Impact of *Garcetti v. Ceballos* (2006)

Holding

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- “We hold 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.”

Rationale

- “restricting speech that owes its existence to a public employee's professional responsibilities **does not infringe any liberties the employee might have enjoyed as a private citizen.** It simply reflects the exercise of employer control over what the employer itself has commissioned or created.”
- Not constitutionalize every dispute in the workplace …

Criticisms from Dissenting Justices

- Stevens: “perverse to fashion new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors.”
- Souter: Majority drew a “strange line” … why create a “categorical exclusion”

How Apply “Official Job Duty” Test

- The inquiry is a “practical” one;
- Should focus on "the duties an employee actually is expected to perform."

- Some lower courts have focused on the “**core functions**” of the employee’s job.

Job Descriptions

- Toward end of his opinion, Justice Kennedy warns: “We reject, however, the suggestion that employers can restrict employees’ rights by creating excessively broad job descriptions.”
- “f]ormal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes."

Williams v. Riley, 481 F.Supp. 2d 582 (N.D. Miss. 2007)

- "This court is gravely troubled by the effect of Garcetti upon a factual scenario such as that before the bar. It allows no federal constitutional recourse for an employee of the state of Mississippi who is fired for reporting a fellow government employee's misconduct."

Another Court “Troubled” By Garcetti

- *Weintraub v . Board of Educ*., 489 F.Supp. 2d 209 (E.D.N.Y. 2006)
- Like other courts that have applied Garcetti in similar circumstances, this Court is "is gravely troubled by the effect of Garcetti" … Though it questions the wisdom of a constitutional policy that disincentivizes public employees from bringing serious misconduct and abuse to the attention of their superiors, while perversely encouraging them to take every internal conflict to the highest levels of governmental oversight, this Court must nevertheless apply the Garcetti rule in good faith **until the Supreme Court sees fit to revisit the issue.”**

How Apply Garcetti?

- As one lower court candidly wrote, “The question of whether an employee speaks pursuant to his official duties is not always easy and *Garcetti* sets forth no dispositive test.”, 478 F.Supp. 2d 377 *Caruso v. Massapequa Union Free School District,* (E.D.N.Y. 2007).

Sigsworth v. City of Aurora, 487 F.3d 506 (7th Cir. 2007)

- Police investigator who worked on drug task force suspected that some members of multi-jurisdictional task force had tipped off some suspects before drug raid. Investigator tells chief of police …. He is later removed from position and denied promotion to sergeant.
- Court rejects claim - Garcetti --- appeals court finds that employee "was merely doing what was expected of him as a member of the task force charged with organizing and overseeing the planning and execution of the arrest warrants."

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

- Superintendent of school district sued after she was terminated for criticizing problems she uncovered with the implementation of the Head Start program. (many families receiving benefits that should not be) …
- Court noted she was "chief overseer of Head Start for the District"

Casey (cont.)

- "As we have held many times, speech reporting the illicit or improper activities of a government entity or its agents is obviously a matter of great public import. We simply hold that Ms. Casey's speech, such as it was, is **more akin to that of a senior executive acting pursuant to official duties than to that of an ordinary citizen speaking on his or her own time."**

Casey (cont.)

- However, different story on another of the superintendent's claims … she wrote a letter to state attorney general, alleging school district's violation of open meetings law …
- "The statements made to the New Mexico Attorney General, however, are another kettle of fish. In the first place, Ms. Casey was not seeking to fulfill her responsibility of advising the Board when she went to the Attorney General's office. Just the opposite: she had lost faith that the Board would listen to her advice so she **took her grievance elsewhere**."

Going Public Doesn't Mean Employee Wins

- See *Andrews v. Clark*, 472 F.Supp. 2d 659 (D. Md. 2007)

- Baltimore officers had shot and killed an elderly man who had barricaded himself in his residence. The plaintiff here complained about the barricade procedures and protocal first to the chief and then to the *Baltimore Sun*.

- Court still held that Garcetti controlled -- ….

Andrews v. Clark (cont.)

- “The gravamen of plaintiff's claim seems to be that when he **elected to "go public**" by handing a copy of his "internal memorandum" to a representative of the media, he converted what is undeniably speech effected pursuant to his employment duties into "citizen speech" on a "matter of public concern." I can find nothing in *Garcetti* or in the more persuasively-reasoned cases that have interpreted *Garcetti* to support this view: that the Supreme Court's plain intention to carve out an enclave of unprotected speech by public employees is so limited.”

Going Public (cont.)

- *Boykin v. City of Baton Rouge*, 439 F.Supp. 2d 639 (M.D. La. 2006)
- Human resources director releases diversification report. Asked to write but then employee distributes in allegedly unauthorized manner. Court rejects plaintiff's claim in part based on *Garcetti.*

Morales v. Jones, 494 F.3d 590 (7th Cir. 2007)

- Two police officers file First Amendment retaliation claim, alleging that they were demoted after revealing to assistant district attorney that the police chief and deputy police chief had harbored a fugitive - the relative of the deputy police chief.
- A jury awarded both plaintiffs $85,000 …
- Reversed on appeal … Garcetti …

Morales v. Jones (cont.)

- The appeals court reasons that the officers' comments to district attorneys was part of their official duties. However, one officer alleged he was retaliated against for his speech during a deposition.

- Here, the court reached a different decision, writing: "Being deposed in a civil suit pursuant to a subpoena was unquestionably not one of Morales' job duties because it was not part of what he was employed to do." -- remanded for new trial …

Morales (cont.)

- "We recognize the **oddity** of a constitutional ruling in which speech said to one individual may be protected under the First Amendment, while precisely the same speech said to another individual is not protected. Indeed, this is exactly the concern that Justice Stevens voiced in his dissent in *Garcetti …* Despite Justice Stevens' admonishment, *Garcetti* established just such a framework, and we are obliged to apply it. As a result, although **we hold that Morales' conversation with Chisholm was unprotected speech, his deposition testimony was protected**."

Morales (cont.)

- Dissenting judge would have upheld jury verdict for Officer Morales (officer who complained to D.A. and testified in deposition).

- “Any citizen may report suspicions of public corruption to the district attorney's office … A reasonable jury could find, and I would find, on balance, that Lt. Morales spoke as a private citizen when he conveyed his suspicions to the district attorney and his speech was therefore protected by the First Amendment.”

Frietag v. Ayers, 468 F.3d 528 (9th Cir. 2006)

- In *Freitag*, a corrections officer was sexually harassed by several inmates at the Pelican Bay State Prison. She complained to her supervisors that her documentation of the incidents was denied or thrown away. After she complained to her state senator and the State Office of the Inspector General, the prison warden terminated her. The Ninth Circuit held that the plaintiff's "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."

Garcetti Doesn't Bar All Claims - See *Lindsey v. City of Orrick*, 491 F.3d 892 (8th Cir. 2007)

- Former public works director attended city council meetings. The city sent the public works director to a seminar that addressed open-meetings issues. The director then raised the issue that the city was not conforming with the open meetings law at several council meetings. The director was required to attend the city council meetings.
- On appeal, city says Garcetti bars claim --- required to attend meetings, we paid for seminar - it is part of your job …

Distinguishing *Garcetti* - *Paulo v. Spada*, 2006 U.S. App. LEXIS 28219 (D. CT. 2007)

- A state trooper complains about a supervisor's allegedly unlawful conduct (false info in official documents, manipulated time schedules, use state time for personal work, etc.).
- Defense raises Garcetti …

Orrick (cont.)

- No, says the 8th Circuit … "there is no evidence Lindsey's [public works director] job duties even arguably included sunshine law compliance. … we hold his speech regarding compliance was as a citizen."

- Contrast this with two other 8th Circuit decisions:
  - (1) *Bradley v. James*, 479 F.3d 536 (8th Cir. 2007);
  - (2) *McGhee v. Public Water Supply*, (8th Cir. 2006)

Paulo (cont.)

- Court says there is fact question --- “the record does not establish as a matter of law that, in carrying out his job duties as a state trooper, that he was expected as a practical matter to investigate or report all potential wrongdoing within the division.”

- Notes Morales decision from 7th Circuit but reaches different decision …

Taylor v. Town of Freetown, 479 F.Supp. 2d 227 (D.Mass. 2007)

- "**Garcetti is not meant to strip an employee of First Amendment protection when speaking out regarding issues of serious and widespread public concern**, like corruption, just because a garden-variety rule requires him to tell a supervisor."

- However, court grants summary judgment to employer for other reasons.

Garcetti may not bar petitioning activities

- The 3rd Circuit determined that Garcetti does apply in the same manner to an employee's freedom of petition claim as it does in the standard free-speech context. "Accordingly, the argument of the DSP defendants that because *Garcetti v. Ceballos* bars plaintiffs' claims as speech, it also bars them as petitions **is inaccurate-petitions are not synonymous with speech for purposes of constitutional analysis**."
- *Foraker v. Chaffinch*, (06-4086)(3rd Cir.)(8/30/2007).
- (Court still rejected petition claims, finding that the claims were not submitted to employer as government agency)

What About Academic Freedom?

- Kennedy acknowledges the concern but reserves for later day the question - "We need not, and for that reason, do not, decide **whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching**."
- "How much room is left for constitutional protection of scholarly viewpoints in post-secondary education was left open in Garcetti … and need not be resolved today." *Mayer v. Monroe County Comm*., 474 F.3d 477 (7th Cir. 2007)