendums that supported new construction and of the money raised from them. The letter was sarcastic in tone and contained a mixture of true and false factual statements.

The Supreme Court held that the public statements of public employees on matters of public concern related to their employment are protected by the First Amendment.[3] The Court held that a school teacher could not be terminated for such statements unless the employer could demonstrate that the efficiency of the public service outweighed the employee's First Amendment rights. *Pickering* held that a teacher may publicly criticize the program of his or her employer so long as that criticism is accurate and does not interfere with his or her day-to-day working relationships.[4] The Court also held that the First Amendment protects false statements concerning the employer if they were not made with reckless disregard for the truth. Finally, the Court emphasized that a teacher is the person in the

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Employer Perspectives

by J. Stuart Garbutt

I. Introduction

In *Garcetti v. Ceballos*,[1] the U.S. Supreme Court redefined in some respects the contours of First Amendment protection for public employees who express themselves on matters of public concern. For some time, the rule as laid down in *Pickering v. Board of Education*,[2] and *Connick v. Myers*,[3] has involved an essentially two-step analysis: did the employee's expression touch on a matter of public concern and, if so, did it nevertheless so interfere with the employer's operations as to, on balance, lose its constitutionally-protected status?

Garcetti adds an element to the two-step analysis. *Garcetti* involved a deputy district attorney (Ceballos) in Los Angeles County, California, whose job as "calendar deputy" required him, among other things, to advise the District Attorney (Garcetti) on whether to proceed with certain criminal prosecutions. In one case, Ceballos discovered what he believed were serious misrepresentations by a sheriff's police officer in an affidavit that had been used to obtain a search warrant which in turn produced critical prosecution evidence. Ceballos told his superiors of his findings, including in an official memorandum recommending that the prosecution be dismissed. That led to a heated meeting with sheriff's personnel, after

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community "most likely" to have an informed and definite opinion regarding the employer's fiscal program.

B. *Connick v. Myers*[5]

Pickering protected speech on matters of public interest. Because public employers are funded by tax dollars, under a broad definition of "matters of public interest," it could be argued that the First Amendment protects speech by employees that those dollars have been misspent, or that employees have been treated unfairly in ways that damage their ability to serve the public. This logic would require First Amendment protection for much speech by public employees regarding the operations of their workplaces.

In *Connick v. Meyers*, the Supreme Court took a much narrower view of the speech protected by *Pickering*. Myers was discharged for circulating a questionnaire to her colleagues in the District Attorney's office regarding transfer policies, office morale, the confidence employees had in their supervisors, the need for a grievance procedure, and whether employees felt pressure to work on political campaigns.

The Court reversed the lower court decisions, which had overturned the discharge. The Court's basic premise was that the questionnaire concerned matters of private concern regarding Myers' own employment, not matters of general public concern. "When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[6] Rejecting the premise that "all matters which transpire in a public office are matters of public concern," the Court held that the contents of Myers' questionnaire were aimed at gathering information for another round of controversy with her superiors and not at matters of public concern.[7]

The Court did hold that the portion of the questionnaire regarding pressure to work on political campaigns was a matter of public concern. Giving deference to the judgment of her employer, the Court held that the potential for the questionnaire to disrupt the efficient functioning of the office outweighed the matters of public concern contained in the questionnaire. "The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships."[8] Accordingly, the Court concluded that the discharge did not violate the First Amendment.

III. *Garcetti v. Ceballos*[9]

Ceballos was a deputy district attorney in Los Angeles. He investigated the factual accuracy of a search warrant and became convinced that the warrant contained serious misrepresentations. He raised his concerns with his superiors and with the sheriff's department. Afterwards, he was transferred and denied a promotion. He sued, alleging that his superiors had retaliated against him, in violation of the First Amendment for raising questions about the warrant.

In a 5-to-4 decision, the Supreme Court held Ceballos' speech was not protected by the First Amendment because it was made pursuant to his duties as a deputy district attorney. Justice Kennedy, writing for the majority, summarized the holding:

> When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its circumstances. When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny. To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.[10]

Under *Garcetti*, a public employee who has suffered retaliation due to his expressive conduct on the job must now pass a new threshold: was the expression pursuant to his or her official job duties? If so, the court need never reach the issue of whether the speech was on a matter of public concern. If not, the court should employ the *Pickering*/*Connick* balancing test to determine whether the expression in question was protected by the First Amendment.[11]

The majority opinion in *Garcetti* specifically cited the portions of

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Pickering that emphasized the constructive role that public employees have in the vibrant dialogue necessary for the proper functioning of a democratic society.[12] It also reaffirmed that the First Amendment protects speech made at work and speech that concerns the subject matter of an employee's employment.[13] The Court eschewed a "comprehensive framework" for defining the scope of an employee's duties and cautioned employers that merely writing an expansive job description would not serve to bar legitimate First Amendment activities.[14] Finally, the Court stopped short analyzing the impact of its reasoning with respect to the constitutional cases on academic scholarship or teaching.[15]

IV. *Garcetti's* Impact

The ruling in *Garcetti* is at odds with one *Pickering* insight, that teachers are "the members of a community most likely to have informed and definite opinions"[16] about school funding and spending. Since nobody knows a job better than the person in it, it would seem that an employee speaking about issues connected with or arising from his or her official duties would have more to contribute to the interests served by open debate about decisions, not less. The Court's decision in *Garcetti* accords no weight to this insight.

Garcetti has made it riskier for public employees to challenge the orthodoxy of their employers. While *Garcetti* made it clear that the "pursuant to official duties" test was a threshold issue, several courts have cited *Garcetti* when weighing the employer's interests under the *Pickering/Connick* balancing analysis.[17] In addition, the Court's holding in *Garcetti* has made it much riskier for employees to challenge their employer when they discover fraud, discrimination, or abuses in their employer's policies.[18]

In *Casey v. West Las Vegas Independent School District*,[19] for example, the court held unprotected a superintendent who directed her subordinate to report violations of federal Head Start regulations to the federal government. The Board had told her to let the matter alone. She acted in part because of the potential criminal and civil liability involved. It is difficult to imagine why we should discourage such speech. It is equally difficult to imagine why an employee should have to choose between her job and complying with the law in such a situation. Similarly, the plaintiffs in *Hill v. Borough of Kutztown*,[20] and *Wilburn v. Robinson*,[21] alleged that they suffered retaliation for enforcing the anti-discrimination policies at their employers. The Courts have always given heightened protection to speech opposed to discrimination. For example, in *Givhan v. Western Line Consolidated School District*,[22] the Court held that the First Amendment protects the right of a teacher to privately complain to her superiors about racial discrimination in the schools. Why should it make a difference that a teacher raised the issue instead of the Director of Personnel?

Garcetti has also made it riskier for public employees to honestly carry out their job duties when such action might bring them into conflict with their superiors. Consider the case of *Spiegla v. Hull*.[23] Spiegla was a prison guard who saw two superiors engage in activity that ordinarily would have made them subject to a search. She was told not to perform the search, and when she questioned the order, she was told that the policy had changed. After she raised the issue of the policy change in a staff meeting, she was reassigned to a more difficult job. The Seventh Circuit originally held that Spiegla's statements were related to a matter of public concern because of the intense security needs of the correctional environment and because she directly observed her superiors acting in a way that required a search under the applicable regulations.[24] Spiegla prevailed at trial.

In a second appeal, after *Garcetii*, the Seventh Circuit reversed the verdict. The court noted that one part of Spiegla's job was to properly implement the search policy at the prison.[25] It held that Spiegla had spoken as an employee pursuant to her official duties and not as a citizen on a matter of public concern.[26] Other courts have similarly denied First Amendment protection to employees who questioned the soundness of the judgments of their superiors with respect to issues closely connected to their jobs.[27]

Courts have limited the holding in *Garcetti* by distinguishing between internal statements and public statements. Thus, courts have rejected the application of *Garcetti* to cases involving public letters,[28] the publication of books,[29] and potential speeches at public events.[30] They have also rejected the application of *Garcetti* in cases involving communications with other state agencies, such as the Office of the Attorney General[31] and a State's Inspector General.[32] Finally, courts have rejected the application of *Garcetti* to communications with state or local legislators.[33]

One notable aspect of these decisions has been the willingness of courts to make distinctions depending upon the "hearer" of the speech. In *Casey*, for example, the school superintendent told her board of education that it was violating the New Mexico open meetings law. She also sought advice from the Attorney General on her position. The court held that the speech to the school board was not protected under *Garcetti*, but that the speech directed to the Attorney General was subject to the *Pickering/Connick* balancing test.[34] Similarly, a

correction officer, in *Freitag v. Ayers,*[35] complained both internally and to her state legislator and the Inspector General of the state about the prison's failure to take action to control the public sexual activities of inmates. The court held that the internal complaints were related to her duties as a correctional officer, but that the communications with the legislator and the Inspector General were protected.[36]

There is a great irony in the foregoing point. It makes the forum of the speech much more important than the content of the speech for First Amendment protection. An "off-the-wall" letter to the newspaper (*Pickering*) is protected, while a prosecutor's effort to vindicate the public trust reposed in his position is not (*Garcetti*). In many cases, however, it is the content of the speech, not the form of the expression, that determines the value of expressive conduct. It would be unfortunate if the Court's decision in *Garcetti* leads to the opposite result.

V. Approaches for Employee Advocates

What follows are practical considerations for employee advocates who are fortunate enough to be consulted prior to the speech or expression that might lead to retaliation. Advocates should judge whether use of these ideas is appropriate, depending on what political and employment situation is involved.

A. Go Big or Stay Home

It follows from the decisions in *Freitag* and *Casey* that an employee who fears retaliation for criticizing a superior or the direction of the employer's policies should openly seek the assistance of the general public and other public bodies. If you think the going is going to be rough, write the newspaper or your state representative. Then you can base your retaliation argument on the speech that was made to external agencies.[37]

B. Act As a Group

The Supreme Court has held that freedom of speech and association protect a public employee's right to join a union without employer retaliation. This right logically extends to the right to participate in union activities, such as processing grievances. By definition, though, almost all grievance processing involves internal employment issues and speech about those issues. While it could be argued under *Garcetti* that such activities are unprotected, because they relate to the official duties of the employees involved, the courts have thus far held that the union activities of employees are not affected by the decision.[38]

Lawyers for employees should disentangle the rights of freedom of association and freedom of speech. The right to form, join and participate in a union derives from the freedom of association guaranteed by the First Amendment. This freedom to engage in collective activity is at risk if one can be punished for it. Thus, employee lawyers must stress this basis for the constitutional rights at issue to skirt the analysis of *Garcetti*. Lawyers for employees represented by unions should also urge employees to let their unions carry the ball in disagreements that may lead to adverse action. This will lessen the chance that an employer can sustain retaliation based upon the principles in *Garcetti*.

C. Emphasize Due Process

The Court stressed in *Garcetti* that a public employer may not rely on a written job description to conclusively determine whether particular speech was part of an employee's official duties. Instead, the court must look to all of the evidence regarding the nature of an employee's official duties.

It would violate principles of due process for an employer to expand the scope of an employee's job without telling the employee and then to discipline that employee for speaking in a way that was previously approved. While no court has yet considered such a fact pattern, that is only because *Garcetti* has largely been applied in cases where the factual development is already complete.

VI. Conclusion

Garcetti narrowed the constitutional protection accorded to many types of valuable expression. The decision makes it riskier for public employees to challenge their employers over many of the issues they know best. It undercuts some of the basic principles set forth in the *Pickering* case. Does *Garcetti* portend a fundamental retreat from the broad First Amendment rights enjoyed by public employees since *Pickering*? Or is it an aberration? Only time will tell. ♦

Notes

1. 126 S. Ct. 1951 (2006).
2. 391 U.S. 563 (1968).
3. Since the speech in question was a letter to the editor of a local newspaper, it was clear that Pickering was engaged in speech which would have been protected by the First Amendment if he had been a private citizen unconnected to the School District.
4. The Court noted that Pickering did not criticize either his colleagues or his immediate superiors, which meant that there was "no question of maintaining either discipline by immediate superiors or harmony by co-workers." *Id*. at 570. The Court also noted that Pickering, as a teacher, did not work directly for either the Board or the superintendent, which meant that the case did not present "the kind of close working relationships for which it can be persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning." *Id*.

5. 461 U.S. 138 (1983).
6. *Id*. at 146.
7. *Id*.
8. *Id*. at 154.
9. *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006).
10. *Id*. at 1961.
11. Of course to ultimately succeed in litigation, the plaintiff must also prove that he or she suffered retaliation because of the speech.
12. *Garcetti*, 126 S. Ct. at 1959.
13. *Id*.
14. *Id*. at 1961.
15. *Id*.
16. Pickering, 391 U.S. at 572.
17. *See, e.g. Communications Workers of Am. v. Ector County*, 467 F.3d 427 (5th Cir. 2006) (*Garcetti* cited in balancing test used to uphold hospital discipline of carpenter for wearing a "Union Yes" button at work); *Piggee v. Carl Sandburg College*, 464 F.3d 667 (7th Cir. 2006) (weight given to employer's interest in efficient operation set forth in *Garcetti* supported conclusion that employer had the right to dismiss a cosmetology school professor who proselytized to students).
18. E.g., *Wilburn v. Robinson*, 480 F.3d 1140, (D.C. Cir. 2007) (First Amendment did not apply to assertions by the District of Columbia Director of Office of Human Resources alleging that salary-setting practice was discriminatory where one of the duties of the Director was to evaluate discrimination claims); *Casey v. West Las Vegas Independent Sch. Dist.*, 473 F.3d 1323 (10th Cir. 2007) (statements of superintendent that board was violating state open meetings law and that district was violating federal regulations regarding Head Start program were not protected by the First Amendment because they were part of the Superintendent's official duties); *Green v. Board of County Commissioners*, 472 F.3d 794 (10th Cir. 2007) (drug lab technician has no First Amendment claim for allegation that she was fired because she complained about the lack of a confirmation testing procedure); *Hill v. Borough of Kutztown*, 455 F.3d 225 (3d Cir. 2006) (claim that Defendant retaliated against Borough Manager for enforcing the Borough's Affirmative Action/Equal Employment Opportunity policies failed under *Garcetti* because administration of those policies was part of Manager's job duties); *Battle v. Board of Regents*, 468 F.3d 755 (11th Cir. 2006) (financial aid workers' revelation of improprieties by supervisor did not constitute protected speech).
19. 473 F.3d 1323 (10th Cir. 2007).
20. 455 F.3d 225 (3d Cir. 2006).
21. 2007 WL 817387 (D.C. Cir. 2007).
22. 439 U.S. 410 (1979).
23 481 F.3d 961 (7th Cir. 2007).
24. *Spiegla v. Hull*, 371 F.3d 928 (7th Cir. 2004).
25. 371 F.3d at 966.
26. *Id*. at 966-67.
27. *E.g., Williams v. Dallas Independent Sch. Dist.*, 2007 WL 614212 (5th Cir. 2007) (denying First Amendment protection to high school athletic director who questioned the use of funds allocated to the athletic program); *Haynes v. City of Circleville*, 474 F.3d 357 (6th Cir. 2007) (denying First Amendment protection to canine handler who protested cutbacks in canine training); *Mills v. City of Evansville*, 452 F.3d 646 (7th Cir. 2006) (denying First Amendment protection to police officer who questioned department's reduction in community policing efforts).
28. *Tokashiki v. Freitas*, 210 Fed. Appx. 391, 2006 WL 2255481 (9th Cir. 2006).
29. *Reuland v. Hynes*, 460 F.3d 409 (2d Cir. 2006).
30. *Scarborough v. Morgan County Bd. of Educ.*, 2006 U.S. App. Lexis 28941 (6th Cir. 2006).
31. *Casey v. West Las Vegas Independent Sch. Dist.*, 473 F.3d 1323 (10th Cir. 2007).
32. *Freitag v. Ayers*, 468 F.3d 523 (9th Cir. 2006).
33. *Id*.
34. *Casey*, 473 F.3d at 1330.
35. 468 F.3d 523 (9th Cir. 2006).
36. *Id*. at 854-55.
37. One downside to this approach is that speech directed outside the employment relationship may undermine governmental efficiency and weigh against ultimate success when the Court applies the *Pickering/Connick* balancing test.
38. *Skehan v. Village of Mamaroneck*, 465 F.3d 96, 106 (2d Cir. 2006); *Fuerst v. Clarke*, 454 F.3d 770 (7th Cir. 2006). ♦

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which Garcetti decided to proceed with the prosecution anyway. During the prosecution, at a hearing on a defense motion to quash evidence from the search warrant, Ceballos testified about his belief that there were significant misrepresentations in the affidavit underlying the warrant. Thereafter, Ceballos allegedly was reassigned to other duties, transferred to another location, and ultimately denied a promotion.

The Supreme Court majority assumed that Ceballos' memorandum to his superiors addressed a matter of public concern, namely, governmental misconduct in a law enforcement matter. But the majority held the memorandum unprotected because it was written as part of Ceballos' regular job responsibilities. The *Garcetti* majority reasoned:

> We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.
>
> This result is consistent with our precedents' attention to the potential societal value of employee speech. Refusing to recognize First Amendment claims based on government employees' work product does not prevent them from participating in public debate . . .
>
> Our holding likewise is supported by the emphasis of our precedents on affording government employers sufficient discretion to manage their operations. Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission[4]

Thus, under *Garcetti*, even if a public employee's expression involves a matter of public concern, it remains unprotected unless it was spoken "as a

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citizen," meaning not in the course of the employee's regular job requirements.

II. Applying *Garcetti's* "Spoken As A Citizen" Requirement

It may sometimes prove difficult to differentiate when public employees' expressions on matters of public concern occurr "pursuant to the employees' official employment responsibilities," rather than "as a citizen." In *Battle v. Board of Regents*,[5] the plaintiff worked in the financial aid office of Fort Valley State University in Georgia. According to the Eleventh Circuit, under both university policies and federal guidelines, such an employee "had a clear employment duty . . . to report any mismanagement or fraud she encountered in student financial aid files."[6] From 1996 to 1998, Battle discovered what she considered extensive evidence of improprieties by her supervisor, including "falsifying information, awarding financial aid to ineligible recipients, making excessive awards, and forging documents."[7] On several occasions, Battle reported those findings to the University's President and its Vice President of Student Affairs. Battle never, however, spoke to anyone outside the University about them. In May 1998, Battle was notified by the Board of Regents that her employment contract was not being renewed.[8]

When Battle sued, the trial court, in a decision issued before *Garcetti*, rendered summary judgment against her. Applying Garcetti, the Eleventh Circuit had little difficulty affirming that judgment, stating:

> By Plaintiff's own admission and in light of federal guidelines, Plaintiff's speech to FVSO officials about inaccuracies and signs of fraud in student files was made pursuant to her official employment responsibilities. We conclude that because the First Amendment protects speech on matters of public concern made by a government employee speaking as a citizen, not as an employee fulfilling official responsibilities, Plaintiff's retaliation claim must fail.[9]

Battle was followed in *Wilburn v. Robinson*.[10] Wilburn served as Interim Director of the District of Columbia's Office of Human Rights. In June 2002, Wilburn sought to hire two black female attorneys for her agency, but the District's Office of Personnel refused to approve the salaries she recommended for them, based on a District policy that Wilburn felt embodied race and gender discrimination. Expressing that belief, Wilburn requested reconsideration of her salary recommendations. Her request was denied, and she was admonished for making "unsubstantiated allegations." Wilburn then was passed over for selection as the OHR's permanent Director and sued alleging First Amendment retaliation.[11]

The trial court rendered summary judgment against Wilburn, finding that she lacked evidence of a causal connection between her allegations about salary discrimination and her nonselection for the OHR Director position. The D.C. Circuit affirmed, but on a more basic, alternative ground: that Wilburn's complaints were not made "as a citizen" and therefore were not constitutionally protected in the first place.[12] Citing *Battle*, the D.C. Circuit noted that, under *Garcetti* "courts of appeals have denied First Amendment protection to government employee speech if the contested speech falls within the scope of the employee's uncontested employment responsibilities."[13] The court then observed:

> Wilburn's allegations of discrimination in DCOP's refusal to approve the salaries she requested easily falls within Wilburn's employment responsibilities. ... Indeed, Wilburn was hired not only to direct personnel matters in OHR but also to root out discrimination in the District government and, thus, when Wilburn commented on racial discrimination in the performance of her duties, she did not speak as a citizen. Accordingly, the First Amendment does not shield from discipline the expressions Wilburn made . . .[14]

In *Green v. Board of Commissioners of Canadian County*,[15] however, a drug-lab technician and detention officer at a county juvenile center complained to her superiors that the center was not following reliable drug-screening protocols and, when her complaint seemed to go unheeded, took it on herself to secure a confirmatory test on one client that revealed the center's initial test as erroneous. Green's actions apparently brought about a change in the center's testing practices, but Green was reassigned and eventually forced out of her job.[16]

When Green filed suit alleging First Amendment retaliation, her claims were deemed untenable based on *Garcetti*. The Tenth Circuit noted the Eleventh Circuit's decision in *Battle*, and two other federal appeals court decisions[17] that had found public employees' expressions on matters of public concern to be constitutionally unprotected because they occurred as part of the employees' jobs.[18] The *Green* court reasoned:

> On the one hand, the speech and conduct at issue can be categorized as activities undertaken in the course of Ms. Green's job. She had the responsibility for collecting samples and testing them, and by extension, making sure the tests were as accurate as possible . . .

> She also had the responsibility for communicating with clients and with third parties regarding testing. Under this view, by making arrangements for the confirmation test without consulting her supervisors, Ms. Green decided to ignore her supervisors' instructions . . . and thereby properly should be subject to discipline.
>
> On the other hand, one could argue that Ms. Green was not a policymaker and her job responsibilities focused on the logistics of taking tests and keeping records, so she was not required to improve the Center's system by advocating for a confirmation policy or obtaining the confirmation test. Under this view, by arranging for the confirmation test to underline the validity of her previously expressed concerns, Ms. Green . . . was acting outside her day-to-day job responsibilities for the public good . . .
>
> We conclude that this case is more similar to *Garcetti* . . . than to activities undertaken by employees acting as citizens. Ms. Green was not communicating with newspapers or her legislators or performing some similar activity afforded citizens; rather, even if not explicitly required as part of her day-to-day job responsibilities, her activities stemmed from and were the type of activities that she was paid to do . . . Her disagreement with her supervisors' evaluation of the need for a formal testing policy, and her unauthorized obtaining of the confirmation test to prove her point, inescapably invoke *Garcetti's* admonishment that government employees' First Amendment rights do "not invest them with a right to perform their jobs however they see fit."[19]

The Seventh Circuit similarly has held that, in deciding for *Garcetti* purposes whether an employee has spoken pursuant to her official duties, focusing on whether the speech was part of her "core job funtions" is too narrow.[20] A contrasting case is *Coles v. Moore*.[21] There, a social worker for the Connecticut Department of Children and Families alleged that she was denied several promotions and job assignments after she complained to the Connecticut Commission on Human Rights about unlawful employment discrimination by her agency. Although the *Coles* court noted that the plaintiff's discrimination allegations were made through the proper channels and concerned the subject matter of the plaintiff's employment, the court also observed that Coles' *official duties* did not include filing such complaints against her supervisors. Therefore, her complaints were filed "as a citizen" for *Garcetti* purposes.[22]

In *Reuland v. Hynes*,[23] a general trial attorney in the Brooklyn prosecutor's office wrote a novel about a homicide detective, and at the same time met with the District Attorney to request promotion to a homicide unit. Reuland received the promotion and a month before his novel was to be published, was interviewed by *New York Magazine* for an article on new authors, in which he touted his book and was quoted as saying that "Brooklyn is the best place to be a homicide prosecutor . . . we've got more dead bodies per square inch than anyplace else."[24] After the article appeared, Reuland was transferred out of the homicide unit and later terminated. He sued for violation of his First Amendment rights and won a jury verdict of $30,000.[25]

The Second Circuit affirmed Reuland's jury verdict. The court found that Reuland's magazine comment was not made in the exercise of his official responsibilities.[26] Moreover, the court ruled that Reuland's statement was protected even if he made it not to criticize local law enforcement but merely to hype his novel. The court held that even if Reuland's comment was "hyperbole" – a deliberate exaggeration – it remained protected.[27]

But, in *Tokashiki v. Freitas*,[28] a secretary to a county police chief wrote a letter to the Police Commission about the chief's violations of Police Commission requirements. The Ninth Circuit found the record insufficient to determine whether that letter to the Police Commission was protected, and remanded the case to the trial court for further analysis.[29]

Given Tokashiki's job, however, and assuming she bore the customary responsibility to report to her employer any knowledge she possessed of violations of employer policies by other employees, should it not have been *presumed* that her letter to the Police Commission was "pursuant to her duties as an employee?"[30]

In *Cioffi v. Averill Park Central School District*,[31] a high school athletic director sent a letter to the superintendent expressing concerns that the school's football coach was not properly supervising the team. Shortly thereafter, reports of hazing among the players appeared in the local press. Then Cioffi heard that the school board might have decided to abolish his position. Apparently fearing that he was being made a scapegoat, Cioffi held a press conference in which he alleged that the impending elimination of his job was in retribution for his criticisms of the coach. Nevertheless, the board abolished his job as planned.[32]

When Cioffi sued, before *Garcetti*, the trial court held that only Cioffi's letter to the superintendent could support his claim, because the board had already decided to eliminate his job by the time of his press conference. But, the court held that Cioffi's letter was unprotected because Cioffi wrote it purely to deflect blame from himself and save his job, i.e., his motive was private, not public. The Second Circuit disagreed and reinstated Cioffi's claims,[33] ruling that Cioffi's selfish

motivation was irrelevant as long as the letter touched on a matter of public concern.[34] In light of *Garcetti*, however, one must ask whether a letter from an athletic director to his superintendent, expressing concerns with the football coach's job performance, should not be regarded clearly as within the scope of the athletic director's official job responsibilities, and therefore not written "as a citizen."

III. The *Pickering* Balance Test After *Garcetti*

Having reemphasized the importance of a governmental employer's interests in regulating what its employees do and say while carrying out their duties, *Garcetti* also may affect how courts apply the *Pickering/Connick* balance test. Once it has been determined that a public employee spoke "as a citizen" and on a mater of public concern, a court must determine whether the employee's speech nevertheless lacked protection because it unduly disrupted or interfered with the employer's operations.

In *Communications Workers of America v. Ector County Hospital District*,[35] the *en banc* Fifth Circuit held, in the wake of *Garcetti*, that a Texas hospital's "interest in promoting the efficiency of the public service it performs by means of its uniform non-adornment policy outweigh[ed] the interest of its [non-patient-care] employees in wearing a 'Union Yes' button on their uniforms while on duty at the Hospital."[36] The court presumed that wearing union buttons at work constituted speech on a matter of public concern.[37] But the court cited *Garcetti* for the proposition that the government "has far broader powers" to restrict employee speech than to regulate the speech of ordinary citizens, and concluded that, because the hospital required all its non-patient care employees to wear uniforms, its regulation forbidding them to supplement or adorn those uniforms prevailed over the employees' interest in expressing their union solidarity through union buttons.[38]

According to the *Ector County Hospital* court, giving effect to the hospital's non-adornment rule in this context "result[ed] in only a minimal intrusion on the free speech rights of union employees," since the employees could "continue to express their support for the union in myriad other ways."[39] Importantly, however, the Fifth Circuit suggested that the balance might tip differently in a state which, unlike Texas, permits public employees to petition for their employer's recognition of their union.[40]

Garcetti may also bolster the authority of public educational employers to regulate what instructional personnel say while teaching. In *Piggee v. Carl Sandburg College*,[41] a public college's cosmetology program included a clinical segment in a college-operated beauty salon. Students complained that Piggee, an instructor in the salon, approached students she suspected of being homosexual and attempted to give them anti-gay religious pamphlets and lecture them about changing their sexual orientations. The college admonished Piggee to stop that activity, and eventually declined to renew her teaching contract.[42]

The Seventh Circuit presumed that Piggee's expression of her views on religion and homosexuality touched on matters of public concern, but downplayed the significance of that element in Piggee's case. According to the court, commentary on matters of public concern is commonplace in the college setting, where instructors regularly cover public topics in their teaching. Therefore, the court reasoned, the "real question" in such higher education cases involves the balance between the instructor's First Amendment freedom and the college's right to require instructors to "stay on message" while teaching.[43] Finding that the balance tipped in favor of the college, the Seventh Circuit noted: (1) although Piggee's speech took place in a commercial establishment, the salon was part of the college's clinical program, and (2) it was evident that Piggee's speech disrupted the college's educational program, because students complained about it.[44]

More recently, in *Mayer v. Monroe County Community School Corp*.[45] a public elementary school teacher alleged she was fired because she confided to her class, during a current-events session, that she had honked her car horn to show her support while passing a local demonstration in favor of peace in Iraq. In deciding that Mayer's statement to her class was not protected under *Garcetti*, the Seventh Circuit explained why in *Piggee* it applied the *Pickering/Connick* balance:

> Piggee had not been hired to buttonhole cosmetology students in the corridors and hand out tracts proclaiming that homosexuality is a mortal sin. The speech to which the student (and the college) objected was *not* part of Piggee's teaching duties. By contrast, Mayer's current-events lesion was part of her assigned tasks in the classroom; *Garcetti* applies directly.[46]

Thus, *Mayer* apparently stands for the proposition that what an instructor says in class as part of the curriculum may not be protected at all after *Garcetti*, regardless of whether it unduly disrupts or interferes with the school's teaching mission.

On the other hand, in a somewhat different context, the Fifth Circuit has eased a plaintiff's burden in First Amendment litigation. In *Oscar Renda Contracting, Inc. v. City of Lubbock*,[47] the plaintiff, a construction contractor, alleged that, even though it was low bidder, it was denied a contract

with the defendant municipality because the company previously had sued a different Texas municipality alleging improprieties by municipal officials. The district court dismissed the contractor's suit, but the Fifth Circuit reversed and reinstated it.

Without discussing *Garcetti*, the Fifth Circuit clarified that, like an individual employee or job applicant, a company can claim constitutional protection against being denied a work opportunity with a public body in retaliation for exercising First Amendment rights.[48] The Fifth Circuit did not address whether such a business, by filing suit over a lost business opportunity, acts "as a citizen" as *Garcetti* requires, although that seems fairly clear in light of the authorities discussed above. However, the court held that, in such a case, the contractor need not show that it had an existing or prior contracting relationship with the defendant municipality to outweigh the municipality's interests and establish a violation of its constitutional rights when the balance test is applied.[49] According to the *Oscar Renda* court, a contractor can recover for being denied a first contract, just as a job applicant can recover for being denied a job, if the denial was in reprisal for First Amendment activity. The Fifth Circuit indicated that any difference in analysis that may be warranted because the plaintiff is a business entity rather than an individual can be accommodated within the *Pickering* balance test.[50]

IV. The Practical Implications for Employers

Garcetti re-emphasizes that giving proper effect to First Amendment freedoms in the public workplace requires an appreciation of practical workplace realities. Those realities demand that governmental employers be permitted to deal with routine personnel matters without each instance becoming a potential "federal case." The Supreme Court made this same general point in *O'Connor v. Ortega*,[51] where a plurality observed that, while public employees possess Fourth Amendment rights against invasive searches in the employment context, those rights are "reduced by virtue of actual office practices and procedures," and that therefore "the privacy interests of government employees in their place of work . . . are far less than those found at home or in some other context."[52] The *Garcetti* majority referred to *O'Connor* and invoked similar logic in support of its conclusion that public employees' speech in the performance of employment *duties* does not implicate the First Amendment.

Even if that represents the correct interpretation of the "as a citizen" phraseology from *Pickering*,[53] however, it is questionable whether it significantly improves the public employer's ability to cope with the practical realities of the government workplace. Before *Garcetti*, a public employee could feel relatively safe that First Amendment protection would at least potentially be available when the job required the employee to report about controversial matters of public concern. In the wake of *Garcetti*, the public employee whose job obliges the employee to make such reports will enjoy First Amendment protection only by publishing the substance of the official report *outside* channels, *e.g.*, to the media or to external authorities. The suggestion of the *Garcetti* majority, that by enacting internal whistleblower or similar protections a public employer may alleviate the employee's incentive to "go public" in this fashion, is well taken only insofar as public employees have confidence in such internal protections. Where skepticism or distrust of internal protections prevails, or where employees have confidence only in the Constitution and the federal courts, they may feel compelled by *Garcetti* to go public with their official reports on sensitive public issues or (just as damagingly) to avoid reporting on such matters at all. ♦

Notes

1. 126 S. Ct. 1951 (2006).
2. 391 U.S. 563, 88 S. Ct. 1731 (1968).
3. 461 U.S. 138, 103 S. Ct. 1684 (1983).
4. 126 S. Ct. at 1960-61.
5. 468 F.3d 755 (11th Cir. 2006).
6. *Id*. at 761.
7. *Id*. at 758.
8. *Id*.
9. *Id*. at 761-2.
10. 2007 WL 817387 (D.C. Cir. March 20, 2007).
11. *Id*. at *1.
12. *Id*. at *6.
13. *Id*. at *8.
14. *Id*. See also *Houlihan v. Sussex Technical School Disrict*, 2006 WL 3349534 (D. Del. Nov. 16, 2006) (school psychologist complaint that school not complying with Individuals with Disabilities in Education Act not protected because it was part of her official duties).
15. 472 F.3d 794 (10th Cir. 2007).
16. *Id*. at 796.
17. *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006) (female prison guard complained internally of sexually explicit and inappropriate inmate behavior); *Mills v. City of Evansville*, 452 F.3d 646 (7th Cir. 2006) (female police sergeant complained to senior police officials about plans to reorganize the police department).
18. *Green*, 472 F.3d at 798-99.
19. *Id*. at 800-01. See, also *Casey v. West Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323, 1330 (10th Cir. 2007) (local school superintendent and head of the local Head Start program's reports of wrongdoing in the Head Start program lacked First Amendment protection because she was the "person primarily responsible for the sound administration of" that program).
20. *Spiegla v. Hull*, 481 F.3d 961, 966 (7th Cir. 2007).
21. 2006 WL 2790436 (D. Conn. Sept. 25, 2006).
22. *Id*. at *4. However, because Coles' discrimination complaints involved only Coles' employment personally, they were deemed to fail the "public concern" requirement for First Amendment protection. *Id*. *See also Charles v. Texas Lottery Commission*, 2006 WL 3358420 (W.D. Tex. Nov. 17, 2006) (holding a lottery employee who sent reports to upper management and the Legislature about alleged misappropriations of funds and discrimination by the lottery protected even though his complaints were "work related," where the complaints were not

part of his job *duties*).
23. 460 F.3d 409 (2d Cir. 2006).
24. *Id*. at 411.
25. *Id*. at 413.
26. *Id*. at 420-21.
27. *Id*. at 418.
28. 201 F.3d Appx 391 (9th Cir. 2006).
29. *Id*. at 394.
30. *See also Morey v. Somers Central Sch. Dist.*, 2007 WL 867203 (S.D.N.Y. March 31, 2007) (holding a custodian's complaint to school authorities about asbestos was protected).
31. 444 F.3d 158 (2d Cir.), *cert. denied*, 127 S. Ct. 382 (2006).
32. *Id*. at 161.
33. *Id*. at 169.
34. *Id*. at 166.
35. 467 F.3d 427 (5th Cir. 2006).
36. *Id*. at 442.
37. *Id*. at 438.
38. *Id*. at 442.
39. *Id*. at 437.
40. *Id*. at 444-45. *See also Weaver v. Chavez*, 458 F.3d 1096 (10th Cir. 2006) (holding uprotected employee complaint of political hiring that maliciously discredited coworkers, defied supervision and took internal matters outside the office).
41. 464 F.3d 667 (7th Cir. 2006).
42. *Id*. at 668-69.
43. *Id*. at 672.
44. *Id*. at 674.
45. 474 F.3d 477 (2007).
46. *Id*. at 480.
47. *Id*. at 383. *See also, O'Hare Truck Service, Inc. v. City of Northlake*, 518 U.S. 712 (1996).
48. *Id*. at 480.
49. *Oscar Renda*, 463 F.3d at 385. *Yadin Co. v. City of Peoria*, Ariz., 2007 WL 63611 (D. Ariz. Jan. 8, 2007).
50. 463 F.3d at 383-84.
51. 480 U.S. 709, (1987).
52. *Id*., at 717, 725. *See, also, Fedanzo v. Vroustouris*, 2001 U.S. Dist. LEXIS 16860 (N.D. Ill. Oct. 15, 2001), where a court found that a public employee was not unconstitutionally "seized" (arrested) when, upon arriving for work, he was required by agents of the municipality's Inspector General to accompany them to be interviewed regarding an employment matter. As the *Fedanzo* court noted, "ordinarily, when people are at work, their freedom to move about has been meaningfully restricted, not by the actions of law enforcement officials but by the workers' voluntary obligations to their employers," quoting *INS v. Delgado*, 466 U.S. 210 (1984).
53. The Court in *Pickering* spoke of balancing "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs." *Pickering*, 391 U.S. at 568. By stating the matter in that way, the *Pickering* Court may have meant to suggest that *any* commentary on a matter of public concern is done "as a citizen," that is, that commenting on matters of public concern is inherently a citizen's activity. ♦

Recent Developments

Recent Developments is a regular feature of The Illinois Public Employee Relations Report. It highlights recent legal developments of interest to the public employment relations community. This issue focuses on developments under the two collective bargaining statutes

IELRA & IPLRA Developments

Subjects of Bargaining

In *Board of Trustees v. ILRB & IELRB*, 224 Ill.2d 88, 862 N.E.2d 944 (2007), the Illinois Supreme Court decided a consolidated case under the IELRA and the IPLRA involving whether a proposal regarding parking arrangements for employees constituted a mandatory subject of bargaining. In the IELRA case, the University of Illinois at Urbana unilaterally increased parking fees paid by building service and food service workers and maintained that it was not required to bargain with the Service Employees International Union because parking fees were not a mandatory subject of bargaining. In the IPLRA case, the Fraternal Order of Police Labor Council filed two unfair labor practice charges against the University after the University refused to consider a FOP parking proposal on behalf of university police officers.

In both cases, the Administrative Law Judges determined that the University violated state labor law by refusing to bargain over the issue of parking. The IELRB and ILRB upheld the ALJs' decisions. However, both causes were reversed on appeal because the Appellate Court found that the burdens on university managerial authority outweighed the benefits of collective bargaining.

The Supreme Court reversed. It explained that under *Central City Educational Ass'n v. IELRB*, 149 Ill. 2d 496, 599 N.E.2d 892 (1992), the court undertakes a three part analysis to determine whether an issue is a mandatory subject of bargaining. First, the court determines whether the issue is one regarding wages, hours, or terms and conditions of employment. If the answer is negative, than the issue is not a mandatory subject of bargaining. However, if the issue does involve wages, hours, or terms and conditions of employment, the court must consider whether the issue involves inherent managerial authority. If the answer to this question is negative, than the issue is a mandatory subject of collective bargaining. If, on the other hand, the answer is affirmative, the court balances the benefits that bargaining would have on the decision making process against the burdens that bargaining imposes upon the employer's authority.

The University contended that parking does not involve wages, hours, or terms and conditions of employment because employees are not required to use the University's parking facilities. Rejecting the University's argument, the court noted that the majority of employees commute to work by car and that parking services provided by the University are critical to the working lives of these employees.

The University argued that because its parking division is required to be self-funding, decisions regarding parking are inherently managerial. Additionally, the University argued that because the issue of parking impacts student services, it touches upon the University's essential academic functions and is therefore inherently managerial. The court rejected the University's arguments. The court

determined that the University's core management authority is implicated only if the final collective bargaining agreement does not provide adequate revenue to sustain the parking division's financial obligations. The court noted that although student parking is an appropriate consideration for the university, it is not inherently an integral part of the University's managerial authority. Thus, the court concluded that parking was a mandatory subject of collective bargaining.

IELRA Developments

Injunctive Relief

In *Laborers' International Union of North America, Local 773 and Cairo Unit School District 1*, Case No. 2007-CA-0020-S (IELRB 2007), the IELRB granted the union's request for a preliminary injunction pursuant to Section 16(d) of the IELRA to prevent the district from transferring a day-shift maintenance worker to an evening-shift custodial position.

In early 2005, a maintenance worker filed two unfair labor practice charges against the district. During the 2005-2006 school year, the maintenance worker had excessive absences due to illness. The district therefore desired to transfer the employee to a custodial position because, according to the district, if he were absent, it would be easier to find a substitute to perform custodial duties than one to perform maintenance duties. However, the transfer would force the employee to quit his second job, where he worked the evening shift. The district attempted to transfer the employee, "due to [his] inordinate absentee rate and [his] overall uncooperative attitude," and the union filed an unfair labor practice charge.

The IELRB granted the union's request for a preliminary injunction because there was a significant likelihood that the union would prevail on the merits of its charge. The IELRB inferred that the district had an unlawful motivation for transferring the employee, because the timing was suspect where it transferred the employee after he filed two unfair labor practice charges, and because the district transferred the employee for an "uncooperative attitude," often a euphemism for the employee having pro-union sentiments. Further, the transfer would have an adverse effect on the employee because he would have to quit his second job. The IELRB also found that preliminary relief was "just and proper," because without it, the employee would have to perform duties he did not want to perform, which is not something that could be remedied later. ♦

Further References

(compiled by Yoo-Seong Song, Librarian, Institute of Labor and Industrial Relations Library, University of Illinois at Urbana-Champaign)

Riccucci, Norma A. THE CHANGING FACE OF PUBLIC EMPLOYEE UNIONISM. *REVIEW OF PUBLIC PERSONNEL ADMINISTRATION*. VOL. 27, NO. 1. MARCH 2007. PP.71-78.

In this article, the author provides a current state of public sector unions with some relevant data. He describes key reasons for the continuing decline of unions in the private sector and growth in the public sector. Overall, the struggle to survive is still a major theme to both private and public sector unions, but the author sees some opportunities for the revitalization of unions especially in the public sector. The author predicts that private sector unions will attempt aggressively to win membership and represent public sector employees in the next several decades.

McEntee,Gerald W. THE NEW CRISIS OF PUBLIC SERVICE EMPLOYMENT. *PUBLIC PERSONNEL MANAGEMENT*. VOL. 35, NO. 4. WINTER 2006. PP.343-346.

The author claims that AFSCME has played a major role in promoting public workers' economic and social status for the past 70 years. He lists several areas where AFSCME made significant progress, such as public employee pension plans and raising salaries, and assesses that AFSCME's efforts in the past have been effective. The author, however, points out that the current environment is not favorable towards public employees and public sector unions. He identifies five areas of challenge that AFSCME and other public sector unions face and believes that the future of public sector unions relies on how public sector unions respond to those challenges now. The five challenges are: fiscal limits, privatization, civil service reform, pension reform, and collective bargaining.

(Books and articles anotated in Further References are available on interlibary loan through ILLINET by contacting your local public library or system headquarters.)

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