

EMPLOYMENT & LABOR QUARTERLY NEWSLETTER

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BOARD MEETINGS

The Board meets the first Wednesday of each month. Section members are welcome at all meetings.

SECTION'S 2006 ANNUAL REPORT

Find out what the Employment and Labor Law Section did last year and plans for 2007.

NOTICES

REQUEST FOR VOLUNTEERS TO ASSIST IN DRAFTING EMPLOYMENT JURY INSTRUCTIONS

The Civil Uniform Jury Instruction Committee is planning to draft a set of much needed employment jury instructions as one of its projects for 2007. The Committee anticipates setting up a subcommittee within the next two months to work on this project and they encourage members of the Labor and Employment Section to be involved in the drafting process. If you are interested in participating, please e-mail the Committee Chair, Chuck Peifer at cpeifer@peiferlaw.com or Judge Linda Vanzi at albdlmv@nmcourts.com.

REQUEST FOR VOLUNTEERS TO ASSIST IN DRAFTING MODEL LEAVE POLICIES

The Committee on Women in the Legal Profession is seeking volunteers to assist in drafting prototypes of family leave policies. Anyone interested should contact Suzanne C. Odom at White, Koch, Kelly & McCarthy, P.C., at 982-4374.

GARCETTI V. CEBALLOS: THE SUPREME COURT DECISION AND SUBSEQUENT TREATMENT BY THE CIRCUIT AND DISTRICT COURTS

By Vanessa Chavez - Law Clerk, Robles, Rael & Anaya, P.C.

Discussion of how courts are applying the Supreme Court's May 2006 decision in Garcetti that the First Amendment does not protect a government employee from discipline based on speech made pursuant to the employee's official duties.

EMPLOYMENT LAW UPDATE

By Carlos Quinones, Esq. - Narvaez Law Firm, P.A.
&

S. Charles Archuleta - Keleher & McLeod, P.A.

Summary of Supreme Court, Tenth Circuit and New Mexico federal and state employment law decisions in 2006.

2006 ANNUAL REPORT

Division/Section/Committee Title: Employment and Labor Law Section

Date: December 15, 2006

Chair/Co-Chairs: Carlos M. Quiñones

Activities Undertaken Since Last Report:

Co-sponsored/presented the following continuing legal education programs:

- a. Genetic Testing and Employment Discrimination – May 19, 2006
- b. Background Investigations: Discriminatory Hiring vs. Negligent Hiring – State Bar Convention – July 21, 2006
- c. Annual Employment and Labor Law Update – October 13, 2006

Published four issues of “Employment and Labor Law Quarterly News,” our Section’s quarterly electronic newsletter. Our last issue for current calendar year will be released late December 2006.

Chair attendance at annual Tulane University Multi-State Labor and Employment Law Seminar in Orlando, Florida – June 7-10, 2006

Per Section bylaw amendment in 2005, solicited non-attorneys to become non-voting members of the Section. Objective was to encourage collaboration between attorneys and non-attorneys (i.e., human resource professionals, administrative agency investigators) in the labor and employment law areas.

Ongoing Activities:

Continuing Legal Education seminars (co-sponsoring a CLE in March 2007).

Quarterly electronic newsletter “Employment and Labor Law Quarterly News.”

Annual donation to University of New Mexico School of Law in form of “Richard Gonzales scholarship” to a student interested in employment and labor law.

Chair attendance at annual Multi-State Labor and Employment Law Seminar in Virginia in 2007.

Issues Requiring Board of Bar Commissioner Action:

None.

Garcetti v. Ceballos:
The Supreme Court Decision and
Subsequent Treatment by the Circuit and District Courts

Vanessa Chavez¹

In Garcetti v. Ceballos the Supreme Court held that the First Amendment does not protect a government employee from discipline based on speech made pursuant to the employee's official duties.² However, the decision merely enumerated the limitations of the then-existent First Amendment protections for public employees in several circuits. Despite this, various courts have utilized Garcetti in limiting First Amendment protection in a number of instances.

Garcetti v. Ceballos

The Court in Garcetti held that speech contained in an internal memo from an attorney to his supervisors was not protected by the First Amendment. Richard Ceballos was a deputy district attorney for the Los Angeles County District Attorney's Office.³ After a defense attorney contacted him regarding inaccuracies in an affidavit used to obtain a search warrant in a pending criminal case, Ceballos conducted an investigation and determined that the affidavit contained serious misrepresentations.⁴ He relayed this information to his supervisors and prepared a disposition memorandum that explained his concerns and recommended dismissal of the case.⁵ From this, a meeting was held to discuss the matter. The meeting allegedly became heated.⁶ Thereafter, Ceballos' supervisor decided to prosecute the case and Ceballos was called by the defense to recount his observations regarding the affidavit.⁷ Ceballos was subsequently reassigned to a different position, transferred to a different courthouse, and denied a promotion.⁸ Ceballos claimed the Los Angeles County District Attorney's Office violated his First and Fourteenth Amendment rights by retaliating against him based on the memo he wrote on March 2, 2000.⁹ However, the Court held that the memo was not protected speech under the First Amendment because it was written pursuant to his official duties.¹⁰

The Court indicated that the determinative factor in such cases is whether the speech owes its existence to the public employee's professional responsibilities, because professional limitations do not infringe upon any liberties enjoyed by that same individual in his capacity as a private citizen.¹¹ Consequently, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes."¹² In Garcetti,

¹ Vanessa Chavez is a second year law student at the University of New Mexico School of Law. Ms. Chavez is also a law clerk for the Albuquerque law firm of Robles, Rael & Anaya, P.C.

² Garcetti v. Ceballos, 126 S.Ct. 1951, 1960 (2006).

³ Id. at 1955.

⁴ Id.

⁵ Id. at 1955-1956.

⁶ Id. at 1956.

⁷ Id.

⁸ Id.

⁹ Id.

¹⁰ Id. at 1960.

¹¹ Id.

¹² Id.

“Ceballos wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do.”¹³ “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.”¹⁴ Civil protection does not give employees the right to “perform their jobs however they see fit.”¹⁵

Despite the limitations imposed on speech made pursuant to an employee’s job duties, the Court recognized public employees’ interests in retaining First Amendment protection over their private speech. The Court specifically rejected the suggestion that “employers can restrict employees’ rights by creating excessively broad job descriptions.”¹⁶ Instead, “the listing of a given task in an employee’s written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee’s professional duties for First Amendment purposes.”¹⁷ However, the Court did not decide whether its ruling was applicable to speech made pursuant to scholarship or teaching.¹⁸

As such, Garcetti adds to the present analysis used in First Amendment retaliation cases. Before Garcetti, constitutional protection of an employee’s speech was governed by the Pickering line of analysis, particularly, Pickering v. Bd. of Ed., 391 U.S. 563 (1968) and Connick v. Myers, 461 U.S. 138 (1983).¹⁹ Under that analysis, protection was afforded to all speech made by citizens on matters of public concern, dependent upon “whether the government employer had an adequate justification for treating the employee differently from any other member of the general public.”²⁰ This meant that the Court first looked at whether the person was speaking as a private individual on issues of concern to other citizens or on matters of personal interest, and then, the employer’s need to limit the employee’s speech. Additionally, each Circuit had followed the Pickering line of analysis, or applied an analysis substantially similar to it.²¹

¹³ Id.

¹⁴ Id.

¹⁵ Id.

¹⁶ Id. at 1961.

¹⁷ Id. at 1962.

¹⁸ Id.

¹⁹ Id. at 1958.

²⁰ Id.

²¹ See Jordan v. Carter, 428 F.3d 67, 72 (1st Cir. 2005) (inquiry includes whether speech involves a matter of public concern, whether interests of plaintiff and the public outweigh the government’s interests in functioning efficiently, and whether the protected speech was a motivating factor in the adverse action); Locurto v. Giuliani, 447 F.3d 159, 172 (2nd Cir. 2006) (inquiry used in a claim of retaliation asks whether employee spoke as a citizen upon matters of public interest and then balances the employee’s interest with the State’s interest as an employer); Springer v. Henry, 435 F.3d 268, 275 (3rd Cir. 2006) (plaintiff must demonstrate that she was engaged in protected speech, i.e., speech that addresses a matter of public concern, and then balance the employee’s and the employer’s interest); Ridpath v. Bd of Governors Marshall Univ., 447 F.3d 292, 316 (4th Cir. 2006) (employee must have spoken as a citizen on a matter of public concern, employee’s interest must outweigh employer’s interest, and a causal nexus must have existed between the protected speech and retaliatory action); Salge v. Edna Indep. Sch. Dist., 411 F.3d 178, 184 (5th Cir. 2005) (employee must establish he suffered an adverse employment action, speech involved matter of public concern, his interest outweighed the employer’s interest, and his speech motivated the adverse action); Miller v. Admin. Office of Courts, 448 F.3d 887, 894 (6th Cir. 2006) (employee must show speech was constitutionally protected, she was subjected to adverse action, and speech was a motivating factor in the adverse action); Miller v. Jones, 444 F.3d 929, 934-935 (7th Cir. 2006) (plaintiff must show statement was constitutionally

Prior to the Garcetti decision, Supreme Court precedent made no explicit distinction regarding the capacity of the employee in speaking. However, as the Court observed in Garcetti, “[u]nderlying [the preceding] cases has been the premise that while the First Amendment invests public employees with certain rights, it does not empower them to ‘constitutionalize the employee grievance.’”²² In fact, proper application of the pre-Garcetti precedent invariably suggests that an employee does not speak as a citizen when the speech arises within the employee’s duties because an employer retains managerial and disciplinary authority over improper employee conduct. While the Garcetti decision enumerates this distinction, it is limited to cases involving *public employees* speaking in their official capacity.²³ Essentially, the Court concluded that when public employees speak as public employees, their speech is subject to disciplinary action.

Even before the Garcetti decision, several circuits had recognized a distinction between employees speaking as employees and employees speaking as citizens. The Tenth Circuit concluded that “[o]rdinarily, for an employee’s *work-related speech* to be on a matter of public concern, the speech must be uttered with an eye to action, to improve the public welfare, not just to remedy a personal grievance.”²⁴ The Eighth Circuit also focused on the citizen distinction, stating “[t]he repeated emphasis in Pickering on the right of a public employee ‘as a citizen...’ was not accidental. This language, reiterated in all of Pickering’s progeny, reflects...the common-sense realization that government offices could not function if every employment decision became a constitutional matter.”²⁵ More importantly, in Ridpath v. Bd. of Governors Marshall Univ., the Fourth Circuit stated, “the public employee must have spoken as a citizen, not as an employee, on a matter of public concern.”²⁶ Furthermore, in Black v. Columbus Pub. Sch., the Sixth Circuit recently held that Garcetti does not affect the Circuit’s existing law since the appellate court had already established that actions concerning an employee’s duties were matters of internal department policy, not matters of public concern.²⁷ Although adding a new component to the First Amendment retaliation analysis, Garcetti essentially clarifies the citizen versus employee distinction already present in a number of circuits.

As such, First Amendment protection is still based on the Pickering and Connick analysis, with the added ‘scope of duties’ requirement. Although different courts have examined the Garcetti prong at various points in the analysis, most courts have first applied Garcetti before proceeding

protected, was a motivating factor for action, and employee’s interest outweighed employer’s); Bradford v. Huckabee, 394 F.3d 1012, 1015-1016 (8th Cir. 2005) (resignation did not violate First Amendment since employee was not being punished for exercising his right, as a citizen, in commenting upon matters of public concern); Pinard v. Clatskanie Sch. Dist., 446 F.3d 964, 974 (9th Cir. 2006) (Pickering requires balancing employer’s interest with employee’s interest in commenting upon matters of public concern); Maldonado v. City of Altus, 433 F.3d 1294, 1309-1310 (10th Cir. 2006) (employee’s speech must be on a matter of public concern, a motivating factor in detrimental employment decision, and balanced with employee’s interest); Cook v. Gwinnett County Sch. Dist., 414 F.3d 1313, 1318 (11th Cir. 2005) (“we apply the...analysis set forth in Pickering).

²² Garcetti, 126 S.Ct. at 1959.

²³ Id. at 1960 (emphasis added).

²⁴ Maldonado, 433 F.3d at 1309 (emphasis added).

²⁵ Bradford, 394 F.3d at 1016.

²⁶ Ridpath, 447 F.3d at 316.

²⁷ Black v. Columbus Pub. Sch., No. 2:96-cv-326, 2006 WL 2385359, at *4 (S.D. Ohio Aug. 17, 2006).

to the other elements of the First Amendment inquiry.²⁸ Therefore, proper analysis first asks whether the speech was made pursuant to the employee's duties, then proceeds to whether it was made as a citizen on a matter of public concern, followed by the balancing of the employer's interest in regulating employee speech.

Garcetti applied

After the Garcetti decision was handed down on May 30, 2006, various circuit and district courts quickly began to define the scope and impact of the ruling.²⁹ Several cases have emerged that use the decision to support unrelated issues³⁰ and numerous cases simply mention Garcetti in defining a different aspect of the First Amendment retaliation analysis.³¹ However, in the months since the decision, several courts have taken a more in-depth look at the implications of Garcetti.

To begin with, treatment of the Garcetti decision has varied across jurisdictions. Although most courts accept Garcetti's general application, in two separate decisions within the Northern District of Ohio, the district court narrowly interpreted Garcetti, holding that the "preliminary analysis is one of 'job relatedness'" rather than whether the employee is acting within the scope of employment.³² This means that an employee acting within the scope of employment will not necessarily be precluded from First Amendment protection of their speech. In Pittman v. Cuyahoga Valley Career Ctr., the district court emphasized that "[i]f the public employee's speech was required by his or her job, then Garcetti applies and the statements are not protected speech. If the speech, however, is not specifically job-related, then the statements are reviewed under a traditional Connick analysis."³³ The Middle District of Pennsylvania has taken a different approach in limiting Garcetti's reach. In Skrutski v. Marut, the district court focused on

²⁸ See Logan v. Indiana Dep't. of Corr., No. 1:04-cv-0797-SEB-JPG, 2006 WL 1750583, at *1 (S.D.Ind. June 26, 2006); Mills v. City of Evansville, No. 05-3207, 2006 WL 1679408, at *2 (C.A.7 June 20, 2006); Wilcoxon v. Red Clay Consol. Sch. Dist. Bd. of Educ., No. CIV.05-524 SLR, 2006 WL 1793546, at *5 (D. Del. June 30, 2006).

²⁹ See Mills v. City of Evansville, No. 05-3207, 2006 WL 1679408, at *2 (7th Cir. June 20, 2006) (Sergeant who was on duty, in uniform, and engaged in discussion with her superiors, all of whom had just come from a briefing, spoke in her official capacity as a public employee contributing to the formation and execution of official policy).

³⁰ See Maxwell v. Kerr-McGee Chem. Worldwide, LLC, No. 04-cv-01224-PSF-CBS, 2006 WL 1660538, at *7 (D. Colo June 9, 2006) (using the employee/citizen distinction to establish elements of original source in qui tam action); Donnell v. City of Cedar Rapids, No. 05-CV-49-LRR, 2006 WL 1562429, at *20-22 (N.D. Iowa June 1, 2006) (speech suppressed in the course of job duties does not amount to a custom or policy sufficient to establish municipal liability); Kingsley v. City of Oklahoma City, No. CIV-05-341-C, 0006 WL 2583762 (W.D. Okla. Sept. 7, 2006) (in order to claim that speech regarded a matter of public concern, the complaint must allege that the speech involved more than a personal grievance).

³¹ See Leonard v. Lipsey, No. 3:04CV7632, 2006 WL 1644334, at *4 (N.D. Ohio June 8, 2006) (assuming employee spoke as a citizen in order to address balancing of employer's interest against employee's interest); Montle v. Westwood Heights Sch. Dist., No. 05-10137-BC, 2006 WL 1663304, at *3 (E.D.Mich. June 15, 2006) (although employee spoke as citizen in wearing t-shirt, employer's interest in promoting efficiency outweighed employee's interest); Taylor v. Hall, No. 2:02 cv 240, 2006 WL 1793603, at *5 (N.D.Ind. June 28, 2006) (quoting Garcetti regarding whether a matter qualifies as a 'public concern'); Brewster v. City of Poughkeepsie, No. 04 CIV. 4204(CM), 2006 WL 1676143, at *2 (S.D.N.Y. May 8, 2006) (when no protection exists for an employee, no protection exists for the employee's spouse).

³² Pittman v. Cuyahoga Valley Career Ctr., 451 F.Supp.2d 905, 929 (N.D. Ohio 2006); Zerman v. City of Strongsville, No. 1:04CV2493, 2006 WL 2812173, at *11 n.9 (N.D. Ohio Sept. 28, 2006).

³³ Pittman, 451 F.Supp.2d at 929 (italics in the original).

Garcetti's requirement that "there is no relevant analogue to speech by citizens who are not government employees," stating that "no relevant analogue" exists when a private citizen *cannot* engage in similar speech.³⁴ In Skrutski, an officer who witnessed improper conduct was asked to falsify a report.³⁵ However, the Court concluded that a relevant analogue existed between the speech in question and the speech of a private citizen because a citizen could have similarly witnessed the conduct and could have also been asked to falsify a statement.³⁶ Finally, the Western District of Virginia determined that "although this court focuses on the capacity of the speaker in relation to the speech, it does so in order to answer two interrelated questions which ultimately determine whether the matter is one of public concern: did the dispute implicate the public interest in receiving the well-informed views of government employees engaged in civic discussion, and did the defendants' actions suppress the rights of public employees to participate in public affairs."³⁷

Furthermore, although Garcetti specifically applies to public employees, whether unconventional employees may fall within this definition has left room for interpretation. Beyond the traditional governmental employee, the district courts have concluded that Garcetti applies to both independent governmental contractors and private employees who have responsibilities owed to a public client.³⁸ In Duran v. City of Corpus Christi, "the Court [found] that the rule in Garcetti was equally applicable to independent contractors" since both the Fifth Circuit and the Supreme Court had recognized the similarities of independent government contractors to government employees.³⁹ Similarly, the court in Logan v. Ind. Dep't of Corr. was "confronted with a hybrid situation, involving a private employee suing her private employer based on the claim that her supervisor conspired with the State of Indiana and its agents to violate her First Amendment rights. Logan's broad responsibilities included those owed not only to her private employer, but also those required of her by her employer's client, the Indiana Department of Corrections."⁴⁰ As such, the court held that Logan's speech was not protected because it arose out of the performance of her employment responsibilities.⁴¹

More importantly, the court will also look at the employee expectations in determining whether the speech fell within the employee's job duties. "[T]he scope of an employee's official duties are defined by actions and expectations of the employer and/or supervisors, of others who have held the employee's position, and of the employee himself."⁴² In Bailey, the employee claimed protection over a letter he wrote to his employer expressing his concerns.⁴³ However, as the court pointed out, the letter included a statement that "[he] considered any time [spent] addressing this matter...to be services [he was] giving the state as a consultant."⁴⁴ Therefore, it

³⁴ Skrutski v. Marut, No. 3:CV-03-2280, 2006 WL 2660691, at *9-10 (M.D.Pa. Sept. 15, 2006) (emphasis added).

³⁵ Id. at *10.

³⁶ Id.

³⁷ Nolan v. Terry, No. Civ.A. 7:04CV00731, 2006 WL 2620002, at *5 (W.D.Va. Sept. 13, 2006).

³⁸ See Duran v. City of Corpus Christi, No. C-04-500, 2006 WL 1900636, at *4 (S.D.Tex. July 11, 2006); Logan v. Ind. Dep't of Corr., No. 1:04-cv-0797-SEB-JPG, 2006 WL 1750583, at *1 (S.D.Ind. June 26, 2006).

³⁹ Duran, 2006 WL 1900636, at *4 n.2.

⁴⁰ Logan, 2006 WL 1750583, at *1.

⁴¹ Id. at *2.

⁴² Price v. MacLeish, No. 04-956(GMS), 2006 WL 2346430 (D.Del. Aug. 14, 2006).

⁴³ Bailey v. Dep't of Elementary & Secondary Educ., No. 05-2448, 2006 WL 1716151, at *5 (8th Cir. June 23, 2006).

⁴⁴ Id.

was evident that the letter was written not by a concerned citizen, but by an “employee concerned with being paid for his time.”⁴⁵

In making these determinations courts defer to ascertainable evidence of job duties and motive, when available. In Bailey, to help determine if the employee was speaking as a citizen, the court looked at the employee’s motive in speaking.⁴⁶ There, the court held that although the subject matter was potentially of public interest, the manner in which it came about emphasized that any public concerns were secondary to the employee grievance.⁴⁷ Similarly, in Boykin v. City of Baton Rouge/Parish of E. Baton Rouge, the district court held that speech arose pursuant to the plaintiff’s job duties because the subject matter was within the scope of employment, even if the manner in which the speech arose was not.⁴⁸ More importantly, as the District of Connecticut stated, although “one can perform one’s official duties inadequately or in an insubordinate manner,” the speech will still be made pursuant to official duties.⁴⁹

This becomes problematic when the speech is in the form of a workplace complaint. As is demonstrated in the various district court cases, whether a complaint is considered part of an employee’s job duties is a case specific determination.⁵⁰ This is best evidenced in Benvenisti v. City of New York, in which the district court analyzed complaints made to an upper-level supervisor, including informing the supervisor that the employee intended to voice his concerns to the city council.⁵¹ Although the threat to report the matter to an external source was considered outside the scope of employment, the court held that the complaints to the supervisor were pursuant to the employee’s official duties.⁵² The court reasoned that the employee’s “complaints to his supervisors involved precisely the sorts of internal office affairs and employment matters that the plaintiff—as a manager and supervisor—had a duty to address.”⁵³ Similarly, in this district, Judge Christina Armijo recently held that “materials or statements [] submitted...as part of [an] internal grievance procedure...are not “protected speech.”⁵⁴ However, in Rohr v. Nehls, the employee “was acting *outside* of his proper employment role when he failed to use proper channels to [file a] complain[t]. [The] complaints, though they involved his employment, were simply not the work product of the sheriff’s department in the same way Ceballos’ memo might have “belonged” to the district attorney’s office in Garcetti.”⁵⁵

Similarly, one of the major concerns regarding Garcetti is the potential for adverse treatment of whistleblowers. While this concern endures, several circuits have tried to reduce the potential

⁴⁵ Id.

⁴⁶ Id. at *4.

⁴⁷ Id.

⁴⁸ Boykin v. City of Baton Rouge/Parish of E. Baton Rouge, 439 F.Supp.2d 605, 609 (M.D.La. 2006).

⁴⁹ Milde v. Hous. Auth., No. 3:00CV2423(AVC), 2006 WL 2583086 (D.Conn. Sept. 05, 2006).

⁵⁰ See Rohr v. Nehls, No. 04-C-477, 2006 WL 2790436, at *4 (E.D. Wis Oct. 11, 2006) (parties agreed that employee’s official duties did not include filing complaints against supervisor); Benvenisti v. City of New York, No. 04 Civ. 3166(JGK), 2006 WL 2777274, at *9 (S.D.N.Y. Sept. 23, 2006) (plaintiff’s weekly complaints to his supervisors were made pursuant to his official duties).

⁵¹ Benvenisti, 2006 WL 2777274, at *3.

⁵² Id. at *8-9.

⁵³ Id. at *9.

⁵⁴ Lindberg v. New Mexico Dep’t of Transp., No. CIV 05-284 MCA/DJS, slip op. at 36 (D.N.M. filed Aug. 1, 2006) [Doc. No. 65].

⁵⁵ Rohr, 2006 WL 2790436, at *7 (italics in the original).

effect Garcetti could have on whistleblower protection laws. In Walters v. County of Maricopa, the court concluded that whistleblowing did not “fall within the scope of employment duties that he “was employed to do.” Any attempt to inflate [the] job description so as to include blowing the whistle on other officers would likely exceed the “practical inquiry” suggested by the Supreme Court.”⁵⁶ Furthermore, even in cases where a supposed duty to report misconduct previously existed, there have been practical limitations on Garcetti’s application. In Batt v. City of Oakland, the court concluded that “an employer’s articulation of a “duty,” without more, does not eliminate any obligation to comply with the First Amendment. Rather, a court must determine whether the employee is “actually expected to perform” the potentially protected act.”⁵⁷ However, evidence of hostility “can support an inference that the [employer] “had the custom of chastising whistleblowers”” rather than an expectation that employees would report misconduct.⁵⁸ The District of Kansas has gone even further, holding that “the Supreme Court in Garcetti was concerned with speech that occurs in the course of an employee’s official *employment* duties, not within the scope of other legal obligations.”⁵⁹ However, the Eleventh Circuit has concluded that a governmental agency requirement to report misconduct that is imposed upon employees does create a job duty susceptible to Garcetti.⁶⁰

Garcetti is not without limitations. Since there was “no dispute that Ceballos’ wrote his disposition memo pursuant to his employment duties,” the Court did not have “occasion to articulate a comprehensive framework for defining the scope of an employee’s duties in cases where there is room for serious debate.”⁶¹ Yet, as emphasized in Ryan v. Shawnee Mission Unified Sch. Dist., this “caveat” will not avoid an adverse decision when it is “sufficiently clear from the record that there is no ‘room for serious debate’” about whether the statements were made pursuant to employment duties.⁶²

⁵⁶ Walters v. County of Maricopa, No. CV 04-1920-PHX-NVW, 2006 WL 2456173, at *14 (D.Ariz. Aug. 22, 2006).

⁵⁷ Batt v. City of Oakland, No. C 02-04975 MHP, 2006 WL 1980401, at *4 (N.D.Cal. July 13, 2006).

⁵⁸ Id. at *4-5.

⁵⁹ Cheek v. City of Edwardsville, No. 06-2210-JWL, 2006 WL 2802209, at *3 (D.Kan. Sept. 29, 2006)(italics in the original).

⁶⁰ Battle v. Bd.of Regents, 468 F.3d 755, 761 (11th Cir. 2006) (not only was there a clear employment duty to ensure the accuracy of files and to report any mismanagement or fraud, but the DOE guidelines required all financial aid workers to report suspected fraud).

⁶¹ Garcetti, 126 S.Ct. at 1961.

⁶² Ryan v. Shawnee Mission Unified Sch. Dist., 437 F.Supp.2d 1233, 1248 (D.Kan. 2006).

2006 EMPLOYMENT LAW UPDATE
Recent Decisions on employment law issues

Carlos M. Quiñones¹
Narvaez Law Firm, P.A.

S. Charles Archuleta²
Keleher & McLeod, P.A.

U.S. SUPREME COURT CASES

First Amendment retaliation claim under 42.U.S.C. Section 1983

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

- * Deputy district attorney alleged that his supervisors retaliated against him based on a memo he wrote explaining his concerns regarding alleged inaccuracies in an affidavit used to obtain search warrant.
- * Supreme Court held that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the United States Constitution does not insulate their communications from employer discipline. Supervisors can evaluate the performance of their employees, including the speech made as part of the job.
- * Public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern.

Burlington Northern & Santa Fe Railway Co. v. White, 126 S.Ct. 2405 (2006).
(6/22/06)

- * The Court determined that the anti-retaliation provision, 42 U.S.C.S. § 2000e-3(a), unlike the substantive provision, 42 U.S.C.S. §2000e-2(a), was not limited to discriminatory actions that affected the terms and conditions of employment, but could be actions not related to employment and that do not take place at the workplace.
- * The plaintiff must show that a reasonable employee, considering all of the circumstances, would have found the action "materially adverse," meaning that it may deter an employee from making a discrimination charge.
- * Reassignment of duties within the job description was determined to be materially adverse because assigning less desirable duties would discourage an employee from charging discrimination. In addition, a 37-day investigatory suspension without pay was deemed materially adverse. Suspension, even though the

¹ The summaries and views expressed herein are those of the author and not of the Narvaez Law Firm, P.A.

² The summaries and views expressed herein are those of the author and not of Keleher & McLeod, P.A.

employer had reinstated the employee and awarded backpay, is a serious hardship for many employees because of the uncertainty of living without income.

TENTH CIRCUIT COURT OF APPEALS

Title VII and Equal Pay Act

Metzler v. Fed. Home Loan Bank of Topeka, 2006 U.S. App. LEXIS 24268 (10th Cir. 2006)(September 26, 2006)

- * Plaintiff was an employee of Federal Home Loan Bank of Topeka a/k/a FHL Bank of Topeka ("FHLB"). Defendant FHLB terminated plaintiff from her position as a Database and Systems Analyst in November 2002. Plaintiff then filed an action under the Family and Medical Leave Act alleging: (1) interference with her FMLA-created rights in violation of 29 U.S.C. § 2615(a)(1); and (2) retaliation for exercising her rights under the FMLA in violation of 29 U.S.C. § 2615(a)(2).
- * The Tenth Circuit had previously held in *Maldonado v. City of Altus*, 433 F.3d 1294 (10th Cir. 2006) that a prima facie case of retaliation under both Title VII and the FMLA required an "adverse employment action".
- * However, later they noted in *Argo v. Blue Cross & Blue Shield of Kansas, Inc.*, 452 F.3d 1193 (10th Cir. 2006), that the Supreme Court recently rejected their "adverse employment action standard," by holding that a Title VII retaliation claim plaintiff "need only show 'that a reasonable employee would have found the challenged action materially adverse.'" *Id.* at 1202 (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2414-15, 165 L. Ed. 2d 345 (2006)).
- * Subsequently, they extended *Burlington* to ADEA and ADA plaintiffs. *See Haynes v. Level 3 Communs.*, 456 F.3d 1215, 2006 WL 2258836 (10th Cir. 2006) (holding that a Title VII, ADEA, or ADA plaintiff must show: "(1) that he engaged in protected opposition to discrimination, (2) that a reasonable employee would have found the challenged action materially adverse, and (3) that a causal connection existed between the protected activity and the materially adverse action").
- * The Supreme Court's rejection of the Tenth Circuit's "adverse employment action" requirement applies with equal force in the context of an FMLA retaliation case because the FMLA's retaliation clause is derived from Title VII and is thus intended to be construed in the same manner.

Mickelson v. New York Life Ins. Co., 2006 U.S. App. LEXIS 21944 (10th Cir. 2006) (August 28, 2006)

- The employee, a marketing service coordinator, demonstrated in her case that each of the women serving in that grade and title in her office were paid less than the men in a comparable position.
- The Tenth Circuit took the opportunity to explain the differences between the Equal Pay Act and Title VII claims opining that "There are two ways a

plaintiff can proceed on a claim of salary discrimination: on a theory of intentional discrimination on the basis of sex in violation of Title VII, or on a theory of wage discrimination on the basis of sex in violation of the EPA.”

- This is a significant distinction because a plaintiff's burden to prove discrimination varies depending on the statute at issue.
- Under Title VII, the plaintiff always bears the burden of proving that the employer intentionally paid her less than a similarly-situated male employee.
- The EPA, however, has been described as imposing a form of strict liability on employers who pay males more than females for performing the same work--in other words, the plaintiff in an EPA case need not prove that the employer acted with discriminatory intent.”

EEOC v. BCI Coca Cola Bottling Co. of Los Angeles, 450 F.3d 476, 2006 WL 1545501 (10th Cir. 2006). (June 7, 2006)

Summary judgment for employer reversed.

- * “Cat’s paw” is described as a “situation in which a biased subordinate, who lacks decision-making power, uses the formal decisionmaker as a dupe in a deliberate scheme to trigger a discriminatory employment action.”
- * The “rubber stamp” doctrine is used when “a decisionmaker gives perfunctory approval for an adverse employment action explicitly recommended by a biased subordinate.”
- * The “cat’s paw” and “rubber-stamp” theories were accepted by the Tenth Circuit. The Tenth Circuit adopted an intermediate approach which tests the biased subordinate’s actions that caused the adverse employment action.
- * These theories arise in subordinate bias claims and impute racist motive to the employer who does not undertake an independent investigation into the reasons for an employment action but relies solely on the input of another employee, who has racial animus.
- * The court found that summary judgment was inappropriate because there was enough evidence of Defendant’s racial bias and of a casual relationship between supervisor’s actions and Plaintiff’s firing to have a jury decide the case.

Reed v. Mineta, 483 F.3d 1063 (10th Cir. 2006). (February 23, 2006)

- * District court jury returned a verdict for the employee in his religious discrimination action against the FAA.
- * The district court awarded prejudgment interest on the entire amount of his back pay award, starting as of the date of his termination.
- * Appeals court held that prejudgment interest should not have been calculated on entire back pay award from date of termination.
- * In reversing the district court's decision and remanding for a recalculation of prejudgment interest, the court held that the employee's monetary injuries were incrementally inflicted from the date of his termination through entry of judgment as each pay period passed and the employee went unpaid.

- * Although the plaintiff was injured on date of termination, he did not actually suffer his entire monetary injury at the time of termination. Because Plaintiff's monetary injuries were incrementally inflicted as each pay period he went unpaid passed, prejudgment interest should have been calculated accordingly.

Maldonado v. Altus, 433 F.3d 1294 (10th Cir. 2006), *overruled on other grounds*, *Metzler v. Fed. Home Loan Bank of Topeka*, 2006 U.S. App. LEXIS 24268 (10th Cir. 2006). (January 11, 2006)

- * Hispanic city street department employees alleged employer's English only policy violated Title VII and 42 U.S.C. Section 1981 and 1983.
- * District court ruling in favor of employer who implemented English-only policy was reversed by the Tenth Circuit.
- * Tenth Circuit held that a jury could reasonably find that the English-only policy had a disparate impact on Hispanic workers and trial court erred in concluding that employer had established a business necessity for the policy.
- * The policy itself, and not just the effect of the policy in evoking hostility by coworkers, may create or contribute to the hostility of the work environment.
- * The Tenth Circuit found Defendants' evidence of business necessity as "scant." As observed by the district court, "There was no written record of any communication problems, morale problems or safety problems resulting from the use of languages other than English prior to implementation of the policy." (Note: two New Mexico federal court judges on this three judge panel)

Jaramillo v. Colo. Judicial Dep't, 427 F.3d 1303 (10th Cir. 2005). (November 2, 2005).

- * Plaintiff employee, a probation officer, sued defendant employer, a state agency, alleging that defendant subjected her to a disparate treatment on the basis of sex when it passed her over for a promotion in violation of Title VII of the Civil Rights Act of 1964.
- * The district court found that defendant provided a legitimate, nondiscriminatory reason for its decision to promote the successful candidate, namely his superior qualifications, and that plaintiff failed to produce evidence of pretext. Appellate court concurred.
- * Plaintiff conceded that the other candidate was at least as well qualified as she was.
- * Evidence of pre-text may include prior treatment of plaintiff; the employer's policy and practice regarding minority employment (including statistical data); disturbing procedural irregularities (e.g. falsifying or manipulating criteria); and the use of subjective criteria.
- * The courts may not act as super personnel department that second guess employer's business judgments. Accordingly, minor differences between a plaintiff's qualifications and those of a successful applicant are not sufficient to show pretext.

Qualified Immunity

Perez v. Unified Gov't of Wyandotte County, 432 F.3d 1163 (10th Cir. 2005).
(December 27, 2005)

- * Appeals Court reverses denial of firefighter-defendant's motion for summary judgment pursuant to qualified immunity.
- * A bystander hit by an emergency response vehicle in the process of responding to an emergency call could not sustain a claim under the substantive due process clause without alleging intent to harm.
- * Firefighter-defendant was responding to an emergency call and it was not alleged that defendant had intent to harm; therefore, the firefighter should have been granted qualified immunity.

ADEA

Kruchowski v. Weyerhaeuser Co., 446 F.3d 1090 (10th Cir. 2006) (May 2, 2006)

Summary Judgment for Employer reversed.

- * Defendants terminated employees as part of a reduction in force. Each plaintiff signed an identical release of claims in order to obtain a severance package in exchange for his or her waiver of the right to assert an ADEA claim against defendant. Plaintiffs contested the waiver for failing to conform to the requirements of the ADEA, as amended by the Older Workers Benefit Protection Act (OWBPA).
- * The release was found to be invalid because the employer inaccurately identified the "decisional unit" as required by the OWBPA, the release was ineffective as a matter of law, and plaintiffs did not waive their right to pursue claims under the ADEA.

Pippin v. Burlington Resources Oil and Gas Co., 440 F.3d 1186, 2006 WL 337586 (10th Cir.). (February 14, 2006)

- * Employee terminated in RIF filed age discrimination suit against his former employer.
- * Court of Appeals affirmed district court's decision granting summary judgment to employer.
- * The employer was properly granted summary judgment on the employee's disparate treatment claim because he failed to present sufficient evidence to support an inference of pretext in the RIF itself, in his prior work performance evaluations, or the employer's alleged history or pattern of age discrimination.
- * The Tenth Circuit has said that a showing of pretext can look to prior treatment of plaintiff, for example, "the employer's policy and practice regarding minority employment (including statistical data); disturbing procedural irregularities (e.g., falsifying or manipulating criteria); and the use of subjective criteria."

- * However, the Court found that plaintiff had failed to establish evidence supporting a prima facie case of disparate impact applying the Supreme Court's recent decision in, *Smith v. City of Jackson*, 544 U.S. 228 (U.S. 2005).
- * The Tenth Circuit determined that to successfully prove that his former employer intended to discriminate against him because of his age, Plaintiff had to show that he was discharged despite the adequacy of his work.

Whittington v. Nordam Group, Inc., 429 F.3d 986 (10th Cir. 2005). (November 29, 2005)

- * The Tenth Circuit affirmed jury verdict for terminated 62 year old employee who was replaced by a 57 year old employee.
- * Employer defended on the basis that 57 year old was not “substantially younger” than 62 year and therefore there was no evidence of discrimination.
- * Court refused to set a bright line rule defining “substantial” age difference, stating the amount of weight to be given to a five year age difference is analyzed on a case by case basis and was properly left to the jury.

ADA

McWilliams v. Jefferson County, 2006 U.S. App. LEXIS 22656 (10th Cir. 2006) (September 6, 2006).

- * McWilliams worked for the County from September 1995 until October 2002 and suffered from depression. While employed, she received several negative performance evaluations concerning her interaction with others and in October 2002 she was terminated when she couldn't get along with her co-workers.
- * The Tenth Circuit decided that the employee's claim of ADA disability discrimination was correctly dismissed by the district court.
- * According to the Circuit, McWilliams is not disabled under the ADA because, “[a]lthough she attests that her intermittent depressive episodes caused her difficulty in sleeping and getting along with her co-workers, she has not shown how these limitations prevented her from performing her job or that she is unable to perform any of the life activities completely.”

NEW MEXICO FEDERAL DISTRICT COURT

Whitaker v. San Jon Schs, 2006 U.S. Dist. LEXIS 28786 (D.N.M. 2006). (April 19, 2006).

- * Plaintiff filed complaint alleging gender discrimination in violation of Title VII alleging that Defendant treated her differently, in response to an alleged inappropriate interaction with a child, than San Jon treated a similarly situated male employee under the same circumstance.
- * The Court agrees with four other Circuits that paid administrative leave is not adverse employment action because the “terms, conditions, or benefits of a

person's employment do not typically, if ever, include general immunity from the application of basic employment policies" against employees who violate those rules. Plaintiff did not show that there was adverse employment action because she was placed on paid administrative leave.

- * The Tenth Circuit has advised that district courts should compare work histories when determining whether two employees are similarly situated. *See Green v. New Mexico*, 420 F.3d 1189 (10th Cir. 2005). Plaintiff failed to show that she was treated differently than a similarly situated male employee because she had additional instances of inappropriate conduct with a student.

Barber v. Lovelace Sandia Health Sys., 409 F. Supp.2d 1313 (D.N.M. 2005). (December 31, 2005).

- * Medical assistants, employees, both Spanish-speaking females, sued medical clinic, alleging, inter alia, national origin discrimination and retaliation claiming no-Spanish policy violated Title VII.
- * A violation of 29 C.F.R. § 1606.7(a) based on a no-Spanish policy did not automatically constitute disparate treatment under Title VII, but the policy did establish an adverse employment action.
- * Defendant articulated a legitimate, nondiscriminatory reason for the policy, i.e., other employees complained that they felt uncomfortable when employees spoke to each other in Spanish, and one patient complained about overhearing a conversation where derogatory remarks made between co-workers in Spanish about a patient.
- * There is nothing inherently discriminating about English-only policies established for legitimate business reasons.
- * The EEOC has determined that a rule requiring employees to speak only English, when applied at all times, is presumed to violate Title VII and a English-only rule, when applied only sometimes, is permissible if based on business justification.
- * Several courts have found English-only policies as applied to bilingual employees do not, alone, violate Title VII.

NEW MEXICO STATE COURTS

New Mexico Human Rights Act

Deflon v. Sawyers, 2006 NMSC 25, 137 P.3d 577. (April 24, 2006)

- * The claimant originally sued the former employer in federal district court for sex discrimination. The federal district court granted the former employer's motion for summary judgment, and the ruling was affirmed on appeal.
- * The claimant then filed suit against several co-employees in state district court.
- * Finding that the doctrines of res judicata and collateral estoppel barred the claims, the state district court dismissed the claimant's complaint with prejudice, and the appellate court affirmed.
- * The reviewing court held that res judicata did not bar the claims for intentional interference with a contract and civil conspiracy because the employees,

defendants in the state court action, who allegedly acted outside the scope of their authority, were not in privity with the employer, defendant in the federal suit.

- * The current issues between the claimant and the employees had not been litigated.
- * Also, collateral estoppel did not bar the claimant's action because the federal district court did not actually and necessarily decide issues which would bar the present claims.

Aguilera v. Bd. of Education, 2006 NMSC 15, 132 P.3d 587. (March 14, 2006)

- * Teacher could only be discharged for reasons personal to her qualifications and performance, and not for an RIF.
- * The issue was whether statutory “just cause” allowed for discharge of a teacher when exigent fiscal circumstances justified an RIF, but the teacher’s competence, turpitude, and performance did not.
- * Contrary to the Court of Appeals, the New Mexico Supreme Court held that the plain meaning of the “just cause” definition was not appropriate; instead, the court looked to judicial interpretations of “just cause” prior to the time of the legislature defined the term.
- * The 1991 statutory definition intended to codify and incorporate the Swisher rule into the School Personnel Act.
- * Accordingly, when a school board was forced to reduce its teaching staff by way of an RIF, it had to satisfy the Swisher requirement and prove that there were necessities of the district.

Ulibarri v. State Corr. Acad., 2006 NMSC 9, 131 P.3d 43. (February 10, 2006)

- * Summary judgment was properly granted in a Human Rights Act case alleging sexual harassment because the actions plaintiff complained of do not amount to sexual harassment.
- * Plaintiff’s supervisor made advances to plaintiff, which she rebuffed
- * The appellate court adopted the continuing violation analysis in the federal case of *Morgan* in analyzing hostile environment claims under the NMHRA.
- * No hostile work environment because the actions were not sufficiently severe or pervasive.
- * No constructive discharge claim because the working conditions did not force her to resign.
- * No quid pro quo claim because there was no action to deprive the employee of tangible employment benefit
- * The isolated criticism cited by the employee did not sufficiently show retaliation.

Juneau v. Intel Corp., 2006 NMSC 2, 127 P.3d 548. (January 17, 2006)

- * The employee alleged that he was pressured to admit that he had engaged in harassment and felt employer prejudged him as guilty and began campaign to get rid of him after he refused to admit guilt.

- * Employee filed EEOC charge alleging retaliation and thereafter was disciplined and ultimately discharged.
- * District court dismissed claim and in overruling that decision, the Supreme Court found that the employee had presented sufficient evidence to create a genuine factual dispute that needed to be resolved by a jury.

OTHER CASES

Leveille v. IRS, 2006 U.S. App. LEXIS 21401 (D.C. Cir. 2006). (August 22, 2006).

- * Court ruled that the I.R.S could not tax compensation for emotional distress as it was not in lieu of income.
- * Court further ruled that 26 U.S.C.S. §104(a)(2) was unconstitutional insofar as it permits the taxation of compensation for a personal injury, which compensation is unrelated to lost wages or earnings.
- * The Sixteenth Amendment does not authorize the Congress to tax as “incomes” every sort of revenue a taxpayer may receive.
- * The first test is to determine whether “the taxpayer’s award of compensatory damages is a substitute for a normally untaxed personal quality, good, or asset.”