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Tenth Circuit Interpretations of Garcetti: Limits on First Amendment Protections for Whistle-Blowers

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TENTH CIRCUIT INTERPRETATIONS OF *GARCETTI*: LIMITS ON FIRST AMENDMENT PROTECTIONS FOR WHISTLE-BLOWERS

INTRODUCTION

In May of 2006, the United States Supreme Court issued a landmark ruling in the case of *Garcetti v. Ceballos*,[1] which significantly restricted the free speech protections of government employees.[2] Justice Kennedy, writing for the narrow majority[3] proclaimed, "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."[4] The Court concluded that although a government employee's speech may be protected where the employee "speaks as a citizen addressing matters of public concern,"[5] the dispositive analysis hinges on a balancing test involving a number of competing contextual factors surrounding the speech.[6] Just because a government employee has spoken on matters of public concern does not guarantee First Amendment protection. In fact, rulings by lower courts interpreting *Garcetti* have denied constitutional protections even when speech by whistle-blowers involved credible allegations of government corruption,[7] mismanagement,[8] and illegality.[9] In cases where the speech occurs pursuant to a government employee's

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1. 126 S. Ct. 1951 (2006).

2. *Id.* at 1960-61; *see also* John Sanchez, *The Law of Retaliation After* Burlington Northern *and* Garcetti, 30 AM. J. TRIAL ADVOC. 539, 553-54 (2007) ("[T]he *Garcetti* Court ruled that anything public employees say in the course of performing their assigned duties is not of public concern, and is therefore not protected under the First Amendment"); Joel Gora, *First Amendment Decisions in the October 2005 Term*, 22 TOURO L. REV. 917, 926 (2007) ("[S]peech at the public workplace . . . may still be protected, but speech on the job is virtually immune from any First Amendment inquiry").

3. Justice Kennedy wrote the majority opinion in which Chief Justice Roberts along with Justices Scalia, Thomas, and Alito joined. *Garcetti*, 126 S. Ct. at 1954.

4. *Id.* at 1960.

5. *Id.* at 1961.

6. *Id.*

7. Battle v. Bd. of Regents, 468 F.3d 755, 761 (11th Cir. 2006) (explaining that a university employee's retaliation claim that she was fired after reporting financial improprieties and possible fraud involving her supervisor, failed under *Garcetti* because her complaints were made pursuant to her official duties).

8. Casey v. W. Las Vegas Indep. Sch. Dist., 473 F.3d 1323, 1331 (10th Cir. 2007) (explaining that a school superintendant's retaliation claim that she was fired after reporting financial improprieties involving federal funding of the district's Head Start program, failed under *Garcetti* because she reported the problems pursuant to official duties).

9. Williams v. Riley, 481 F. Supp. 2d 582, 583-84 (N.D. Miss. 2007) (explaining that three police officers' retaliation claims that they were fired after reporting the beating of a restrained prisoner by a fellow officer, failed under *Garcetti* because their complaints were made pursuant to their official duties).

official duties, the Court in *Garcetti* held that there is no First Amendment shield.[10]

Interestingly, the Court declined to provide a framework for determining when speech is pursuant to official duties.[11] Without a framework, the federal courts at both the trial and appellate levels have had to break new ground in this area.[12] How a court construes speech pursuant to official duties often determines whether an employee's speech is unprotected.[13] Predictably, different courts have taken different approaches to this analysis.[14] Problematically, some have interpreted the Court's decision in *Garcetti* broadly, declaring more speech to be unprotected.[15] Others have interpreted *Garcetti* narrowly, expanding the field of protected speech relative to other courts.[16]

The Tenth Circuit has provided guidance in this developing area[17] and follows the broader application of the *Garcetti* test.[18] The impact has been a substantial erosion of speech protections for government employees. Two opinions issued after *Garcetti* offered perhaps the most expansive interpretation of how speech pursuant to official duties should be construed. In *Green v. Board of County Commissioners*,[19] the appellate panel barred First Amendment protection because the plaintiff's speech involved generally "the type of activities [the employee] was paid to do."[20] The Tenth Circuit drew a similar post-*Garcetti* conclusion in the 2007 case of *Casey v. West Las Vegas Independent School District*,[21] in which the appellate court found statements relating to matters within an employee's "portfolio" of responsibilities to be "pursuant to her official duties."[22] The Tenth Circuit's most recent refinement of *Garcetti* came

10. *Garcetti*, 126 S. Ct. at 1962.

11. *Id.* at 1961.

12. *See, e.g.*, *Casey*, 473 F.3d at 1328.

13. *See* Sanchez, *supra* note 2, at 559-60.

14. Petition for Writ of Certiorari at *1, *11, *13, Spiegla v. Hull, No. 07-273, 2007 WL 2461589 (7th Cir. Aug. 27, 2007) (explaining how different federal courts at the trial and appellate levels have construed the *official duty* analysis of *Garcetti* differently).

15. *See, e.g.*, Battle v. Bd. of Regents, 468 F.3d 755, 761 (11th Cir. 2006); Freitag v. Ayers, 468 F.3d 528, 546 (9th Cir. 2006); Mills v. City of Evansville, 452 F.3d 646, 647-48 (7th Cir. 2006).

16. Pittman v. Cuyahoga Valley Career Ctr., 451 F. Supp. 2d 905, 929 (2006) (indicating the court "interprets *Garcetti* more narrowly . . . . If the public employee's speech was required by his or her job, then *Garcetti* applies and the statements are not protected speech. If the speech, however, is not specifically job-related, then the statements are reviewed under a traditional *Connick* analysis"); *see also* Lindsey v. Orrick, 491 F.3d 892, 897-98 (8th Cir. 2007); Jackson v. Jimino, 506 F. Supp. 2d 105, 109-10 (N.D.N.Y. 2007); Barclay v. Michalsky, 451 F. Supp. 2d 386, 394-99 (D. Conn. 2006).

17. Cheek v. City of Edwardsville, 514 F. Supp. 2d 1220, 1230 (D. Kan. 2007) ("The Tenth Circuit . . . has provided significant guidance on this issue since *Garcetti*."); *see also* Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1203 (10th Cir. 2007).

18. *Brammer-Hoelter*, 492 F.3d at 1203-04; Charles W. Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173, 1195-96 (2007) (explaining the difference between narrow and broad applications of *Garcetti*).

19. 472 F.3d 794 (10th Cir. 2007).

20. *Id.* at 800-01.

21. 473 F.3d 1323 (10th Cir. 2007).

22. *Id.* at 1329.

in the 2007 case of *Brammer-Hoelter v. Twin Peaks Charter Academy*,[23] in which the appellate court said "speech relating to tasks within an employee's uncontested employment responsibilities is not protected from regulation."[24]

While the Tenth Circuit's use of the term "uncontested employment responsibilities" to define official duties in *Brammer-Hoelter* seems to slightly narrow the general guidelines offered in *Green* and *Casey*, the analysis remains broad. Broad interpretations of official duties tend to result in more restrictions to speech because more speech can be caught in the wide net of expansive terminology. By broadly defining when speech is pursuant to official duties, *Brammer-Hoelter*, *Green*, and *Casey* arguably limit the First Amendment protections of government employees beyond even the Court's guidance in *Garcetti*. Thus, the Tenth Circuit's approach has important implications for whistle-blowers and practitioners.

Part I of this comment provides a brief history of the case law through *Garcetti* including a description of the *Garcetti* razor[25] and its consequences. Part II analyzes the Tenth Circuit cases that have interpreted *Garcetti*, and makes the argument that the Tenth Circuit has restricted free speech beyond the specific application used in *Garcetti*. Part III compares the Tenth Circuit's approach to other circuits that have interpreted *Garcetti*, looking specifically at how the jurisprudential framework can be the most important dispositive factor. Finally, Part IV discusses the impacts on whistle-blowers, citizens, and governments, concluding with some thoughts for practitioners operating in a post-*Garcetti* landscape.[26]

I. IT WASN'T ALWAYS THIS WAY

In simpler times, before *Garcetti*, the "unchallenged dogma"[27] assumed government employers could use the employment relationship as leverage to restrict an employee's First Amendment rights.[28] That prevalent attitude in the early twentieth century eventually yielded to a juris-

23. 492 F.3d 1192 (10th Cir. 2007).

24. *Id.* at 1203.

25. The *Garcetti* razor is a term invented by the author to describe the test that often blocks public employee speech claims from the constitutional balancing test known as the *Connick-Pickering* test.

26. A common theme throughout this comment is the author's opinion that *Garcetti* is overly broad, lacks predictability, and leaves too much speech unprotected.

27. Garcetti v. Ceballos, 126 S. Ct. 1951, 1957 (2006) ("[T]he unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment-including those which restricted the exercise of constitutional rights." (quoting Connick v. Myers, 461 U.S. 138, 143 (1983)).

28. Rhodes, *supra* note 18, at 1176; *see also id.* (quoting Justice Holmes that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman").

prudential approach that was more sympathetic to free speech.[29] This change in philosophy evolved in the 1950s and 1960s through a string of cases concerning government attempts to identify, blacklist, and retaliate against former or suspected members of the communist party in America.[30] The cases struck down statutes and conduct aimed at restricting government employees from exercising their rights to "participate in public affairs."[31] The precedential seeds of those progressive cases would bear fruit in the landmark 1968 case of *Pickering v. Board of Education*.[32]

A. *The* Pickering *Balance Creates Constitutional Protections for Public Employees*

The *Pickering* case expanded the speech rights of public employees, providing some First Amendment protections to those whose speech related to matters of public concern. In *Pickering*, the Board of Education [Board] fired a teacher for writing a "letter to the editor" in which the teacher criticized the Board and superintendant for spending too much money on athletics, and for attempting to bar teachers from publicly criticizing a bond issue.[33] The Court established a balancing test weighing the interests of the public employee's speech against the government's interest in efficient administration of services.[34] The *Pickering* Court held the teacher's speech interest prevailed because the teacher spoke on matters of public concern, specifically taxes and elections.[35] Furthermore, the Court reasoned, the exercise of the contested speech had little impact on the orderly and efficient operation of the school district.[36] The Court also recognized that teachers are "most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent."[37] Thus, while the Court did not view the speech of government employees as having absolute constitutional protection, the Court was willing to extend that shield if the employee's interest in speaking on matters of public concern outweighed the government's interest in quashing the speech. The *Pickering* test formed the modern basis for evaluating government retaliation claims, and remained largely unmodified until the 1983 case of *Connick v. Myers*.[38]

29. *Id.* at 1176-77.
30. *Connick*, 461 U.S. at 144.
31. *Id.* at 144-45.
32. *Id.*; 391 U.S. 563 (1968).
33. *Pickering*, 391 U.S. at 566.
34. *Id.* at 568.
35. *Id.* at 571-72.
36. *Id.* at 570-73.
37. *Id.* at 572.
38. 461 U.S. 138 (1983).

B. Connick *Makes Speech Retaliation Claims More Difficult for Government Employees*

In *Connick*, the Court added an obstacle to the traditional *Pickering* test by requiring an antecedent analysis of whether the speech related to matters of public concern.[39] That is, the new rule required a finding that the speech constituted a matter of public concern before the courts could employ the balancing test under *Pickering*.[40] Prior to *Connick*, courts generally skipped the public concern analysis and went straight to the balancing test.

In *Connick*, an employee in the New Orleans District Attorney's Office, upset after being given a forced transfer, put together a questionnaire asking co-workers to share their views on issues, including confidence in management and employee morale.[41] She passed out the questionnaires to co-workers.[42] Upon learning of the employee's "mini insurrection,"[43] her bosses fired her for insubordination.[44] The question for the Court involved assessing whether the plaintiff's speech was protected under *Pickering*.[45] The Court reasoned that the prerequisite hurdle to *Pickering* is a public concern analysis.[46] That is, the public employee must have spoken as a citizen on matters of public concern before the Court would employ the *Pickering* test.[47] The Court concluded that the content of the employee's questionnaire amounted to speech about the employee's personal grievances.[48] In that capacity, the Court reasoned, the employee was not speaking as a citizen on matters of public concern and was therefore not entitled to constitutional protection from her employer's discipline.[49] Thus, *Connick*, as a limiting factor, gave judges a filter to bar certain cases from ever getting to the *Pickering* balance.[50] This effectively restricted the First Amendment protections of public employees by limiting the claims that would survive a summary judgment challenge.[51]

The combination of *Pickering* and *Connick* resulted in a four-step analysis.[52] First, did the public employee speak as a citizen on a matter of public concern?[53] Second, if the employee spoke as a citizen on a

39. Rhodes, *supra* note 18, at 1178.
40. *Connick*, 461 U.S. at 146.
41. *Id.* at 140-41.
42. *Id.* at 141.
43. Characterization given by supervisor Dennis Waldron. *Id.*
44. *Id.*
45. *Id.* at 142-43.
46. *Id.* at 145-46.
47. *Id.* at 147-48.
48. *Id.* at 154.
49. *Id.*
50. *See* Sanchez, *supra* note 2, at 552.
51. *Id.*
52. Rhodes, *supra* note 18, at 1179-80.
53. *Id.* at 1179.

matter of public concern, did the individual's speech interest outweigh the government's interest in efficient administration?[54] Third, if the individual's speech interest outweighed the government's interest, did the government commit a retaliatory employment action because of the employee's speech?[55] Fourth, even if the government retaliated against the employee's speech, would the government have taken the same action if the speech had not occurred?[56] For the adverse employment claim to be actionable, the plaintiff must win each prong of the *Connick-Pickering* test, whereas the government prevails if it can win at least one prong.[57]

The *Connick* addition to the *Pickering* test made it very difficult for public employees to have actionable claims when their speech triggered employer retaliation.[58] The cases that typically survived the *Connick* reformulation were those focusing on whistle-blowers whose speech exposed government misconduct.[59] The courts were generally more receptive of claims in which the employee had at least a partial motivation to expose government corruption, as opposed to primarily airing personal grievances.[60]

C. *Along Comes* Garcetti

The *Connick-Pickering* analysis would undergo another restrictive reformulation in the landmark case of *Garcetti v. Ceballos*.[61] In *Garcetti*, an assistant district attorney, Ceballos, wrote a memo to his superiors explaining that he believed a police search warrant contained key misrepresentations.[62] He recommended that the district attorney dismiss the case.[63] During a heated meeting, Ceballos' superiors and colleagues "sharply criticized" his conclusions and ultimately ignored them.[64] Ceballos later claimed he had suffered retaliatory employment action culminating in his forced transfer and reassignment.[65] He further alleged that he had been passed over for a promotion in the aftermath of his memo.[66]

The Court, reasoning that his speech was made pursuant to his official duties, ultimately rejected Ceballos' retaliation claim.[67] In short, he

54. *Id.*
55. *See id.* at 1179-80.
56. *Id.* at 1180.
57. *See id.* at 1179-80.
58. *See* Sanchez, *supra* note 2, at 552.
59. Rhodes, *supra* note 18, at 1187.
60. *Id.*
61. 126 S. Ct. 1951 (2006).
62. *Id.* at 1955-56.
63. *Id.*
64. *Id.* at 1956 ("The meeting allegedly became heated, with one lieutenant sharply criticizing Ceballos for his handling of the case.").
65. *Id.*
66. *Id.*
67. *Id.* at 1960.

would not have written the memo had his employer not required his opinion on a pending case.[68] According to the narrow majority, restricting "speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created."[69] Consequently, the Court barred constitutional protection for Ceballos' speech because he spoke pursuant to his official duties as a deputy district attorney.

D. The Garcetti *Razor*

The practical impact of *Garcetti* is that it created another hurdle for claimants to overcome before courts can proceed with the *Connick-Pickering* analysis.[70] If the speech of a government employee is found to be pursuant to official duties, then the rule in *Garcetti* acts as a razor, cutting off the possibility of constitutional protection and preventing the court from proceeding to the *Connick-Pickering* test.[71]

E. Implications of Garcetti

The fallout from the Court's ruling in *Garcetti* is significant in that it further limits the kinds of retaliation claims that will survive a summary judgment challenge.[72] In the aftermath, even claims by whistleblowers documenting government misconduct and corruption have failed under the threshold test of *Garcetti*.[73] For example, in *Battle v. Board of Regents*,[74] the plaintiff Lillie Battle, a financial aid officer at a Georgia university, was fired after she reported instances of alleged fraud and mismanagement involving her supervisors handling of federal monies.[75] Battle sued on a retaliation claim alleging her First Amendment rights had been violated.[76] Even though state and federal audits substantially confirmed Battle's prior allegations regarding fraud and mismanagement,[77] the Eleventh Circuit held her speech to be unprotected. Interpreting *Garcetti*, the court found that because Battle's job duties included an obligation to report fraud and misconduct, her whistle-blowing activities fell within the scope of her official duties.[78] According to the Eleventh Circuit, Battle was not speaking as a private citizen under *Garcetti*, and

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68. *Id.*
69. *Id.*
70. *See* Sanchez, *supra* note 2, at 561.
71. *Id.*
72. *See id.* at 563.
73. *See, e.g.*, Battle v. Bd. of Regents, 468 F.3d 755, 761 (11th Cir. 2006); Freitag v. Ayers, 468 F.3d 528, 546 (9th Cir. 2006); Mills v. City of Evansville, 452 F.3d 646, 647-48 (7th Cir. 2006).
74. 468 F.3d 755.
75. *Id.* at 757-58.
76. *Id.* at 759.
77. *Id.*
78. *Id.* at 761-62.

therefore her speech was not constitutionally protected.[79] Thus, if a court concludes, as a matter of law, that the speech was made pursuant to an employee's official duties, it receives no constitutional protections even though the content of the speech may have been of great interest to the public.

Anticipating the whistle-blower's dilemma, the dissent in *Garcetti* criticized the majority's rigid pigeon-holing of job-related speech as being pursuant to official duties.[80] This is because once speech is construed as "pursuant to . . . official duties" it is categorically barred from being a matter of public concern.[81] If the speech is not a matter of public concern then it warrants no First Amendment protection.[82] Justice Souter, in his dissent, complained that the rule in *Garcetti* would deny constitutional protections when "a public auditor speaks on his discovery of embezzlement of public funds, when a building inspector makes an obligatory report of an attempt to bribe him, or when a law enforcement officer expressly balks at a superior's order to violate constitutional rights he is sworn to protect."[83] Likewise, legal commentators have argued that *Garcetti*'s chilling effect on future whistle-blowers will ultimately undermine the public's "right to hold government accountable," and frustrate the public's ability to uncover waste and corruption.[84]

Curiously, as rigid and formalistic as the rule in *Garcetti* seems to be, it nevertheless leaves much interpretative room for the lower courts. The *Garcetti* Court declined to provide a framework for making the critically important determination of when speech is pursuant to official duties.[85] The Court would only say that the inquiry is a "practical one," and that formal job descriptions may not accurately describe the actual duties expected of an employee.[86] In fashioning its decision, the Court left broad interpretive power on the table for the lower courts to flesh out. How the courts conduct this "practical" inquiry can have an enormous, even dispositive, impact on the outcome of a case.[87]

II. THE TENTH CIRCUIT INTERPRETS *GARCETTI*

The Tenth Circuit has already begun to provide guidance in this murky area.[88] Three cases decided since *Garcetti* each attempted to ar-

79. *Id.*
80. Garcetti v. Ceballos, 126 S. Ct. 1951, 1966 (2006) (Stevens, J., dissenting).
81. *Id.* (Souter, J., dissenting)
82. *Id.*
83. *Id.* at 1966-67.
84. Sanchez, *supra* note 2, at 563.
85. *Garcetti*, 126 S. Ct. at 1961.
86. *Id.* at 1961-62.
87. *See generally* Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192 (10th Cir. 2007); Casey v. W. Las Vegas Indep. Sch. Dist., 473 F.3d 1323 (10th Cir. 2007); Green v. Bd. of County Comm'rs, 472 F.3d 794 (10th Cir. 2007).
88. Cheek v. City of Edwardsville, 514 F. Supp. 2d 1220, 1230 (D. Kan. 2007) ("In *Garcetti*, the Supreme Court declined to articulate a comprehensive framework for determining when a gov-

ticulate when employees speak pursuant to their official duties. The cases are *Green v. Board of County Commissioners*,[89] *Casey v. West Las Vegas Independent School District*,[90] and *Brammer-Hoelter v. Twin Peaks Charter Academy*.[91]

A. Green v. Board of County Commissioners

In January 2007, the Tenth Circuit issued its first interpretation of *Garcetti* in the case of *Green v. Board of County Commissioners*.[92] In *Green*, plaintiff Jennifer Green was a technician and detention officer employed in the drug-lab of a juvenile detention center.[93] She became concerned that a particular drug test was unreliable after an apparent false positive.[94] On her own initiative, and without her supervisor's permission, she arranged a confirmation test at a local hospital.[95] She also informed the Department of Human Services about her suspicions.[96] When the confirmation test revealed the suspect test was indeed flawed, Green notified her supervisor.[97] As a result, the juvenile detention center adopted a new policy instituting confirmation testing.[98] Shortly thereafter, Green claimed her supervisors retaliated against her. [99] The detention center transferred her out of the drug-lab and demoted her.[100] When she failed to show up for work, the center fired her.[101]

The Tenth Circuit noted in *Green* that the *Garcetti* Court did not articulate a framework for determining when an employee's speech is pursuant to official duties.[102] Faced with an open question, the appellate panel in *Green* interpreted *Garcetti* to stand for the proposition that "speech is made pursuant to official duties if it is generally consistent with 'the type of activities [the employee] was paid to do.'"[103]

The speech in question had to do with Green's communications with the manufacturer, state, and the defendant regarding the confirmation test.[104] The court of appeals framed its analysis as an either/or sce-

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ernment employee speaks pursuant to his or her official duties. The Tenth Circuit, however, has provided significant guidance on this issue since *Garcetti*." (citation omitted)).

89. 472 F.3d 794.
90. 473 F.3d 1323.
91. 492 F.3d 1192.
92. *Green*, 472 F.3d 794.
93. *Id.* at 796.
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 797.
101. *Id.*
102. *Id.* at 798.
103. Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1203 (10th Cir. 2007) (alteration in original) (quoting *Green*, 472 F.3d at 801).
104. *Green*, 472 F.3d at 800.

nario. Either Green was acting within the scope of her duties because she was hired to collect samples, conduct drug tests, check equipment, and communicate with others regarding the testing,[105] or she was acting as a private citizen outside the boundaries of her job as a matter of public concern by advocating for better testing policies and arranging for the re-test of a suspect sample, none of which she was hired to do.[106]

The appellate panel concluded the facts were closer to the *Garcetti* scenario than to one involving a private citizen because Green had been working internally on activities that "stemmed from" the type of duties she was hired to do.[107] According to the Tenth Circuit, the fact that she disagreed with her supervisors on the testing policy, and sought an unauthorized confirmation test, confirms she was working within the scope of her official duties, even if she did not have explicit authority to take the particular action.[108] Quoting *Garcetti*, the appellate court said a "government employee's First Amendment rights do 'not invest them with a right to perform their jobs however they see fit.'"[109]

Accordingly, the Tenth Circuit in *Green* refined *Garcetti*'s "pursuant to official duties" analysis by asking whether an employee's on-the-job speech is generally consistent with the type of activities the employee was paid to do.[110] If the answer is yes, then the speech is pursuant to official duties, and there is no constitutional protection from employer discipline.

B. Casey v. West Las Vegas Independent School District

Just a few weeks after issuing the ruling in *Green*, the Tenth Circuit crafted another decision interpreting *Garcetti*: *Casey v. West Las Vegas Independent School District.*[111] In *Casey*, the court defined the *Garcetti* scope of duties broadly, declaring speech that falls within an employee's "portfolio" to be pursuant to her official duties.[112]

In *Casey*, the plaintiff was a school district superintendant who oversaw the district's federally funded Head Start program.[113] Superintendant Casey eventually learned the district may have improperly disbursed federal monies to families that did not qualify for Head Start.[114] Fearing the payouts could jeopardize future funding, Ms. Casey notified school board officials, who told her "not to worry about it."[115] Con-

105. *Id.*
106. *Id.*
107. *Id.* at 800-01.
108. *Id.* at 801.
109. *Id.* (quoting Garcetti v. Ceballos, 126 S. Ct. 1951, 1960 (2006)).
110. Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1203 (10th Cir. 2007).
111. 473 F.3d 1323 (10th Cir. 2007).
112. *Id.* at 1329; *Brammer-Hoelter*, 492 F.2d at 1203.
113. *Casey*, 473 F.3d at 1325.
114. *Id.* at 1326.
115. *Id.*

cerned she had a legal duty to report fiscal improprieties, Ms. Casey ordered an assistant to disclose the findings to Head Start.[116] In response, the U.S. Department of Health and Human Services substantiated the allegations and ultimately sought to recoup over $500,000 from the school district.[117] Several months later the school board demoted Ms. Casey, and eventually fired her.[118] She sued the district alleging her termination was unconstitutional retaliation against her speech.[119] Defendants asked for summary judgment based on a defense of qualified immunity.[120] After the District Court denied summary judgment, defendants appealed to the Tenth Circuit.[121]

The Tenth Circuit began its inquiry by again employing the first question under the post-*Garcetti Connick-Pickering* test: Did the plaintiff speak as a private citizen on a matter of public concern?[122] The appellate panel applied the rule in *Garcetti* that government employees who speak pursuant to their official duties do not speak as private citizens and thus are not protected from employer discipline.[123]

Similar to its analysis in *Green*, the Tenth Circuit framed the central question as an either/or proposition.[124] Either Ms. Casey's act of notifying federal Head Start about possible improprieties amounted to a private citizen engaging in constitutionally protected whistle-blowing, or Ms. Casey's communication amounted to speech "pursuant" to her "official duties," in which case it would not be protected speech.[125]

The court of appeals reasoned that when Ms. Casey agreed to become superintendent, she assumed an obligation to comply with federal regulations concerning the Head Start program.[126] The panel also noted that "with knowledge of financial irregularities [Ms. Casey] risked civil and criminal liability by remaining silent in the face of such knowledge."[127] Despite the plaintiff's argument that her reports to federal authorities constituted speech by a private citizen, the court found the speech to be squarely within her "portfolio," and thus pursuant to her official duties.[128] Consequently, the Tenth Circuit held that her speech did not qualify for First Amendment protections under *Connick-*

116. *Id.*
117. *Id.*
118. *Id.* at 1327.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 1328.
123. *Id.*
124. *Id.* at 1329.
125. *Id.*
126. *Id.* at 1330.
127. *Id.*
128. *Id.* at 1329, 1331-32.

Pickering as modified by *Garcetti*.[129] Thus, the *Garcetti* razor settled the matter before it ever got to a *Connick-Pickering* analysis.

In both *Green* and *Casey*, the Tenth Circuit interpreted *Garcetti*'s "speech pursuant to official duties" bar broadly, denying First Amendment protection for employees' speech that either fell within their *portfolio* of duties[130] or was *generally consistent* with the type of duties they were hired to do.[131] The court held this to be true even though the employees' speech in both cases arguably amounted to whistle-blowing that revealed impropriety, mismanagement, and possible fraud involving public tax dollars.

Interestingly, the Tenth Circuit could have chosen to interpret *Garcetti* more narrowly, as some other courts have,[132] which would have allowed the *Garcetti* razor to cut short the case only where the speech is *required by* rather than *consistent with* official duties. Had the appellate court chosen such an approach in *Green* and *Casey*, the plaintiffs' claims might have survived the *Garcetti* razor.

C. Brammer-Hoelter v. Twin Peaks Charter Academy

When the Tenth Circuit took its third swing at *Garcetti*, it approached the same speech questions somewhat less conservatively than the previous two cases.[133] In contrast to *Green* and *Casey*, the third post-*Garcetti* case to come out of the Tenth Circuit in 2007 was *Brammer-Hoelter v. Twin Peaks Charter Academy*.[134] The court in *Brammer-Hoelter* interpreted *Garcetti*'s (speech pursuant to official duties) test more narrowly, and thus more charitably to free speech rights, than the previous Tenth Circuit cases. Nevertheless, *Brammer-Hoelter* remains less deferential to free speech than similar cases from other circuits.[135] *Brammer-Hoelter*'s key refinement interprets *Garcetti*'s speech pursuant to official duties to mean "speech relating to tasks within an employee's uncontested employment responsibilities."[136]

In *Brammer-Hoelter*, the plaintiffs, a group of teachers at a charter school, became concerned about the "operation, management, and mission" of the school.[137] They met at private homes, restaurants, and even

129. *Id.* at 1331.
130. *Id.* at 1329.
131. Green v. Bd. of County Comm'rs, 472 F.3d 794, 801 (10th Cir. 2007).
132. For a discussion of the narrow approach to interpreting *Garcetti*, see Rhodes, *supra* note 18, at 1195-96.
133. This is the author's opinion based on what appears to be a slightly narrower application of the *Garcetti* test in *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 492 F.3d 1192 (10th Cir. 2007), relative to *Green* and *Casey*.
134. 492 F.3d 1192.
135. *See infra* Part III.A (highlighting cases that interpreted *Garcetti*'s rule narrowly). *See generally* Rhodes, *supra* note 18, at 1195-96.
136. *Brammer-Hoelter*, 492 F.3d at 1203.
137. *Id.* at 1199.

a church to talk about their grievances.[138] Upon learning of the meetings, the school's principal ordered the teachers not to talk about school issues outside of work with anyone, including other teachers and staff at the academy.[139] Moreover, during a mandatory meeting, the principal advised the teachers not to associate outside of work.[140] In defiance of the principal's directives, the teachers continued to meet after hours and off school grounds.[141] Eventually, the teachers voiced their grievances to the school's board of directors.[142] A short time later, the teachers alleged, the principal gave them poor performance reviews despite later acknowledging that no teacher had violated the school's "policies, codes, or procedures."[143] The teachers ultimately resigned and brought retaliation claims alleging the school board had violated their First Amendment rights.[144]

The Tenth Circuit explained that *Garcetti* has turned the traditional *Pickering* analysis of speech retaliation claims into a five step inquiry.[145] First, did the employee speak pursuant to her official duties, or as a private citizen?[146] Second, if the employee spoke as a private citizen, was the speech a matter of public concern?[147] Third, if the citizen's speech was a matter of public concern, did the employee's speech interest outweigh the government's interest in efficient management?[148] Fourth, if the employee's speech interest outweighed the government's interest, was the speech a substantial or motivating factor in the adverse employment action?[149] Fifth, if the plaintiff prevails on the previous factors, can the government show that it would have taken the same action regardless of whether the protected speech had occurred?[150] If the answer is yes, then the inquiry ends and there is no government liability.[151] Thus, in order for the plaintiff to have an actionable claim the speech must be construed: (1) as that of a private citizen speaking on matters of public concern; (2) whose speech interest outweighs the government's interest; (3) whose speech was a substantial motivating factor triggering the retaliation; and, (4) but for the speech, the employee would not have suffered the adverse employment action. The high bar set for the plaintiff means the claim fails entirely if it fails any individual factor.[152]

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138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.* at 1202.
145. *Id.*
146. *Id.*
147. *Id.* at 1202-03.
148. *Id.* at 1203.
149. *Id.*
150. *Id.*
151. *See id.* at 1202-03.
152. *See id.*

The Tenth Circuit concluded that some of the employees' contested speech was not made pursuant to official duties.[153] These instances included speech about "resignations of other teachers . . . [restrictions to teachers'] freedom of speech . . . staffing levels . . . teacher salaries and bonuses . . . criticisms of the school board . . . lack of support, trust, feedback . . . restrictions on speech and association . . . [and] upcoming [b]oard elections."[154] Notably, the Tenth Circuit reached this finding even though the teachers entered contracts agreeing to "support the philosophy and curriculum of the [school] without reservation,"[155] and even though the teachers were encouraged to "present their views to improve the [school] and did so in the form of complaints and grievances to the Board."[156]

D. Analysis: Brammer-Hoelter, Casey *and* Green

Brammer-Hoelter's notion of "uncontested employment responsibilities" seems to allow more gray-area speech to survive the *Garcetti* razor than *Green*'s "generally consistent with," and *Casey*'s "portfolio" of duties analysis. For example, in *Brammer-Hoelter*, the court construed speech about staffing levels, criticism of the school board, and lack of support, trust and feedback, to be speech that falls outside of "uncontested employment responsibilities" and thus not pursuant to official duties under *Garcetti*.[157] The court seemed to reason that if the speech is arguably outside of the scope of an employee's responsibilities, then it survives the *Garcetti* razor and is not considered pursuant to official duties.

The same inquiry using the *Green* and *Casey* standards might have yielded different results. Conceivably, the same speech that passed the *Garcetti* hurdle under *Brammer-Hoelter*, might well have failed under the previous two cases. Using the broader standards of *Green* and *Casey*, the appellate panel might have otherwise construed speech about staffing levels, criticisms of the board, and lack of support, trust, and feedback as being speech "generally consistent" with the "portfolio" of tasks the teachers were paid to do. That is, those grievances might be generally consistent with the broader job requirement of providing high quality education to kids and feedback to superiors. Thus, certain unprotected speech under *Green* and *Casey* might well be protected speech under *Brammer-Hoelter*.

153. *Id.* at 1204-05.
154. *Id.*
155. *Id.* at 1204.
156. *Id.*
157. *Id.* at 1203-05.

E. Brammer-Hoelter *is Still Broader than* Garcetti

While *Brammer-Hoelter* provides a narrower analysis for excluding speech from constitutional protection than the previous two Tenth Circuit cases, it nevertheless remains broader than the specific application used in *Garcetti*. The facts of *Garcetti* involved an employee whose speech consisted of a written memo that he produced as a requirement of his job.[158] The Court stated, "Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case . . . ."[159] A narrow reading of *Garcetti* might leave the impression that unless the job requires the speech in question, it does not occur pursuant to official duties.

The Tenth Circuit did not read *Garcetti* so narrowly. Even *Brammer-Hoelter*'s standard of branding speech unprotected if it relates to "uncontested employment responsibilities,"[160] is a broader exclusion of speech than the narrower reading of *Garcetti* above. There is plenty of speech that is not required by a job, but is still nonetheless related to uncontested employment responsibilities. For example, imagine a government employed aviation engineer who is required by his job to report only design flaws on the projects for which he is directly responsible. If he notices a systemic problem on a fellow employee's project and takes it upon himself to report it through the chain of command, he might still be disciplined under *Brammer-Hoelter* because the report is related to his uncontested employment responsibilities to produce safe aircraft. On the other hand, a court interpreting *Garcetti* narrowly might conclude the speech was not pursuant to official duties because it was not specifically required by the job. Thus, there may be cases in which employees suffer retaliatory discipline for their speech under *Brammer-Hoelter* whereas they might otherwise have been protected under a narrower reading of *Garcetti*.

III. INTERPRETATIONS OF *GARCETTI*

The Fifth, Seventh, Ninth, and Tenth Circuits have all read *Garcetti*'s test broadly.[161] In each circuit, the appellate panel found speech occurring within the employment context to be pursuant to official duties even if the speech was not specifically required by the employer. Such interpretations arguably expand upon the vague parameters of *Garcetti*.

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158. Garcetti v. Ceballos, 126 S. Ct. 1951, 1953 (2006).

159. *Id.* at 1960.

160. *Brammer-Hoelter*, 492 F.3d at 1203.

161. *See* Williams v. Dallas Indep. Sch. Dist., 480 F.3d 689, 694 (5th Cir. 2007); Battle v. Bd. of Regents, 468 F.3d 755, 761 (11th Cir. 2006); Freitag v. Ayers, 468 F.3d 528, 546 (9th Cir. 2006); Mills v. City of Evansville, 452 F.3d 646, 647-48 (7th Cir. 2006); *see also supra* Part II.A-D (explaining Tenth Circuit cases that broadly interpret *Garcetti*).

A. Expansive Interpretations of Garcetti

In the case of *Williams v. Dallas Independent School District*,[162] an athletic director was fired after reporting financial improprieties via a memo to the principal.[163] Even though the employee was not required by the terms of employment to report the findings, the Fifth Circuit held the subject of the memo related to the types of things athletic directors deal with on a daily basis, specifically athletic accounts.[164] The panel concluded the athletic director was not speaking as a concerned citizen but rather as a government employee pursuant to his official duties and was therefore not entitled to constitutional protection.[165]

Likewise, in *Mills v. City of Evansville*,[166] a police sergeant was disciplined after criticizing a plan by the police chief that would have moved several officers from crime prevention to patrol.[167] The criticism occurred after an official meeting, in the presence of other senior supervisors, and concerned the sergeant's prediction that community organizations would resist the proposed change.[168] Despite the sergeant's claim that she suffered retaliation for speaking on matters of public concern, the Seventh Circuit concluded the plaintiff was in uniform, speaking as an employee, on matters of official policy, and thus was not constitutionally protected from discipline.[169] Thus, even though the employee's speech was not specifically required by her employment, the appellate panel held her speech was nevertheless pursuant to her official duties.[170]

The Ninth Circuit came to a similar post-*Garcetti* conclusion in the case of *Freitag v. Ayers*.[171] In *Freitag*, a corrections officer complained to her supervisors about sexual harassment perpetrated by inmates at a maximum security prison.[172] After her bosses ignored her repeated internal complaints, she wrote letters to state officials, including a state senator.[173] Her supervisors eventually disciplined her and later terminated her employment.[174] Shortly thereafter, a state investigation corroborated the plaintiff's claims.[175] While the Ninth Circuit held her communications to state officials were protected under *Garcetti*, her internal complaints to supervisors were not constitutionally protected.[176]

162. 480 F.3d 689.
163. *Id.* at 690-91.
164. *Id.* at 693-94.
165. *Id.* at 694.
166. 452 F.3d 646 (7th Cir. 2006).
167. *Id.* at 647.
168. *Id.*
169. *Id.* at 648.
170. *Id.*
171. 468 F.3d 528 (9th Cir. 2006).
172. *Id.* at 533-34.
173. *Id.* at 533-35.
174. *Id.* at 535-36.
175. *Id.* at 535.
176. *Id.* at 546.

The appellate panel reasoned that the plaintiff spoke pursuant to her official duties when she complained to her immediate supervisors.[177]

Similarly, the Tenth Circuit cases previously discussed approach the "speech pursuant to official duties" analysis from the same vantage point. The decisions in *Green*, *Casey*, and *Brammer-Hoelter* each reveal a jurisprudential approach that categorizes instances of employee speech to be pursuant to official duties even if the speech was not specifically required by the terms of employment.[178]

The common thread tying together the Fifth, Seventh, Ninth, and Tenth Circuit interpretations of *Garcetti* concerns the question of whether speech that is required by the job should be distinguished from speech that is related to the tasks of the job.[179] In *Garcetti*, the plaintiff lost his constitutional claim because his speech was specifically required by his employment.[180] To wit, Ceballos' memo that caused him to suffer retaliatory discipline was work product required by the terms of his employment as a prosecutor.[181] As an assistant district attorney, he was required to give his opinion on the merits of a pending case.[182] Contrary to the unique facts of *Ceballos*, many of the circuit interpretations discussed in this comment dealt with plaintiffs whose speech was not specifically required by the job.[183] The appellate courts interpreting the post-*Garcetti* cases broadened the analysis of speech pursuant to official duties beyond what the *Garcetti* Court specifically applied.[184] Thus, instead of equating speech pursuant to official duties as meaning speech *required* by official duties, the circuits typically construed speech pursuant to official duties to mean speech that is generally consistent with official duties. As the case holdings indicate, the broader categorization tends to limit the speech protections for government employees.

B. Narrow Interpretations of Garcetti

Not all courts have adopted the expansive approach of the Tenth Circuit. At the federal trial court level, some judges have rejected the broad interpretations of speech pursuant to official duties in favor of an

177. *Id.*
178. Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1203 (10th Cir. 2007) (quoting Green v. Bd. of County Comm'rs, 472 F.3d 794, 801 (10th Cir. 2007)); Casey v. W. Las Vegas Indep. Sch. Dist., 473 F.3d 1323, 1329, 1331 (10th Cir. 2007).
179. For a good discussion on the difference between the broad and narrow interpretations of *Garcetti*, see Rhodes, *supra* note 18, at 1195-97.
180. Garcetti v. Ceballos, 126 S. Ct. 1951, 1960 (2006).
181. *Id.*
182. *Id.*
183. *See* cases cited *supra* note 161.
184. *Id.*

approach that limits *Garcetti*'s razor to cases in which the speech is required by the job.[185]

For example, in *Pittman v. Cuyahoga Valley Career Center*,[186] the Northern District of Ohio held that *Garcetti* applies as a limiting factor only when the employee's speech is required by the job.[187] In *Pittman*, an African-American substitute teacher alleged racial discrimination and retaliation against an Ohio school.[188] One of the contested speech instances involved a memo the substitute teacher had written to the principal about parking issues.[189] Because the memo was related to employment responsibilities but arguably not required by the job, the court concluded *Garcetti* may not be determinative in barring the claim.[190]

Likewise, in *Barclay v. Michalsky*,[191] the United States District Court of Connecticut held that a nurse's retaliation claims, based on her criticism of the use of "excessive restraints" on psychiatric patients, were not barred by *Garcetti*.[192] Even though reporting patient health and safety issues was clearly related to the plaintiff's employment responsibilities, and even though specific work rules required her to file the complaints, the court nevertheless reasoned that her speech did not occur pursuant to her official duties.[193] The primary justification for that decision had to do with evidence suggesting the plaintiff did not know she was specifically required by her employment to file internal reports alleging patient abuse; she merely acted of her own accord.[194] Thus, in *Barclay*, the court not only concluded employee speech must have been required by the job in order for a retaliation claim to be barred under *Garcetti*, but the employee must have also been aware of the speech requirement in order for *Garcetti*'s razor to have impact.[195]

C. Speech Pursuant to Official Duties: All or Nothing

The Tenth Circuit, like the Fifth, Seventh, and Ninth Circuits, has faithfully followed the Court's guidance in *Garcetti* that the analysis of

185. Rhodes, *supra* note 18, at 1195; *see also* Pittman v. Cuyahoga Valley Career Ctr., 451 F. Supp. 2d 905, 929 (N.D. Ohio 2006) (explaining that "[a]lthough some legal analysts appear to be interpreting *Garcetti* as holding that statements made by public employees will *never* be protected if the employee is acting within the scope of his or her employment while making the statements, this Court interprets *Garcetti* more narrowly." (emphasis added)).

186. *Pittman*, 451 F. Supp. 2d 905.

187. *Id.* at 929.

188. *Id.* at 910, 913-14.

189. *Id.* at 929.

190. *Id.*

191. 451 F. Supp. 2d 386 (D. Conn. 2006).

192. *Id.* at 396.

193. *Id.*

194. *Id.*

195. *See id.*

speech pursuant to official duties is an all-or-nothing proposition.[196] That is, either a government employee's speech is pursuant to official duties, or the employee is speaking as a private citizen.[197] Nowhere does the majority in *Garcetti* account for the possibility that an employee may be speaking both as an employee and as a private citizen on matters of public concern.[198] Yet, as Justice Souter argues in his dissent, "a citizen may well place a very high value on a right to speak on the public issues he decides to make the subject of his work day after day."[199]

For example, imagine a police department that has an unwritten policy of encouraging officers to use excessive force when arresting political protesters. Also assume that every officer who wants to criticize police policy is required to do so through a superior. Perhaps there is an officer who disagrees with the excessive force policy not because of his inability to carry out the policy, but rather because of the policy's potential impact on members of his own family. The officer may fear that his teenage son, who frequently engages in political protest, might be injured by police officers who have no disincentive to refrain from using excessive force. The officer might also be concerned that the policy could impact his neighbors who may be afraid to engage in public political expression because they fear injury during an arrest.

Assuming the aforementioned circumstances, imagine what would happen if the officer, while on duty and in uniform, had taken his concerns to his superiors who ultimately fired him in retaliation for his criticism of the policy. While it seems clear the officer in the hypothetical was speaking as a father, neighbor, and citizen about a policy of which he had held a unique vantage point because of his employment as a police officer, he would nonetheless be barred from constitutional protection by the *Garcetti* razor. This is because he was required by his employment to voice his criticisms of department policy through the chain of command. Because he was in uniform, on duty, speaking about department policy, and following internal procedures required by his employment, he could be construed as both speaking pursuant to his official duties and speaking as a private citizen on matters of public concern. Yet the rule in *Garcetti* and its subsequent interpretations in the Tenth Circuit and other federal circuits would end the inquiry once the court determined the speech was pursuant to official duties, even if the officer's primary motivation to speak had come from his perspective as a private citizen.

196. Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1203 (10th Cir. 2007); Williams v. Dallas Indep. Sch. Dist., 480 F.3d 689, 692 (5th Cir. 2007); Freitag v. Ayers, 468 F.3d 528, 545 (9th Cir. 2006); Mills v. City of Evansville, 452 F.3d 646, 647 (7th Cir. 2006).

197. Garcetti v. Ceballos, 126 S. Ct. 1951, 1960 (2006).

198. *Id.*

199. *Id.* at 1965 (Souter, J., dissenting).

Similarly, in the previously discussed Tenth Circuit case of *Green*,[200] the lab technician's speech to correct problems with the county's drug testing program might well have arisen both from a desire to better perform her official duties and to better serve her interests as a private citizen (on matters of public concern). As a public employee, she may have been motivated by the desire to achieve more accurate testing results. Alternatively, as a private citizen, she may have been motivated by a desire to ensure that the drug testing system treats fellow citizens fairly.[201] To the extent that job related speech overlaps both domains, the *Garcetti* test forces the facts into a false dichotomy.[202] In *Green*, the Tenth Circuit employed *Garcetti*'s all-or-nothing approach, finding that the lab technician spoke pursuant to her official duties.[203] Thus, even though she may have had a compelling interest as a private citizen to speak on matters of public concern, her speech was not protected from employer retaliation because it was too closely related to her job duties.[204] The predictable and unfortunate consequence of an all-or-nothing approach is the chilling impact on whistle-blowers whose economic need for a job may outweigh the desire to correct government improprieties.[205]

IV. DIMINISHED PROTECTION FOR WHISTLE BLOWERS

The Court in *Garcetti* acknowledged the importance of government whistle-blowers whose special vantage point makes them particularly well situated to comment on fraud, corruption, and mismanagement.[206] The majority stated, "[e]xposing government inefficiency and misconduct is a matter of considerable significance."[207] The Court also suggested that governments should be open to "constructive criticism" "as a matter of good judgment."[208] Yet the Court seemed little concerned about constitutional protections for employees so situated. Instead, the Court assumed the patchwork of existing state and federal regulations will provide the appropriate protections. According to the majority, government employees enjoy "the powerful network of legislative enactments—such as whistle-blower protection laws and labor codes—available to those who seek to expose wrongdoing."[209] Yet, as Justice Souter vigorously pointed out in his dissent to *Garcetti*, these legislative

200. Green v. Bd. of County Comm'rs, 472 F.3d 794 (10th Cir. 2007).

201. *Id.* at 800 ("Under this view, by arranging for the confirmation test . . . , Ms. Green was not doing the job she was hired to do, but was acting outside of her day-to-day job responsibilities for the public good.").

202. Sanchez, *supra* note 2, at 560 (discussing *Garcetti*'s per se rule and the false dichotomy it creates between citizen speech and employee speech).

203. *Green*, 472 F.3d at 801.

204. *Id.* at 800-01.

205. Sanchez, *supra* note 2, at 563 (discussing the whistle-blower's dilemma in a post-*Garcetti* landscape).

206. Garcetti v. Ceballos, 126 S. Ct. 1951, 1962 (2006).

207. *Id.*

208. *Id.* (quoting Connick v. Myers, 461 U.S. 138, 149 (1983)).

209. *Id.* (citation omitted).

protections are neither uniform, comprehensive, nor existent in all jurisdictions.[210] In fact, several recent cases have removed any lingering doubt.[211]

For example, in *Williams v. Riley*,[212] the state whistle-blower statute in Mississippi was not broad enough to protect several county police officers who were fired after reporting to their supervisors that a fellow officer had physically beaten a "restrained prisoner."[213] After their termination, the officers sued the county sheriff on speech retaliation claims.[214] Because the officers reported the alleged misconduct through the chain of command as their job duties required, the federal trial court found the speech to be pursuant to official duties under *Garcetti*.[215] Predictably, the claims failed because the *Garcetti* razor categorically bars constitutional protection for speech that is pursuant to official duties. However, even as the court concluded the outcome "impossible to circumvent" in light of *Garcetti*, the court also expressed deep reservations about the rule.[216] In a lamenting opinion, critical of *Garcetti*, the trial judge wrote, "[t]his court is gravely troubled by the effect of *Garcetti* on a factual scenario such as that before the bar. It allows no federal constitutional recourse for an employee of the State of Mississippi who is fired for reporting a fellow government employee's misconduct."[217]

The lack of whistle-blower protection means fewer government employees are likely to come forward to provide information of corruption and malfeasance. Legal commentators have criticized *Garcetti*'s chilling effect on potential whistle-blowers, a development that seems likely to damage the public's ability to learn of government fraud and mismanagement.[218] Similarly, *Garcetti* has been accused of undermining the state's ability to operate efficiently by implicitly encouraging the non-reporting of waste and corruption.[219]

A. The Perverse Incentive

The Supreme Court offered several justifications for its dramatic roll-back of free speech rights in *Garcetti*. The Court claimed compel-

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210. *Id.* at 1970-71 (Souter, J., dissenting).

211. *See, e.g.*, Williams v. Riley, 481 F. Supp. 2d 582, 584-85 (N.D. Miss. 2007); *see also* Petition for Writ of Certiorari at *21, Spiegla v. Hull, No. 07-273, 2007 WL 2461589 (7th Cir. Aug. 27, 2007).

212. *Riley*, 481 F. Supp. 2d 582. The state whistle-blower statute would have protected the officers had they reported the misconduct through a state investigative agency such as the district attorney rather than through the Sherriff's chain of command. *Id.* at 585.

213. Williams v. Riley, No. 2:05CV83-P-B, 2006 U.S. Dist. LEXIS 46697, at *1-*2 (N.D. Miss. July 10, 2006).

214. *Riley*, 481 F. Supp. 2d at 584.

215. *Id.*

216. *Id.*

217. *Id.*

218. Sanchez, *supra* note 2, at 563; *see also* Garcetti v. Ceballos, 126 S. Ct. 1951, 1967 (2006) (Souter, J., dissenting) (asserting Justice Souter's criticisms of the majority in *Garcetti*).

219. Sanchez, *supra* note 2, at 563.

ling separation of powers concerns for not wanting to second guess every executive branch decision relating to employee discipline.[220] Moreover, the Court asserted the smooth operation of government depends in part on the official communications of employees being "accurate, demonstrat[ing] sound judgment, and promot[ing] the employer's mission."[221] The majority seemed to imagine a world without *Garcetti* as being tantamount to rabble rousers on the public payroll using the Constitution as an excuse to say whatever they want, perform their jobs however they see fit, and make every disciplinary case a matter of constitutional retaliation.[222]

Ironically, the *Garcetti* rule appears to have created a perverse incentive that encourages government employees to take their problems first to the media, or any authority outside of the employee's immediate chain of command.[223] This is because a government employee who tips off a newspaper reporter about government corruption is more likely to have engaged in constitutionally protected speech than the government employee who reports the same corruption through official government channels.[224]

For example, if a state prison worker notices a drug dealing scheme involving several other prison guards, she is not protected from discipline if she reports the behavior through the official chain of command. This is because her job description likely includes duties such as reporting health, safety, and criminal infractions to her supervisor. Thus, if her employer fires her for reporting her fellow guards, she would have no constitutional recourse because her speech was pursuant to her official duties. However, if that same prison guard instead went straight to the media to report the drug dealing scheme because she was outraged as a taxpayer that her government was operating prisons in such a perilous way, the result might be very different. Her speech is more likely to be constitutionally protected because she is speaking as a private citizen on matters of public concern.

Justice Stevens, in his *Garcetti* dissent, recognized the troubling possibility that the very same speech that is constitutionally protected in one context is barred from protection in another context.[225] Likewise, in his lengthy discussion criticizing the majority's opinion, Justice Souter

220. *Garcetti*, 126 S. Ct. at 1961 (explaining that to allow constitutional protection for job related speech would "demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.").

221. *Id.* at 1960.

222. *Id.* at 1959 (explaining that "while the First Amendment invests public employees with certain rights, it does not empower them to 'constitutionalize the employee grievance.'" (quoting Connick v. Myers, 461 U.S. 138, 154 (1983))).

223. Sanchez, *supra* note 2, at 562.

224. *See id.*

225. *Garcetti*, 126 S. Ct. at 1963 (Stevens, J., dissenting).

said it is "no adequate justification for the suppression of potentially valuable information simply to recognize that the government has a huge interest in managing its employees and preventing the occasionally irresponsible one from turning his job into a bully pulpit."[226]

Interestingly, even the majority in *Garcetti* recognized the possibility of the perverse incentive when it advised public employers to create internal procedures to encourage employees to share their criticisms privately.[227] Writing for the majority, Justice Kennedy said, "Giving employees an internal forum for their speech will discourage them from concluding the safest avenue of expression is to state their views in public."[228]

B. Practical Implications for Practitioners

In light of Tenth Circuit trends in the wake of *Garcetti*, government employers looking to hedge their advantage may choose to define job descriptions broadly, including specific directives that employees are to funnel all complaints and concerns relating to possible fraud, mismanagement, waste, and criminality to appropriate internal channels. While the Court in *Garcetti* bristles at the suggestion that employers can limit the speech rights of employees by simply imposing "excessively broad job descriptions,"[229] a growing body of case law emerging at the trial and appellate levels seems to suggest the reality on the ground is otherwise.[230] Government employers might also strengthen their position by mandating employees attend formal training to reinforce the expected duties.

As for employees, it seems clear the Supreme Court and federal circuits have established a significant burden for the employee to overcome. One possible way to preserve whistle-blower protections is to bargain for them contractually. For employees who have leverage, via union or otherwise, insisting on contractual speech protections can help avoid the default position of having little constitutional protection should a case of speech retaliation arise. In the event that a case of corruption, criminality, or waste comes up, the employees who cannot bargain for contractual protections are left with a choice to either stay quiet or risk losing their jobs. Reporting outside the chain of command seems to offer more possibility for constitutional protection if the matter is one of public concern. However, employers may be able to defeat this potential shield if

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226. *Id.* at 1967 (Souter, J., dissenting).
227. *Id.* at 1961.
228. *Id.*
229. *Id.*
230. *See generally* Williams v. Dallas Indep. Sch. Dist., 480 F.3d 689 (5th Cir. 2007); Battle v. Board of Regents, 468 F.3d 755 (11th Cir. 2006); Freitag v. Ayers, 468 F.3d 528 (9th Cir. 2006); Mills v. City of Evansville, 452 F.3d 646 (7th Cir. 2006); *see also supra* Part II.A-D (explaining Tenth Circuit cases that broadly interpret *Garcetti*).

the job description specifically bars employees from going to the media or elsewhere with speech that is related to the job. Ultimately, whistle-blowers have more to lose in a post-*Garcetti* landscape and less incentive to be courageous.

CONCLUSION

Garcetti v. Ceballos significantly restricted the First Amendment protections of government employees. The new rule acts as a razor against retaliation claims that arise pursuant to official duties. Yet for such an important change, the Supreme Court left a surprising amount of discretion to the lower courts to fashion a framework for determining when speech is pursuant to official duties. Predictably, different courts, including the Tenth Circuit, have moved in different directions. The Tenth Circuit, among others, seems to have expanded the specific test used in *Garcetti*. The result is a broader analysis of job related speech acts that ultimately leads to more speech restrictions. The regrettable impact is the chilling effect on whistle-blowers. As a result, citizens are now more likely to be deprived of information about government corruption, criminality, and waste.

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