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Personnel Section Annual Report Materials

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A Summary Guide for Investigating Workplace Complaints

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At one time or another it is likely that we will all be asked to investigate a personnel complaint, or, at minimum be asked to train personnel within the human resources department on how to investigate complaints. This paper examines when you do it, how you do, and how you record your findings. In addition to providing techniques for investing workplace complaints, this paper explores some of the ways that mediation may be used to help avoid workplace issues before they become workplace complaints.

The Duty to Investigate

There has been lots of literature over the years on the duty to investigate workplace complaints. Some of that duty stems from law (i.e. claims for sexual harassment, race/gender/age discrimination.) Others stem from internal personnel policies. And, still others stem from our own sense of what is right, wrong, and ethical. Regardless of the basis, all investigations require that the questions asked are fair, reasonable and thorough, while at the same time respecting the rights of both the victim and the alleged wrong-doer. Thus, while there may be a duty to investigate, the level of investigation that is done will ultimately depend on the nature of the complaint. Not every investigation must be made into a federal case. The saying "Do not make a mountain out of a mole-hill comes to mind." However, recognizing the difference is the first step to determining how to go about your investigation.

The Reasons We Investigate

The reason we investigate is simple: it is the right thing to do. But, if you need to convince your public agencies why training (and sometimes spending funds in order to do the training) is necessary for all those involved in supervising employees, and responsible for insuring that our workplaces are free from harassment and discrimination, consider the following recent examples:

McQuagge v. Hendrick Automotive Group. Former finance manager awarded $815,000 in compensatory and punitive damages for sexual harassment. Salesperson, who was the top salesperson for the dealership, continually engaged in conduct that included "rating" female customers and employees, and make sexually derogatory remarks. Finance manager complained, but nothing was done to stop the comments.

Caesar Palace's. Based upon charged filed by the Equal Employment Opportunity Commission, Caesars Palace settled $850,000 based upon a claim that Latina kitchen workers were subjected to repeated and sometimes severe sexual harassment

Meloff v. New York Life Insurance Co. An employee claimed she had been defamed when the company sent an e-mail to multiple people falsely claiming that the employee had "defrauded" the company. Jury awarded $1.25 million dollars.

When to Investigate

Sometimes we concentrate too much on the investigative aspect of handling workplace complaints, rather than simply taking action. For example, a comment that might be interpreted as including a sexual innuendo, a joke passed around the office via e-mail, or inappropriate posters at a workstation, rarely require a full-blown investigation. What it does require however is action. Recognizing the signs of when to act is important. Consider the following as a checklist that triggers your obligation to act:

- Inappropriate comments are made in front of you (do not ignore them. If you do, as a supervisor, it may be inferred that your silence is acquiescence).
- An employee complains about the comments/actions.
- An employee's conduct is repetitive (could lead to hostile workplace concerns).
- Others have had investigations conducted for similar conduct. Remember everyone needs to be treated the same and no preferential treatment can be given. However it does not necessarily work in the opposition direction. If policies have not been enforced in the past, it does not mean that no action for such conduct can be taken now.
- When you are in doubt as to whether action should be taken. Trust your judgment here. If there is any question, err on the side of taking action.

Conducting the Investigation

When it is clear an investigation needs to be done, use the following as a checklist to ensure a thorough investigation.

- Arrange for a private place to conduct the interview, free from disruptions due to telephones or other noise.
- Explain what you will be doing and the process, including when you expect the investigation to be complete.
- Stress the need for confidentiality to insure the integrity of the process.
- Begin with open ended questions, such as "Tell me what happened?" This allows the employee to start at the point that they feel is most important. Continue to use open-ended questions, such as "What happened next?" Do not fill in the blanks for the employee.
- When the employee has completed this first phase of the questioning by telling you his or her side of the story, go back and try to reconstruct the incident in chronological order, asking for clarification of dates, time, and people present.
- When the chronology is complete, probe for details by asking the 5W's: Who, What, Where, When, Why, and of course How.
- Go back, clarify, and confirm the salient facts.
- Watch for non-verbal clues. Some cities now give training to their police officers on recognizing the non-verbal clues witnesses give that sometimes tell more about the truth

or falsity of a story, than the actual statements made. Do not overlook some of the non-verbal clues you may be given. Clues such as failing to look at you directly, crossing and uncrossing legs or arms, looking away when direct questions are asked, are all signs that, while perhaps indicating a bit of nervousness, can also indicate problems with the story.

Recording the Information

If you are going to tape record the interview, let the witness know what you are doing and try to keep the recorder in a location that causes the least amount of attention. Otherwise, your witness/employee will be focused too much on the tape recorder, and not enough on the story. Consider having the notes typed immediately after the interview so that you can fill in any missing details. You are more likely to be able to remember additional comments made if you type the notes immediately after the interview. Two schools of though exist with respect to the handwritten notes you take. One is attach the notes to the back of the typed memorandum. The second is to toss them once a written record is made. I tend to attach my notes so that I always have a record of what information I took down, but this is a matter of personal preference. The important thing in recording information whether in your notes or in a written memorandum is to record only the facts. Avoid editorializing such as "Witness appears to be lying" or "The actions constitute a hostile work environment." Leave the editorializing and legal conclusions for later.

Mediation and Alternative Dispute Resolutions

One way that workplace concerns can be handled before they turn into workplace complaints, is to consider whether the circumstances justify a mediation of the issues. If an allegation of harassment is made and investigation is done, mediation can be helpful regardless of the results. For example, sometimes an investigation might be done for workplace complaints, and the results of the investigation demonstrate that there is not sufficient evidence to demonstrate discrimination or harassment. This does not mean though that there are not problems in the workgroup that can benefit from mediation. Of course, if there are damages, and it is likely the employee will file a claim, it is particularly useful to engage the services of an outside neutral who can possibly mediate that claim before it turns into a formal complaint, or a lawsuit.

This past August, the Equal Employment Opportunity Commission issued a study that examined the effectiveness of utilizing alternative dispute resolutions ("ADR") to resolve job disputes. The study can be found at www.eeoc.gov/federal/adr/adr_report_2006/index.html. However, some of the interesting conclusions and highlights of the study include the following:

- When ADR was utilized in the pre-complaint area, mediation was the choice in almost 98% of the cases.
- The success rate for using neutrals to resolve job disputes was 50% in 2006.
- Settlements for ADR were generally less than monetary settlements made after EEO counseling.
- Non-monetary benefits in settlements include improved communication, a detail, a desk audit, leave restored, or a reassignment of duties. During the pre-complaint process in FY

2006, ADR efforts resulted in 5,808 settlements, including 5,557 with non-monetary benefits.

Although these findings relate to federal agencies, the study is useful in predicting results for other public agencies involved in addressing workplace complaints. Some conclusions that can be drawn from the study are that by using mediation in the pre-complaint process, settlement amounts can be significantly decreased and, during this stage, non-monetary benefits can play a significant role in addressing workplace issues.

Disclaimer: The views expressed in this paper are those of the author and do not necessarily represent the views of the firm. Nothing herein should be taken as legal advice, and are prepared for the sole purpose of educational/training materials.

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[Note: This paper and the paper by Marlene A. Pontrelli, Esq., Personnel Section Vice-Chair, entitled "A Summary Guide for Investigating Workplace Complaints" are submitted as part of the Personnel Section's 2007 Annual Report.]

Public Employee Speech: A Post-Garcetti Update Blogging

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[Section members may wish to read this paper in conjunction with the paper that the author prepared for presentation at this year's Annual Conference Work Session VIII entitled "Sherlock Holmes in the 21st Century Workplace" that addresses monitoring and surveillance of public employment workplaces in an electronic age. Privacy concerns arising from the evolving concepts of individual privacy (including workplace privacy) and protections from unreasonable searches in a public workplace setting overlap with those arising under free speech (and freedoms of assembly and religion). Recent developments in public employee speech and blogging are addressed in this paper. This paper represents the views of the author and should not be construed as providing legal advice. It is intended solely as use for educational purposes.]

I. Employee Free Speech. The 2006 U.S. Supreme Court decision in *Garcetti v. Ceballos*[1] was greeted in some sectors with great alarm, while others yawned in disinterest. Those in the former category saw the decision as yet another conservative roadblock to asserting individual freedom claims in federal courts. Those in the latter category viewed the decision as being merely consistent with the *Pickering-Connick* test (named for opinions issued in 1968 and 1983[2]) that has governed public employee expression for some forty years. The full effects of *Garcetti* will become evident with the benefit of analysis of ensuing court decisions, particularly those issued by the federal circuit courts of appeal. Accordingly, this section of the paper looks at some recent decisions involving public employee speech.

From a federal perspective, public employee free speech rights truly emerged with the *Pickering-Connick* which held that public employees had First Amendment protections for speaking out as citizens on matters of public concern, subject to their employers' interest, as employers, in promoting the efficiency of the public services performed through their employees. In *Garcetti*, the U.S. Supreme Court said that speech made by public employees as part of their official

[1] 547 U.S. __, 129 S.Ct. 1951 (2006).
[2] *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983).

duties is not made as citizens speaking under the First Amendment. In other words, such speech does not prevent managerial discipline based on employee expression that is made pursuant to their official responsibilities.

Given the widespread availability of whistleblower protection laws,[3] any narrowing of employee free speech protection by *Garcetti* may have little practical impact. Of course, not all such laws may be applicable in all instances of employee speech made in the course of duty. Yet, the potential for protection afforded by those laws should not be underestimated.

Even when whistleblower laws may not protect "official speech," if that speech has the effect desired by the speaker, it may very well run afoul of the adverse effect on workplace efficiency prong of the traditional *Pickering-Connick* test. A key concept for public employers is to focus in policies and actions – not on the exercise of speech – but instead on counterproductive effects in the workplace. An effective policy on official speech does not focus on words alone, but also should encourage employees to address concerns internally.

Thus, successfully addressing the issue of employee speech is not merely a matter of "muzzling" dissent which might suppress official speech, but could easily lead to dissension, dissatisfaction, and morale issues. Effective procedures to allow employees to address concerns in a meaningful manner should accompany efforts to address employee speech restrictions. Against that background, here are some short summaries of only a sampling of the post-*Garcetti* decisions that have been issued in the last year or so.

Blackman v. NYC Transit Authority, (2nd Cir. June 21, 2007). Blackman, a NYC Transit Authority employee, challenged, as a violation of his First Amendment free speech rights, his dismissal for commenting that he thought two Transit Authority supervisors who had recently been murdered "deserved what they got" for getting another transit authority employee fired.

Blackman had worked for the Authority for 15 years and was an outspoken union advocate on numerous issues, including health and safety matters. In December 2003, Blackman raised concerns over safety of hydraulic jacks used by car inspectors and was dissatisfied with his supervisor's (Perez) response. An argument ensued with escalating comment and Blackman was told to leave the workplace and that someone else would do the inspection. Blackman refused to leave, urging Perez to call the cops and stating, "I wish that some day I'll read in the newspaper that something bad has happened to you and also to your kids." Perez again told him to leave and Blackman replied he was not leaving, as he had a Transit Authority pass entitling him to be present "and a .38 and I'll call my brother." Not sure if he really meant this as a threat, Perez just

[3] Those interested in further reading on whistleblower protection may wish to read *Whistleblowing in the Public Sector Workplace: From Snitch to Saint?* which I wrote for IMLA's MUNICIPAL LAWYER, vol. 47, No. 3, May/June 2003.

walked away. Blackman was not fired for this incident, but a disciplinary action notice recommending a 30-day suspension was filed which was then grieved. While the grievance was pending, a disgruntled authority employee, who had been fired, shot and killed two former supervisors. While employees were discussing this incident, Blackman said "I hate to say this, but those two guys deserve what they got for getting the (murderer) fired." When a co-employee asked what Blackman would do if he lost his livelihood, Blackman repeated his earlier comment, adding that "those two scumbags deserved what they got for getting the (employee) fired." Another disciplinary notice was filed recommending discharge. An independent arbitrator ruled that the Authority had cause for discipline, and ruled that termination for the comments would not violate his First Amendment rights. Blackman then filed legal action and the trial court granted the Authority's motion for summary judgment finding that the comment was not protected speech.

The circuit court said a two-step analysis was required. (1) Is speech protected? (2) If so, is the employee's interest in free speech outweighed by government interest in efficiency of public services? In perhaps seeking to avoid an appeal, the court assumed, for the sake of argument only, that the speech here was protected since Blackman was a vocal union spokesman and the root cause of at least some of his concern lay in safety issues. Instead, the court emphasized the second issue – the effect of the speech, and noted that an employer's ability to respond to speech is related, in part, to how much the employee's speech truly relates to a public concern. While the court did assume for the purposes of the appeal that Blackman's speech could have touched upon a public concern, at most, the comment only minimally touched on that concern and the government's burden in demonstrating a need to control the speech was at the lowest level. Here, the court ruled that the interest in disciplining Blackman (even including termination) was substantial, citing:

- The comments, in light of the earlier threat to Perez, indicated that Blackman had a violent disposition;
- The comments were disruptive within the workplace.

Although the case was decided in June of this year, it did not use *Garcetti*'s official speech context in deciding the case.

Lindsey v. City of Orrick, MO, (8th Cir. June 26, 2007). Lindsey was employed as the city's Public Works Director. Though he owned land in the city, he was not a resident. The city sent him to training that included a session on the state's open meetings law, after which he became convinced that the City Council was violating the law by improperly entering non-public sessions and passing ordinances without public discussion. Lindsey raised these concerns at four different public meetings. After one of these meetings, Lindsey was told by the city attorney that the procedures complied with the law and was told by one of the council members that other councilors were angry because of his statements and "the best thing you could do is shut up."

A month later, he made similar accusations at another council meeting, after which Taylor (the mayor who was Lindsey's direct supervisor and was named as a co-defendant in the case) told him the open meeting law was none of his business and to think about his actions before he "embarrassed the City." Several months later, at another council meeting, Lindsey read from the law and urged the council not to violate it by going into closed session. Then, several months later, he spoke again on the issue at a council meeting. Finally, some months later, he identified 15 "violations" of the law.

Mayor Taylor responded that the council considered the matter closed and Lindsey's concerns were not placed on the council agenda. However, during the meeting, at the mayor's suggestion, the council entered closed session to discuss personnel matters. A year or so later, Lindsey again spoke with the mayor saying he had audio- and video-taped meetings and was going to meet with an assistant attorney general. Less than a month later, Lindsey was fired, after being presented with two handwritten critiques of his work. Lindsey asserted none of those concerns had been noted previously. One of the critiques asserted that Lindsey has "attacked the council" and had said the council was not "handling city business or ordinances properly."

Lindsey responded with a §1983 lawsuit alleging violation of his First Amendment right of free speech. The city and Mayor Taylor, as defendants, moved for summary judgment. The trial court denied the motion finding that the speech was protected speech and that the mayor was not protected by "qualified immunity," as a person in her position would know or should have known that firing him for the speech was illegal. The city and mayor appealed.

The circuit court said that *Garcetti* had "clarified" public employee First Amendment protection to apply only when an employee speaks as "a citizen addressing matters of public concern." A first consideration is the medium or location in which speech is made, but that may not be the sole controlling factor. The defense argued that the speech was not citizen speech because it was made at a council meeting which Lindsey attended as part of his job. But, his attendance in that capacity was to report on water, sewer, and street matters. Though he had attended training which included a session on the "sunshine law," there was nothing to indicate he was sent to the training to learn about the law or that his job included ensuring compliance with the law.

Next, the defense argued that the comments were not on a matter of public concern, since they addressed the council's procedures for adopting ordinances governing retirement and other municipal employee benefits. Therefore, it was argued, they were self-serving and could not constitute protected speech. The court responded that criticism, "no matter how obnoxious or offensive, of government officials and their policies clearly addresses matters of public concern." While Lindsey did comment on some ordinances involving benefits,

that was not the thrust of his complaints. The comments to the mayor about contacting the attorney general's office were not unprotected threats (like the *Blackman* case). The mayor also claimed that his comments were not made as a citizen because he was not a city resident. Residency, though, is not a technical requirement to asserting constitutional rights. The constitutional protection is triggered by Lindsey's United States citizenship.

The focus then shifted to the effect on employment, with the court noting that the employer must introduce at least some evidence of such an adverse impact. Mere allegations of adverse effect on morale or a department's reputation will not suffice. In effect, the claim was that an employee's attack on elected officials has a direct and adverse effect and strains in the relationship become apparent. Though his speech to the council was characterized as confrontational and disruptive, actual disruption of city functions must be shown.

Tennessee Secondary School Athletic Association v. Brentwood Academy, (U.S. Supreme Court, June 21, 2007). While this case does not address employee statements as a basis for discipline, it is worth noting as the principal issue is whether enforcement of a rule prohibiting high school coaches from recruiting middle school athletes violates the First Amendment. The Association is a not-for-profit organization that regulates interscholastic sports within its membership, including 290 public and 55 private high schools. Brentwood's coach invited some eighth grade boys to attend spring football practice, with a goal that they would attend the Academy. The Association sanctioned Brentwood which, after filing internal appeals, brought an action asserting that enforcement of the rule violated the First Amendment. (The Supreme Court earlier had found that the Association was a "state actor" and, thus, its actions could implicate First Amendment concerns. This appeal resulted from lower court decisions in Brentwood's favor after the case was sent back for further proceedings.)

Brentwood had free speech rights to disseminate truthful information about itself and to persuade prospective students and parents that its excellence in sports was a reason to attend. Yet, like public employee speech rights, those rights are not absolute. The rule in question sought to further the purposes of preventing child exploitation, ensuring that athletic interests were secondary to academics, and promoting competition. The court first decided that the rule did not prohibit Brentwood from disseminating truthful information about it and its sports programs, but Brentwood's actions differed from such communications.

More importantly for present purposes, the concerns of a voluntary organization (including one with state ties so as to implicate First Amendment concerns) in enforcing its rules may, like a government employer's interest in running an efficient workplace, outweigh speech concerns. The court cautioned that a quasi-public organization's ability to condition membership on relinquishment of any and all constitutional rights, just like public employees

when speaking on matters of public concern, may face restrictions on speech only when necessary for efficient and effective operations (citing *Garcetti*).

Lee v. York County School Division, et als., (4th Cir. May 2, 2007). Lee, who taught high school in York County, initiated this suit, maintaining that the School Board violated his First Amendment rights by removing materials he had posted on bulletin boards in his classroom. The trial court concluded that his postings were curricular in nature and thus did not constitute speech on a matter of public concern. In substance, Lee maintained on appeal that he possessed a First Amendment right to post his materials on classroom bulletin boards.

When Zanca, the principal of Lee's school, first viewed the postings, he saw that some prominently included religious terms such as "Bible" or "God." Although Zanca did not read any of the articles in their entirety, he exercised his discretion as principal to remove five items because he saw them as overly religious and thus violative of the Establishment Clause. Aside from his determination that the postings might be legally problematic, Zanca believed the items to be irrelevant to the Spanish curricular objectives that Lee was obliged to follow within his classroom.

Although the school had no formal policy on teacher postings in the classroom, unwritten school board policy, practice, and custom allowed teachers to post materials related to curricular objectives, or to post materials of a general and personal nature that were consistent with the high school's educational mission. When asked why he had posted the items, Lee explained that he had posted each either because he liked it or because it was uplifting. He also explained that a teacher could post most anything in a classroom and make it relevant to the curriculum being taught. He said that schoolteachers often use creative materials to catch and retain the attention of students. He also said that they were, in his opinion, "positive and good for the kids" and due to his position as a teacher, he felt responsible for more than just his students' academic well-being, likening the postings to those of a picture of George Washington.

Lee appealed the dismissal of his §1983 suit to the circuit court which said, "it is important to first acknowledge that schoolteachers do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). However, Lee's assertions that his postings were speech on matters of public concern failed to consider that courts have generally recognized that public schools possess the right to regulate speech that occurs within a compulsory classroom setting, and that a school board's ability in this regard exceeds the permissible regulation of speech in other governmental workplaces or forums. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988) which said "We thus recognize that the determination of what manner of speech in the classroom . . . is inappropriate properly rests with the school board rather than with the federal courts." The circuit court, however, then said that the *Garcetti* ruling explicitly

did not decide whether this analysis would apply in the same manner to a case involving speech related to teaching so it applied the *Pickering-Connick* balancing test in the context of the circuit's precedent that included analysis of whether the speech was curricular speech, in which case it was not protected. To make that determination the court asked whether (1) the speech was school-sponsored bearing the imprimatur of the school, and (2) the speech is supervised by faculty members and designed to impart knowledge to the students. Finding that the postings met both these criteria, the court affirmed the dismissal of Lee's action.

Bessent v. Dyersburg State Community College (DSCC), (6th Cir., April 2, 2007). In another academic setting, a former supervisor of DSCC's adult education program alleged that her First Amendment rights were violated when she was fired in retaliation for making statements regarding the internal operation of DSCC's adult literacy program. She had started an adult literary program through a privately funded nonprofit agency. When some state funding became available, the program was run through an agreement with DSCC. Some concerns arose over her handling of the program. Bessent voiced opposition to DSCC's planned takeover of the program because she believed that such a consolidation would lead to a funding shortfall, while at the same time increasing costs due to the requirement that it comply with Tennessee Board of Regents regulations. Despite her opposition to the merger, DSCC hired Bessent as a supervisor, the functional equivalent of the pre-merger position she held with the private agency. She continued to voice her opposition to the situation at numerous meetings asserting that the merger was responsible for funding shortfalls. Eventually she was terminated and denied an internal appeal based on her status as a probationary employee.

The trial court granted the defendants' motion for summary judgment. Though several issues were involved in the appeal, the nature of her statements is discussed here. After reviewing the traditional balancing test, the circuit court cited *Garcetti* to the effect 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." At oral argument, Bessent's counsel conceded as much, admitting that "Ms. Bessent well had the obligation as the Executive Director of the corporation, of a non-profit corporation, to speak out on the functioning of that program." Later, the court asked counsel, "So this was part of her job?" Counsel responded, "Yeah – to make these suggestions, to make sure the program is functioning properly, to make sure most – more people are being reached." Again, the court inquired, "So your position, if I understand it, is that the statements for which she was fired were an integral part of her job," to which counsel stated "I think that, yes...." Therefore, Bessent's statements were made as part of her official duties and did not receive constitutional protection. Of course, it must be remembered that job titles and descriptions do not categorically determine if speech is made "officially," but this clear admission doomed her claim.

Snelling v. City of Claremont, __ N.H. __ (July 18, 2007). In this state supreme court ruling, the plaintiff, the city's assessor, claimed he was wrongfully terminated in violation of his First Amendment rights. After a couple of incidents involving local land use boards unrelated to his position, he participated in a series of interviews with a local newspaper. In the resulting article, he was credited with "adding his voice" to those of others who claimed the city's tax system was unfair or otherwise flawed. In the article he also indicated that certain city council members were taking unfair, but legal, advantage of the city's tax abatement system. He also was referenced as commenting on some efforts made to correct the system and his role, or proposed role, in those changes.

After meeting with the city attorney, the city manager terminated the assessor, citing seven reasons, one of which concerned the comments in the newspaper article. The ensuing legal action resulted in jury verdicts for the plaintiff. Two grounds upon which the city appealed were the assertions that (1) the assessor's First Amendment claim was barred by *Garcetti* and (2) the traditional balancing test weighed against his claim.

In determining if the assessor was acting pursuant to official employment duties, the court said job descriptions and listing of tasks as the sole analytical factor would allow employers to restrict employee rights by creating excessively broad descriptions. With that in mind, the court rejected each of the city's claims that he was acting officially.

First, as to the claim that he was so acting because the newspaper article mentioned his job as city assessor, the court noted it is the employee's official job duties that are relevant, not a third party's motivation in speaking with the employee. Thus, the newspaper reporter's view is irrelevant. As to the assertion that the assessor's duties encompassed speaking to the public and clarifying taxation, the court found only one function in the job description that might so indicate, and that was to "explain to property owners and others the procedures and techniques used by the assessor's office in revaluation, abatements, exemptions, and effect of new or proposed construction on assessed values." Thus, communication on assessor's office procedures and techniques would be within the official duties; comments on fairness of the tax system or identification of potential abuses were not. Lastly, the city asserted that the official nature of the comments was shown by the assessor's statement at trial that the article contributed to his role in communicating to the public an understanding of whether to file for abatements. However, the court said the article served no such purpose and that its effect was measured from the content. The court then proceeded to the standard *Pickering* balancing test and ruled for the employee. (A motion for rehearing was pending at the time this paper was written.)

Morales and Kolatski v. Jones, Ray, and City of Milwaukee, (7th Cir., July 17, 2007). This case demonstrates some of the very real difficulties in categorizing speech as being official or unofficial. The plaintiffs were two police

officers assigned to the vice squad. They alleged that their reassignment to street patrol duties constituted retaliation for exercising protected free speech. At the risk of oversimplification, the facts can be summarized as follows. The two officers were assigned to arrest an alleged drug dealer. After several attempts failed, they came to believe that the Chief and Deputy Chief (the latter being the sister of the alleged dealer) participated in harboring the dealer to prevent his arrest. The belief arose apparently on the basis of an erroneous statement by a restaurant owner that, while delivering food to the home of the Deputy Chief, the alleged dealer was seen in the company of both the Chief and the Deputy. That belief was also supported when another officer was ordered to delete the Deputy Chief's address on a report of the incident. The two officers reported their belief to other officers and supervisors and Officer Morales spoke with an assistant district attorney. He also testified about these matters in a deposition in an unrelated matter. The defendants appealed jury verdicts against them asserting that the officers' speech was not protected under *Garcetti*.

In an extensive analysis of speech made pursuant to official duties, the court made several notable comments, including:

- The crux of the inquiry was whether the officers' speech was made pursuant to official duties.
- *Garcetti* did not provide a definitive framework for determining the scope of an employee's duties because the parties there agreed that the speech was made officially.
- That inquiry is a practical one and should focus on the duties "an employee actually is expected to perform."

The officers claimed, first, that the speech was not made officially because they first learned about the allegations of the Chief's and Deputy's actions after the arrest had been made. However, official duties in this case included processing arrests and, thus, did not end with the arrest. Next, the officers asserted that the official nature of the incident ended when the Chief concluded his investigation into whether one of the officers disclosed confidential information to the restaurant owner. The Chief decided that the disclosure did not pose a threat to the investigation because the arrest had already occurred. This, the officers said, supported the claim that their official actions ended with the arrest. The court disagreed for the same reasons as set forth on the first issue and also said the Chief's investigation had no bearing on the nature of the statements. Lastly, they argued that the speech was not official because they were uncertain of what they should do regarding the restaurant owner's allegations. But, uncertainty or merely having discretion to act does not signify that action is unofficial or outside the scope of duties. Exercising discretion can be a part of one's official duties. The internal reports of conversations concerning the alleged actions of the Chief and Deputy, thus, were official duties and were not protected.

Morales' comments made in an unrelated deposition, though, were a different matter.[4] He had testified that in his opinion Officer Kolatski was transferred because of the report of the allegations against the Chief and Deputy. Being deposed in a civil suit pursuant to a subpoena was clearly not one of the officer's job duties. The fact that he testified about speech made pursuant to official duties did not change the character of that testimony. At this point, the court acknowledged that it might seem odd for speech to be classified as official or not based on the identity of the listener.[5] Odd though it may be, the court said that is the requirement of *Garcetti* and, since the court could not determine whether the retaliation against Morales was for protected or unprotected speech, it returned the case to the lower court for a new trial on that issue alone.

The dissenting judge felt that the first issue should have been to identify clearly the speech that was the cause of retaliation, but he agreed that comments other than those made to the assistant district attorney and at the deposition were made officially. The discussion with the assistant D.A. involved several considerations in addition to the issue of Morales' discretion. Some of it entailed a discussion of his findings regarding the arrest and submission of reports (e.g., work product) that would not be protected; but when he was speaking as a witness about the possibility of public corruption he spoke in the same fashion as might any citizen who witnessed suspicious conduct by a government official. Therefore, that aspect of his discussion constituted protected speech. As to the deposition testimony, the dissent had little trouble finding that the speech was protected as there was no obligation to testify as part of Morales' duties. The dissent also disagreed with the decision to send the matter back for retrial. He said the jury could reasonably have found that the demotion's timing indicated it resulted from protected speech during the deposition and not from unprotected speech made several months previously.

Brammer-Hoelter, et als. v. Twin Peaks Charter Academy, et als., (10th Cir., July 12, 2007). This decision addressed First Amendment rights of charter school teachers who began meeting off-campus and after hours in residences, restaurants and at least one church to discuss concerns about the operation, management and mission of the school. The academy's principal issued an order that banned discussion of Academy matters outside of work and later told the teachers she would prefer that they not even associate with each other outside of work. Sometime later, the participants began receiving unfavorable performance reviews, contrary to past evaluations. They also said the principal ignored them and treated them rudely, e.g., slamming doors in their presence. They eventually submitted resignation letters, but later tried to rescind them (apparently after the principal resigned).

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[4] The case in which the deposition was taken involved a different officer's assertion that he had been transferred in violation of First Amendment rights.

[5] The court noted that Justice Stevens' dissent in *Garcetti* said it "is senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description" 126 S.Ct at 1963.

A critical issue in the case was whether the trial court was correct in ruling that the discussions did not involve matters of public concern. The circuit court said that following *Garcetti*, a five-step test was now appropriate:

> 1. Is the employee speaking pursuant to official duties or as a citizen? If the speech is in the former category, no constitutional protection exists because the employer restriction "simply reflects the exercise of employer control over what the employer itself has commissioned or created."
> 2. If the speech is not made pursuant to official duties, is the subject a matter of public concern? If not, the speech is unprotected.
> 3. If the employee speaks as a citizen on a matter of public concern, does the employee's interest in speaking on the issue outweigh the interests of the government as employer?
> 4. Assuming the employee's interest in speaking does outweigh the government's interest as the employer, the employee must then show the speech was a substantial or motivating factor in a detrimental employment decision.
> 5. If that factor is shown, the employer may then show it would have taken the same action against the employee even in the absence of the protected speech.

Summary. As noted at the beginning of this section, the effects of *Garcetti* are still "in process." At this point, though, it should be reasonably evident that governmental employers might still wish to seek to defend employment decisions arising from employee statements by demonstrating adverse effects on governmental operations, not solely on trying to characterize statements as being made within the employee's official duties. Additionally, employers should not neglect the other limitations on employee speech including:

- Justification for action based on the non-speech related performance of the employee; and
- Exceptions for political, confidential and policy-making positions.

II. Public Employee Blogging. Aside from instances in which employee blogging may be protected as free speech, by workplace privacy considerations, or under whistleblower protection laws, it does not appear that court decisions or state legislatures, at least as yet, have carved out defined, specific rules that specifically address blogging. What can be said definitively, though, is that blogging is in fact a means of communication. It is growing and will continue to grow. Targets of comment will not be limited to Hollywood starlets or national events. Local government – and local government officials – will continue to find themselves at the heart of much blogging. In this context, it is worthwhile recalling the timely adage that "all politics is local."[6]

Several reported cases have dealt with the disclosure of the identity of bloggers. While anonymous speech is protected under the First Amendment, some opinions indicate a concern with elevating blogging to too high a protected

[6] Variously attributed to former U.S. House Speaker Thomas P. "Tip" O'Neill, Jr.

status. For example, a grand jury's ability to compel disclosure was found permissible, as extending a reporter's privilege to the "easily created blog or the ill-defined pamphleteer" could defeat legitimate investigative roles of grand juries.[7] Yet, blogging by public employees clearly must be recognized as having the potential to be a protected exercise of free speech.

Thus, public employers face at least two concerns with regard to blogging (1) identifying the blogger and (2) the ability to discipline or discharge an employee for blogging. Of course, in those states where public employees are not at-will employees, some discernible reason for disciplining or discharging an employee for blogging would have to exist.[8]

One grand appeal of blogging appears to be the ability to engage in anonymous chat or chatting under a pseudonym. Thus, employers may wish to conduct a "search" to identify bloggers whose comments are deemed cause for action. When blogs are made using an employer's computer system, a properly drafted and communicated computer use policy should be sufficient to overcome most, if not all, challenges based on an expectation of privacy. To support a claim that a governmental warrantless search (including one by a public employer) of electronic communications violates the Fourth Amendment, the individual must have both subjective and objective expectations of privacy in the place searched or in the items seized.[9] Some courts also hold that society, as a whole, must be prepared to recognize that privacy expectation as being reasonable.

The "rub" to effective utilization of computer use policies would seem to arise when employers permit some personal use of the system. Employers are likely little concerned with the occasional email from home asking a worker to make dinner reservations or pick up some groceries on the way home. Employers may even not be overly concerned when an employee reads on-line editions of newspapers – so long as not too much time is "wasted" in such activities. But, when an employee sends a letter to an editor or email or creates a blog that is critical of the employer, a supervisor, or co-worker (or even a vendor), then the employer may become concerned. At this point, the employer's decision to act might be characterized as "content-based" and that may raise the stakes.

Though results are mixed, several courts have held that no reasonable expectation of privacy can exist in chat room communications. In part, this reasoning is a logical result stemming from two realities: by and large, a sender does not know who else is in the chat room and once sent, the sender no longer

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[7] *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2005).

[8] One might, for example, posit a *Garcetti* or *Pickering* scenario in which an employee blogged about an internal workplace issue or even a public matter within the course of duty or in a manner that adversely affected the public workplace so that free speech protection did not exist. But, the question would then arise as to whether "cause" existed for discipline or termination.

[9] *Expectation of Privacy in Internet Communications*, 92 ALR5th 15.

can control the destinations or recipients to whom the communication may be forwarded.

While constitutional protections regarding searches may be limited,[10] federal statutes may affect various issues regarding communications involving the Internet, including, for example, those dealing with stored electronic communications and transactional records access.[11] Both disclosure of communications and subscriber information may be implicated. Federal laws also regulate interception of electronic communications[12] and fraud and related activity in connection with computer usage.[13] The normal prudent advice that governmental employers should consult with legal counsel regarding adoption of personnel policies is prudent advice in this context as well.

The ability to identify an anonymous public employee blogger who is not using the employer's computer system may be subject to a more rigorous test and may be governed by the individual's relationship with the email provider or by the terms and use of the website involved in the communication. While promises of privacy by a commercial enterprise do not guarantee a constitutional expectation of privacy, they are factors, along with actual practice and the nature of the communication, in determining the ability of a governmental employer to obtain access to information about this type of blogging. A policy that alerts employees to the possibility that some "private" blogging may be subject to review may assist an employer in attempting to control adverse effects.[14]

Though policies may assist employers, they are not necessarily a requirement to demonstrate that emails are not private. A Pennsylvania court held that an employer may impose discipline for what it deemed improper email comments made over its system even though it had made assurances that all email communications would be confidential and privileged, and such communications would not be intercepted and used as grounds for termination. A former at-will employee brought a wrongful termination suit after being fired for inappropriate and unprofessional email comments. The court stated that the employee could not possibly have had a reasonable expectation of privacy in the communications since they were voluntarily made to the employee's supervisor. Thus, they may have been used by the employer, but they were not intercepted. Once communicated over the system to the supervisor over an email system used by all employees, any privacy expectation was abandoned.[15]

Outside of the context of employment, chat room communications have been found not to be accompanied by an expectation of privacy.[16] It should be

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[10] *Expectation of Privacy in Internet Communications*, 92 ALR 5th 15.
[11] 18 U.S.C. §2701, et seq.
[12] 18 U.S.C. §2510, et seq.
[13] 18 U.S.C. §1030.
[14] *See*, e.g., the sample policy included in the author's paper for Work Session VIII.
[15] *Smyth v. Pillsbury Co.*, 914 F. Supp. 97 (E.D. Pa. 1996).
[16] *U.S. v. Charbonneau*, 979 F. Supp. 1177 (S.D. Ohio 1997).

noted, however, that these and other similar cases reported in the ALR annotation cited at note 10 involved allegations of criminal pedophile activity. Yet, the very nature of chat rooms would seem to suggest that users should not expect their comments to be deemed private. After all, is not the purpose of a chat room to make statements and offer opinions to other individuals or the public generally. Website comments are similarly viewed, particularly if access to the website is not strictly controlled.[17]

As supportive as some of the foregoing cases may be for employer freedom to access blogging sites and use the content in disciplinary matters, blogging is an exercise in communication. First Amendment protections will apply in the same manner as other forms of expression.

The Tenth Circuit *Twin Peaks Academy* case discussed in the *Garcetti* update did not deal with blogging, but instead addressed First Amendment rights of charter school teachers who met off-campus and after hours in residences, restaurants and a church to discuss concerns about the operation, management and mission of the school. Those off-work communications, in some ways, can be compared to blogging, so it would seem appropriate to apply a similar five-step test as used in that decision when looking at public employee blogging.

Even in those states where public employment remains "at-will," courts have created and expanded protections for employees under "quasi-contract" or public policy exceptions.[18] As with employee free speech and privacy issues, a substantial element of an employer's ability to control blogging may be affected by employee expectations which are established though properly adopted and communicated personnel policies. That approach may have a more limited applicability to public policy exceptions to at-will employment where some lawyers have crafted arguments asserting that employer blogging and similar restrictions "encroach on employees' personal autonomy."[19] Thus, employees have challenged, albeit with limited success, restrictions on personal relationships and non-workplace behavior.[20]

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[17] *J.S. ex rel. H.S. v. Bethlehem Area School District*, 757 A.2d 412 (Pa. Commw. Ct. 2000) upholding school district's suspension of student whose personal website, created at home and on student's own time, made derogatory comments about a teacher and principal that were deemed threatening and harassing.

[18] For example, a college professor's letter of engagement, even though referring to handbook status as an at-will employee, was held to have limited a college's otherwise free hand to terminate, *Dillman v. New Hampshire College*, 150 N.H. 431 (2003); and a grocery store manager who refused to make unescorted late-night deposits of large amounts of cash was protected by the public policy exception to at-will status, *Cloutier v. Great Atlantic & Pacific Tea Co.*, 121 N.H. 915 (1981). See generally, Gely and Bierman, *Social Isolation and American Workers: Employee Blogging and Labor Reform*, 20 HARV. J. OF LAW & TECHNOLOGY 287 (2007) at 315.

[19] Gely and Bierman, *Ibid*. at 316.

[20] The New Hampshire Legislature has barred employers from requiring as a condition of employment that employees abstain from using tobacco products, RSA 275:37-a.

Reported cases in Wisconsin and New Jersey ruled against employees who were terminated after news accounts reported, respectively, their outside, non-work-related racial bias and sales of neo-Nazi paraphernalia. It is not too hard to see how a court could find that these activities were not protected under public policy exceptions to the at-will doctrine. The Idaho Supreme court upheld termination of an employee who criticized a proposal by his employer and a civic group to manage a local national forest. These cases do not appear to have involved public employers, so First Amendment concerns may not have been considered; but they do represent what seems to be a narrow application of the public policy exception, at least in some instances.[21]

Laws like New Hampshire's regarding off-duty use of tobacco products in some states include other lawful off-duty activity including alcohol use, and New York, California, and North Dakota protect workers from adverse or discriminatory employment actions arising from lawful off-duty conduct. These laws may limit protections where the off-duty conduct may be seen as being in "direct conflict with the essential business needs of the employer."[22]

Another case that does not deal directly with blogging may serve to guide employer responses to blogging since its subject (political support) is often associated with blogging. The case[23] arose when a county tax commissioner dismissed an office clerk after winning reelection. The clerk had allowed an opponent of the commissioner to post a campaign sign on her property. The termination was claimed to be part of an effort "to clean house" and the specific reason for her termination was a "cold environment." As the clerk was not covered by an internal appeal process, she brought an action alleging the firing violated her First Amendment right of association. The defendants sought to dismiss the action claiming that the clerk was subject to the patronage exception under which political appointees may be terminated without regard to First Amendment protections[24] so as to further the legitimate governmental end of assuring implementation of policies of a new administration, policies presumably sanctioned by the electorate. The court found the exception did not apply because the discharged employee was not deputized, did not need to work in close cooperation with the elected official, and loyalty to the official was not needed to perform the clerical duties her job entailed.

Translating the guidance from that case into the blogging arena, where political comment is often the reason for participation, one can see that termination or discipline with adverse employment consequences for mere participation in public comment would be inappropriate unless the employer can:

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[21] Gely and Bierman, *supra*, n. 18 at 319.
[22] N.D. Cent. Code §14-02.4.03, cited *Ibid*. at 321.
[23] *Epps v. Watson, et al.*, (11th Cir., July 18, 2007).
[24] Traditionally referred to as the *Elrod-Branti* exception (based on cases so named in 1976 and 1980), this doctrine permits termination based on speech and actions when the employee is a policy-maker or confidential employee or when the it can be shown that party affiliation is an appropriate requirement for the effective performance of the office involved.

- Identify an exception such as that set forth for political, confidential employees;
- Determine that the blogging occurs within the context of official duties; or
- If it constitutes protected speech, find adverse consequences under the *Pickering* balancing test.

III. Conclusion and Guidance. Without benefit of a crystal ball, the immediate and longer term future of free speech and blogging rights cannot be predicted with great accuracy. Many critics of the status quo, like Frederick S. Lane,[25] assert that increasing technological capability increases threats to employee workplace privacy and rights. Citing statistics such as the incredible increase of computer email, Internet, and blogging use – in and out of the workplace – and the relative ease of anonymous communication, others will point to the need to control productivity and prevent liability and adverse effects arising from unfettered criticism of management, co-workers, and governmental entities.

It can be predicted with reasonable accuracy that some of the time-worn traditions in the workplace will be reassessed. Federal circuit courts of appeal will continue to refine and implement those decisions that have created some broad outlines that need better definition in the new electronic workplace. It can be expected that Congress or state legislatures may well seek to define additional rules governing the public workplace.

For now, employer policies and practices seeking to advise employees on expectations with regard to speech and blogging will remain an effective way to control the workplace by ensuring that employees are aware of proper and improper conduct in and out of the workplace and to ensure that supervisors and management remain active in monitoring activities for compliance with those policies. Readers may wish to review the sample computer use and blogging policies included with the author's paper prepared for the Annual Conference's Work Session VIII noted above.

[25] Author of THE NAKED EMPLOYEE, American Management Association (2003).