GARCETTI IN DELAWARE: NEW LIMITS ON PUBLIC EMPLOYEES' SPEECH

Erin Daly*

In balancing the free speech rights of individuals against the ability of a government employer to control the workplace, the United States Supreme Court, under Chief Justice Roberts, has come down squarely on the side of the government. *Garcetti v. Ceballos*[1] is the most recent salvo in a spate of cases spanning 40 years that has addressed this issue, and it is the most restrictive of the speech of public employees and the most deferential of employers. Lower courts' cases in the Third Circuit illustrate the impact that *Garcetti* has had in the few years since its announcement.

Cases about the free speech rights of public employees do not tend to garner the biggest headlines, even though they profoundly affect millions of people: more than 18 million people in America are public employees[2] and in Delaware alone, 60,700 people work for the government.[3] These individuals work in a wide range of professional areas, from schools to police, to waste management, to health services, and they speak on a huge range of topics of public concern, from corruption to discrimination to safety. Indeed, "[s]peech involving government impropriety occupies the highest rung of First Amendment protection."[4]

The question in these cases is whether the government employer can discipline an employee who speaks out against governmental abuse or mismanagement. In the private workplace, firing an outspoken employee is well within the law — since most private employees work at will and may be terminated for any reason or no reason at all, including outspokenness. Moreover, disciplining private sector employees for their speech raises no particular issues of public concern — since most such speech interests only those who are connected to the particular workplace. But public employees have traditionally had greater protection against retaliation, in part because their speech is more likely to be of public interest: when a public employee complains about discrimination or fraud or safety hazards in a government workplace, it concerns us all, as citizens and as taxpayers. And government employers, like all government actors, are subject to constitutional constraints: disciplining an employee could implicate the First Amendment if it suppresses the employee's speech or limits the public's ability to receive information of public importance.

After years of recognizing the public interest immanent in much public employee speech, the Supreme Court in *Garcetti* drew a bright line between speech that was said in the course of an employee's official duties and speech that is outside the scope of his or her employment. The former, the Court said, is never constitutionally protected, whether or

* Professor of Law and Associate Dean for Faculty Research and Development, Widener University School of Law

1. 547 U.S. 410 (2006).

2. U.S. Census Bureau data for 2006, available at http://ftp2.census.gov/govs/apes/06stlus.txt (Reporting 16, 135, 699 total state and local employees) and http://ftp2.census.gov/govs/apes/06fedfun.pdf (Reporting 2,720,688 total federal government employees).

3. Delaware Monthly Labor Review (Mar. 2008), Delaware Department of Labor, Volume XV, Number 4 (Apr. 18, 2008) available at http://www.delawareworks.com/OOLMI/resources/2008-03_mlr.pdf. Of these, 5,200 work for the federal government, while 30,500 work for state government, and 25,000 work for local governments.

4. Lapinsky v. Bd. of Education, 2008 U.S. Dist. LEXIS 68821 (D. Del. Sept. 11, 2008) (quoting Swineford v. Snyder County Pa., 15 F.3d 1258, 1274 (3d Cir. 1994)).

not it is of public concern.[5] The effect of the decision, as is discussed in detail below, is to subject thousands of employees in Delaware alone to discipline when they complain about workplace issues, even if their complaints raise important issues of public concern.[6]

Not surprisingly, there is a "vast amount of lower court litigation"[7] involving employment speech: in the two years since *Garcetti* was decided, it has been cited 700 times by lower courts — an extraordinary number by any measure.[8] More than 70 cases citing *Garcetti* have been decided at the district court level in the Third Circuit. Of these, eleven were decided in the District of Delaware. Almost all of these have been decided *against* the employees who were disciplined or fired, reflecting the strong employer bias of the *Garcetti* rule.

This article examines the Supreme Court decision and then reviews the Third Circuit and Delaware cases applying it. Cases from other circuits are discussed in the footnotes. After this summary of the cases, the policy implications of *Garcetti* and its implementation in Delaware are examined.

I. Background to *Garcetti*

In the seminal case in the series, *Pickering v. Board of Education*, a teacher had been dismissed for sending a letter to the local newspaper "in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools."[9] Recognizing the competing interests of the employee and the government employer, the Court announced a straightforward balancing test: "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[10]

---

5. 547 U.S. 410 (2006). Notwithstanding its bright line, the decision itself is the product of a deeply divided Court. It was the only case held over for re-argument from the long transition at Justice O'Connor's retirement. When it finally was decided, the vote was five to four, and included three dissenting opinions. Justice Kennedy wrote the opinion of the Court, in which Chief Justice Roberts and Justices Scalia, Thomas, and Alito joined. Justices Stevens, Souter, Breyer, and Ginsburg dissented, the first three filing separate dissenting opinions.

6. The Court reserved judgment on the extent to which the rule established in the case would apply in the context of public academic employment: applying the rule categorically to scholarship would severely limit the traditional scope of academic freedom. *Garcetti,* 547 U.S. at 425. In *Borden v. School District*, 2008 U.S. App. LEXIS 8011, at *39-40 n.13 (3d Cir. Apr. 15, 2008), the court noted that the Supreme Court had left this issue open. Although many of the cases discussed below, particularly at the district court level, arise in academic settings, they do not concern traditional academic freedom; rather, they mostly concern statements made about fellow employees and internal school policy.

7. "In *Garcetti v. Ceballos*, … the Court's holding that the First Amendment did not reach speech of public employees that was part of their employment responsibilities — no matter how much a matter of public concern it might be — established a new rule governing a vast amount of lower court litigation." Frederick Schauer, *The Supreme Court, 2005 Term: Foreword: the Court's Agenda - and the Nation's*, 120 Harv. L. Rev. 4, 35 (2006).

8. Lexis search conducted May 9, 2008.

9. Pickering v. Board of Education, 391 U.S. 563, 564 (1968).

10. *Id.*

However, in *Connick v. Myers*,[11] the Court elaborated only on the government employer's side of the balance: "The *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public."[12] This attention to the needs of the employer reflects the shift on the Court from the 1960s when *Pickering* was decided and the Court was particularly sensitive to free speech issues, to the 1980s when *Connick* was decided. This shift would be further entrenched in *Garcetti*.

Further, and again presaging *Garcetti*, the *Connick* Court limited the balancing of employer and public interests to cases where courts had first determined that the speech at issue was of public concern, and not merely relating to intra-office matters. In *Connick,* an employee in a district attorney's office had prepared a questionnaire for her co-workers soliciting their views on "office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors," and so on.[13] These matters were not of public importance because they only concerned those who worked in the office. According to the Court, since speech that is not of public concern is not constitutionally protected, the government employer has the same authority to discipline the employee for such speech as a private employer would; the matter is resolved under simple contract principles and no constitutional balancing is required.

One of the questions in the questionnaire, however, concerned whether the employees felt "pressured to work in political campaigns on behalf of office supported candidates."[14] Based on "the content, form, and context of a given statement, as revealed by the whole record,"[15] the court held that this question did touch on a matter of public concern because "official pressure upon employees to work for political candidates not of the worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights."[16] If the employee was disciplined for this question, the Court held, it would be necessary to balance whether the rights of the employee to speak out as any citizen could outweigh the right of the public employer to control the workplace environment.

Thus, under these two principal cases, a public employee's speech is protected against workplace retaliation only if it concerns a matter of public interest and if that public interest outweighs the employer's interest in an efficient workplace.

II. The *Garcetti* Case

In *Garcetti,* the Court carved another category out of the area of constitutionally protected speech that public employees enjoyed under *Pickering*. Richard Ceballos, a deputy district attorney, was subjected to a series of disciplinary measures after he had written a memo alleging inaccuracies in an affidavit used to support a search warrant in an ongoing investigation.[17]

---

11. 461 U.S. 138 (1983).

12. *Id.* at 150.

13. *Id.* at 141.

14. *Id*. at 155.

15. Rankin v. McPherson, 483 U.S. 378, 385 (1987) (quoting Connick v. Myers, 461 U.S. 138, 147-48 (1983)).

16. *Connick*, 461 U.S. at 149 (citing Branti v. Finkel, 445 U.S. 507, 515-16 (1980)).

17. According to the Supreme Court, the measures included "reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion." *Garcetti*, 547 U.S. at 415.

When Ceballos argued that the disciplinary measures were in retaliation for his speech, the Ninth Circuit agreed with him, finding that "Ceballos's allegations of wrongdoing in the memorandum constitute protected speech under the First Amendment"[18] because, as allegations of governmental misconduct, they were "inherently a matter of public concern."[19] But the Supreme Court reversed, 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."[20] This ensures that the employer can control "what the employer itself has commissioned or created."[21]

The Court distinguished the speech an employee engages in *as an employee* from the speech he or she engages in *as a citizen*. The first is never constitutionally protected (though the second may be under *Pickering* and *Connick)*. The Court explained: "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."[22]

To determine whether the speech at issue was uttered as an employee or as a citizen, courts should consider whether the speech was made pursuant to the employee's duties. In the *Garcetti* case, the fact that the memo was written at work was not dispositive,[23] and neither was the fact that "the memo concerned the subject matter of Ceballos' employment."[24] What the Court found critical was the fact that Ceballos' "expressions were made pursuant to his duties as a calendar deputy."[25] Since writing memos about investigations was part of Ceballos's job, when he did so, he was acting as an employee fulfilling his official responsibilities, not as a citizen speaking out about matters of public concern. According to the Court, "When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance."[26]

As the District Court in Delaware has since explained, *Garcetti* inserts a preliminary element in the *Pickering/Connick* calculus:

> In evaluating whether speech by a public employee warrants constitutional protection, the court must engage in a three-step analysis. First, the court determines whether the public employee spoke as a

18. 361 F.3d 1168, 1173 (9th Cir. 2004).

19. *Garcetti*, 547 U.S. at 416.

20. *Id.* at 421.

21. *Id*. at 422.

22. *Id.* at 421-22.

23. *Id*. at 420.

24. 547 U.S. at 421. The Eleventh Circuit Court of Appeals also said that Ceballos' supervisor's expectations of Ceballos were not dispositive: "[The *Garcetti*] Court itself explicitly refrained from placing the emphasis on supervisors' specific expectations…. What the Court did emphasize was whether the public employee was acting as an agent of the government at the time of the relevant speech." Khan v. Fernandez-Rundle, 2007 U.S. App. LEXIS 23571 (11th Cir. Oct. 3, 2007) (finding unprotected speech of assistant district attorney who told the truth in court when he was expected to lie).

25. *Garcetti,* 547 U.S. at 421.

26. *Id*. at 422.

> citizen or an employee. *Garcetti v. Ceballos*, 126 S.Ct. 1951, 164 L. Ed. 2d 689 (2006). Second, the court determines whether, in light of the content, form and context of the entire record, the speech touched on matters of public concern. *Connick v. Myers*, 461 U.S. 138, 146, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983). Third, the value of the employee's speech must outweigh "the government's interest in the effective and efficient fulfillment of its responsibilities to the public."[27]

Thus, courts will only reach the question of whether the speech is constitutionally protected if they have first decided that the speech was not within the employee's responsibilities.[28]

---

27. Wilcoxon v. Red Clay Consol. Sch. Dist. Bd. of Educ., 437 F. Supp. 2d 235, 243 (D. Del. 2006). The court continued:

> Determining whether the speech touched on matters of public concern and whether the value of the speech outweighs governmental interests in efficiency are questions of law for the court. Accordingly, a discharged public employee has no right to judicial review if the expression is not related to a matter of public concern or, even if it is so related, its value is outweighed by the need to permit the government to take actions that promote efficiency and effectiveness.

Id. (citation omitted). *See also* Reilly v. City of Atl. City, 532 F.3d 216, 228 (3d Cir. 2008); Lapinsky v. Bd. of Education, 2008 U.S. Dist. LEXIS 68821 (D. Del. Sept. 11, 2008) (both also referring to the post-*Garcetti* analysis as involving three steps). *But see* Justice v. Danberg, 2008 U.S. Dist. LEXIS 57818 (D. Del. July 29, 2008) (defining *Garcetti*'s course-of-employment test as not being within *Connick*'s public-interest test).

Other circuits have described the new *Garcetti* element similarly:

> While all implications of *Garcetti* have not been developed at this point, it is clear that *Garcetti* added a threshold layer to our previous analysis. "Under *Garcetti*, we must shift our focus from the content of the speech to the role the speaker occupied when he said it." The Seventh Circuit has framed the new test … as follows: "*Garcetti* … holds that before asking whether the subject-matter of particular speech is a topic of public concern, the court must decide whether the plaintiff was speaking 'as a citizen' or as part of her public job. Only when government penalizes speech that a plaintiff utters 'as a citizen' must the court consider the balance of public and private interests, along with the other questions posed by *Pickering* and its successors…."

Davis v. McKinney, 518 F.3d 304, 312 (5th Cir. 2008) (citations omitted). *See also* Vigil v. S. Valley Acad., 247 Fed. Appx. 982, 988 (10th Cir. 2007).

While the test in the Third Circuit is described as having three parts, other circuits have described it as a "two-step analysis" (Khan v. Fernandez-Rundle, 2007 U.S. App. LEXIS 23571 (11th Cir. Oct. 3, 2007)), a "four-factor test" (Wilburn v. Robinson, 375 U.S. App. D.C. 257 (D.C. Cir. 2007)), and a "five step inquiry" (Brammer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192, 1202 (10th Cir. 2007)). The differences seem more semantic than substantive. This commentator believes that the Third Circuit's description is the most apt.

28. *See, e.g.*, Boyce v. Andrew, 510 F.3d 1333, 1342-43 (11th Cir. 2007) ("To qualify as constitutionally protected speech … as *Garcetti* has specified, the speech must be made by a government employee speaking as a citizen and be on a subject of public concern.").

Some other circuits describe the post-*Garcetti* landscape differently. For example, in *Curran v. Cousins*, the First Circuit explained:

> *Garcetti* has clarified and expanded on the earlier law. The Supreme Court described the correct analysis as involving a two-step initial inquiry. The first step requires a determination of: whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. *Garcetti* recognizes that this first step itself has two subparts: (a) that the employee spoke as a citizen and (b) that the speech was on a matter of public concern…. [I]t is the judge who decides as a matter of law the issues in the two steps *Garcetti* identifies. *See Connick*, 461 U.S. at 148 n.7 ("The inquiry into the protected status of speech is one of law, not fact.")…. The court must first determine whether the speech involved is entitled to any First Amendment protection — that is, whether the speech is by an employee

continued on page 28

As in the other employment speech cases, the *Garcetti* Court said it was trying to accommodate competing interests. On the one hand, the Court said it wanted to preserve the right of a government employee to speak out *as a citizen*; a person does not lose his or her First Amendment rights to participate in public debate upon accepting government employment. Such speech is important not only to the speaker, but also to the general public, whose First Amendment right to receive information of public concern has long been recognized.

On the other hand, the Court wanted to protect the public employer's "heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications," the Court said, "have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission."[29]

The problem is that the *Garcetti* rule does not balance the competing interests. Like the Court's approach in *Connick,* it places all the weight on the side of the employer's interest in controlling employee speech — even if that speech is accurate, demonstrates sound judgment, and promotes the employer's mission — and takes away from the employee's right to speak out about issues of public concern, and from society's right to know what the government is doing.

III. Expanding "Official Duties" Leaves Less Speech Protected

The *Garcetti* Court itself suggested that the decision did not significantly change the landscape and was entirely consistent with the precedents.[30] As the Third Circuit noted in *Foraker v. Chaffinch*, the court "applied the rule it enunciated

continued from page 28

> acting as a citizen on a matter of public concern. If so, the court then decides whether the public employer "had an adequate justification," to use *Garcetti's* rephrasing of the *Pickering* test.

Curran v. Cousins, 509 F.3d 36, 44-46 (1st Cir. 2007) (holding that menacing and threatening statements to a superior "were made in the course of [plaintiff's] duties within the Department, to his superiors, and during a discussion of official Department policy" but assuming that plaintiff was acting "as a citizen" when he posted racist and bizarre messages on a "union website open to public posting and viewing") (citing Lewis v. City of Boston, 321 F.3d 208, 219 (1st Cir. 2003)).

A bit more simply, the Eighth Circuit reads *Garcetti* as simply clarifying the citizen/employee distinction from the earlier cases:

> After *Garcetti*, a public employee does not speak as a citizen if he speaks pursuant to his job duties. *See* McGee v. Pub. Water Supply, Dist. # 2, 471 F.3d 918, 919 (8th Cir. 2006) (holding that a public water supply district manager's complaints about environmental compliance, although involving matters of public concern, were made pursuant to his official duties to ensure regulatory compliance and thus were not made as a citizen).

Lindsey v. City of Orrick, 491 F.3d 892, 898 (8th Cir. 2007). In *Lindsey*, the court found that the city's public works director (responsible for maintenance) engaged in protected speech when he voiced concerns about the city's compliance with sunshine laws:

> Although Lindsey attended a training seminar which included a session on the sunshine law, there is nothing in the record to suggest the City sent him to the seminar to learn about the law or that he was subsequently charged with ensuring its compliance. Thus, we hold his speech regarding compliance was as a citizen.

Id.

29. *Garcetti,* 547 U.S. at 422-23.

30. 547 U.S. at 422 ("This result is consistent with our precedents' attention to the potential societal value of employee speech"). *But see* Casey v. W. Las Vegas Indep. Sch. Dist., 473 F.3d 1323, 1325 (10th Cir. 2007) (*Garcetti* "profoundly alters how courts

continued on page 29

to Ceballos' claims. Thus, the rule announced was not purely prospective."[31] However, review of the cases decided under *Garcetti* in the Third Circuit indicates that a public employee making a speech-based retaliation claim faces substantial new obstacles. By restricting constitutional protection for employee speech to that which is made *outside* the employee's official duties, the *Garcetti* rule forces judicial analysis of the scope of the employee's employment and reduces the scope of employee free speech rights.

Foraker v. Chaffinch illustrates many of the issues that *Garcetti* raises and provides the most thorough evaluation of the *Garcetti* rule of any case decided in the Third Circuit. It is a particularly telling case because the jury's verdict in favor of plaintiffs had to be reconsidered in light of *Garcetti*, which was decided on the day that the *Foraker* jury was instructed. In *Foraker*, the plaintiffs were former Delaware State Troopers who were instructors in the Delaware State Police Firearms Training Unit, assigned to the indoor firing range in Smyrna. According to the court,

> [t]he range and those who used it encountered a number of difficulties from the outset, including problems with the heating, ventilation, and air conditioning ("HVAC") system…. [Plaintiffs] Price, Warren, and Foraker considered the range conditions intolerable, and were specifically concerned with health and safety issues there. The HVAC system did not work properly, the bullet trap was malfunctioning, and officers and students at the range were suffering the physical manifestations of contamination, including elevated levels of heavy metals in their blood.[32]

These were, by all accounts, significant public concerns and, eventually, the facility was closed. However, the State Police altered the terms of plaintiffs' employment, allegedly in retaliation for their complaints. This case presents a stark illustration of the impact of *Garcetti* since the plaintiffs prevailed before the *Garcetti* decision, but not afterwards.[33]

The *Foraker* court engaged in a relatively in-depth analysis of the *Garcetti* rule, referring as well to cases from other circuits. Ultimately, the court adopted a broad definition of job responsibilities, including within that term areas over which the employee had special knowledge and experience, whether or not the employee had actual responsibility over those areas. Even though Price and Warren *were not responsible* for safety at the firing range, they:

---

continued from page 28

review First Amendment retaliation claims."); Frederick Schauer, *The Supreme Court, 2005 Term: Foreword: the Court's Agenda - and the Nation's*, 120 HARV. L. REV. 4, 35 (2006) (*Garcetti* "established a new rule").

31. Foraker v. Chaffinch, 501 F.3d 231, 238 n.4 (3d Cir. 2007).

32. *Id.* at 233.

33. More recently, the Third Circuit has held that while reports criticizing fellow state police officers were made pursuant to a patrol supervisor's official duties and therefore unprotected, the filing of a lawsuit is protected First Amendment activity. Skrutski v. Marut, 2008 U.S. App. LEXIS 15452, at *8-11 (3d Cir. July 18, 2008).

The Second Circuit case of *Ruotolo v. City of New York*, 514 F.3d 184, 188 (2d Cir. 2008), presents a similar situation. In 2003, plaintiff had filed suit alleging retaliation after he had submitted a requested report detailing serious and accurate environmental and health hazards in his department. *Garcetti* was decided two weeks before the trial was set to begin, so after 3 years of pre-trial litigation, the district court dismissed the complaint. That dismissal was not appealed (because *Garcetti* clearly foreclosed it), though the court's rejection of Ruotolo's claim of retaliation based on the filing of the lawsuit was appealed. The Second Circuit held that whether or not filing the lawsuit based on non-protected speech is itself protected, it did not raise a matter of public concern and therefore was not constitutionally protected. *Id.*

> were acting within their job duties when they expressed their concerns up the chain of command because they needed to have a functioning bullet trap to conduct their educational programs and it was their special knowledge and experience with the bullet trap that demonstrated their responsibility for ensuring its functionality by reporting problems to their superiors.[34]

Thus, areas that lie outside a person's official duties but that may be useful or relevant to one's job may be within the employee's duties for purposes of *Garcetti*.[35] Such speech now may be subject to retaliation without any First Amendment protection.

---

34. *Foraker,* 501 F.3d at 240. The Third Circuit took the "special knowledge and experience" language from the Fifth Circuit's decision in *Williams v. Dallas Independent School District*, 480 F.3d 689 (5th Cir. 2007) (per curiam), where

> the Fifth Circuit applied *Garcetti* to foreclose the retaliation claim of a high school athletic director who was discharged after writing a memo to his principal concerning the handling of school athletic funds…. [T]he Court held that it was within Williams' "daily operations" to manage the athletic department, and because he needed information on the athletic accounts in order to be able to do that, his memorandum to his superior concerning accounts was necessary for him to complete his job. The Court noted that this outcome was dictated by the fact that "Williams had *special knowledge* that $200 was raised at a basketball tournament," and that he was "*experienced* with standard operating procedures for athletic departments."

Id. (emphasis in original; citations omitted).

On the other hand, the Fifth Circuit declined to apply the "special knowledge and experience" test where a systems analyst wrote emails alleging racially discriminatory activity within his department where the emails were sent to state legislators, but from his personal email account and providing his personal contact information. Charles v. Grief, 2008 U.S. App. LEXIS 6275 (5th Cir. Mar. 26, 2008). The court in *Charles v. Grief* states as follows:

> To hold that any employee's speech is not protected merely because it concerns facts that he happened to learn while at work would severely undercut First Amendment rights. Also, it is apparent that Charles identified himself as a Commission employee solely to demonstrate the veracity of the factual allegations he was making in his e-mails to the legislators…. Most significantly, though, Charles's speech — unlike that of the plaintiffs in *Garcetti* and *Williams* — was not made in the course of performing or fulfilling his job responsibilities, was not even indirectly related to his job, and was not made to higher-ups in his organization (as were Ceballos's and Williams's) but was communicated directly to elected representatives of the people. As a systems analyst, Charles worked in the area of Information Resources as a senior technical lead coordinating and supporting the Commission's computer network operations…. As the district court indicated, there can be no *Garcetti*-like nexus between Charles's systems analyst's work and the malfeasance that he sought to expose to the cognizant public authorities.

Id. at *13-14.

35. The Sixth Circuit has decided cases similarly. In *Haynes v. City of Circleville*, 474 F.3d 357 (6th Cir. 2007), the court found that a police canine trainer who wrote a memo expressing his concern that the reduced training would render the police dogs less effective and would potentially endanger the public was acting in the course of his duties. *Id.* at 364-65. Likewise, plaintiff's discussion with a consultant hired by plaintiff's employer to interview her about the department in order to create a departmental evaluation was within her official duties as an "ad hoc" responsibility even if not squarely within her job description. Weisbarth v. Geauga Park Dist., 499 F.3d 538, 544 (6th Cir. 2007). *See also* Bevis v. Bethune, 232 Fed. Appx. 212, 216 (4th Cir. 2007) ("Bevis used his role as Nickles's supervisor to access the meeting, and those in attendance understood his presence to be in his supervisory capacity…. Bevis explained that although his supervisory responsibilities did not require him to attend the meeting, he considered it appropriate that he do so, because he considered it 'a major meeting,' and Nickles had asked him to be present….").

In the Eleventh Circuit, the Court of Appeals has held that complaints to a supervisor about one's own workload are within one's job duties. Using language from *Connick*, the court said:

> The form and context in which the complaints by [caseworkers at child welfare agency] were made are indicative of the fact that they intended to address only matters connected with their jobs at Dekalb DFCS. Verbal, electronic

continued on page 31

Likewise, areas that lie outside a person's official duties, but that may be mentioned in a performance review, may be within the employee's duties. In *Foraker*, plaintiff Price was apparently commended for "'aid[ing] his supervisors in identifying safety issues at the facility'" and "'reach[ing] out to experts'" in a variety of fields in order to "'search out the root cause and contributing factors surrounding the dangers [the department faced] in exposure to heavy metal contamination.'"[36] The court concluded that "the fact that Price may have exceeded the expectations of his formal job description as a firearms instructor does not mean that they were not within the scope of his duties."[37]

In several post-*Garcetti* cases, courts have drawn the scope of an employee's official duties broadly based on the plaintiffs' own descriptions in court papers, depositions, and even the complaint itself. In *Yatzus v. Appoquinimink School District*,[38] a school psychologist had complained about the failure of the school district to provide appropriate Individualized Educational Plans (IEP) (as required by federal law) and had assisted parents with their claims with the Office of Civil Rights regarding their childrens' services. At the deposition (before *Garcetti* was decided), she indicated that these activities were part of her responsibility, which she defined rather broadly. "'A school psychologist has many responsibilities in that, responsible for the assessment; participation in the IEP process; being there as a consultant for teacher, the school process; counseling; crisis intervention. It's a multitude of different responsibilities.'"[39] The court held that the complaints were within her official duties.

---

continued from page 30

> mail, and ADO complaints by [plaintiffs] to their supervisors focus on their respective views that their caseloads were too high, which caused each not to meet expected deadlines, and their consequent need for assistance.

Boyce v. Andrew, 510 F.3d 1333, 1343-44 (11th Cir. 2007).

The Seventh Circuit has also decided cases similarly. In *Spiegla v. Hull*, 481 F.3d 961 (7th Cir. 2007), "a corrections officer responsible for maintaining prison security reported a breach of a prison security policy by another prison employee to her superior." *Id.* at 962-63. The *Spiegla* court held that the corrections officer was speaking pursuant to her official duties — not as a citizen — when she reported the security policy breach because ensuring compliance with prison security policy was part of what she was employed to do. *Id.* at 965-66. Likewise, in *Vose v. Kliment*, 506 F.3d 565 (7th Cir. 2007), "Vose was employed to oversee the narcotics unit's investigations, which Vose himself stated could have been compromised by the alleged misconduct of the major case unit detectives…. Vose was merely doing his job when he reported to his superiors his suspicions of the detectives' misconduct. A public employee's more general responsibilities are not beyond the scope of official duties for First Amendment purposes." *See also* Vigil v. S. Valley Acad., 247 Fed. Appx. 982, 990 (10th Cir. 2007) ("Ms. Vigil's complaints of falsely reported student statistics clearly were made in her professional capacity as office manager because she was the one charged with filing these reports.").

However, the Seventh Circuit drew a slightly narrower compass around "official duties" in *Doggett v. Cook County*, 255 Fed. Appx. 88, 88-89 (7th Cir. 2007), where the court found that memos written by an emergency room technician (ERT) in a public hospital concerning patient care, scheduling conflicts, and violations of policy by other ERTs might be constitutionally protected because "nothing in the record suggests that reporting perceived errors in the hospital's administration is part of an ERT's official duties." *Id.* at 89. In that case, however, the claims were dismissed on unrelated grounds.

36. *Foraker*, 501 F.3d at 242.

37. *Id.*

38. 458 F. Supp. 2d 235 (D. Del. 2006).

39. *Id.* at 246. After *Garcetti* was decided, she filed a clarification, attempting to distinguish between the "requirement[s of her] position" and her "ethical responsibility;" only the latter included speaking up for the rights and needs of her students and their parents, including communicating her concerns to the School District. However, Judge Sue Robinson disregarded the subsequent affidavit, finding that the only plausible explanation for it was "the intervening change in the law resulting from the Supreme Court's *Garcetti* decision." *Id.* at 247.

In *Hill v. Borough of Kutztown,* the court again relied on the complaint to define the scope of the job responsibilities:

> Hill's complaint states that "[h]aving received complaints from employees [of the Borough] about hostile, intimidating, oppressive and harassing actions by Defendant Marino, Plaintiff as part of his duties as Manager and otherwise duly reported them, as well as his own complaints about the same kind of behavior, to Borough Council."[40]

In his brief, Hill states that he 'relayed his and other workers' complaints [to the Borough Council] in fulfillment of his responsibilities as manager and appointed enforcer of the Borough's Affirmative Action/Equal Employment Opportunity Policy and Program.'"[41] The court held, as a matter of law, that the reports were not protected speech because, by plaintiff's own admission, they were made pursuant to his official duties.[42] In *Houlihan v. Sussex Technical School District*, the court again looked to the complaint to find that the reports of a Special Education Coordinator about her colleagues' violations of the Individuals with Disabilities in Education Act (IDEA) were within her official duties:

> [B]oth in the allegations of her Complaint and the exhibits attached thereto, Plaintiff repeatedly refers to the "insubordination" of staff members whom she confronted with alleged IDEA violations, but who ignored her. In the Court's view, the fact that Plaintiff acknowledges her authority to approach these individuals directly and characterizes their refusal to comply with her requests as "insubordination" infers [sic] that Plaintiff was approaching these individuals as part of her official duties as School Psychologist and/or Special Education Coordinator.[43]

After *Garcetti*, plaintiffs are on notice that their own descriptions of their jobs, whether within or outside of the litigation, will inform the court about whether the speech was within their official responsibilities.

In some cases, even speech that is unauthorized or that lies *outside* of the employer's expectations has been found to be within the employee's job duties. In *Kougher v. Burd,* the employee was a dog warden who had filed state animal cruelty charges against the operator of an unlicensed kennel. He was directed to withdraw the charges because "dog wardens lack the proper authority to file such charges,"[44] but he subsequently refiled them and then he "also spoke to the Bedford Gazette regarding the Bureau's ongoing investigation of [the] kennel, in spite of a policy that dog wardens refer all media inquiries to the Department's press office."[45] Without any discussion, the court found that the charges and the

---

40. Hill v. Borough of Kutztown, 455 F.3d 225, 242 (3d Cir. 2006).

41. *Id.*

42. *Id.*

43. Houlihan v. Sussex Tech. Sch. Dist., 461 F. Supp. 2d 252, 260 (D. Del. 2006).

44. Kougher v. Burd, 2008 U.S. App. LEXIS 8296, at *9-10 (3d Cir. Apr. 16, 2008). The opinion is "not precedential opinion under third circuit internal operating procedure rule 5.7. Such opinions are not regarded as precedents which bind the court."

45. *Id.* at *3.

"unauthorized contact with the press concerned matters related to his professional duties."[46] Thus, speech that is unauthorized may be held by a court to be within one's job responsibilities for purposes of *Garcetti*.

Other Third Circuit cases also found the *Garcetti* issue — whether the speech was within the employee's official duties — to be relatively easy to dispose of after review of the facts. In *Shingara v. Skiles,* the court affirmed the dismissal of plaintiffs' First Amendment claim in one short paragraph, finding that an anonymous letter written to superiors complaining about a supervisor "was not protected speech because Shingara spoke as a public employee when writing the letter, not as a citizen."[47] Likewise, the circuit court in *Muzslay v. Ocean City*, affirmed the district court's ruling that complaints by a long-time captain of the Ocean City Beach Patrol about lifeguard hours and the treatment of a fellow employee were "pursuant to his duties as Patrol Captain, not as a private citizen."[48] And again in *Devlin v. Blackman*, the court quickly affirmed the district court's finding that a correction officer's report about contraband was within her official duties.[49]

On the other hand, *DeLuzio v. Monroe County,* 2008 U.S. App. LEXIS 6961, shows the flip-side of this situation — where the employee complains about all kinds of things over which he has no particular knowledge, experience, or responsibility. Somewhat counter-intuitively, such speech is protected:

> Despite his junior status, [plaintiff] DeLuzio often clashed with [his supervisor] Bahl and others over CYS's provision of services to its clients and its internal policies and procedures. DeLuzio made his opinions on these matters known to his superiors at CYS repeatedly and insistently, often by writing

---

46. *Id.* at *9. *See also* Khan v. Fernandez-Rundle, 2007 U.S. App. LEXIS 23571, at *6-7 (11th Cir. Oct. 3, 2007) (finding that an assistant district attorney who told the truth in court when his supervisor had told him (and expected him) to lie, was acting within the scope of his duties). The *Kahn* court stated as follows:

> By focusing on the fact that he was acting outside his "expected" duties when he told the truth to the court, Khan in effect is asking us to recognize First Amendment protection for any employee who disobeys his employer's instructions. This approach is wholly at odds with the *Garcetti* Court's desire to avoid "permanent judicial intervention in the conduct of governmental operations" and we decline to embrace it.

Id.

However, when a supervisor requested that an employee speak to the press, her statements were "manifestly made in [plaintiff's] 'official capacity' and therefore not constitutionally protected" even though the subject matter of the interview was not related to her job. Almontaser v. N.Y. City Dep't of Educ., 519 F.3d 505, 508 (2d Cir. 2008).

47. Shingara v. Skiles, 2008 U.S. App. LEXIS 8411, at *7 (3d Cir. Apr. 17, 2008). The opinion is "not precedential opinion under third circuit internal operating procedure rule 5.7. Such opinions are not regarded as precedents which bind the court."

48. 238 Fed. Appx. 785, 789 (3d Cir. 2007) ("not precedential opinion under third circuit internal operating procedure rule 5.7. Such opinions are not regarded as precedents which bind the court").

In two other district court cases, the *Garcetti* issue was decided summarily. In *Navarro v. Coons*, 2007 U.S. Dist. LEXIS 66280 (D. Del. Sept. 7, 2007), Judge Sleet granted defendants' motion for summary judgment in a conference (though the court allowed plaintiff to amend his complaint). According to the subsequent opinion, "[i]n making its ruling, the court relied on the Supreme Court's decision in *Garcetti v. Ceballos*, which limits the free speech rights of public officials and, in this case, precluded the plaintiff's Free Speech retaliation claims (Claims I and II of the original complaint)."

In *Johnson v. George*, 2007 U.S. Dist. LEXIS 42465 (D. Del. June 11, 2007), U.S. Magistrate Judge Thynge found that statements made by a Vice-President and Director of one campus of Delaware Technical and Community College during a meeting of campus department chairs were within her job duties and not of public concern. The court pursued its *Pickering* (public concern) analysis even after finding the claims untenable under *Garcetti*.

49. 2008 U.S. App. LEXIS 16038 (3d Cir. June 20, 2008).

> memos outlining the problems he saw with CYS's operations and the treatment strategies for clients of other caseworkers.[50]

Similar conduct was found to lie outside a trooper's job duties when he contacted "a television reporter with concerns about the sufficiency of another officer's investigation" because it "was not one of the tasks [that the plaintiff] was expected to perform."[51] As the court explained, "Indeed, the [Pennsylvania State Police] has a policy requiring that officers not interfere with ongoing investigations or release information to the public without complying with certain regulations."[52] Such interference, therefore, was not within the bounds of his official duties. And while the court found that the speech did concern issues of public importance (an investigation of a teacher), it ultimately held that plaintiff's decision to contact the media and his failure to follow the chain of command justified the action taken against him. In the recent case of *Reilly v. Atlantic City*, the Third Circuit held that "truthful testimony in court constituted citizen speech" and that such speech was therefore "not foreclosed by the 'official duties' doctrine enunciated in *Garcetti*."[53] These are among the few Third Circuit cases after *Garcetti* to actually reach the *Pickering* balancing stage of analysis.[54]

Speech written privately may also fall outside the scope of official duty. In *Wilcoxon v. Red Clay Consolidated School District Board of Education*,[55] the district court found that a teacher's journal containing notations about misconduct of a fellow teacher "was not written pursuant to his official duties as a teacher. He was not employed to monitor the absences of fellow teachers, and defendants do not allege that he was required to do so."[56] (The court further held that, although the journal was written privately, it touched on matters of public concern and therefore, under *Pickering*, it was protected speech). Another district court has found that resigning one's position may be a form of symbolic speech that is protected because it is, by definition, not within the scope of one's official duties.[57]

In another recent decision, Judge Robinson cautioned against reading *Garcetti* as leaving unprotected any speech that "was related in any way to their employment."[58] In that case, the court found that "plaintiff was acting as a citizen

---

50. DeLuzio v. Monroe County, 2008 U.S. App. LEXIS 6961, at *7 (3d Cir. Mar. 31, 2008). CYS is Monroe County Children and Youth Services. According to the court, "[h]is superiors' problems with DeLuzio stemmed precisely from his frequent and unwelcome comments on matters that the supervisors felt were not within DeLuzio's purview — such as the course of treatment for other caseworkers' clients, or operating procedures that DeLuzio thought were harmful but was without power to change." *Id*. at *8.

51. Meenan v. Harrison, 2008 U.S. App. LEXIS 3025, at *8-9 (3d Cir. Feb. 12, 2008). The opinion is "not precedential opinion under third circuit internal operating procedure rule 5.7. Such opinions are not regarded as precedents which bind the court."

52. *Id.*

53. 532 F.3d 216, 231 (D.N.J. 2008).

54. Another case, *Espinosa v. County of Union*, 212 Fed. Appx. 146, 154 (3d Cir. 2007), seems to assume that the speech was constitutionally protected because it proceeded directly to the causation issue, affirming the dismissal upon finding that his "termination was not in retaliation for the protected expression." *Id.* Had the court applied *Garcetti*, it would have undoubtedly found that the speech was not protected since the speech was testimony given to help prosecute fellow corrections officers at a county jail.

55. 437 F. Supp. 2d 235 (D. Del. 2006).

56. *Id*. at 243.

57. Balas v. Taylor, 2008 U.S. Dist. LEXIS 57754 (D. Del. July 29, 2008).

58. Justice v. Danberg, 2008 U.S. Dist. LEXIS 57818 (D. Del. July 29, 2008).

when participating in union negotiation activities" because, while he was "required by Delaware law to be a member of [the union], he was not required to be a vice president in the union nor was he required to even be active in the union beyond that required by law."[59]

In most cases in the Third Circuit and District of Delaware, courts applied *Garcetti* in a common sense way, making fact-specific judgments about the actual scope of the employment and the particular nature of the speech at issue. *Garcetti,* then, is not problematic for how it is applied, but for its ramifications when it is *correctly* applied. It is these policy concerns that are addressed below.

IV. *Garcetti* in the Courtroom

The *Garcetti* Court said that it had decided to limit, rather than expand, the range of constitutionally protected speech because a "contrary rule" would subject almost all government employee speech to constitutional scrutiny, thereby authorizing federal courts to review routine employment decisions made by all federal and state agencies. This, in turn, would raise concerns under separation of powers and federalism principles.[60] Thus, one justification for the rule is simply judicial restraint. As Judge Pollak (sitting by designation in the Third Circuit) wrote in *Foraker*, "It may be expected that *Garcetti* will, to some extent, inhibit federal judicial micromanaging of public employment practices."[61]

However, it is not at all clear that the new approach accomplishes that objective. First, the Court's assumption overstates the role that the judiciary played before *Garcetti* was decided. While the 1968 case of *Pickering* mandated pure balancing, by 1983 the *Connick* Court had significantly narrowed judicial discretion by requiring balancing only once the court had determined, *as a matter of law,* that the speech was of public importance. For 25 years, then, there was no judicial review of routine employment decisions if the speech related to the workplace or other private matters; thus, there is no reason to think that, prior to *Garcetti*, there was a problem of federal judicial micromanaging of public employment practices that needed inhibition.

The district court case of *Gorum v. Sessom* helps to illustrate the problem.[62] In that case, Judge Sleet granted summary judgment to Delaware State University defendants where a tenured professor claimed retaliation for actions and statements that were clearly part of his job, including voicing opposition to the finalists for the post of university president and disinviting the president to be a speaker at a school event. This is the kind of case that the *Garcetti* Court presumably had in mind when it sought to prevent disgruntled employees from constitutionalizing their grievances, and to limit federal courts' involvement in routine employment decisions. But the court's dismissal of the case could have just as easily been achieved under the pre-*Garcetti* rules: the court would have decided, as a matter of law, that the professor's speech was not protected because it was not of public concern. On its own terms, then, it is not clear that the *Garcetti* rule was necessary to limit the scope of judicial review of the government workplace.

This case also reveals a deeper problem relating to judicial review under *Garcetti*. *Garcetti*, as implemented by *Foraker* and other cases, was meant not only meant to fix the quantitative problem — by reducing the number of cases

---

59. *Id.* at *14-16.

60. "To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers." *Garcetti,* 547 U.S. at 423.

61. *Foraker*, 501 F.3d at 250 (Pollak, concurring).

62. 2008 U.S. Dist. LEXIS 10366 (D. Del. Feb. 12, 2008).

in which a federal court reviewed public employment decisions — it would also fix a qualitative problem: according to Judge Pollak, it would avoid judicial "displacement of managerial discretion" and would prevent courts from assuming "a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business."[63] And this benefit in terms of judicial restraint would be worth the cost, even though, as Judge Pollak wrote, "[i]t may also may be expected that *Garcetti* will, to some extent, inhibit dissemination of information of arguable public interest about the operations of government agencies."[64]

But again, the cases discussed above suggest that the line drawn by the *Garcetti* Court is not nearly as bright in practice as it might have been in theory. Indeed, Judge Pollak's next sentence explains why: "How the balance will be struck may be expected to depend, to some extent, on the *nuanced judgments* of public employees and their superiors, *and also of courts,* on the scope of a public employee's employment duties."[65] Simply put, and as the cases bear out, the *Garcetti* rule necessitates nuanced judgments and fact-based examination of the nature of the employment.[66] In *Foraker,* the Third Circuit noted the "fact-intensive nature of this inquiry," recognizing that, "[u]nlike the question of whether speech is protected by the First Amendment, the question of whether a particular incident of speech is made within a particular plaintiff's job duties is a mixed question of fact and law."[67]

Before *Garcetti*, the court in a case like *Gorum* would have decided *as a matter of law* that the speech did not touch on matters of public concern; now, the court must decide as a matter of fact, or as a mixed question, whether the speech was uttered pursuant to the professor's job responsibilities.[68] This raises rather than reduces the level of judicial "micromanaging" of the employment relationship and of judicial intrusiveness into the workplace, an area which I examine in more detail next.

---

63. *Foraker*, 501 F.3d at 250 (Pollak, concurring).

64. *Id.* Judge Pollak's statement also undervalues the free speech interest. Since *Connick* eliminated judicial review of speech that is not of public interest, the *Garcetti* rule only concerns speech that is of *actual* (not "arguable") public interest. The speech that *Garcetti* finds unprotected is speech that everyone agrees is important for the public to know precisely because it concerns the operation of government agencies. The free speech interests are discussed further below.

65. *Id.* (emphasis added).

66. *See* Marable v. Nitchman, 511 F.3d 924, 932 (9th Cir. 2007) (describing the "the inquiry into whether employee speech is pursuant to employment duties" as "a practical one"). The court found neither the employee's job description nor the training manual to be dispositive. The court stated as follows:

> Functionally, however, it cannot be disputed that [plaintiff's] job was to do the tasks of a Chief Engineer on his ferry, and such tasks did not include pointing to corrupt actions of higher level officials whom he purportedly thought were abusing the public trust and converting public funds to their own use by overpayment schemes.

Id.

67. *Foraker*, 501 F.3d at 240. *See also* Houlihan v. Sussex Tech. Sch. Dist., 461 F. Supp. 2d 252, 259-60 (D. Del. 2006); Kougher v. Burd, 2008 U.S. App. LEXIS 8296, at *8 (3d Cir. Apr. 16, 2008); Hill v. Borough of Kutztown, 455 F.3d 225, 241 (3d Cir. 2006) ("To state a First Amendment retaliation claim, a public employee plaintiff such as Miller must allege: (1) that the activity in question is protected by the First Amendment, and (2) that the protected activity was a substantial factor in the alleged retaliatory action…. The first factor is a question of law; the second factor is a question of fact.").

68. *See also* Reilly v. Atlantic City, 532 F.3d 216, 227-28 (3d Cir. 2008) (remanding the case for "further factual development by the District Court" where the lower court had entered judgment in plaintiff's favor prior to *Garcetti*, but where there had been "no argument, let alone fact finding, by the District Court as to whether Reilly's speech was made pursuant to his official duties").

V. *Garcetti* in the Workplace

The implications of *Garcetti* go beyond the scope of judicial review; the case raises serious concerns for the effective operation of government workplaces as well. As the Court noted, "[e]mployees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection."[69] But this encourages employees to speak out publicly about concerns they have about their work before trying to resolve the problem internally. As the dissent pointed out, by disallowing constitutional protection for speech within the employee's official responsibilities, the *Garcetti* rule encourages public employees to complain *outside* of the scope of their employment. For instance, had Richard Ceballos criticized the government's criminal investigation not in an internal memo but in a letter to the editor of the local newspaper, he would have been acting not as an employee but as a citizen, and his speech would have been constitutionally protected.[70] This would have given him "some possibility of First Amendment protection" which would have triggered constitutional balancing under *Pickering*.[71] In any given case, a court may find that the employer's interest in efficiency or effectiveness outweighs the employee's interest in free speech. The employer might still win the case, but the result could not be considered a victory, since most employers would surely want their dirty linen to be aired within the confines the office and not in the press. Moreover, many public employees are forbidden, by the terms of their employment, to speak to the press absent a supervisor's authorization. Thus, they are in a double bind: if they air their concerns in-house, they may be subject to retaliation but if they air their concerns to the press, they have violated their employment contract and are likewise subject to disciplinary action. And employees who speak out both publicly and privately are nonetheless subject to retaliation for their internal speech within the scope of their responsibilities.

Speaking out only publicly is not only problematic from the employer's perspective, but it is also contrary to practice. One scholar of whistleblowing has noted that:

> [I]nternal reporting is the most common type of initial whistleblowing. Benefits of internal whistleblowing include facilitating the prompt investigation and correction of wrongful conduct and minimizing the organizational costs of whistleblowing by permitting employers to rectify misconduct confidentially, with little disruption to the employer-employee relationship. Internal whistleblowing also enables the correction of misunderstanding, which reduces the likelihood that the organization and its employees will unfairly suffer harm.[72]

---

69. *Garcetti*, 547 U.S. at 423.

70. In *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006), the Ninth Circuit considered a warden's communications to outsiders about a prison's failure to discipline inmates for certain behaviors. It held that communications with a California state senator and the California Inspector General were clearly protected under the First Amendment because plaintiff had acted as a citizen in complaining to an elected public official and an independent state agency on these matters of public concern. *Id*. at 545-46. However, the court also held that internal reports on the same subject "were not constitutionally protected." *Id.* at 546. *See also* Charles v. Grief, 2008 U.S. App. LEXIS 6275, at *13-14 (5th Cir. Mar. 26, 2008) (discussed at note 34).

71. The employee may try to protect him- or herself by speaking out anonymously, but this may not provide effective protection, given the sporadic coverage of shield laws and the press's ability to reveal sources notwithstanding a contract. Cohen v. Cowles Media Co., 501 U.S. 663 (1991). *See* Note, Sonya Bice, *Tough Talk from the Supreme Court on Free Speech: The Illusory Per Se Rule in* Garcetti *as Further Evidence of Connick's Unworkable Employee/Citizen Speech Partition*, 8 J.L. Soc'y 45 (2007).

72. Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 Mich. L. Rev. 1757, 1760 (2007) (noting that although most "state and federal statutes designate only an external recipient," Section 806 of Sarbanes-Oxley "is unusual in specifying internal whistleblowing as an appropriate channel," thereby following "common whistleblower practice" (referring to Sarbanes-Oxley Act of 2002 § 806(a), 18 U.S.C. § 1514A(1) (Supp. II 2002)).

The cases demonstrate that for most employees, speaking out publicly against their employer is only a last resort.

Even limiting the speech to within the office produces what might be a counter-intuitive result: an employee's speech is more likely to be protected if it falls outside of her responsibilities than within her responsibilities. Thus, an employee who complains about unsafe working conditions risks her job if her job includes safety responsibilities, but might be constitutionally protected if her job included no responsibility for safety either because she was not in a managerial position or because safety was not within her area of expertise.[73] This is particularly problematic for employees like ombudsmen and compliance officers, whose very job it is to rout out wrongdoing and internal violations wherever they may find them.[74] If they raise problems to their supervisor as they are required to do, they may be subject to retaliation; but if they don't, they may be disciplined for not doing their job. In addition, as one commentator has pointed out, this may be a special problem for national security employees, whose employers could reasonably argue that "the overall national security interest of the agency makes protecting that interest an official duty of the employee."[75] But it is equally true of most other employees who could reasonably be expected to report safety violations, misconduct by fellow employees or other important issues relating to their job. The "special knowledge and expertise" test adopted by the Third and Fifth Circuits may cast a wide net indeed.

The *Garcetti* Court's response is simply that "[a] public employer that wishes to encourage its employees to voice concerns privately retains the option of instituting internal policies and procedures that are receptive to employee criticism."[76] Thus, whether speech of public concern is protected becomes a matter of government employer grace. The Court cautions that the employer may not draw the employee's job description so broadly that it includes all forms of speech; courts should engage in a meaningful evaluation to determine the realistic contours of the employee's official duties.[77] But as we have seen, many courts have drawn the employee's job description more broadly than employers themselves.

VI. *Garcetti* in the Marketplace of Ideas

As a matter of public policy, the *Garcetti* rule may be problematic in one additional, though immeasurable, way. It has the potential to diminish the quantum of speech about issues of public concern that finds its way to the "marketplace" of ideas.[78] From a constitutional standpoint, the most significant concern about *Garcetti* is how the Court treated speech

73. *See, e.g.,* Lindsey v. City of Orrick, 491 F.3d 892, 898 (8th Cir. 2007) (finding a city's public works director's speech about compliance with sunshine laws to be protected because it was not within his job responsibilities) (discussed at note 28).

74. *See* Wilburn v. Robinson, 468 F.3d 1140, 1151 (D.C. Cir. 2007) ("Wilburn's statements regarding discrimination … [are unprotected under *Garcetti*] because they were made by [a public employee] expressly charged with exposing governmental misconduct. Indeed, Wilburn was hired not only to direct personnel matters in OHR but also to root out discrimination in the District government and, thus, when Wilburn commented on racial discrimination in the performance of her duties, she did not speak as a citizen.").

75. Jaime Sasser, Comment: *The Silenced Citizens: the Post-*Garcetti *Landscape for Public Sector Employees Working in National Security*, 41 U. Rich. L. Rev. 759, 760 (2007). "As a result, national security employees cannot speak about even ordinary official duties, such as filling out forms, reporting budgeting mistakes, or any other matter that the government can tie to a national security interest, regardless of whether the employee speech is related to an official job duty." *Id.*

76. *Garcetti,* 547 U.S. at 424.

77. *Id.* at 424-25.

78. *See* Abrams v. U.S., 250 U.S. 616, 630 (1919) (Holmes, J. dissenting).

that is of dual nature: it is both part of the job *and of public concern* (as the speech admittedly was in *Garcetti* itself). The Court might have said that speech that is of public concern has such obvious First Amendment value that it should be protected even if it was uttered pursuant to official duties.[79] Or, it might have said that a *per se* rule is inappropriate in this situation and that courts will have to consider in each case how valuable the speech is from a First Amendment standpoint in order to determine whether speech-based discipline was permissible.[80] Instead, it held that the First Amendment value of such speech is nil because the employer's interest in control over the employee *invariably* trumps both the employee's interest in speaking out and the public's interest in receiving the information of admitted public concern. The recent Third Circuit case of *Kline v. Valentic*[81] illustrates the problem. Where a police officer complained about misconduct by another, the Court of Appeals said that "as a general matter, police misconduct constitutes a matter of public concern."[82] However, the speech lost its constitutionally protected character because Kline complained up the chain of command and not in any public forum and because "his actions in no way indicated that he wanted the public to know" about the misconduct.[83] The narrowing of the scope of constitutionally protected speech in *Garcetti* is consistent with other cases in which the Rehnquist and Roberts Courts have sided with management interests over employee claims,[84] as well as with recent First Amendment cases in which the Supreme Court has expanded the scope of governmental authority to restrict speech when the government is acting in non-regulatory roles such as manager,[85] educator,[86] and proprietor.[87]

---

79. This would have been consistent with the cases *Pickering* and *Connick*, which distinguished between speech of public importance and private speech, but which did not distinguish between speech made pursuant to official duties or not.

80. It is true that either of these alternatives would have involved federal courts in many employment disputes, but there are several important rejoinders to this. The first is that ensuring that individuals' constitutional rights are protected is one of the most important functions of federal courts. To say that this would encroach on federalism and separation of powers values is to devalue the countervailing interests in individual constitutional rights. The second rejoinder is that, as a practical matter, the Court's rule has not diminished federal court litigation over employment disputes, but shifted it. As described above, instead of deciding the legal question of whether the speech was protected, courts are now busy with the threshold question of whether the speech was within the employee's official duties — an inquiry which is time-consuming and fact-specific and perhaps much more intrusive into the employer-employee relationship than the constitutional question of the status of the speech. *See* Note, Sonya Bice, *Tough Talk from the Supreme Court on Free Speech: The Illusory Per Se Rule in* Garcetti *as Further Evidence of* Connick's *Unworkable Employee/Citizen Speech Partition*, 8 J.L. Soc'y 45 (2007) on the litigation over the boundaries of the "*per se*" rule of *Garcetti*.

81. 283 Fed. Appx. 913 (3d Cir. 2008).

82. *Id.* at 916.

83. *Id.*

84. Ledbetter v. Goodyear Tire & Rubber Co., 550 U.S. 618 (2007); Engquist v. Or. Dep't of Agric., 128 S. Ct. 2146, 2157 (2008).

85. United States v. American Library Association, 539 U.S. 194 (2003).

86. Morse v. Frederick, 551 U.S. 393 (2007).

87. Int'l Society for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992); Rust v. Sullivan, 500 U.S. 173 (1991). *See* Andrew Bernie, *Recent Development: a Principled Limitation on Judicial Interference:* Garcetti v. Ceballos*,* 126 S. Ct. 1951 (2006), 30 Harv. J.L. & Pub. Pol'y 1047, 1056 (2007) ("The Court seemed animated by similar principles in *Rust v. Sullivan,* where it held that Congress could constitutionally withhold government funds from recipients who counseled abortion as a method of family planning.... *Rust's* relevance, which *Garcetti* reaffirmed in only a slightly different context, is that the public has the right to expect its government to work toward ends that have been 'democratically agreed upon.'").

But in none of these other areas has the Court decided that an entire category of speech that concerns matters of public importance, such as the functioning of governmental agencies, lies outside of First Amendment protection. As one commentator has noted, when the Court engages in such "categorical balancing" (that is – deciding whether a whole category of speech is protected or not), it has almost invariably decided that the category of speech *was* protected, with the sole exception of child pornography — which has, of course, no public importance.[88]

The diminution of speech about issues of public concern is problematic from two perspectives. For the speaker, who would otherwise be motivated to speak, the *Garcetti* rule may force an employee to choose between her conscience and her job. For the public, the *Garcetti* rule may result in a marked diminution of information about how our government is run, if those who are most likely to have "special knowledge and experience" are less likely to speak out, whether it is about mis-statements in an affidavit supporting a warrant, or cost overruns or corruption at government agencies, misconduct in a high school, or safety at a firing range. If, as the Supreme Court told us in 1964, there continues to be a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,"[89] the hidden costs of the *Garcetti* rule may be significant.[90]

The Court's response to this charge was that "the powerful network of legislative enactments — such as whistleblower protection laws and labor codes" along with the "rules of conduct and constitutional obligations apart from the First Amendment" that govern public attorneys, as well as "obligations arising from any other applicable constitutional provisions and mandates of the criminal and civil laws," protect government employees from speech-based retaliation even in the absence of First Amendment protection.[91] But this may overstate the level of protection that exists for public employees. The principal sources of protection — whistleblower statutes — are sporadic and limited in scope.[92] Indeed, in partial response to *Garcetti*, the Senate passed a bill designed to overturn some of its effects, although it has not so far become law.[93] In any event, the possibility of legislative protection should not detract from the mandate of constitutional protection.

---

88. "The recent trend in the Court, with the unique exception of child pornography, has been to use categorical balancing to expand First Amendment-protected speech." Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of* Garcetti v. Ceballos, 42 U. Rich. L. Rev. 561, 570 (2008).

89. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

90. *See* Marable v. Nitchman, 511 F.3d 924, 932 (9th Cir. 2007) (finding protected the speech of an engineer for the Washington State Ferries concerning alleged corrupt practices by management). The court stated as follows:

> At the outset, we think it worth noting that an employee's charge of high level corruption in a government agency has all of the hallmarks that we normally associate with constitutionally protected speech. The matter challenged was a matter of intense public interest, had it become known, and criticisms of the government lie at or near the core of what the First Amendment aims to protect.

Id.

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

92. Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 Mich. L. Rev. 1757, 1767 n.66 (2007).

93. "Senate bill 494 was passed as an amendment to the 2007 National Defense Authorization Act, 96-0 on June 22, 2006. The Senate bill was passed to overturn the Supreme Court decision of *Garcetti v. Ceballos*." Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 Mich. L. Rev. 1757, 1767 n.66 (2007).

Ultimately, there is no real way to measure *Garcetti's* effect on speech. The cases considered here tend to protect the employer who seeks to control the workplace environment at the expense of speech that concerns matters of public importance. However, these cases may understate the important speech that is lost under the new rule, since this review obviously does not take into account the cases that did not arise because the speech criticizing government policies or activities was not said.