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Respect for Authority: Translating Enduring Principles into Modern Law

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Respect for Authority: Translating Enduring Principles into Modern Law

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"The nail that stands out will be hammered down."[1]

I. INTRODUCTION

Richard Ceballos may feel like his supervisors hammered down on him when they demoted him for writing a memorandum that criticized the local sheriff's department and recommended dismissal of a case.[2] The Los Angeles County District Attorney's Office's reprisal action against this public worker implicates a wide variety of issues that all derive from one question: Does the First Amendment protect speech made pursuant to official job responsibilities?[3] If a state bureaucrat joins an ultra-progressive political party, her employer cannot punish her for being a member.[4] If a public school teacher complains about the school board in a letter to the newspaper, the district cannot fire him for his comments.[5] But if a lawyer working for the District Attorney writes an official memorandum that criticizes law enforcement officials, can his supervisors take corrective action against him?[6]

In *Garcetti v. Ceballos*, the United States Supreme Court correctly answers this question with a firm "yes," authorizing government entities to hammer down any nails that are not doing their jobs correctly.[7] By answering "yes," the Court falls exactly in line with judicial precedence in its approach to public employee free speech: it takes general principles established in *Pickering v. Board of Education*[8] and translates them into explicit, applicable rules. However, the decision was widely criticized, with many scholars and commentators fearing that lower courts would interpret and apply the Supreme Court decision broadly, allowing government entities to

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Japanese Proverb, Quoteland, http://www.quoteland.com/author.asp?AUTHOR_ID=105 (last visited Feb. 17, 2010).

[2] *See* Garcetti v. Ceballos, 547 U.S. 410, 414-15 (2006) (5-4 decision) [hereinafter "Garcetti"].

[3] *Id.* at 413.

[4] *See* Wieman v. Updegraff, 344 U.S. 183, 191 (1952) (holding that states cannot require employees to make loyalty oaths swearing non-association with certain organizations); Shelton v. Tucker, 364 U.S. 479, 490 (1960) (holding that states cannot require employees to identify organizations they associate with); Cramp v. Bd. of Pub. Instruction of Orange County, 368 U.S. 278, 287 (1961) (holding that states cannot require employees to sign an oath swearing they never supported the communist party).

[5] Pickering v. Bd. of Educ., 391 U.S. 563, 569 (1968).

[6] *See Garcetti,* 547 U.S. at 413.

[7] *See id.* at 426.

[8] 391 U.S. at 563.

completely silence their employees.[10] This fear never became reality. Based on a review of post-*Garcetti* cases from all eleven federal judicial circuits in the United States, this article argues that lower courts have interpreted the *Garcetti* decision very narrowly, resulting in government employees retaining significant First Amendment protection in the work place.[11]

This article is organized into five parts. Part II tracks *Garcetti* as it has progressed from Ceballos's memorandum in March 2000 to its disposition before the United States Supreme Court in 2006. The Court's reasoning – in both the majority and dissenting opinions – in this thin 5-4 decision backing the government employer is also analyzed in Part II. Part III examines the doctrine announced in *Pickering*[12] and argues that *Garcetti* treats *Pickering* the same way *Connick v. Myers*[13] does: it takes established public employee free speech principles and translates them into explicit components of a multi-step rule with *per se* and balancing elements. Part III further contends that the Ninth Circuit's unworkable legal reasoning and lopsided policies in its review of the case are ignorant of enduring *Pickering* principles and the superiority of whistleblower statutes over the First Amendment in protecting public employees from employer reprisal.[14] Part IV argues that critics' fears that *Garcetti* would significantly strip away First Amendment rights of government employees did not come true and that lower courts in all eleven United States judicial circuits have exercised considerable restraint when applying the case, generally interpreting it very narrowly. Part V of this article concludes that *Garcetti* is not the radical shift in law opponents made it out to be, because it merely refines an established principle into a practicable rule and has been applied narrowly by courts across the country.

II. ANALYSIS OF *GARCETTI*

A. Facts

Richard Ceballos was working as a calendar deputy in the Los Angeles County District Attorney's Office when a defense counsel contacted him in February 2000 with concerns about misrepresentations in an affidavit used to obtain a search warrant in a pending criminal case.[15] The defense attorney filed a motion to challenge the warrant and asked Ceballos to investigate the matter.[16] Based on the affidavit and a visit to the site it described, Ceballos concluded that the affiant, a deputy sheriff, made substantial misrepresentations.[17] In a memorandum to his

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[10] *See, e.g.*, Steven J. Stafstrom, Jr., Note, *Government Employee, Are You a "Citizen"?:* Garcetti v. Ceballos *and the "Citizenship" Prong to the "Pickering/Connick Protected Speech Test*, 52 ST. LOUIS U. L.J. 589 (2008); Christie S. Totten, Note & Comment, *Quieting Disruption: The Mistake of Curtailing Employees' Free Speech Under* Garcetti v. Ceballos, 12 LEWIS & CLARK L. REV. 233 (2008).

[11] *See infra* Part IV.

[12] *Id.*

[13] 461 U.S. 138 (1983).

[14] *See* Ceballos v. Garcetti, 361 F.3d 1168, 1172 (9th Cir. 2004) (2-1 decision) [hereinafter "Ceballos"].

[15] *Garcetti*, 547 U.S. at 413. *People v. Cusky* is the case *Ceballos* investigated. *Ceballos*, 361 F.3d at 1170-71.

[16] *Garcetti*, 547 U.S. at 413-14. It is not uncommon for defense attorneys to request calendar deputies to investigate matters arising from cases. *Id.* at 414.

[17] *Id.* The alleged misrepresentations include classification of a separate roadway as a long driveway and the ability to leave tire tracks on a road. *Id.*

supervisors, Carol Najera and Frank Sundstedt, Ceballos criticized the sheriff's department and recommended dismissal of the case; Sundstedt chose to prosecute, pending the outcome of the defense motion to challenge.[18] The defense subpoenaed Ceballos, who testified at the hearing, and the judge denied the motion.[19] Subsequent to these events, the District Attorney's Office demoted Ceballos to a trial deputy position, transferred him to another courthouse, and denied him a promotion.[20]

B. Procedural History

After the District Attorney's Office denied his employment grievance, finding no retaliation occurred, Ceballos filed a lawsuit[21] alleging that his employer violated his First and Fourteenth Amendment rights by retaliating against him for writing the memo.[22] The court granted summary judgment for the defendants, holding that the memo was not protected speech because Ceballos wrote it as part of his employment duties.[23] Since Ceballos did not show a violation of a clearly established right to free speech, the court alternatively held that the defendants had qualified immunity.[24]

In an appeal to the Ninth Circuit,[25] Ceballos maintained that he had a constitutional right to free speech because his memo addressed a matter of public concern and his interest in the speech outweighed the defendants' interests.[26] He argued that the right was clearly established, a reasonable person would have known of it, and, consequently, the defendants were not entitled to qualified immunity.[27] The Ninth Circuit agreed with Ceballos's assertions.[28] It reversed the summary judgment, holding that none of the defendants were entitled to qualified immunity, and remanded the case on March 22, 2004, giving Ceballos another opportunity to have his day in

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[18] *Id.* at 414.

[19] *Garcetti*, 547 U.S. at 414-15.

[20] *Id.* at 415.

[21] Ceballos filed the lawsuit in the United States District Court for the Central District of California and the defendants were District Attorney Gil Garcetti, Frank Sunstedt, Carol Najera and the County of Los Angeles. Joint Appendix Vol. I at 136-37, Garcetti v. Ceballos, 547 U.S. 410 (2006).

[22] *Garcetti*, 547 U.S. at 415. Ceballos also wrote a second memo and spoke about the matter to his supervisors, at a meeting, and as a defense witness at the hearing, but these statements are not addressed by the Court in its holding. *Id.* at 443-44 (Stevens, J., dissenting).

[23] *Id.* at 415 (majority opinion). The district court did not publish an opinion.

[24] *Id.* A government official may assert qualified immunity for acts that do not violate "'clearly established . . . constitutional rights of which a reasonable person would have known.'" *Ceballos*, 361 F.3d at 1172 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

[25] Circuit Judges Stephen Reinhardt, Diarmuid F. O'Scannlain and Raymond C. Fisher heard the appeal. *Id.* at 1169. Reinhardt wrote the majority opinion and O'Scannlain wrote a concurring opinion. *Id.*

[26] *Id.* at 1172-73.

[27] *Id.* at 1172. These requirements must be satisfied to strike down qualified immunity. *See supra* note 21 and accompanying text.

[28] *Ceballos*, 361 F.3d at 1170.

court.[29] In a concurring opinion, Circuit Judge O'Scannlain agreed that Ninth Circuit precedent mandated the outcome, but said the current law is incorrect and should be overruled.[30]

The defendants took the case one step further and appealed to the United States Supreme Court; the Court granted certiorari on February 28, 2005,[31] heard oral arguments on October 12, 2005, and heard rearguments on March 21, 2006.[32] In its May 30, 2006 decision, the Court reversed the Ninth Circuit, holding 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."[33] Chief Justice Roberts and three other Justices – Scalia, Thomas, and Alito – joined in Kennedy's opinion of the Court; the remaining Justices dissented.[34]

C. Court's Reasoning

1. Justice Kennedy's Majority Opinion Translates Principles Into Practicable Rules

In deciding whether Ceballos's memo written pursuant to his employment duties deserves protection, the Court begins its analysis with a discussion of the balancing nature of public employee First Amendment cases.[35] The Court then lays out the multi-step *Pickering* rule, which determines whether a government employee's speech is protected against retaliation.[36] Under *Pickering* and its progeny, the Court must first conduct a *per se* test to determine if the public employee "spoke as a citizen on a matter of public concern."[37] If the answer is affirmative, the Court must decide "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public."[38] In the absence of an adequate justification, the employee has a First Amendment cause of action.[39]

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[29] *Id*. The court also held Los Angeles County and the District Attorney did not have sovereign immunity. *Id*.

[30] *See id*. at 1186 (O'Scannlain, J., concurring) (noting that under the current law all speech by public employees on matters of public importance receives automatic First Amendment protection).

[31] Garcetti v. Ceballos, 543 U.S. 1186 (2005).

[32] *Garcetti*, 547 U.S. at 410. Rearguments were heard because Justice Alito was not a member of the Court during the original oral arguments. *See* Members of the Supreme Court of the United States, http://www.supreme courtus.gov/about/members.pdf (last visited Dec. 15, 2008).

[33] *Garcetti*, 547 U.S. at 421.

[34] *Id*. at 412. Stevens and Ginsburg joined in Souter's dissenting opinion; Stevens and Breyer also filed separate dissenting opinions. *Id*.

[35] *See id*. at 420 ("The Court's decisions . . . have sought both to promote the individual and societal interests that are served when employees speak as citizens on matters of public concerns and to respect the needs of government employers attempting to perform their important public functions."); *but see id*. at 423 (holding that a balancing approach is not applied when the speech is pursuant to an employee's job duties).

[36] *Garcetti*, 547 U.S. at 418.

[37] *Id*. (citing *Pickering*, 391 U.S. at 568).

[38] *Id.* (citing *Connick*, 461 U.S. at 147) (If the answer is no, the speech is not protected by the First Amendment).

[39] *Id.*

In *Garcetti*, the Court does not even reach the "matter of public concern" test, because it holds that speech by public employees pursuant to official responsibilities is not protected by the First Amendment and, consequently, not entitled to proceed to the remainder of the *Pickering* analysis.[40] The Court refines the current *Pickering* analysis with a separate "employment duties" *per se* test, because the restricted memorandum owes its existence to the District Attorney's Office and there is no infringement on any rights Ceballos would have as a private citizen.[41] Mitigating the effects of its refined *Pickering* rule, the Court identifies other opportunities for public employees, like Ceballos, to speak with First Amendment protection[42] and recognizes the value of this free speech to both the employee and society at large.[43] However, the Court remains firm in its stance that, under the *Pickering* principles, an employee paid by the government to perform a job, even if it involves written speech, is subject to supervisors evaluating and taking action in response to his or her work.[44] Beyond the fact that Ceballos's rights as an individual are not infringed, the Court justifies its decisions on a larger scale with an efficiency argument: "Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission."[45]

The Court concludes its analysis by addressing the concerns of its opponents: Ceballos, the Ninth Circuit, and the dissenting Justices.[46] Ceballos's rule, adopted by the Ninth Circuit, requires courts to conduct a *Pickering* analysis for speech made pursuant to job responsibilities.[47] According to the Supreme Court, this rule increases judicial intervention in government activity, contrary to principles of federalism and separation of powers.[48] The Ninth Circuit established this rule to resolve a perceived anomaly: "compelling public employers to tolerate certain speech made publicly, but not speech made pursuant to . . . assigned duties."[49] However, the Supreme Court argues this perceived anomaly does not exist by reiterating that there is no non-employee analogue to a public employee speaking pursuant to job duties.[50]

By stating that formal job descriptions are not sufficient to prove a task is pursuant to employment duties, the Supreme Court rejects the dissenting Justices' fear of employers restricting employees' speech by creating broad job descriptions.[51] Though the dissenting Justices are

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[40] *Id.* at 421. The fact that Ceballos wrote on the subject matter of his employment and only showed the memo to his supervisors are not dispositive. *Garcetti*, 547 U.S. at 420 (citing Givhan v. W. Line Cosol. School Dist., 439 U.S. 410, 414 (1979).

[41] *Id.* at 421-22.

[42] *Id.* (noting the holding does not prevent public workers from participating in civic debate).

[43] *Id.* at 419 (noting "the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion").

[44] *Id.* at 422.

[45] *Garcetti*, 547 U.S. at 422-23.

[46] *See id.* at 424-25.

[47] *Id.* at 423.

[48] *Id.* The Court did not consider whether increased judicial intervention may be necessary to determine if an employee spoke as part of his or her job responsibilities. *See infra*, note 60 and accompanying text.

[49] *Garcetti*, 547 U.S. at 423.

[50] *Id.* The Court also claims an employer can limit any perceived anomaly by giving employees an internal forum for voicing complaints so workers will not conclude that speaking publicly is the safest form of expression.

[51] *Id.* at 424-25 (noting formal job descriptions are usually different than an employee's official duties).

apprehensive about the effect of this ruling on teaching and academic scholarship at public institutions, the Court holds that its analysis does not apply to that type of expression and any decision in this area is better left for the future.[52] To dissuade any other concerns, the Court calls attention to the wide range of whistleblower protection laws, labor codes, rules of conduct, and constitutional obligations that it considers more practicable for protecting public workers than the First Amendment.[53]

2. Dissenting Opinions

i. Justice Stevens' Dissenting Opinion Avoids Categorical Rules

In a short dissent, Stevens strays away from the Court's separate "employment duty" *per se* rule and argues that some situations require protection of speech made pursuant to official duties, such as when an employee knows facts a supervisor wants to keep quiet.[54] According to Stevens, the Court's decision is senseless: First Amendment protection for the exact same words depends on whether they are spoken pursuant to employment duties and government workers are encouraged to handle problems publicly instead of internally.[55]

ii. Justice Souter's Dissenting Opinion Sets a Standard

Souter agrees with the Court's efficiency arguments for restricting speech made pursuant to employment duties; however, like Stevens, Souter advocates a balancing approach over a *per se* rule.[56] He finds a societal interest in employees addressing official wrongdoing and threats to health and safety, arguing that a full *Pickering* analysis is the proper tool for determining if this interest outweighs the government's efficiency concerns.[57] According to Souter, by not proceeding through a full *Pickering* analysis and instead focusing solely on whether the speech is pursuant to job duties, the Court conducts unjustified judicial line-drawing that produces arbitrary results.[58] Additionally, Souter predicts government employers will take advantage of the *per se* rule by broadening job descriptions, which he believes are the controlling factors in determining what speech is protected.[59] Under Souter's analysis, a *per se* rule based on official employment

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[52] *Id.* at 425.

[53] *Id.* (citing 5 U.S.C.A. § 2302(b)(8) (West 2005); CAL. GOV'T. CODE § 8547.8 (West 2005); CAL. LAB. CODE § 1102.5 (West Supp. 2006); CAL. RULE PROF. CONDUCT 5-110 (2005); Brady v. Maryland, 373 U.S. 83 (1963)).

[54] *Garcetti*, 547 U.S. at 426-27 (Stevens, J., dissenting).

[55] *Id.* at 427; *but cf. infra* note 144 and accompanying text (discussing the *per se* "employment duty" component that is formalized into the analysis).

[56] *Id.* at 428 (Souter, J., dissenting).

[57] *Id.* at 429 ("[W]e have regarded eligibility for protection by *Pickering* balancing as the proper approach when an employee speaks critically about the administration of his own government employer.").

[58] *See id.* at 430; *but see Garcetti*, 547 U.S. at 421-22 (majority opinion) (noting the result is not contradictory because the Court does not infringe any liberties Ceballos might have enjoyed as a private citizen). Souter also reiterates the contradiction of the Court protecting speech for matters handled publicly, but not internally. *Id.* at 430 n.1 (Souter, J., dissenting).

[59] *Id.* at 431 n.2 ("[P]rotection under *Pickering* may be diminished by expansive statements of employment duties." (citation omitted)). The Court is not concerned because it does not use job descriptions to determine employment duties. *See supra* note 51 and accompanying text.

duties requires increased litigation to determine if an employee spoke as part of his or her job responsibilities.[60]

In urging the Court to continue to a balancing test, instead of cutting off the analysis with an "employment duty" *per se* test, Souter notes that the interests on the employee and public side of the balance do not change when the employee speaks pursuant to job duties.[61] He concedes to the Court that the government employer's interest increases when the employee is speaking as a worker instead of as a citizen.[62] However, rather than categorically exclude an interest balancing and automatically side with the government in every case, Souter proposes instituting a minimum standard that employee speech must satisfy to prevail against the government's interest.[63]

After advocating a balancing approach, Souter attacks the legal support the Court depends on to justify cutting off its analysis at the "employment duty" *per se* test instead of continuing to the remainder of the *Pickering* rule.[64] First, he criticizes the Court for interpreting *Rust v. Sullivan*[65] as holding that all statements made pursuant to public employment duties are the government's own speech and, consequently, not protected.[66] Souter believes only employees hired to "[broadcast] a particular message" are subject to this lack of protection.[67] Public workers, like Ceballos, who are hired to "enforce the law by constitutional action" receive greater protection.[68] Souter notes that, under the Court's interpretation, valuable academic freedom rights of public university professors are threatened.[69]

Second, he condemns the Court's reliance on whistleblower protection statutes.[70] He argues that speech can fall outside these laws, coverage is not consistent, and some employees have been held responsible for speech made pursuant to employment duties under these protections.[71] Finally, Souter urges the Ninth Circuit, when it takes up the case on remand, to consider other statements by Ceballos that the Court did not consider in its ruling.[72]

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[60] *Garcetti*, 547 U.S. at 431 n.2 (Souter, J., dissenting). This is contrary to the Court's objective of decreasing judicial intervention. *See id.* at 423 (majority opinion); *see also id.* at 435-36 (Souter, J., dissenting) (noting the Court's holding does not guarantee against litigation over whether statements were made pursuant to official duties).

[61] *Id.* at 433.

[62] *Id.* at 422, 434. (majority opinion and Souter, J., dissenting) ("Official communications have official consequences."

[63] *Garcetti*, 547 U.S. at 435 ("[O]fficial dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety . . . .").

[64] *Id.*

[65] 500 U.S. 173 (1991); *Garcetti*, 547 U.S. at 436-37(quoting Rosenberger v. Rector, 515 U.S. 819, 833 (1995) (Souter interprets *Rust* to mean the government may restrict speech only when it "'appropriates funds to promote a particular policy[.]'").

[66] *Garcetti*, 547 U.S. at 435.

[67] *Id.* at 437.

[68] *Id.*

[69] *Id.* at 438.

[70] *Id.* at 439.

[71] *Garcetti*, 547 U.S. at 440.

[72] *See supra* note 22 and accompanying text.

iii. Justice Breyer's Dissenting Opinion Raises the Standard

Like Souter, Breyer argues for a more balanced approach for determining if a public employee's statements made pursuant to official job responsibilities are protected by the First Amendment.[73] Breyer distinguishes himself by giving more weight to the government than Souter does in the balancing of interests; Breyer includes "the government's augmented need to direct speech that is an ordinary part of the employee's job-related duties."[74] In Ceballos's case, Breyer finds two special circumstances that overcome the government's heavy interest: the speech is professional speech and the Constitution imposes speech obligations on a prosecutor.[75]

III. *GARCETTI'S* ROLE IN THE SEA OF FIRST AMENDMENT LAW

A. The Court Translates Pickering *in* Garcetti

Garcetti does to *Pickering* what *Connick* does to *Pickering*: it takes previously established principles and translates them into an explicit rule with *per se* and balancing components. *Pickering* laid the foundation in 1968 by announcing the basic principles of a public employee free speech analysis.[76] *Connick* formalized the "matter of public concern" requirement in 1983 with a *per se* rule[77] and clarified the "interest balancing" process.[78] In 2006, *Garcetti* cleared up the only ambiguity left after *Connick* by establishing a *per se* rule for speech pursuant to employment duties.[79] In the end, the legal principles set forth in *Pickering* are translated into a substantively similar, but easier to apply, multi-step rule that goes as follows: *per se* test, *per se* test, balancing test.[80] *Garcetti* is not the radical change some make it out to be.[81] Rather, the Court stands by a previously established principle – a government employee's job speech is not protected by the First Amendment – by giving it a more formal appearance as a *per se* component to an overall rule.[82]

1. *Pickering* and its Antecedents Lay a Soft Foundation

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[73] *Garcetti*, 547 U.S. at 446 (Breyer, J., dissenting).

[74] *Id.* at 448.

[75] *Id.* at 446-47.

[76] *See generally Pickering*, 391 U.S. at 569-75.

[77] *Connick*, 461 U.S. at 146 (explaining that interest balancing is only required when speech addresses a matter of public concern).

[78] *See generally id.* at 149-54 (explaining how to balance interests).

[79] *Garcetti*, 547 U.S. at 416-25 (explaining that the test does not proceed if the speech is pursuant to work duties).

[80] The current rule begins with an "employment duty" *per se* test. *See id.* at 417. If the claim passes this component, it proceeds to a "matter of public concern" *per se* test. *See Connick*, 461 U.S. at 146. If this test is satisfied, the claim finishes with a balancing of interests. *See id.* at 149.

[81] *See* Amicus Curiae Brief of Association of Deputy District Attorneys and California Prosecutors Association in Support of Respondent at 2, Garcetti v. Ceballos, 2004 U.S. Briefs 473 (2005) (No. 04-473) ("[S]uch a rule would naturally result in chilling of speech that is integral to the effective functioning of our justice system.").

[82] *See* Petitioner's Brief on the Merits at 26-27, Garcetti v. Ceballos, 2004 U.S. Briefs 473 (2005) (No. 04-473) ("The holding in *Pickering* was carefully limited and did not espouse First Amendment protection for purely job-required speech.").

Respect for Authority: Translating Enduring Principles into Modern Law

The Court's approach to public employee free speech prior to *Pickering* is best summarized by Justice Holmes in a case before the Supreme Judicial Court of Massachusetts: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."[83] Until the middle of the twentieth century, the Court held public employees could not object to employment terms that restricted their constitutional rights – free speech included.[84] This pattern shifted in the 1960s when the Court scaled back the government's ability to limit rights of public workers.[85] Under this backdrop, the Court held in *Pickering* that a public school teacher could not be dismissed for exercising his right to speak on a matter of public importance by writing a letter to the newspaper.[86]

Pickering declines to establish an explicit rule for distinguishing between protected and unprotected speech; rather, it provides principles to rely on when conducting an analysis.[87] Components of the post-*Garcetti Pickering* test are loosely spread throughout the opinion: establishing whether the employee acted as a citizen,[88] determining whether the subject is a matter of public concern,[89] and balancing the interests of the employee and employer.[90] The Court opts for a flexible approach of laying out principles over a rigid method of formulating a multi-step test, because the circumstances from which public employee free speech issues arise are too diverse for a single standard to resolve all cases.[91]

With flexibility comes confusion – confusion in the form of inconsistency among and within the Circuits. In a Firth Circuit case, the Court of Appeals held that a fire department violated an employee's First Amendment rights when it terminated a firefighter for criticizing the department.[92] In an analogous case, the Second Circuit Court of Appeals ruled in favor of a fire

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[83] McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (Mass. 1892). Holmes later became a Supreme Court Justice. *See* Members of the Supreme Court of the United States, *supra* note 33.

[84] *See* Adler v. Bd. of Educ., 342 U.S. 485, 492 (1952); Garner v. Bd. of Pub. Works, 341 U.S. 716, 720-21 (1951); Pub. Workers v. Mitchell, 330 U.S. 75, 94 (1947).

[85] Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007, 1014 (2005) (citing *Shelton*, 364 U.S. 479, 490 (1960); Keyishian v. Bd. of Regents, 385 U.S. 589, 619-20 (1967)). The Court shifted its view in response to government efforts to require workers to swear oaths of loyalty and reveals groups with which they associated. *Connick*, 461 U.S. at 144.

[86] *Pickering*, 391 U.S. at 574.

[87] *Id.* at 569 ("Because of the enormous variety of fact situations . . . we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all statements may be judged.").

[88] *Compare id.* at 572 ("[H]is position as a teacher . . . did not qualify him to speak with any greater authority than any other taxpayer."), *with Garcetti*, 547 U.S. at 418 (noting the Court must determine if the employee spoke as a citizen) (citing *Pickering*, 391 U.S. at 568).

[89] *Compare Pickering*, 391 U.S. at 571 ("[T]he question . . . is a matter of legitimate public concern[.]"), *with Garcetti*, 547 U.S. at 418 (citing *Pickering*, 391 U.S. at 568) (noting the Court must determine if the employee spoke as a matter of public concern).

[90] *Compare Pickering*, 391 U.S. at 573 ("[T]he interest of the school . . . is not significantly greater than its interest in limiting a similar contribution by any member of the general public."), *with Garcetti*, 547 U.S. at 418 (citing *Pickering*, 391 U.S. at 568) (noting the Court must determine whether the government had a reason for treating the employee differently from a member of the general public).

[91] *Pickering*, 391 U.S. at 569 ("Because of the enormous variety of fact situations . . . we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all statements may be judged.").

[92] Bickel v. Burkhart, 632 F.2d 1251, 1258 (5th Cir. 1980).

department.[93] Not only did the Second Circuit rule differently than the Fifth, there was also inconsistency within it. The District Court of Connecticut, in a comparable case involving a police officer, held that the officer's rights were violated when his government employer suspended him for voicing criticisms.[94] A lack of uniformity among and within the Circuits threatened the supremacy of *Pickering* and called for Supreme Court action.[95]

2. *Connick* Solidifies the *Pickering* Foundation

Connick is the Court's response to nearly two decades of ambiguities in public employee free speech law that grew from *Pickering*.[96] The problem with *Pickering* is not what is said, but how it is said: with a lack of definition and wide use of presumptions.[97] In *Connick*, the Court gives structure to *Pickering* in three ways. First, the Court describes factors to consider when determining if speech addresses a matter of public concern: "content, form, and context[.]"[98] This description includes an analysis of whether the employee's speech relates to a matter of public concern; the analysis is filled with guidance on how to conduct this type of inquiry.[99] By defining and walking through a "matter of public concern" analysis, the Court makes explicit in *Connick* the rules that are implicit in *Pickering*.[100]

Second, the Court holds that there is no need to balance the interests of the public employee and the government if the speech does not address a matter of public concern.[101] By formalizing this principle into a *per se* test, the Court provides relief to the lower courts because "balancing is difficult[.]"[102] Justifying its decision to interpret the "matter of public concern" requirement as a *per se* rule, the Court finds a greater value in providing government officials with breathing space and decreasing judicial intervention[103] than ensuring every employee dismissal is fair.[104]

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[93] Janusaitis v. Middlebury Volunteer Fire Dep't, 607 F.2d 17, 25 (2d Cir. 1979).

[94] Haurilak v. Kelley, 425 F. Supp. 626, 631 (D. Conn. 1977).

[95] *Cf.* Martin v. Hunter's Lessee, 14 U.S. 304, 348 (1816) (noting that non-uniform interpretations of a law diminish its effectiveness).

[96] *Ceballos*, 361 F.3d at 1186 (O'Scannlain, J., concurring) ("[T]he Supreme Court attempted to clarify its doctrine in *Connick v. Myers*.") (citation omitted). The Court made less substantial clarifications to *Pickering* before *Connick*. *See* Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (holding that the employee must prove his speech is protected and is a motivating factor for his termination); *Givhan*, 439 U.S. at 413-14 (holding that First Amendment protection applies when a public worker communicates privately with his employer).

[97] *See* Paul Ferris Solomon, Editorial Note, *The Public Employee's Right of Free Speech: A Proposal for a Fresh Start*, 55 U. CIN. L. REV. 449, 458-459 (1986).

[98] *Connick*, 461 U.S. at 147-48.

[99] *See id.* at 148-49.

[100] Rodric B. Schoen, Pickering *Plus Thirty Years: Public Employees and Free Speech*, 30 TEX. TECH. L. REV. 5, 24 (1993); Karin B. Hoppmann, Note, *Concern with Public Concern: Toward a Better Definition of the* Pickering*/*Connick *Threshold Test*, 50 VAND. L. REV. 993, 996 (1997) ("To the great consternation of lower courts . . . the Court has failed to provide a clear definition for public concern.") (internal quotation marks omitted).

[101] *Connick*, 461 U.S. at 146; *but see id.* at 149 (applying the balancing test when it is not required).

[102] *Id.* at 150; *Ceballos*, 361 F.3d at 1186 (O'Scannlain, J., concurring) ("[L]ower courts struggled to define the terms of, and to apply, *Pickering's* amorphous balancing test.").

[103] *See Garcetti*, 547 U.S. at 423. The Court does not consider that its holding may increase litigation over whether speech addresses a matter of public concern. *Cf. supra* note 48 and accompanying text.

[104] *Connick*, 461 U.S. at 146.

Third, the Court carefully explains how to balance the interests of the government and public worker.[105] After determining that only one of the fourteen questions – "[I]f assistant district attorneys ever feel pressured to work in political campaigns" – in the employee's survey touches upon a matter of public concern, the *Connick* Court proceeds to a *Pickering* balancing.[106] This analysis is slightly confusing in light of *Mt. Healthy City Board of Education v. Doyle* and the holding that the *Connick* Court establishes just three pages prior to conducting this balancing.[107] *Mt. Healthy* holds that an employee must prove her protected speech is the motivating factor for her termination.[108] The employee in *Connick* clearly cannot meet this burden since her thirteen other questions – which do not address a matter of public concern – serve as the motivating factor for her dismissal.[109] *Connick* holds that a court only proceeds to a balancing when the government terminates a worker for speech that addresses a matter of public concern.[110] However, even though the law does not afford the employee in *Connick* an opportunity to survive the "matter of public concern" *per se* test and proceed to a balancing, the *Connick* Court, just three pages in the opinion later, balances the competing interests.[111] Despite this irregularity, the Court is not contradicting itself or overruling *Mt. Healthy.*

Rather, this inconsistency proves the Court uses *Connick* to lay out the *Pickering* principles in a more practicable manner. The *Connick* Court could have easily extinguished the claim with the "matter of public concern" threshold, but instead goes out of its way to conduct a thorough balancing because it uses the case for something greater: translating previously established principles into a comprehensive rule.[112] In *Pickering*, the Court sets forth the idea of balancing interests, but is not explicit about what to consider and how to weigh interests.[113] *Connick* makes clear that the balancing must consider "'the manner, time, and place'" of the speech.[114] It also places a heavier weight in the balancing test on the government's interest.[115] However, the Court is quick to point out that the heaviness of this weight is inversely proportional to how much the

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[105] *Id.* at 149-54. *Connick* is the first opportunity the Court has to apply the balancing test since first laying out its principles in *Pickering. See* Pengtian Ma, *Public Employee Speech and Public Concern: A Critique of the U.S. Supreme Court's Threshold Approach to Public Employee Speech Cases*, 30 J. MARSHALL L. REV. 121, 123-24 (1996).

[106] *Connick*, 461 U.S. at 149. The Court considers this question a matter of public concern based only on recent cases. *Id.* (citing Branti v. Finkel, 445 U.S. 507, 515-16 (1980); United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 557 (1973)).

[107] *See Mt. Healthy*, 429 U.S. at 287.

[108] *See id.*

[109] *Connick*, 461 U.S. at 148.

[110] *See id.* at 146.

[111] *Id.* at 149.

[112] *Contra* Peter C. McCabe III, Note, Connick v. Myers*: New Restrictions on the Free Speech Rights of Government Employees*, 60 IND. L.J. 339, 349 (1984) ("Because one of the questions in the survey . . . touched on a matter of public concern . . . the Court *reluctantly* embarked on a *Pickering* balancing inquiry.") (emphasis added).

[113] *See Pickering*, 391 U.S. at 573 (explaining that the interest of the school is not greater than the interest of the teacher).

[114] *Connick*, 461 U.S. at 153 (quoting *Givhan*, 439 U.S. at 415 n.4).

[115] *Id.* at 151-52 ("[A] wide degree of deference to the employer's judgment is appropriate.").

speech addresses a matter of public concern.[116] The Court's lack of detail about balancing in *Pickering* explains its thoroughness in *Connick*.

3. *Garcetti* Makes One Final Clarification to *Pickering*

The Court uses *Garcetti* to explain the one aspect of the *Pickering* principles it could not clarify in *Connick*:[117] speech made by a government employee pursuant to job duties is not protected.[118] Just as *Connick* uses *Pickering* principles to recognize that a "matter of public concern" *per se* test is a component of the overall rule,[119] *Garcetti* uses *Pickering* principles to recognize an "employment duty" *per se* test is a separate component of the overall rule.[120] By holding that speech pursuant to employment duties is not protected by the First Amendment, *Garcetti* clarifies a long standing *Pickering* principle, translating it into an explicit rule.[121]

In gathering support for its holding, the Court does not wander into newer sources of authority on public employee free speech issues;[122] rather, it calls upon its tried and true friends: *Pickering* and *Connick*.[123] The Court immediately contrasts *Garcetti* from *Pickering*: a memo pursuant to job duties is not the same as a letter to the editor.[124] Therefore, the balancing of interests set forth in *Pickering* – and clarified in *Connick* – does not encompass work-related speech.[125] Drawing from this principle, the Court determines that a *per se* test for the "employment duties" component is part of the overall rule.[126] The Court does not wander into clarifying the other components of the *Pickering* rule, demonstrating that *Connick* sufficiently handles that task.[127] Additionally, the Court does not introduce any novel principles; it merely improves upon

[116] *Id.* at 152 ("We caution that a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern.").

[117] It is too far of a stretch for the *Connick* Court to clarify the "employment duty" component of the rule because the employee did not create the survey pursuant to her job duties. *See id.* at 141. The *Pickering* Court also cannot speak explicitly about this element because the teacher did not write the letter as part of his job responsibilities. *See Pickering*, 391 U.S. 563.

[118] *Garcetti*, 547 U.S. at 421.

[119] *See supra* section III.A.2 and accompany notes.

[120] *See id.* at 422.

[121] *Compare Pickering*, 391 U.S. at 568 (holding that the teacher's speech as a *citizen* is protected), *and Connick*, 461 U.S. at 147 (holding that the public worker's speech is not protected because she spoke more as an *employee* on a matter of personal interest, than a *citizen* on a matter of public concern), *with Garcetti*, 547 U.S. at 421 (holding that Ceballos' speech is not protected because he spoke as an *employee* pursuant to job duties).

[122] *See generally, e.g.*, Rankin v. McPherson, 483 U.S. 378 (1987); Waters v. Churchill, 511 U.S. 661 (1994); United States v. Nat'l. Treasury Employees Union, 513 U.S. 454 (1995); *Rosenberger*, 515 U.S. at 819.

[123] *See generally Garcetti*, 547 U.S. at 421-25.

[124] *Id.* at 422.

[125] *See id.*; Amicus Curiae Brief Supporting Petitioners at 17-18, Garcetti v. Ceballos, 2004 U.S. Briefs 473 (2005) (No. 04-473).

[126] *Garcetti*, 547 U.S. at 421.

[127] *See generally id.* at 421-25.

Pickering the way *Connick* does.[128] It clarifies the overall rule by recognizing a *per se* test for "employment duties."[129]

The end result is the current public employee free speech rule: *per se* tests for the "employment duties" and "matter of public concern" components and a balancing test, weighted in favor of the government,[130] for analyzing the competing interests of the employer and employee.[131] *Garcetti's* clarifications to *Pickering*, while critical, are miniscule compared to what *Connick* does to *Pickering*. Those who fear *Garcetti* represents a dramatic shift in law are misguided.[132] The more encompassing *Connick* decision did not have this effect – it merely explained the rule – so neither will *Garcetti*.[133]

B. The Ninth's Circuit's New Law is Unworkable, so the Supreme Court Enters the Debate

By rejecting the Ninth Circuit's decision (hereinafter "*Ceballos*"), the Supreme Court made a statement that the Court of Appeal's law did not fit into existing doctrine. Incorporating the Ninth Circuit's decision in *Ceballos* into the existing public employee free speech rule derived from *Pickering* is like fitting a square peg into a round hole: it simply does not work.[134] The two-judge majority opinion opts to ignore established principles and explicit rules in favor of a holding supported primarily by policy justifications.[135] *Ceballos* operates under the premise that it applies the *Pickering* rules explicated in *Connick.*[136] However, the Ninth Circuit concludes that a balancing test is automatically necessary since Ceballos's speech addresses a matter of public concern.[137] It mentions, but does not consider, the other portion of the "matter of public concern" element: "as a citizen."[138] The court excuses its conduct by citing a number of cases from other

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[128] *Id.* at 424 ("Because Ceballos' memo falls into this category, his allegation of unconstitutional retaliation must fail.").

[129] *Id.*

[130] *Connick*, 461 U.S. at 150 ("The *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public."); *but cf. Pickering*, 391 U.S. at 573 (explaining that the interest of the school is not greater than the interest of the teacher).

[131] *See Connick*, 461 U.S. at 152 ("We caution that a stronger showing may be necessary if the employee's speech more substantially involves matters of public concern.").

[132] *See* Amicus Curiae Brief of Association of Deputy District Attorneys and California Prosecutors Association in Support of Respondent at 2, Garcetti v. Ceballos, 2004 U.S. Briefs 473 (2005) (No. 04-473).

[133] *See Connick*, 461 U.S. at 146-54.

[134] *Ceballos*, 361 F.3d at 1192 (O'Scannlain, J., concurring) ("This case—and the doctrine it ratifies—thus implicates . . . the too-common tendency of well-intentioned jurists to squeeze a policy-oriented square peg into a round constitutional hole.").

[135] *Id.* at 1191 ("The majority's response is long on policy, but short on law.").

[136] *Id.* at 1173 (majority opinion) ("To determine whether Ceballos's speech is protected by the First Amendment, we apply a two-step test that stems from the Supreme Court's holdings in *Connick v. Myers* and *Pickering v. Bd. of Educ*[.]") (citations omitted).

[137] *See id.* at 1178. *Roth* is the real violator of *Pickering* and *Connick*; *Ceballos* only applies the *Roth* holding. *Id.* at 1186-87 (O'Scannlain, J., concurring) (citing Roth v. Veteran's Admin., 856 F.2d 1401, 1406 (9th Cir. 1988) (holding that speech by a public employee on a matter of public concern automatically receives First Amendment protection).

[138] *Ceballos*, 361 F.3d at 1173 (majority opinion). Though *Connick* does not explicitly establish a *per se* test for the "as a citizen" requirement, its makes clear that this element cannot be ignored. *Connick*, 461 U.S. at 143

circuits that ignore the "as a citizen" requirement;[139] conversely, the concurring opinion cites an equal number of cases that follow the requirement.[140] This opinion proves that a clarification to the *Pickering* principles that only the Supreme Court can provide is necessary.[141]

Ceballos attempts to fill gaps in its legal reasoning with a consistency argument.[142] The court supports its position by identifying a supposed contradiction that results if a *per se* "employment duty" component is formalized into the analysis.[143] It argues that giving First Amendment protection to a citizen who speaks outside of work duties, but not to an employee who makes statements pursuant to work duties, is inconsistent.[144] However, an analogous kind of senselessness results from *Ceballos's* rule: an employee receives protection for speech related to employment duties, but is left unprotected if those duties do not involve speech.[145] For example, an officer who physically refuses to keep in custody a suspect who he feels the police department does not have the legal right to detain has no First Amendment claim if his superiors retaliate against him for this employment duty related action. Therefore, why should an officer be protected by the First Amendment if he writes a memorandum, pursuant to his job responsibilities, saying he will not detain the suspect?

Whistleblower protection laws are a better and more appropriate[146] source of protection than the First Amendment for public employees who bring attention to government misconduct or failings.[147] These statutes exist throughout the United States and cover those who "[discourage] official misfeasance by facilitating wider public exposure of improper conduct[.]"[148] Consistency that cannot be obtained through the First Amendment occurs under whistleblower laws. Under the California Labor Code, the police officer from the example above can receive protection for

("The repeated emphasis in *Pickering* on the right of a public employee 'as a citizen, in commenting upon matters of public concern,' was not accidental.").

[139] *Ceballos*, 361 F.3d at 1176-77.

[140] *Id.* at 1187-88 (O'Scannlain, J., concurring).

[141] *See Janusaitis*, 607 F.2d at 25; *but see Ceballos*, 361 F.3d at 1177 n.7 ("[T]hese cases point to the nearly unanimous opposition . . . to the imposition of a per se rule denying all First Amendment protection to public employees' speech pursuant to their job-related duties.").

[142] *See generally Ceballos*, 361 F.3d at 1174-80.

[143] *See id.* at 1174.

[144] *See id.*

[145] Brief for the United States as Amicus Curiae Supporting Petitioners at 14, Garcetti v. Ceballos, 2004 U.S. Briefs 473 (2005) (No. 04-473) ("A public employer obviously cannot violate the First Amendment by dismissing . . . an employee based on the performance of job duties that do not involve speech. There is no basis for a different result . . . where the employee performs the duties in question by speaking or writing.").

[146] The majority justifies using the First Amendment for protection based on an oversimplified argument: "Because whistleblowers play an important role in rendering government accountable, the First Amendment must protect their whistleblowing activities." *Ceballos*, 361 F.3d at 1191-92 (O'Scannlain, J., concurring).

[147] *Id.* at 1192.

[148] *Id.* (citing Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified in scattered sections of Title 5 of the United States Code); ALASKA STAT. 39.90.100-.150 (2004); ARIZ. REV. STAT. § 38-532 (LexisNexis 2004; HAW. REV. STAT. §§ 378-62, 378-63 (2004); IDAHO CODE ANN. §§ 6-2101-2109 (2004); OR. REV. STAT. §§ 659A.200-.224 (2004); WASH. REV. CODE §§ 42.40.010-.910 & 42.41.010-.902 (2004)); *accord supra* note 50.

speech[149] (refusing to detain the suspect through a written memo) and non-speech[150] (refusing to physically detain him) if he has a reasonable belief that custody violates the law. The First Amendment leaves the latter situation vulnerable to employer retaliation.

Whistleblower legislation is not just the more appropriate source of protection in this area, it is also the constitutionally prudent choice.[151] The Ninth Circuit's desire to insulate public workers from reprisal action by their employers removes autonomy from the people – who are the source of power behind these statutes through representative democracy[152] – and creates surplusage in a well regulated area of law.[153] Additionally, these statutes allow the *Garcetti* Court to dispose of the case without deciding on more issues than necessary.[154] By limiting constitutional protection to non-employment speech, the Supreme Court blocks new avenues for other courts to voice their own interpretations of the First Amendment.[155] Both the legal gaps and policy hurdles created by *Ceballos* are paved over in *Garcetti*.

IV. SUBSEQUENT CASES: GOVERNMENT EMPLOYEES STILL PROTECTED

The fear that *Garcetti* represented a radical shift in the First Amendment rights of government employees never became reality. A review of cases from courts in all eleven United States judicial circuits demonstrates a clear desire across the judiciary to apply the *Garcetti* decision very narrowly. Courts have made efforts, sometimes painstaking, to use restraint when interpreting and applying this decision. This restraint has been exercised in a wide variety of situations, including cases involving complaints to lower-level managers, statements to the media, letters to higher-level officials, work-related journals, mixed speech, speech pursuant to union duties, concerns raised as a result of job-required training, and complaints made as part of general job duties established by law or employee handbooks. In all of these situations, the lower courts have held that the government employee was not acting pursuant to his or her official job duties and, thus, is protected by the First Amendment. These courts have not only made great efforts to apply *Garcetti* so that it leaves public workers with significant First Amendment freedom of speech rights, they have also worked to preserve other First Amendment rights for government employees, such as the rights to petition and association. The end result is that nearly three years

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[149] CAL. LAB. CODE §1102.5(b) (Deering 2006) ("An employer may not retaliate against an employee for *disclosing information* . . . where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute . . . .") (emphasis added).

[150] *Id.* §1102.5(c) ("An employer may not retaliate against an employee for *refusing to participate* in an activity that would result in a violation of state or federal statute[.]") (emphasis added).

[151] *See Ceballos*, 361 F.3d at 1192 (O'Scannlain, J., concurring).

[152] *Id.* at 1193 (quoting JAMES BRADLEY THAYER, JOHN MARSHALL 103-04, 106-07 (1901) (noting that under judicial review "[t]he correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors.").

[153] *Id.* ("In this case . . . the majority has not struck down an unwise enactment; instead it has rendered utterly superfluous a bevy of wise ones.").

[154] *See* Adam M. Guren, *The Judgment of Solomon*, HARVARD CRIMSON, June 7, 2006, http://www.thecrimson.com/article.aspx?ref=513823 (quoting John Roberts, Chief Justice, United States Supreme Court, Commencement Address at Georgetown University Law Center (May 21, 2006) ("[I]f it's not necessary to decide more to dispose of a case . . . it is necessary not to decide more.)).

[155] *See Garcetti*, 547 U.S. at 421.

after the *Garcetti* decision came down, government employees in all eleven United States judicial circuits have retained significant First Amendment protection.

A. First Circuit

While most cases narrowly interpret *Garcetti* in the context of defining what type of speech is pursuant to a government employee's job duties, a case from a court in the First Circuit analyzes *Garcetti* from a different angle: it narrowly interprets the decision as leaving "public officials" fully protected by the First Amendment.[156] In *Conservation Commission of the Town of Westport v. Beaulieu*,[157] four appointed members of a conservation commission alleged that the town's Board of Selectmen retaliated against them for speech protected by the First Amendment.[158] Specifically, the plaintiffs argued that the Board "[retaliated] against them for their 'actions, deliberations and votes as Commissioners on matters involving enforcement of state laws and Town regulations affecting wetlands protection[.]'"[159] The defendants advocated a broad interpretation of *Garcetti*, arguing that public employees, such as these commissioners, are not protected by the First Amendment for speech made pursuant to their employment duties.[160] Though deliberating and voting are part of a commissioner's duties, the court chose to narrowly interpret *Garcetti* and not apply it to this case.[161] Rather, the court held that these plaintiffs were public officials, not public employees; therefore, *Garcetti* does not apply and they are entitled to First Amendment protection, even for speech made pursuant to their official duties.[162] Rather than broadly apply *Garcetti* to any plaintiff who is on the government payroll, this court in the First Circuit used restraint and narrowly interpreted the Supreme Court decision so that it does not apply to "public officials."[163]

B. Second Circuit

In *Barclay v. Michalsky*,[164] a psychiatric nurse sued a state mental hospital and her supervisors for retaliation in violation of her First Amendment rights.[165] The nurse claimed that she was disciplined and ultimately transferred out of her position because she "expressed to her supervisors concerns that other employees . . . were using excessive restraints with patients and were sleeping on the job, and suggested that the employees needed more training and additional staff."[166] The defendants argued that even if they had retaliated against the nurse for expressing her concerns, they were entitled to summary judgment on the claim because the nurse's comments

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[156] Conservation Comm'n of Westport v. Beaulieu, No. 07-11087-RGS, 2008 U.S. Dist. LEXIS 71438, at *14, 17 (D. Mass. Sept. 18, 2008).

[157] *Id.*

[158] *Id.* at *11-12 (D. Mass. Sept. 18, 2008).

[159] *Id.* at *12 (quoting Compl. ¶ 8).

[160] *Id.* at *13-15.

[161] Conservation, 2008 U.S. Dist. LEXIS 71438, at *13-25.

[162] *See id.*

[163] *Id.*

[164] 451 F. Supp. 2d 386 (D. Conn. 2006).

[165] *Id.* at 389.

[166] *Id.* at 390.

were pursuant to her official duties.[167] Specifically, they claimed that work rules applicable to all employees, regarding not endangering patients and having an affirmative duty to report violations of hospital procedures, made the nurse's comments part of her official duties and, thus, not protected by the First Amendment under *Garcetti*.[168] The court, choosing to narrowly interpret *Garcetti*, rejected these arguments, denying the defendants' motion for summary judgment.[169] The court held that when rules, which impose a general duty on all employees, are not particularly within the province of a specific employee's professional duties, more so than other employees, the employee's statements related to those rules are not made as part of her job duties.[170] Therefore, the First Amendment protects those statements against government employer retaliation.[171] *Garcetti* critics who fear that any complaint a government employee makes while on the job will be considered part of that employee's official job duties should rest assured that this is not the case because the Second Circuit has law to the contrary.

In *Jackson v. Jimino*,[172] the Second Circuit continued to interpret *Garcetti* narrowly, rejecting a government employer's attempt to "transform *Garcetti* into an impermeable rule that all speech by government officials, no matter the facts presented, is fully engulfed by their governmental duties[.]"[173] In this case, a county tax assessor sued the county he worked for and its executive on the ground that his First Amendment rights were violated when he was not reappointed to his job after criticizing county tax laws and leaders in the media.[174] The defendants argued that the case should be thrown out because the comments, since they were related to the plaintiff's job, were made in the course of the plaintiff's employment.[175] The court firmly rejected the contention that all speech related to a public employee's job is automatically part of that employee's job duties.[176] With *Jackson*, the Second Circuit continues the narrow interpretation of *Garcetti* that was started by *Barclay*.

McGuire v. Warren[177] involves a government contract employee who was responsible for providing early intervention and pre-school services for autistic children.[178] The employee claimed that her contract was terminated because of a letter she wrote about a single child's specific needs and "statements she made more broadly about the provision of services to special needs children as a group[.]"[179] The court concluded that, under *Garcetti*, the employee's letter was not protected by the First Amendment, but that her general comments about caring for autistic children

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[167] *Id.* at 395.
[168] *Id.*
[169] *Barclay*, 451 F. Supp. 2d at 396.
[170] *Id.*
[171] *Id.*
[172] 506 F. Supp. 2d 105 (N.D. N.Y. 2007).
[173] *Id.* at 109.
[174] *Id.* at 107.
[175] *Id.* at 109.
[176] *Id.* at 109-10.
[177] 490 F. Supp. 2d 331 (S.D.N.Y. May 11, 2007).
[178] *Id.* at 334.
[179] *Id.* at 335.

could be.[180] The court held that the fact that the employee was speaking on the general subject matter of her employment was "inconsequential."[181] The court does not treat *Garcetti* as the broad speech-squelching mechanism that many of its critics make it out to be. Rather, the court applies a narrow interpretation – seeing the case as only leaving speech related to specific job tasks unprotected.[182]

In *Drolett v. DeMarco*,[183] a police officer complained about staffing, mismanagement, and budgetary issues in an anonymous letter to the police commission.[184] His supervisor disciplined him for not following complaint procedures spelled out in the police department employee manual.[185] The officer sued on the ground that he was retaliated against for speech protected by the First Amendment.[186] The court found that the officer's official duties did not include complaining about workplace problems, even though the employee manual requires officers to report problems through the chain of command.[187] Therefore, *Garcetti* would not prevent First Amendment protection from applying to the officer's letter to the police commission.[188] This case, which is very similar to *Barclay*, demonstrates a clear view among Second Circuit courts that *Garcetti* is to be interpreted narrowly.

C. Third Circuit

In *Wilcoxon v. Red Clay Consolidated School District Board of Education*,[189] a teacher sued because he was disciplined for keeping a journal recording the absences of a fellow teacher with whom he co-taught a class.[190] The school board argued that, under *Garcetti*, it was allowed to discipline the teacher for keeping this journal because he wrote it pursuant to his official duties as a teacher.[191] However, the court refused to apply such a broad view of *Garcetti*, holding that the teacher's journal was protected because he was not employed to monitor the absences of fellow teachers.[192] Courts in other circuits have held that statements by government employees to their employers and the media can receive protection under *Garcetti*; this Third Circuit court took that narrow interpretation further by protecting an employee's private writing.

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[180] *Id.* at 340-41.
[181] *Id.*
[182] *See McGuire*, 490 F. Supp. 2d at 340-41.
[183] No. 3-05CV1335(JCH), 2007 WL 1851102, at *2 (D. Conn. June 26, 2007).
[184] *Id.*
[185] *Id.* at *3.
[186] *Id.*
[187] *Id.* at *5.
[188] *Drolett*, 2007 WL 1851102, at *5-6.
[189] 437 F. Supp. 2d 235 (D. Del. June 30, 2006).
[190] *Id.* at 238-42.
[191] *Id.* at 243-44.
[192] *Id.* at 243.

In *Hailey v. City of Camden*,[193] two deputy fire chiefs sued the city after being retaliated against for certain statements they made that were critical of the fire department.[194] The two deputy chiefs complained about safety, overtime, and hiring practices to the fire department, newspaper, and city council.[195] The city argued that *Garcetti* "ejects [the plaintiffs] from the realm of protected speech" because these statements were related to the deputy fire chiefs' jobs and, thus, pursuant to their official duties.[196] The court rejects that argument and holds that these activities were clearly done as private citizens, not public employees on the job.[197] This Third Circuit court does not allow *Garcetti* to be used to silence government employees merely because they are talking about matters related to their jobs.[198]

In *Guarnieri v. Borough*,[199] a Third Circuit court narrowly interprets *Garcetti*, not just in the context of the right to free speech, but also in regard to the First Amendment right to petition.[200] A police chief filed a grievance with his government employer.[201] The chief was later terminated from his job; he claimed that the termination was in retaliation for his grievance and, thus, violated the First Amendment.[202] The defendants argued that, even if they did terminate him for this reason, the filing of a grievance by a public employee is not protected by the First Amendment under *Garcetti*.[203] The court held that the chief did not file the grievance as part of his official duties; thus, *Garcetti* does not take away his First Amendment right to petition.[204]

D. Fourth Circuit

In *Wright v. Federal Bureau of Investigation*,[205] two former FBI counter-terrorism agents sought to publish writings critical of the FBI's counter-terrorism efforts.[206] Under FBI policy, current and former employees must receive Agency approval before publishing a writing based on information learned on the job.[207] After reviewing the former agents' writings, the FBI denied them the right to publication.[208] The former agents sued, arguing this denial violated the First Amendment.[209] The FBI motioned for summary judgment, claiming that the agents had no First

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[193] No. 01-3967, 2006 WL 1875402 (D. N.J. July 5, 2006).
[194] *Id.* at *1.
[195] *Id.* at *15.
[196] *Id.*
[197] *Id.* at *16.
[198] *See Hailey*, 2006 WL 1875402, at * 16.
[199] No. 3:05-CV-01422, 2008 WL 4132035 (M.D. Pa. Sept. 2, 2008).
[200] *Id.* at *6.
[201] *Id.*
[202] *Id.*
[203] *Id.*
[204] *Guarnieri*, 2008 WL 4132035, at *6.
[205] Nos. 02-915 (GK), 03-226 (GK), 2006 WL 2587630 (D.D.C. July 31, 2006).
[206] *Id.* at *1.
[207] *Id.*
[208] *Id.* at *3.
[209] *Id.* at *5.

Amendment right in this situation; the court denied the motion.[210] In its decision, the court immediately determined that a writing about a former government worker's employment is not made pursuant to his official duties and, thus, *Garcetti* does not apply.[211]

E. Fifth Circuit

The Fifth Circuit has been careful to draw a narrow interpretation of *Garcetti* when applying that case to public employee free speech decisions. In *Davis v. McKinney*,[212] the court was faced with a challenging issue – determining how to treat an employee's letter which contained a mix of complaints, some that were part of the employee's job and others that were not.[213] The plaintiff was a former employee of a state university who sued officials of her government employer based on retaliatory discharge in violation of the First Amendment.[214] The employee was responsible for investigating other employees' access of pornography on the university's computers.[215] Dissatisfied with the university's response to her findings, the employee sent complaint letters to several administrators, the FBI, and the Equal Employment Opportunity Commission.[216] The letters raised a mix of issues, including concerns about inadequate response to the pornography investigation, excessive number and pay of vice presidents at the university, possible presence of child pornography on university computers, and racial discrimination at the university.[217] The court held that the letters contained some statements made pursuant to the employee's job and other statements made as a private citizen.[218] However, rather than broadly applying *Garcetti* to leave these "mixed" letters completely unprotected by the First Amendment, since they all contained some unprotected statements, the court painstakingly labored through a statement-by-statement analysis to identify which statements passed the *Garcetti* test and could form the basis of a free speech claim.[219] This approach is hardly how a court seeking to completely silence government employees would act.

In addition to allowing First Amendment protection of "mixed" speech, the Fifth Circuit falls in line with other circuits by holding, in *Charles v. Grief*,[220] that a government employee who complains externally about his employer regarding matters not related to his job duties is not affected by *Garcetti*.[221] In *Charles*, an employee of the state lottery commission sued his employer, alleging that he had been fired in retaliation for making complaints about the commission, in violation of the First Amendment.[222] Specifically, the employee sent emails to

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[210] *Wright*, 2006 WL 2587630, at *1.
[211] *See id.* at *5 n.13.
[212] 518 F.3d 304 (5th Cir. 2008).
[213] *Id.* at 314.
[214] *Id.* at 307.
[215] *Id.*
[216] *Id.* at 308-09.
[217] *Davis*, 518 F.3d at 309.
[218] *Id.* at 315-16.
[219] *Id.*
[220] 522 F.3d 508 (5th Cir. 2008).
[221] *Id.* at 514.
[222] *Id.* at 509-10.

high-ranking commission officials and members of the legislature complaining of violations of the Texas Open Records Act, misuse of state funds, and racial discrimination.[223] The defendants argued that, under *Garcetti*, the employee's complaints were not protected by the First Amendment because they concerned special knowledge that he obtained through his employment and he identified himself in his emails as a commission employee.[224] The court ruled that neither of these arguments was dispositive, holding that when a government employee speaks about issues unrelated to any conceivable job duties, *Garcetti* does not prevent him from being entitled to First Amendment protection.[225] When given the choice of accepting the plaintiff's argument to interpret *Garcetti* narrowly and the defendants' argument to interpret it broadly, the Fifth Circuit chose the narrow approach.

F. Sixth Circuit

A Sixth Circuit court explicitly stated that *Garcetti* is to be interpreted narrowly.[226] It limits *Garcetti* to situations where the public employee's speech was specifically required by his or her job.[227] In all other situations, a court is to proceed with the normal pre-*Garcetti* public employee free speech analysis.[228] Another court in the Sixth Circuit took the mandate to narrowly interpret *Garcetti* even further. In *Barber v. Louisville and Jefferson County Metropolitan Sewer District*,[229] an employee on the executive staff of a sewer district told the executive director about possible abuses of authority by a board member and city council member.[230] The executive director asked the employee to provide him with a memorandum about the situation.[231] The employee sent the director the memo and later sent a letter to the attorney general with both information from the memorandum and details of other alleged improprieties.[232] The employee was later terminated and sued on the ground that she was retaliated against based on speech protected by the First Amendment.[233] The defendants argued that because the employee was specifically asked to prepare the memorandum that contained the statements at issue, those statements were made as part of the employee's job duties and are thus left unprotected by the First Amendment under *Garcetti*.[234] The court, drawing an extremely narrow interpretation of *Garcetti*, held that the statements to the attorney general were not part of the employee's job duties because she sent them without permission.[235] If *Garcetti* was the far-reaching case that its critics claimed it to be, then the court in *Barber* would not have gone through such great lengths to apply it narrowly.

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[223] *Id.* at 510.
[224] *Id.* at 513.
[225] *Charles*, 522 F.3d at 514.
[226] Pittman v. Cuyahoga Valley Career Ctr., 451 F. Supp.2d 905, 929 (N.D. Ohio 2006).
[227] *Id.*
[228] *See id*.
[229] No. 3:05-cv-142-R, 2006 WL 3772206 (W.D. Ky. Dec. 20, 2006).
[230] *Id.* at *1.
[231] *See id.* at *6.
[232] *Id.*
[233] *Id.* at *1.
[234] *Barber*, 2006 WL 3772206, at *6.
[235] *Id.* at *7.

G. Seventh Circuit

Shortly after the Supreme Court decided *Garcetti*, the Seventh Circuit Court of Appeals held that a government employee's comments in his capacity as a union representative are not made as part of his employment and, thus, are eligible for First Amendment protection.[236] In *Shefcik v. Village of Calumet Park*,[237] a Seventh Circuit court carried out that narrow interpretation of *Garcetti*.[238] This case involved a police officer who also served as secretary of the police union.[239] While holding that position, the officer filed collective grievances against the department, wrote complaint letters, attended meetings, and made Freedom of Information Act requests on behalf of the union.[240] The officer was retaliated against, he claims, as result of this activity, in violation of his First Amendment rights.[241] He sued the police chief, who argued that even if there was retaliation, the activity was not protected by the First Amendment because it was done pursuant to the officer's work duty, since it concerned working conditions within the department.[242] The court quickly distinguished union duties from employment duties, holding that the two are not the same.[243]

Like the Third Circuit, the Seventh Circuit also narrowly interprets *Garcetti* so that the decision does not apply to a government employee exercising his First Amendment right to petition when he sues his employer on an issue related to his job. In *Iovinelli v. Pritchett*,[244] a firefighter claimed his government employer retaliated against him after he filed a suit alleging irregularities with the fire department's pension fund.[245] A key fact in this case is that the plaintiff was not just a firefighter, but he also served as a member of the pension board.[246] The defendants argued that, as a member of the pension board, oversight of the program was part of the firefighter's official job duties and, therefore, *Garcetti* prevents him from being entitled to First Amendment protection.[247] The court determined that filing a suit was not part of the firefighter's duties as a pension board member, basing its holding on the fact that the firefighter derived legal standing to sue from his status as a pension fund participant and not as a board member.[248] The court examined the situation at a micro-level to find support for its narrow interpretation of *Garcetti*.

H. Eighth Circuit

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[236] Fuerst v. Clarke, 454 F.3d 770, 774 (7th Cir. 2006).
[237] 532 F. Supp.2d 965 (N.D. Ill 2007).
[238] *See id.* at 973-74.
[239] *Id.* at 971.
[240] *Id.* at 972.
[241] *Id.*
[242] *Shefcik*, 532 F. Supp. 2d at 974.
[243] *Id.*
[244] No. 06 C 6404, 2008 WL 2705446 (N.D. Ill. July 9, 2008).
[245] *Id.* at *1
[246] *Id.*
[247] *Id.* at *17.
[248] *Id.*

A Court of Appeals case shows that even in a post-*Garcetti* environment, public employee free speech rights are still alive and strong in the Eighth Circuit. *Lindsey v. City of Orrick*[249] involves a public works director who was required, as part of his job, to attend city council meetings.[250] Also as part of his job, the director attended a training seminar, which included a session on an open meetings law that the city was required to follow.[251] Based on what he learned at that seminar, the director concluded that the city was violating the open meetings law.[252] The director complained at four different council meetings that the city was violating the law.[253] The city fired the director after he made these comments, and the director sued on the ground that this termination was in violation of his First Amendment rights.[254] The court ruled in favor of the director, holding that the complaints were not made pursuant to his job duties, even though they were said at meetings he was obliged to attend and based on information obtained through training required by the city..[255] The court determined that the director was not speaking pursuant to his employment, since complaining about violation of the open meetings law was not a specific part of his job duties as a public works director.[256] Additionally, the court found that, since the director was not sent to the training for the specific purpose of learning about the open meetings law, his complaints on that matter were not part of his job duties.[257] In its narrow interpretation of *Garcetti*, the Eighth Circuit leaves much room for the First Amendment to join a government employee at work.

I. Ninth Circuit

Not surprisingly, the Ninth Circuit – the jurisdiction where *Garcetti* originated – chooses to narrowly interpret that case so that government employees maintain significant First Amendment rights. In *Marable v. Nitchman*,[258] the court determined that "catch-all provisions" in training manuals cannot be used to broaden an employee's job duties for the purposes of a *Garcetti* analysis.[259] This case involved a chief engineer of a ferry who was suspended without pay for complaining of corruption and wasteful practices by the management of his department.[260] The defendants argued that a "catch-all provision" in a training manual, which required that employees "[k]now and enforce all applicable federal and state rules and regulations," made complaining about corruption part of the engineer's job duties and, thus, not protected by the First Amendment.[261] The court strongly rejected this argument, stating that government employers

[249] 491 F.3d 892 (8th Cir. 2007).
[250] *Id.* at 895.
[251] *Id.* at 896.
[252] *Id.*
[253] *Id.*
[254] *Lindsey*, 491 F.3d at 896-97.
[255] *Id.* at 898.
[256] *Id.*
[257] *Id.*
[258] 511 F.3d 924 (9th Cir. 2007).
[259] *Id.* at 933, n.13.
[260] *Id.* at 926-27.
[261] *Id.* at 933, fn. 13.

cannot restrict employees' rights by creating "'excessively broad job descriptions.'"[262] The Ninth Circuit rejects the broad interpretation of *Garcetti* – that it is a tool for silencing government employees – and adopts the narrow view: *Garcetti* is intended to clarify public employee free speech law while maintaining significant First Amendment rights.

The Ninth Circuit also adopts a narrow interpretation of *Garcetti* in *Freitag v. California Department of Corrections*.[263] In that case, a corrections officer claimed that her government employer retaliated against her after she complained about prison conditions to the Department of Corrections, a state senator, and the Office of Inspector General.[264] Her employer argued that it did not violate the officer's First Amendment rights because all of these complaints were made pursuant to her job duties.[265] The court held that the right to complain to an elected public official and an independent state agency is guaranteed to every citizen and, thus, not part of a government employee's job duties.[266] Therefore, those complaints were protected by the First Amendment.[267] It did not matter that the officer initiated the communications while at work or wrote complaints that concerned the subject matter of her employment.[268] Under the Ninth Circuit's narrow interpretation of *Garcetti*, government employees maintain significant First Amendment rights.

J. Tenth Circuit

Support for a narrow interpretation of *Garcetti* also exists in the Tenth Circuit. In *Rohrbough v. University of Colorado Hospital Authority*,[269] a heart transplant coordinator nurse was terminated after she spoke out about nurse staffing issues, reported improprieties in the provision of a donor heart and the cover-up of those events, and drafted incidence reports involving lapses in care for heart transplant patients.[270] The nurse sued on the ground that her termination was in retaliation for her complaints, which were protected by the First Amendment.[271] Her government employer argued that her speech was not protected because it was made pursuant to her employment.[272] Specifically, the hospital argued that because its risk management department directed the nurse to create the incident reports and a state statute requires nurses to report improprieties, the plaintiff's speech was part of her job duties.[273] The court refused to accept such a broad interpretation of *Garcetti*.[274] The court held that the nurse's complaints were not made

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[262] *Id.* (quoting *Garcetti*, 547 U.S. at 424).
[263] 289 F. App'x 146 (9th Cir. 2008).
[264] *Id.* at 147-48 n.1.
[265] *Id.* at 147 n.1.
[266] *Id.*
[267] *Id.* at 147.
[268] *See Fretag*, 289 F. App'x at 147 n.1.
[269] No. 06-cv-00995-REB-MJW, 2006 WL 3262854 (D. Colo. Nov. 9, 2006).
[270] *See id.* at *2-3.
[271] *Id.* at *1.
[272] *See id.* at *2.
[273] *See id.* at *3.
[274] *See Rohrbough*, 2006 WL 3262854, at *3.

pursuant to her official duties and that concrete proof that she was compensated to do these acts is required before the court will strip away the nurse's First Amendment protection.[275]

K. Eleventh Circuit

While most courts interpret *Garcetti* in the context of free speech, a court in the Eleventh Circuit examines the decision's effect on government employees' First Amendment right to associate. In *VanCamp v. McNesby*,[276] a deputy sheriff sued his supervisors on the ground that they retaliated against him for choosing a particular attorney – one who was an outspoken critic of the supervisors – to represent him in a wage dispute with the Sheriff's Office, in violation of his First Amendment right to freely associate with an attorney of his choosing.[277] The supervisors argued that, as a public employee, the deputy sheriff's association with another person was not protected under the First Amendment because it related to his employment.[278] The court rejected this argument and narrowly interpreted *Garcetti*, holding that "a public employee who associates with an attorney . . . for the sole purpose of pursuing a legitimate, employment-related grievance . . . is acting in the capacity of a private citizen and enjoys First Amendment protection."[279] In continuing the practice seen in other circuits of narrowly interpreting *Garcetti*, this court leaves public employees with not only significant free speech rights, but also the First Amendment right to freely associate.

V. CONCLUSION

In *Pickering*, the Court laid out all of the principles pertinent to a public employee free speech analysis. The *Garcetti* Court does not create any new rules in this area. Rather, like the earlier *Connick* Court, it correctly takes the general ideas implicit in *Pickering* and translates them into an explicit component of a multi-step analysis. Of the three main principles announced in *Pickering*, *Connick* explains two and *Garcetti* explains the third. An explicit multi-step rule, with all three elements in clear form, exists today. In contrast, the Ninth Circuit incorrectly decided to favor its own flawed approach as well as ignore legal precedence and the Supreme Court's enduring reliance on whistleblower protection laws.

There were many who feared that government employees working in a post-*Garcetti* world would be left with little First Amendment protection. However, a review of cases from all eleven United States judicial districts in the three years since *Garcetti* demonstrates that lower courts have exercised restraint in applying the Supreme Court decision by interpreting it very narrowly. Whether a government employee is complaining to a supervisor, acting on a general job duty, speaking to the media, or even suing his own employer, he still has significant First Amendment protection.

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[275] *Id.*

[276] No. 3:08cv166-RS-MD, 2008 WL 2557539 (N.D. Fla. June 20, 2008).

[277] *Id.* at *1.

[278] *See id.* at *11.

[279] *Id.* at *14.