THE "OFFICIAL DUTIES" PUZZLE: LOWER COURTS' STRUGGLE WITH FIRST AMENDMENT PROTECTION FOR PUBLIC EMPLOYEES AFTER *GARCETTI v. CEBALLOS*

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INTRODUCTION

Since 1968, the threshold inquiry for determining whether the First Amendment protected public employees from retaliation for their speech was whether the employee spoke as a citizen on a matter of public concern.[1] For almost forty years, courts focused on whether an employee spoke on a "matter of public concern" and paid little attention to whether the employee spoke "as a citizen." As long as their speech concerned a matter of public concern, public employees were generally protected from retaliation if the employee's interest in commenting on public issues outweighed the state's interest in promoting the efficiency of the public services it performed.[2]

The Supreme Court's May 2006 decision, *Garcetti v. Ceballos*,[3] reestablished that before balancing the interests of the employee and the state, courts must first independently examine whether the employee spoke "as a citizen."[4] *Garcetti* is the first Supreme Court decision to hold that an employee *never* speaks as a citizen when speaking "pursuant to his official duties."[5] The Court, however, did not formulate a test or shed much light on how to determine when a public employee speaks pursuant to "official duties."

The Court's failure to articulate an "official duties" test has caused lower courts to interpret *Garcetti* in many different, and sometimes conflicting, ways. While some courts have stated that *Garcetti* "significantly changes the landscape"[6] or "profoundly alters how courts review First Amendment

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1. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).
2. *Id.*
3. Garcetti v. Ceballos, 547 U.S. 410 (2006).
4. *See id.* at 418.
5. *Id.* at 421.
6. Ryan v. Shawnee Mission Unified Sch. Dist. No. 512, 437 F. Supp. 2d 1233, 1247 (D. Kan. 2006).

retaliation claims,"[7] others have characterized it as a "narrow holding."[8] Still others have cited *Garcetti* while seemingly ignoring the "official duties" prong altogether.[9]

The lower courts' efforts to apply *Garcetti*'s categorical holding to various fact scenarios have resulted in some puzzling outcomes that seem to have raised more questions than *Garcetti* purported to settle. For example, when public employees' "official duties" require them to report wrongdoing, can government employers fire them for reporting that wrongdoing merely because they acted "pursuant to" those duties? If so, does that not mean that public employers could fire employees for doing their jobs correctly? Is a legal or ethical obligation to blow the whistle the same as an "official duty" to do so? If so, does this mean that government employees can be fired for obeying the law? Do public employees lose the right to petition the government for redress when their "official duties" compel them to communicate with governmental authorities? This Note explores some of the lower courts' struggles in addressing these perplexing issues in the months following *Garcetti v. Ceballos*.

Part I provides a background on the state of the law of First Amendment protection from retaliation for public employees prior to *Garcetti*. Part II describes the facts of the *Garcetti* case and summarizes the Court's opinion. Part III examines some of the many lower court opinions that have relied upon *Garcetti* between June of 2006 and June of 2007. Specifically, Subpart A analyzes a case in which speech constituted "official duties" when directed toward a public employer, but speech on the same subject matter did not constitute "official duties" when directed toward an elected official. Subpart B examines cases that contrast *Garcetti*'s "official duties" with legal and ethical duties. Subpart C discusses cases that deal with "official duties" when public employees are required to report wrongdoing as part of their jobs. Part III concludes with some suggestions for lower courts and attorneys faced with First Amendment retaliation claims for public employees.

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7. Casey v. W. Las Vegas Indep. Sch. Dist., 473 F.3d 1323, 1325 (10th Cir. 2007).

8. Walters v. County of Maricopa, No. CV 04-1920-PHX-NVW, 2006 WL 2456173 at *14 (D. Ariz. Aug. 26, 2006).

9. *See, e.g.*, Commc'ns Workers of Am. v. Ector County Hosp. Dist., 467 F.3d 427 (5th Cir. 2006); Zerman v. City of Strongsville, No. 1:04CV2493, 2006 WL 2812173 (N.D. Ohio Sept. 28, 2006).

I. FREE SPEECH FOR PUBLIC EMPLOYEES PRIOR TO *GARCETTI*

The Supreme Court's 1968 decision, *Pickering v. Board of Education*,[10] set forth the balancing test for courts to apply to First Amendment retaliation claims for public employees: "to arrive at a balance between the interests of the [employee], 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."[11]

Pickering involved a high school teacher who lost his job after sending a letter to a local newspaper that criticized the Board of Education's handling of tax proposals and its manner of allocating financial resources between the schools' educational and athletic programs.[12] The Board alleged, and the Supreme Court agreed, that some of the statements in Pickering's letter were false.[13] However, the Court was less concerned with the falsity of Pickering's statements than it was with his constitutionally protected right to speak as a citizen on matters of public concern.[14]

According to the Court, the issue of whether a school system required additional funds was a matter of legitimate public concern, and "[o]n such a question free and open debate is vital to informed decision-making by the electorate."[15] As teachers were the members of the community most likely to have informed opinions on how funds should be spent in schools, the Court found it essential that they be able to speak freely on those issues without fear of retaliation.[16] Therefore, the Court struck the balance in Pickering's favor, holding that the school's interest in "limiting teachers' opportunities to contribute to public debate was not significantly greater than its interest in limiting a similar contribution by any member of the general public."[17]

While *Pickering* discussed protection for a public employee speaking "as a citizen on matters of public concern," the Court did little to articulate what

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10. 391 U.S. 563 (1968).
11. *Id.* at 568.
12. *Id.* at 564-65.
13. *Id.* at 571.
14. Citing the landmark First Amendment case, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court emphasized that the "public interest in free and unhindered debate on matters of public importance" was too great to authorize liability for defamation of a public official absent knowledge of the statements' falsity or reckless disregard for their truth. *See Pickering*, 391 U.S. at 573.
15. *Id.* at 571-72.
16. *Id.* at 572.
17. *Id.* at 573.

it meant to speak "as a citizen." However, the Court did note that "the fact of employment [was] only tangentially and insubstantially involved in the subject matter of the public communication."[18] In addition, the letter was not shown to have impeded the teacher's performance of his daily duties in the classroom or the regular operation of the schools.[19] Presumably, the tenuous relationship between speech and employment, as well as the speech's minimal effect on job performance, were factors weighing in favor of treating Pickering "as a citizen." Whether those factors survived the *Garcetti* ruling, however, remains to be seen.

A decade after *Pickering*, the Court clarified in *Givhan v. Western Line Consolidated School District*[20] that the First Amendment protection for public employees applies not only to public displays of speech but also to private conversations between employees and their employers.[21] In *Givhan*, a school district terminated a teacher after she criticized the school's racially discriminatory policies during a series of private encounters with the school's principal.[22] Relying on *Pickering*, the Fifth Circuit held that the teacher's speech was not protected because she complained to the principal privately rather than expressing her views publicly.[23] The Supreme Court reversed, rejecting the view that freedom of speech was "lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public."[24] However, the Court did state in a footnote that "[p]rivate expression . . . may . . . bring additional factors to the *Pickering* calculus. . . . [T]he employing agency's institutional efficiency may be threatened not only by the content of the employee's message but also by the time, manner, and place in which it is delivered."[25] Nonetheless, it was clear after *Givhan* that an employee may still speak "as a citizen" when addressing matters of public concern privately rather than publicly.

The Court elaborated upon *Pickering*'s "matter of public concern" prong in *Connick v. Myers*,[26] holding that

18. *Id.* at 574.
19. *Id.* at 572-73.
20. 439 U.S. 410 (1979).
21. *Id.* at 413.
22. *Id.* at 412.
23. *Id.* at 413.
24. *Id.* at 415.
25. *Id.* at 415 n.4.
26. 461 U.S. 138 (1983).

> when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.[27]

In *Connick*, Myers, an assistant district attorney, distributed a questionnaire inside the office which inquired about office transfer policy, office morale, the need for a grievance committee, whether employees had confidence in particular named superiors, and whether they felt pressure to work in political campaigns.[28] In considering whether the questionnaire items addressed matters of public concern, the court stated that the issue "must be determined by the content, form, and context of a given statement, as revealed by the whole record."[29] Applying this test, the Court held that with one exception, the questionnaire did not touch upon matters of public concern, but rather upon matters of personal interest.[30] On the other hand, the Court found that the question on feeling pressured to work in political campaigns did address a matter of public concern.[31] However, the Court struck the *Pickering* balance in favor of the government, finding that there was "little First Amendment interest" in protecting what was essentially an "employee grievance concerning internal office policy."[32]

After *Connick* clarified that the First Amendment does not protect public employees from retaliation when their speech addresses matters of purely personal interest, courts did not apply the *Pickering* balancing test until after first determining that the employee spoke on a "matter of public concern."[33] It was not until *Garcetti*, however, that the Supreme Court definitively stated that courts must separately address whether the employee speaks "as a citizen" before weighing the interests of the state and the employee.

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27. *Id.* at 147.
28. *Id.* at 141.
29. *Id.* at 147-48.
30. *Id.* at 148.
31. *Id.* at 149.
32. *Id.* at 154.
33. *See, e.g.*, United States v. Nat'l Treasury Employees Union, 513 U.S. 454, 466 (1995); Rankin v. McPherson, 483 U.S. 378, 384 (1987); Alpha Energy Savers, Inc. v. Hansen, 381 F.3d 917, 923 (9th Cir. 2004); Love-Lane v. Martin, 355 F.3d 766, 776 (4th Cir. 2004).

II. *GARCETTI V. CEBALLOS*[34]

A. Facts and Procedural History of Garcetti

Richard Ceballos worked as a calendar deputy district attorney for the Los Angeles County District Attorney's Office.[35] In February 2000, a defense attorney alerted Ceballos of inaccuracies in a sheriff's affidavit that was used to obtain a search warrant.[36] After visiting the location described on the affidavit, Ceballos determined that the affidavit contained "serious misrepresentations."[37] When Ceballos received an unsatisfactory explanation from the warrant affiant, he sent a memorandum to his supervisors which explained his concerns and recommended dismissal of the case.[38] A few days later, Ceballos sent another memo that described a second conversation with the affiant.[39]

At an allegedly "heated" meeting between Ceballos, his supervisors, the warrant affiant, and other sheriff's department employees, one lieutenant sharply criticized Ceballos's handling of the case.[40] Later, Ceballos testified at a hearing on the defense's motion to traverse the warrant.[41] The court rejected the challenge to the warrant, and the District Attorney's Office proceeded with the prosecution.[42]

Thereafter, the office reassigned Ceballos's position from calendar deputy to trial deputy, transferred him to another courthouse, and denied him a promotion.[43] Ceballos sued under 42 U.S.C. § 1983[44] in the United States District Court for the Central District of California asserting that employees

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34. 547 U.S. 410 (2006).
35. *Id.* at 413.
36. *Id.*
37. *Id.* at 414.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* at 414-15.
42. *Id.*
43. *Id.* at 415.
44. 42 U.S.C. § 1983 (2006) provides, in relevant part,

> [E]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured . . . .

of the District Attorney's Office violated the First and Fourteenth Amendments of the United States Constitution by retaliating against him based on the speech contained in his first memo.[45]

The district court granted summary judgment to the defendants, holding that Ceballos was not entitled to First Amendment protection for the memo's contents because he wrote the memo "pursuant to his employment duties."[46] The Court of Appeals for the Ninth Circuit reversed, holding that Ceballos's memo involved a "matter of public concern"; namely, governmental misconduct.[47] Without considering whether Ceballos wrote the memo in his capacity as a citizen, the Ninth Circuit proceeded directly to the *Pickering* balancing test, striking the balance in Ceballos's favor.[48]

B. The Supreme Court's Reversal

The Supreme Court, in a 5-4 decision, reversed the Ninth Circuit's judgment, 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."[49] In other words, "[r]estricting 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."[50]

Justice Kennedy, writing for the majority, found the "controlling factor" in Ceballos's case to be that his expressions were made "pursuant to his duties as a calendar deputy."[51] Because Ceballos conceded in his brief that he prepared the memorandum "pursuant to his duties as a prosecutor,"[52] the Court had "no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate."[53] Nonetheless, the Court did note that "[t]he proper inquiry is a practical one."[54]

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45. *Garcetti*, 547 U.S. at 415.
46. *Id.*
47. Ceballos v. Garcetti, 361 F.3d 1168, 1170, 1174 (9th Cir. 2004), *rev'd*, 547 U.S. 410 (2006).
48. *Id.* at 1173, 1179-80.
49. *Garcetti*, 547 U.S. at 421.
50. *Id.* at 421-22.
51. *Id.* at 421.
52. *Id.*
53. *Id.* at 424.
54. *Id.*

As illustrated below in Part III, the Court's failure to formulate a test as to what constitutes "official duties" has generated much confusion in the lower courts. However, the Court did provide some guidance on what "pursuant to official duties" does *not* mean.

First, the Court stated that it was not dispositive "[t]hat Ceballos expressed his views inside his office, rather than publicly.[55] Recognizing that "[m]any citizens do much of their talking inside their respective workplaces,"[56] the Court was unwilling to hold that all speech at work is automatically stripped of First Amendment protection.[57]

In addition, the Court found it nondispositive that "[t]he memo concerned the subject matter of Ceballos' employment."[58] Later in the opinion, the Court contrasted Ceballos's memo with the letter in *Pickering*, which "had no official significance and bore similarities to letters submitted by numerous citizens every day."[59] In other words, although Pickering's letter concerned the subject matter of his employment, he did not write the letter pursuant to his official duties. The "official significance" of Ceballos's memo, rather than its focus on his job, was what rendered the memo outside the scope of First Amendment protection.

Also, the Court stated that an employee's formal 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."[60] Therefore, the Court rejected "the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions."[61]

Today, federal district courts and courts of appeals continue to face the challenge of interpreting what this decision means—or does not mean—for public employers and their employees, and how it affects—or does not affect—prior precedent on First Amendment protection for public employees. Part III, below, discusses a small fraction of the cases decided under *Garcetti v. Ceballos*,[62] selected for illustrative purposes to demonstrate how the Court's failure to create an "official duties" test has impacted courts' analyses of First Amendment retaliation claims.

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55. *Id.* at 420.
56. *Id.*
57. *Id.* at 420-21.
58. *Id.* at 421.
59. *Id.* at 422.
60. *Id.* at 425.
61. *Id.* at 424.
62. As of January 2008, over 450 cases have cited *Garcetti*. Search of Westlaw, KeyCite service (Jan. 18, 2008) (search for cases citing *Garcetti*).

III. FIRST AMENDMENT RETALIATION CLAIMS AFTER *GARCETTI*

A. Freitag v. Ayers:[63] *"Official Duties" as a Function of Whether Public Employees Address Their Speech Internally or Externally*

Prior to *Garcetti*, a jury in the Northern District of California determined that a female prison guard was entitled to First Amendment protection for reporting sexually abusive inmate behavior to various authorities.[64] However, the Ninth Circuit remanded the case to the district court for reconsideration of the verdict in light of *Garcetti* because the trial judge instructed the jury to consider speech that, after *Garcetti*, was not protected.[65]

1. Facts of Freitag

On several occasions, Deanna Freitag, a correctional officer for the California Department of Corrections and Rehabilitation (CDCR), reported to CDCR officials several instances of inmates openly masturbating in front of her.[66] In addition, she filed a formal complaint with the California Department of Fair Employment and Housing and wrote letters to a state senator, alleging that she had been harassed and that her employers had retaliated against her and failed to take appropriate correctional measures.[67] Her letters to the senator resulted in an investigation by the California Office of Inspector General, which revealed that her allegations were true.[68] Before the Inspector General issued its report, however, the CDCR determined that Freitag had made false accusations and terminated her.[69]

The jury found that several CDCR employees retaliated against Freitag in violation of her First Amendment rights.[70] The district judge's instructions included as examples of free speech her communications with her employer and the state senator as well has her cooperation in the Inspector General's

63. Freitag v. Ayers, 468 F.3d 528 (9th Cir. 2006).
64. *See id.* at 532.
65. *Id.* at 543.
66. *Id.* at 532-34.
67. *Id.* at 534-35.
68. *Id.* at 535.
69. *Id.* at 536.
70. *Id.* at 542-43.

investigation.[71] On appeal, the defendants argued that, under *Garcetti*, Freitag did not speak "as a citizen" in any instance.[72]

The Ninth Circuit found that even after *Garcetti*, Freitag's communications with the senator and the Inspector General were protected because "[h]er right to complain both to an elected public official and to an independent state agency is guaranteed to any citizen in a democratic society regardless of his status as a public employee."[73] The court noted that, under *Garcetti*, Freitag did not contact the government officials "pursuant to [her] official duties," she did not lose rights simply because she was speaking about the subject matter of her employment, and her letters "'bore similarities to letters submitted by numerous citizens every day.'"[74]

The court, however, determined that, with respect to Freitag's internal complaints, "it is clear that, under *Ceballos*, such activity is not constitutionally protected. . . . Freitag submitted those reports pursuant to her official duties as a correctional officer and thus not in her capacity as a citizen."[75] Determining that the relevant instruction permitted the jury to consider some unprotected speech, the court remanded to the district court the question of whether the jury instruction was "more probably than not harmless."[76]

With respect to Freitag's letter to the Director of the CDCR, the court was "unsure whether prison guards are expected to air complaints . . . all the way up to the Director of the CDCR at the state capitol in Sacramento."[77] The Ninth Circuit found that the district court was in a better position to make the relevant factual determinations and remanded the issue of whether that particular letter was protected.[78]

On remand, the district court held that Freitag did not write her letter to the Director of the CDCR pursuant to her official duties.[79] Although the director represented the third level in the employee grievance process, the court found that the letter was not part of any "grievance."[80] According to the

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71. *Id.*
72. *Id.*
73. *Id.* at 545 (citing Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968)).
74. *Id.* (quoting Garcetti v. Ceballos, 547 U.S. 410, 422 (2006)).
75. *Id.* at 546.
76. *Id.*
77. *Id.*
78. *Id.*
79. *See* Freitag v. Cal. Dep't of Corr., No. C00-2278 TEH, 2007 WL 1670307 (N.D. Cal. June 6, 2007).
80. *Id.* at *4.

court, there was no evidence that "Freitag was in any way required by her official job duties to raise her concerns with [the director], even if she had the right to do so as part of the grievance process after first attempting resolution with her immediate supervisor and with the warden."[81] Moreover, Freitag did not ask for any specific remedy for herself, such as a reassignment, but rather referenced the CDCR's obligations to the public.[82] In addition, the court pointed to Freitag's decision not to use official stationery and her use of her own home address as evidence that she did not write the letter pursuant to her official duties.[83]

With respect to the jury verdict, the district court determined that the inclusion in the jury instructions of examples of unprotected speech constituted harmless error.[84] In other words, the court was "confident that the jury would more probably than not have reached the same verdict had the jury only considered Freitag's letters to [the director and the senator] and her written and oral communications with the Office of the Inspector General."[85]

2. Analysis

While the Ninth Circuit's determination that the First Amendment protects communications to elected officials appears to be consistent with *Garcetti*, it is questionable whether the court's analysis of the *internal* complaints had any basis in precedent. Without much explanation, the Ninth Circuit concluded that it was "clear" that preparing internal forms was not protected under the First Amendment.[86] However, the Ninth Circuit's holding failed to account for prior precedent that public employees do not lose their First Amendment protection merely because they express their grievances internally rather than externally. The Court made this clear in *Givhan*,[87] and again in *Garcetti*,[88] when it stated that it was nondispositive that Ceballos expressed his views inside the office.[89] A similar concern arises with respect to the Ninth Circuit's remand to the district court for a factual determination of whether Freitag was expected to "air" her complaints all the way to the

81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* at *6.
85. *Id.*
86. Freitag v. Ayers, 468 F.3d 528, 546 (9th Cir. 2006).
87. Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 414 (1979).
88. Garcetti v. Ceballos, 547 U.S. 410 (2006).
89. *Id.* at 420.

director level. In other words, the Ninth Circuit was unsure whether that complaint was "external" enough to fall within First Amendment protection.

In addition, it is far from "clear" what part of Freitag's job duties required her to be subjected to sexual harassment, let alone to report it. In extending Freitag's prison guard duties to include reporting any sexual harassment that she may experience, the Ninth Circuit seems dangerously close to violating *Garcetti*'s rejection of overly broad job descriptions.[90] Further, even if Freitag were obligated to report sexual harassment by inmates, it is all the more curious that the government could constitutionally retaliate against her for doing exactly what she was supposed to do.

If the Ninth Circuit was concerned with the disruptive effect Freitag's complaints could have had on the efficient operation of the prison, it could have addressed this issue by using the *Pickering* balancing test rather than by categorically precluding internal complaints from First Amendment protection. Moreover, *Freitag* is not a case in which a public employee was unjustifiably disruptive in making frivolous claims. To the contrary, the Inspector General's investigation revealed that Freitag's allegations of inmate misconduct were true.[91] Further, the Ninth Circuit affirmed the jury's finding that the CDCR, along with the prison inmates, did in fact create a hostile work environment because of Freitag's sex under Title VII of the Civil Rights Act of 1964.[92] The Ninth Circuit also found that sexual harassment was a matter of public concern.[93] Therefore, the effect of the Ninth Circuit's decision in *Freitag* is to strip all internal grievances of First Amendment protection, regardless of their truth or importance.

On remand, the district court faced the task of separating the "unprotected" speech from the protected speech. Since the court held that Freitag's speech to the Director of the CDCR was protected,[94] and that it was more probable than not that the jury would have reached the same verdict if it had not considered instances of unprotected speech,[95] Freitag ultimately prevailed. However, if any factually similar cases arise in which the public employee *only* complained internally or to someone higher up in the chain of command, courts under the Ninth Circuit's jurisdiction will be bound by

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90. *See id.* at 424-25.

91. *Freitag*, 468 F.3d at 535.

92. *Id.* at 538-41.

93. *Id.* at 545-46.

94. Freitag v. Cal. Dep't of Corr., No. C00-2278 TEH, 2007 WL 1670307, at *4 (N.D. Cal. June 6, 2007).

95. *Id.* at *6.

Freitag to hold that such speech does not receive First Amendment protection as a matter of law.

B. Official Duties versus Legal and Ethical Duties

In his dissent to *Garcetti*, Justice Breyer pointed out that Ceballos had both the professional and constitutional obligation to "learn of, to preserve, and to communicate with the defense about exculpatory and impeachment evidence in the government's possession."[96] Nevertheless, the majority found that Ceballos's speech was not protected because he spoke pursuant to his official duties. The Court's failure to accord protection to Ceballos's speech notwithstanding his professional and constitutional obligations to speak might suggest that the First Amendment does not protect speech compelled by legal or ethical duties when a job duty places an additional obligation to utter the same speech. At least two district courts, however, have held otherwise.

1. Cheek v. City of Edwardsville[97]

According to the District of Kansas, a *legal* duty is not necessarily the same as an *official* duty.[98] Jeffrey Cheek, a Major in the Police Department of the City of Edwardsville, Kansas, informed the Attorney General's Office when he discovered that various city officials had protected their friends from criminal charges.[99] As a result, Cheek lost his job and alleged First Amendment retaliation.[100] The defendants argued that, after *Garcetti*, Cheek's speech to the Attorney General was not protected because he "had a duty under Kansas law to report any official misconduct by city officials because he would have been guilty of the felony of concealing evidence of a crime . . . if he had not reported the corruption."[101]

The court rejected the defendants' contention, stating 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 or duties."[102] Therefore, the court denied the defendants' motion

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96. Garcetti v. Ceballos, 547 U.S. 410, 447 (2006) (Breyer, J., dissenting) (citing Kyles v. Whitley, 514 U.S. 419, 437 (1995); Brady v. Maryland, 373 U.S. 83 (1963)).

97. 06-2210-JWL, 2006 WL 2802209 (D. Kan. Sept. 29, 2006).

98. *Id.* at *3.

99. *Id.* at *1.

100. *Id.*

101. *Id.* at *2.

102. *Id.* at *3.

to dismiss for failure to state a claim and allowed Cheek to prove that his speech to the Attorney General was outside his official duties.[103]

2. Shewbridge v. El Dorado Irrigation District*[104]*

Scott Shewbridge worked as a senior engineer for the Water Division of the El Dorado Irrigation District (EID) in California.[105] Shewbridge believed that EID's mismanagement of water resources could lead to environmental damage, water shortages, and a complete unavailability of water.[106] Among other activities, Shewbridge reported his concerns to the Department of Fish and Game, the State Water Board, the Department of Health Services, and the California Attorney General's Office.[107] He also participated in a public water conference, gave a Sierra Club presentation regarding water supply, wrote letters to the editor, had discussions with reporters regarding his concerns about water supply and demand issues, and participated in a citizen's water advisory group.[108] After a series of formal and informal disciplinary proceedings, EID fired Shewbridge, allegedly because of attitude problems.[109]

Shewbridge brought a First Amendment retaliation claim in the District Court for the Eastern District of California.[110] Relying on Shewbridge's testimony that he had a professional obligation as an engineer to report wrongdoing and to respond to potential dangers to the public, the defendants contended that he made his speech in the context of his employment.[111] The court rejected the defendants' argument that Shewbridge's "obligation as a professional engineer is inseparable from his obligation as an employee of EID because he was hired by EID to work *as an engineer*."[112] That is, Shewbridge's testimony that the California Code of Regulations governing engineers imposed upon him, *by law*, an ethical obligation to report wrongdoing was not an admission that such reporting was within his *job* duties.[113]

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103. *Id.* at *2.
104. No. CIV. S-05-0740 FCD EFB, 2006 WL 3741878, at *1 (E.D. Cal. Dec. 19, 2006).
105. *Id.* at *1.
106. *Id.* at *3.
107. *Id.* at *3-4.
108. *Id.*
109. *Id.* at *2-3.
110. *Id.* at *1.
111. *Id.* at *5-6.
112. *Id.* at *6.
113. *Id.*

The court found that, unlike *Garcetti*, *Shewbridge* presented a factual dispute as to whether the plaintiff spoke pursuant to his official duties.[114] Resolving the factual dispute in favor of Shewbridge, the court denied the defendants' motion for summary judgment.[115]

3. Analysis

Unlike Ceballos, Shewbridge and Cheek addressed their concerns externally rather than inside the office. As noted above, however, both *Givhan* and *Garcetti* made clear that public employees do not lose First Amendment protection merely because they choose to speak internally.[116] Therefore, in order to reconcile *Shewbridge* and *Cheek* with *Garcetti*, there must be some other distinction between the cases.

Notably, the Eastern District of California distinguished *Shewbridge* from *Garcetti* because *Shewbridge* presented a factual dispute as to whether the plaintiff spoke pursuant to his official duties.[117] Perhaps the critical difference between the cases is that Shewbridge and Cheek did not stipulate that they spoke pursuant to their official duties whereas Ceballos did.[118] If that is the case, it is possible that, in the absence of Ceballos's concession, the Supreme Court might have held that his independent constitutional and professional obligations rendered his speech outside of his official duties, or at least might have remanded the case for such a determination. Because *Garcetti* left the question of the legal-versus-official duty dichotomy unanswered, lower courts have been free to reach their own conclusions on whether or not a legal duty can ever be distinct from an official duty.

C. Legal Obligations Plus *Employment Obligations: Legal Compliance Jobs*

At least two courts of appeals have found that, in the context of jobs that require public employees to advise their employers about compliance with applicable laws, *legal* duties are indistinguishable from official duties.

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114. *Id.*

115. *Id.* at *7. The court also concluded that Shewbridge's speech addressed a matter of public concern, *id.*, and that there was a triable issue of fact as to whether the speech was a substantial or motivating factor in the defendants' decision to terminate him. *Id.* at *8.

116. *See* Garcetti v. Ceballos, 547 U.S. 410, 420 (2006); Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 414 (1979).

117. *Shewbridge*, 2006 WL 3741878, at *6.

118. *Garcetti*, 126 S. Ct. at 1960.

1. Battle v. Board of Regents[119]

i. Facts

As a financial aid counselor at Fort Valley State University, Lillie Battle's job included verifying the completion and accuracy of student files as well as reporting any perceived fraudulent activity.[120] In reviewing student files previously assigned to her supervisor, Jeanette Huff, Battle discovered that Huff was "falsifying information, awarding financial aid to ineligible recipients, making excessive awards, and forging documents."[121] Battle alerted Huff, as well as the president and vice president of the university of the "improprieties" and was later terminated despite a positive evaluation.[122] Believing that she lost her job because of her attempts to expose Huff's fraud, Battle provided the Department of Education with documents suggesting potential fraud.[123] As a result, the Georgia Department of Audits investigated and found "serious noncompliance with federal regulations and risk factors for fraud," confirming Battle's allegations.[124]

Battle filed suit, alleging that she was discharged in violation of the First Amendment.[125] The Court of Appeals for the Eleventh Circuit affirmed the district court's grant of summary judgment to all defendants, reasoning that Battle admitted that she had a "clear employment duty to ensure the accuracy and completeness of student files as well as to report any mismanagement or fraud she encountered."[126] In addition, the court noted that the Department of Education guidelines required all financial aid workers to report suspected fraud.[127] Therefore, "[b]y Plaintiff's own admission and in the light of federal guidelines," Battle's speech was made pursuant to her official duties.[128]

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119. Battle v. Bd. of Regents, 468 F.3d 755 (11th Cir. 2006).
120. *Id.* at 757-58.
121. *Id.* at 758.
122. *Id.*
123. *Id.* at 759.
124. *Id.*
125. *Id.*
126. *Id.* at 761.
127. *Id.*
128. *Id.*

ii. Analysis

In other words, the government could constitutionally fire Battle for reporting suspected fraud notwithstanding the fact that she was required both by law and her job to report it. Battle, like many public employees after *Garcetti*, faced termination both for *not* reporting the fraud and *for* reporting the fraud. Notably, Battle was correct in her suspicions of fraud, as revealed by the Department of Audits' investigation. This was not a case in which her employers were justified in firing her because she performed her "official duties" poorly. Rather, they fired her because they were dissatisfied with the results of the proper execution of her official duties.

It is questionable whether the Supreme Court would sanction the notion that public employees could be fired for doing their jobs correctly. *Garcetti* does not dictate such a result, because there was no indication in the Court's opinion that Ceballos was correct in his suspicions about the warrant. To the contrary, the trial court denied the challenge to the warrant,[129] making it at least somewhat more likely that Ceballos's concerns were unfounded. While it may seem unfair that the district attorney's office could retaliate against Ceballos despite a good-faith belief that the warrant contained errors, lower courts are now bound by that decision. Courts are, however, still free to reject the idea that public employers have unchecked discretion to fire their employees for speech uttered in the course of correctly performing their jobs.

2. Casey v. West Las Vegas Independent School District[130]

i. Facts

Barbara Casey was the Superintendent of the West Las Vegas Independent School District.[131] One of her duties as superintendent was serving as CEO of Head Start, a federally-funded program that provided educational opportunities, meals, and healthcare to low-income children between the ages of three and five.[132] The Head Start Director, Jacqueline Padilla, informed Casey of evidence that as many as fifty percent of the families enrolled in Head Start had incomes that were too high to qualify for

129. Garcetti v. Ceballos, 547 U.S. 410, 415 (2006).
130. Casey v. W. Las Vegas Indep. Sch. Dist., 473 F.3d 1323 (10th Cir. 2007).
131. *Id.* at 1325.
132. *Id.*

participation.[133] Casey reported the problem several times to various school board members, all of whom responded that she should not worry about it.[134]

Given the board's inaction, Casey felt that "she had a duty as Head Start's executive director to report this wrong doing [sic] to federal authorities."[135] Therefore, Casey directed Padilla to report her findings to the Head Start regional office.[136] As a result, the United States Department of Health and Human Services determined that some of the enrollments in the program were improper and ordered repayment of more than half a million dollars in federal aid.[137]

Later, Casey informed the board that it violated the New Mexico Open Meetings Act by making decisions without proper notice and meeting agendas.[138] When the defendants ignored her warnings, Casey filed a complaint with the New Mexico Attorney General's office.[139] The Attorney General determined that the board had, in fact, violated the Open Meetings Act.[140]

Moreover, Casey informed the board that she believed that the school district violated state or federal laws by hiring employees without advertising vacancies or conducting a review process and improperly handling a case in which a teacher and a principal had an affair.[141] Thereafter, Casey was subsequently demoted and eventually terminated.[142]

Casey alleged that the defendants retaliated against her for exercising her First Amendment rights.[143] After the district court denied the defendants summary judgment, the Supreme Court handed down *Garcetti*.[144] Because *Garcetti* "significantly modified" the first prong of the *Pickering* balancing test, the Court of Appeals for the Tenth Circuit analyzed whether Casey provided evidence that she spoke as a citizen and not pursuant to her official duties.[145]

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133. *Id.* at 1326.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 1327.
143. *Id.*
144. *Id.*
145. *Id.* at 1328.

As to her communications with the board concerning their potential violations of federal and state law, Casey conceded that this category of statements was barred as a matter of law.[146] The court agreed that the statements fell within the scope of her duties because they were "aimed solely to the [s]chool [b]oard," and her job included advising defendants "about the lawful and proper way to conduct school business."[147] However, as discussed below, it is questionable whether the First Amendment does or should categorically preclude these types of statements.

With respect to Casey's comments to the school board about the lack of compliance with federal regulations on the Head Start program, the Tenth Circuit stated, "we cannot help but conclude that Ms. Casey made these statements pursuant to her official duties."[148] As the comments "were directed only to her supervisors and . . . sought to raise concerns about the legality of the [d]istrict's operations," the court held that she was again acting pursuant to her duty of advising the board how to lawfully conduct school business.[149]

The court also found that Casey spoke pursuant to her official duties in contacting federal authorities about the Head Start income-reporting issues.[150] Before *Garcetti*, the defendants argued that Casey acted ultra vires and in a disruptive manner, while Casey argued that she had a duty to report wrongdoing.[151] After *Garcetti*, however, the parties switched positions; the defendants alleged that Casey acted within her job duties, while Casey alleged that she acted purely as a citizen.[152] The court agreed with the defendants' new position that Casey acted "pursuant to her official duties" because she acknowledged in a deposition that "she would be held legally responsible for having knowledge of something that was wrong and not reporting that."[153] In addition, the court stated that the fact that Casey directed a subordinate to report to Head Start officials buttressed the conclusion that she acted "in accordance with, if not compelled by, her office."[154]

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146. *Id.* at 1329.

147. *Id.* (citing Sur-Reply Brief of Appellant at 7 n.4; Casey v. W. Las Vegas Indep. Sch. Dist., 473 F.3d 1323, 1325 (10th Cir. Jan. 24, 2007) (No. 06-2054)).

148. *Id.* (citing Garcetti v. Ceballos, 547 U.S. 410, 420-24 (2006); Mills v. City of Evansville, 452 F.3d 646, 647-48 (7th Cir. 2006)).

149. *Id.*

150. *Id.* at 1329-30.

151. *Id.*

152. *Id.* at 1330.

153. *Id.* (internal quotation marks omitted).

154. *Id.*

The court, however, held that Casey's statements to the Attorney General were *not* made pursuant to her official duties.[155] Therefore, she was not fulfilling her responsibility of advising the school board, but "[j]ust the opposite: she had lost faith that the [b]oard would listen to her advice so she took her grievance elsewhere."[156] Because there was no evidence that Casey had the responsibility of overseeing the board's meeting practices, her conduct "fell sufficiently outside the scope of her office to survive even the force of the Supreme Court's decision in *Garcetti*."[157]

ii. Analysis

A few complications arise from the court's logic in *Casey*. First, constitutional protection is dependent upon the circumstances in which the speech is made. Similar to the Ninth Circuit's reasoning in *Freitag*, the exact same statement could be protected in one instance and not protected the next, and the only discernable distinction is that some speech is internal and other speech is external. While the context in which a public employee makes a statement does make a difference for purposes of balancing the interests of the speaker and the public employer,[158] there does not appear to be a compelling reason for summarily rejecting internal speech without a fact-sensitive inquiry. In other words, the *Pickering* balancing test is sufficient for determining which internal speech is protected and which is not.

On a related note, the court found that Casey's speech *was* protected when she did "[j]ust the opposite" of what her official duties dictated.[159] This suggests that public employees are better off ignoring internal grievance procedures and running straight to high government officials or the media with any complaints they might have. Regardless of whether the Court intended such a result, Justice Stevens appears to have been correct in his dissenting opinion in *Garcetti* that the Court fashioned "a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors."[160]

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155. *Id.* at 1332-33.

156. *Id.* at 1332.

157. *Id.* at 1332-33.

158. *See* Connick v. Myers, 461 U.S. 138, 147-48 (1983); Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 415 n.4 (1979).

159. *Casey*, 473 F.3d at 1332.

160. Garcetti v. Ceballos, 547 U.S. 410, 427 (2006) (Stevens, J., dissenting).

IV. CONCLUSIONS AND SUGGESTIONS

Determining whether a public employee spoke pursuant to "official duties" may seem like an unnecessary hurdle for both courts and employees alike. For the past forty years, the *Pickering* balancing test weeded out meritless claims. First, the employee's speech had to address a matter of public concern. In other words, the First Amendment did not protect matters of purely personal interest.[161] In addition, courts were afforded the flexibility of a balancing test that allowed them to weigh the employee's interest in exercising free speech rights against the state's interest in efficiently running its operations.[162] Therefore, the Court could have reached the same result in *Garcetti* by holding that the state's interest in operating the district attorney's office without disruption outweighed Ceballos's interest in recommending dismissal of the case. Instead, it chose to categorically bar from First Amendment protection all speech uttered pursuant to "official duties," without giving much guidance as to what "official duties" means.

However unreasonably broad-sweeping or complicated the "official duties" element may appear, lower courts are now bound by the Supreme Court's decision. One way to make the most of this confusing situation is to read *Garcetti* as narrowly as possible.

For example, lower courts should keep in mind the three caveats the Court mentioned in articulating what the "official duties" test does *not* mean. That is, (1) a formal job description is neither necessary nor sufficient for ascertaining official duties, (2) the fact that Ceballos's speech was made in the office rather than publicly was not dispositive, and (3) the fact that Ceballos's speech dealt with the subject matter of his employment was not dispositive.[163] These three limitations can substantially confine a court's ability to hold that speech was uttered pursuant to official duties.

It is also critical for lower courts to recognize that Ceballos stipulated that he spoke pursuant to his official duties.[164] As discussed in the analysis of *Shewbridge* and *Cheek*,[165] the Court might well have reached a different result had Ceballos not made this concession. Whether it was fair for the Court to hold Ceballos to that concession when he had little reason to know that it would be fatal to his case is a separate issue. What is important for courts

161. *Connick*, 461 U.S. at 148.
162. *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).
163. *Garcetti*, 547 U.S. at 420-21, 424-25.
164. *Id.* at 424.
165. *See supra* Part III(B)(3).

relying on *Garcetti* is to follow the course taken in *Shewbridge* and *Cheek* and to recognize that absent a stipulation, there will often be a genuine issue of material fact as to whether an employee spoke pursuant to his official duties.

In addition, lower courts should make decisions in light of public policy concerns; courts should be especially sensitive to the "matter of public concern" of exposing governmental wrongdoing and should not be too quick to conclude that the public employee did not speak "as a citizen" in disclosing that wrongdoing either internally or externally. Although the examination of whether speech addressed "a matter of public concern" and whether the employee spoke "as a citizen" are two independent inquiries, it is possible that some subjects are so vital to the public interest that public employees' obligations as citizens, rather than their obligations as employees, compel them to speak on those subjects. In other words, even when public employees have an "official duty" related to the speech, they do not necessarily speak "pursuant to" that duty. As Justice Souter discussed in his dissent in *Garcetti*, whistleblower laws are not always enough to provide public employees the protection they deserve in exposing corruption within government.[166] Therefore, keeping in mind that governmental wrongdoing is generally a matter of public concern, courts should remain open to the possibility that public employees may be motivated as citizens, rather than as public employees, to speak about those issues.

Finally, lower courts should remember that the inquiry of whether or not an employee spoke pursuant to "official duties" is a "practical one."[167] Sometimes, in order to recognize that it is both unfair and inconsistent with prior precedent to strip a public employee of First Amendment protection when he or she has a legal or ethical obligation to disclose the wrongdoing of public officials, all it takes is common sense.

166. *Garcetti*, 547 U.S. at 440-41 (Souter, J., dissenting).

167. *Id.* at 424 (majority opinion).