

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

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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,

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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).