

# PECULIAR MARKETPLACE: APPLYING *GARCETTI V. CEBALLOS* IN THE PUBLIC HIGHER EDUCATION CONTEXT

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## INTRODUCTION

In *Garcetti v. Ceballos*,<sup>1</sup> the United States Supreme Court modified the test for determining whether speech by a public employee receives the protection of the First Amendment. *Garcetti* has been the subject of considerable attention and analysis, mostly unflattering. The criticism has been sharp: *Garcetti* has been accused of standing First Amendment doctrine on its head and of offending the fundamental principle that speech on matters of public interest should receive expansive protection.<sup>2</sup> And the criticism has been comprehensive: indeed, the *Garcetti* court has been chided for imposing a categorical rule,<sup>3</sup> for imposing a rule that does not operate categorically,<sup>4</sup> and for doing both these things at once.<sup>5</sup>

Critics have further argued that the standard endorsed in *Garcetti* would lead to serious practical and constitutional difficulties if applied to employees of state institutions of higher education, particularly faculty members. Some have taken limited comfort from the fact that the Court expressly reserved the question of whether the standard it announced “would apply in the same manner to a case involving speech related to scholarship and teaching.”<sup>6</sup> But others have voiced grave concerns about the implications of *Garcetti* for academic freedom and its potential impact

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1. 547 U.S. 410 (2006).

2. See Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and § 1983: A Critique of Garcetti v. Ceballos*, 42 U. RICH. L. REV. 561 (2008); Cynthia Estlund, *Free Speech Rights that Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463 (2007).

3. See Nahmod, *supra* note 2.

4. See Sonya Bice, *Tough Talk from the Supreme Court on Free Speech: The Illusory Per Se Rule in Garcetti as Further Evidence of Connick’s Unworkable Employee/Citizen Speech Partition*, 8 J.L. IN SOC’Y 45, 66 (2007).

5. See Charles W. Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173 (2007).

6. *Garcetti*, 547 U.S. at 425; see, e.g., Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497, 1500 (2007) (noting that “[a]lthough *Garcetti* is not entirely reassuring, the Court’s apparent unwillingness to extend the rule in that case to the academic context signals a continuing recognition that something about universities demands a different approach”).

on the higher education environment, which the Supreme Court has described as “peculiarly the ‘marketplace of ideas.’”<sup>7</sup> Because those concerns emerged hard on the heels of the *Garcetti* decision, and therefore were based largely on the text of the opinion itself, it was impossible to know whether they would be borne out by the lower court decisions that would follow. Enough cases have now been decided to make at least a preliminary assessment.

This article attempts to evaluate the impact of *Garcetti* on higher education law through an analysis of the cases decided to date. This necessarily requires some speculation because we still do not have a substantial number of lower court decisions applying *Garcetti* in that context, particularly with respect to faculty members. Nevertheless, the existing case law reflects some patterns that may signal the significance of *Garcetti* for public institutions of higher education and their employees. In general, those patterns suggest that *Garcetti* is likely to have the effect of substantially limiting the First Amendment protection afforded to speech by employees and perhaps even the academic freedom enjoyed by faculty members.

# I. THE *GARCETTI* DECISION

Richard Ceballos served as a deputy district attorney in Los Angeles.<sup>8</sup> In February of 2000, a defense attorney informed Ceballos that an affidavit used to obtain a critical search warrant included inaccuracies.<sup>9</sup> Ceballos looked into the matter, concluded the affidavit did indeed contain serious misrepresentations, and sent a memorandum to his superiors outlining his concerns and recommending dismissal of the case.<sup>10</sup> Ceballos’s superiors nevertheless decided to proceed with the prosecution.<sup>11</sup> The defense attorney challenged the warrant, even calling Ceballos as a witness, but the trial court ruled for the prosecution.<sup>12</sup> Ceballos claimed that, after these

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7. *Healy v. James*, 408 U.S. 169, 180–81 (1972) (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)). For early critical analyses of *Garcetti*, see Barbara K. Bucholtz, *What Goes Around Comes Around: Legal Ironies in an Emergent Doctrine for Preserving Academic Freedom and the University Mission*, 13 TEX. WESLEYAN L. REV. 311, 316 (2007) (arguing that, “[w]ithout question, [*Garcetti*’s] statement of the First Amendment rights of public employees baldly threatens the academic freedom of scholars in public universities”), and Risa L. Lieberwitz, *The Assault on Academic Freedom in the Academy: Exploring the Intersectionalities of Race, Religion, and Gender in Higher Education: Linking Professional Academic Freedom, Free Speech, and Racial and Gender Equality*, 53 LOY. L. REV. 165, 169 (2007) (contending that “[a]fter *Garcetti*, the constitutional viability of individual rights of academic freedom is even more questionable”).

8. *Garcetti*, 547 U.S. at 413.

9. *Id.*

10. *Id.* at 414.

11. *Id.*

12. *Id.*

events, the district attorney's office took a number of actions against him in retaliation for his speech, including his memorandum.<sup>13</sup>

Ceballos filed a lawsuit in federal court alleging a violation of 42 U.S.C. § 1983.<sup>14</sup> The district court granted the defendants' motion for summary judgment but the Ninth Circuit reversed, holding that "Ceballos's allegations of wrongdoing in [his] memorandum constitute protected speech under the First Amendment."<sup>15</sup> In so ruling, the Ninth Circuit relied on the standard for assessing the protection afforded public employee speech that the Supreme Court set forth in *Pickering v. Board of Education*<sup>16</sup> and *Connick v. Myers*.<sup>17</sup> In sum, the *Pickering-Connick* standard focuses on two issues when public employee plaintiffs claim that their employer retaliated against them in violation of the First Amendment: first, whether the speech addressed an issue of public concern or simply an individual personnel matter; and, second, whether the employees' interest in making the statement outweighed the employers' interest in regulating the speech.<sup>18</sup> Applying this standard, the Ninth Circuit concluded that Ceballos's memorandum, which recounted alleged governmental misconduct, qualified as speech regarding a matter of public concern.<sup>19</sup> The Ninth Circuit further held that the defendants had failed to identify any countervailing consideration that might outweigh Ceballos's interests, such as disruption or inefficiency within the district attorney's office.<sup>20</sup> The defendants appealed and the Supreme Court granted certiorari.<sup>21</sup>

The Supreme Court reversed and remanded, with Justice Kennedy delivering the opinion of the Court.<sup>22</sup> The Court began by describing the *Pickering-Connick* line of cases and then announced its new and central

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13. *Id.* at 415.

14. *Id.*

15. Ceballos v. Garcetti, 361 F.3d 1168, 1173 (9th Cir. 2004).

16. 391 U.S. 563 (1968) (holding that a teacher's comments concerning school funding touched on a matter of public concern and could not, consistent with the First Amendment, provide a basis for dismissal).

17. 461 U.S. 138 (1983) (holding that the question of whether a public employee's speech is constitutionally protected turns on the "public" or "private" nature of such speech). For an extended discussion of *Pickering*, *Connick*, and their progeny, see Kevin L. Cope, *Defending the Ivory Tower: A Twenty-First Century Approach to the Pickering-Connick Doctrine and Public Higher Education Faculty After Garcetti*, 33 J.C. & U.L. 313 (2007).

18. Ceballos, 361 F.3d at 1173.

19. *Id.* at 1173-78.

20. *Id.* at 1178-80.

21. Garcetti v. Ceballos, 543 U.S. 1186, 1186 (2005).

22. Justice Kennedy was joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. In part, *Garcetti* has attracted so much attention because Supreme Court observers have taken it as a signal of how the new conservative majority may approach a variety of constitutional issues. See, e.g., Mark C. Rahdert, *The Roberts Court and Academic Freedom*, CHRON. HIGHER EDUC. (Wash., D.C.), July 27, 2007, at B16.

holding: “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.”<sup>23</sup> The Court reasoned that:

When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences. When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny.<sup>24</sup>

In a critical passage, the Court stressed that “[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. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.”<sup>25</sup>

Applying this test, the Court concluded Ceballos’s memorandum did not constitute protected speech.<sup>26</sup> “The controlling factor in Ceballos’ case,” the Court held, “is that his expressions were made pursuant to his duties as a calendar deputy.”<sup>27</sup> “Ceballos did not act as a citizen when he went about conducting his daily professional activities,” the Court observed, and “[t]he fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.”<sup>28</sup>

This left the question of how, in future cases, lower courts were expected to go about determining whether a public employee plaintiff spoke pursuant to her or his official duties. The Court declined to “articulate a comprehensive framework”<sup>29</sup> that would answer this question. Instead, the Court declared that “[t]he proper inquiry is a practical one.”<sup>30</sup> Further, the Court stressed that many of the considerations that common sense suggests should inform such an inquiry do not dispose of it.<sup>31</sup> Thus, the Court said that whether the speech occurred inside or outside the office “is not dispositive.”<sup>32</sup> Similarly, the Court observed that whether the

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23. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

24. *Id.* at 423.

25. *Id.* at 421–22.

26. *Id.* at 422.

27. *Id.* at 421.

28. *Id.* at 422.

29. *Id.* at 424.

30. *Id.*

31. As the later discussion implicitly demonstrates, by including these “non-dispositive” factors in the opinion the Court provided a list of considerations to the lower courts, which those courts have in effect treated as dispositive.

32. *Garcetti*, 547 U.S. at 420.

expression concerns the subject matter of the plaintiff's employment "is nondispositive."<sup>33</sup> In addition, the Court took a somewhat dismissive approach to job descriptions, pointing out that they may "bear little resemblance to the duties an employee actually is expected to perform."<sup>34</sup>

Four members of the Court dissented, but for present purposes Justice Souter's opinion raised the most significant objection.<sup>35</sup> In his dissent, Justice Souter worried over the impact the Court's ruling might have on the protection afforded academic freedom. Specifically, he expressed the "hope" that the Court's ruling "does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to official duties.'"<sup>36</sup>

Although the majority did not attempt to rebut every point made in the various dissents, it responded to this one. The Court acknowledged that "[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests."<sup>37</sup> Accordingly, as noted above, the Court declared that it did not need to decide, and was not deciding, the question of whether the newly announced test "would apply in the same manner to a case involving speech related to scholarship or teaching."<sup>38</sup>

From the first, the majority's response to Justice Souter offered little comfort to those who shared his concern. After all, the majority did not say that the *Garcetti* test does not apply when it conflicts with faculty academic freedom; rather, the majority simply said that it did not need to decide that issue.<sup>39</sup> In addition, whether academic freedom poses an obstacle to application of the *Garcetti* test depends on the weight and parameters of that freedom; unfortunately, however, few Supreme Court cases have addressed academic freedom and those that have done so offer only limited guidance.<sup>40</sup> And, finally, certain statements made at the oral argument of *Garcetti* seem to suggest that at least some of the Justices find nothing troublesome in the idea that a college or university could terminate a

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33. *Id.* at 421. Indeed, the Court expressly left room for the possibility that public employees "may receive First Amendment protection for expressions made at work . . . or related to the speaker's job." *Id.* at 420–21.

34. *Id.* at 424–25. As some commentators have noted, this offers little predictability to employers, employees, and the attorneys who advise them. See Rhodes, *supra* note 5, at 1194–95.

35. Justices Stevens and Breyer also filed dissenting opinions. Justices Stevens and Ginsburg joined in Justice Souter's dissent.

36. *Garcetti*, 547 U.S. at 438 (Souter, J., dissenting).

37. *Id.* at 425 (majority opinion).

38. *Id.*

39. *Id.*

40. Indeed, Justice Souter cited only three cases in support of his academic freedom point, and one of those cases, *Grutter v. Bollinger*, 539 U.S. 306 (2003), concerns the prerogatives of educational institutions. Of course, for purposes of applying *Garcetti*, those institutions stand in the position of the employer.

faculty member based on the content of his or her lectures because they make those statements in the fulfillment of their job duties.<sup>41</sup>

## II. AFTER *GARCETTI*: GENERAL PATTERNS

To date, hundreds of lower court cases have cited and relied on *Garcetti*. It is still too soon to provide a comprehensive assessment of the impact of the case. Nevertheless, several general patterns have emerged through these decisions.

### A. The Constitutional Protection Afforded Public Employee Speech Has Changed.

Although one court has declared that *Garcetti* did not affect the law in its circuit,<sup>42</sup> a majority of courts have concluded that the case significantly changed the test that applies to First Amendment retaliation claims.<sup>43</sup> Some courts have described this shift as dramatic,<sup>44</sup> others less so,<sup>45</sup> but most have acknowledged that a meaningful change in the applicable analysis has occurred. Indeed, some courts have explicitly stated that *Garcetti* compelled them to reach a different result from the one that they would have reached applying only the *Pickering-Connick* inquiries.<sup>46</sup>

41. For a discussion of the exchanges at oral argument, see Larry D. Spurgeon, *A Transcendent Value: The Quest to Safeguard Academic Freedom*, 34 J.C. & U.L. 111, 147 (2006).

42. See *Black v. Columbus Pub. Sch.*, No. 2:96-CV-326, 2006 WL 2385359, at \*4 (S.D. Ohio Aug. 17, 2006) (finding that *Garcetti* did not change the law in the Sixth Circuit).

43. It will be some time before it is possible to determine empirically whether the overall protection afforded employees has changed because state and federal statutes may provide viable causes of action to employees who have no First Amendment claim after *Garcetti*. Indeed, the *Garcetti* majority pointed to “the powerful network of legislative enactments[,] such as whistle-blower protection laws and labor codes,” as a source of “checks on supervisors who would order unlawful or otherwise inappropriate actions.” *Garcetti*, 547 U.S. at 425–26. In addition, contractual concepts like tenure may provide some protection to the academic freedom of faculty members.

44. See, e.g., *Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323, 1325 (10th Cir. 2007) (declaring that *Garcetti* “profoundly alters how courts review First Amendment retaliation claims”); *Salas v. Wis. Dep’t of Corrs.*, 493 F.3d 913, 925 n.8 (7th Cir. 2007) (observing that *Garcetti* “significantly limits First Amendment protection of public employees’ speech”); *Broderick v. Evans*, No. 02-CV-11540-RGS, 2007 WL 967861 (D. Mass. Mar. 30, 2007) (holding that *Garcetti* represents “something of a sea change in First Amendment law”).

45. See, e.g., *Dennis v. Putnam County Sch. Dist.*, No. 5:05-CV-07 (CAR), 2007 WL 891517, at \*4 (M.D. Ga. Mar. 21, 2007) (describing *Garcetti* as adding a “new element to the traditional analysis”); *Logan v. Dep’t of Corrs.*, No. 1:04-CV-0797-SEB-JGP, 2006 WL 1750583, at \*1 (S.D. Ind. June 26, 2006) (describing *Garcetti* as simply “add[ing] a new test”).

46. See, e.g., *Spiegla v. Hull*, 481 F.3d 961 (7th Cir. 2007) (describing a complicated case history: district court granted summary judgment to defendants; plaintiff appealed and Seventh Circuit reversed; jury returned verdict for plaintiff and

### B. The *Garcetti* Test Raises a Distinct Threshold Question.

Most courts have viewed *Garcetti* as adding a new and initial consideration in determining whether public employee speech receives constitutional protection.<sup>47</sup> This makes logical and practical sense: after all, if the court concludes that the speech occurred as part of the employee's official duties then the First Amendment does not protect it and the court need not reach the public concern and balancing issues presented by the *Pickering-Connick* standard. A few courts seem to have understood *Garcetti* in a somewhat different sense, and have incorporated it as a clarification of the public concern inquiry of the *Pickering-Connick* standard.<sup>48</sup> At present, however, this appears to reflect a minority approach.

### C. It Is Unclear How Broadly *Garcetti* Applies.

Courts have differed in how they have framed and applied the threshold inquiry. Some courts have embraced a fairly expansive interpretation.

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defendants appealed; Seventh Circuit vacated verdict in light of *Garcetti*, decided while case was pending); *Williams v. Riley*, 481 F. Supp. 2d 582 (N.D. Miss. 2007) (overturning initial denial of defendants' motion to dismiss but reconsidered and dismissed in light of *Garcetti*); *Ruotolo v. City of N.Y.*, No. 03 Civ. 5045(SHS), 2006 WL 2033662 (S.D.N.Y. July 19, 2006) (describing how *Garcetti* changed the court's actions). In *Williams*, the court even went so far as to note that it was "gravely troubled" by the result dictated by the new *Garcetti* standard. *Williams*, 481 F. Supp. 2d at 584. In *Williams*, county police officers who were terminated after filing a report detailing beatings of prisoners by fellow officers were judged to have no claim because they had issued the report as part of their official duties. *Id.*

47. See, e.g., *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 692 (5th Cir. 2007) (holding that *Garcetti* "added a threshold layer to the *Pickering* balancing test"); *Spiegla*, 481 F.3d at 965 (holding that, after *Garcetti*, "the threshold inquiry is whether the employee was speaking as a citizen"); *Bowman-Farrell v. Coop. Educ. Serv. Agency*, No. 02-C-818, 2007 U.S. Dist. LEXIS 77283, at \*34 (E.D. Wis. Oct. 16, 2007) (holding that "[i]n the wake of *Garcetti*, the threshold inquiry is whether the public employee was speaking as a citizen or, by contrast, pursuant to his duties as a public employee"); *Jennings v. County of Washtenaw*, 475 F. Supp. 2d 692, 702 (E.D. Mich. 2007) (holding that "[t]he threshold inquiry is whether Plaintiff was speaking in her capacity 'as a citizen'"); *Dennis*, 2007 WL 891517, at \*4 (ruling that "before analyzing whether Plaintiff has established the *Pickering* elements, the Court will first determine whether Plaintiff made her disclosures of financial irregularities pursuant to her official duties").

48. See, e.g., *Nolan v. Terry*, No. Civ.A. 7:04CV00731, 2006 WL 2620002, at \*3 (W.D. Va. Sept. 13, 2006) (discussing the "capacity of the speaker" as a dimension of the *Pickering-Connick* inquiry); *Healy v. N.Y. Dep't of Sanitation*, No. 04 Civ. 7344(DC), 2006 WL 3457702, at \*4 (S.D.N.Y. Nov. 22, 2006) (observing that "[t]he U.S. Supreme Court recently clarified the applicable test in *Garcetti*"); see also *D'Angelo v. Sch. Bd.*, 497 F.3d 1203, 1209 (11th Cir. 2007) (describing how the Seventh, Tenth, and Eleventh Circuits have addressed *Garcetti* by "refin[ing]" their "analys[es] of the first step of the *Pickering* test"). It is not clear that this difference actually makes a difference because under this formulation the court still asks whether the plaintiff "spoke as a citizen" on a matter of public concern. *Id.*

Under this approach, a plaintiff's job duties are broadly construed and communications that in any way stem from those duties qualify as official speech.<sup>49</sup> Other courts seem to have construed *Garcetti* more narrowly.<sup>50</sup> In the view of this author, it is too soon to assess the depth of the disagreement among the circuits or to identify the approach that will ultimately prevail.

#### D. Whether the Communication Was Made to an External or Internal Audience Plays a Very Significant Role in the Analysis.

Several patterns have emerged in lower court efforts to engage in the prescribed "practical inquiry" into the plaintiff's employment duties. So far, written job descriptions have not figured significantly in the courts' analyses.<sup>51</sup> Courts have instead paid greater attention to such factors as the tenor and substance of the speech, and, in the case of written communications, whether the employee's signature appears over his official title and whether the statements were made using official forms or letterhead stationery.<sup>52</sup> The most significant factor, however, has been whether the employee made the communication to an internal or external audience.

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49. See, e.g., *Green v. Bd. of County Comm'rs*, 472 F.3d 794, 800–01 (10th Cir. 2007) (finding that the employee's communications with superiors regarding concerns about drug testing procedures were within her official duties even though she had no responsibility to advocate for better testing and that her communications "stemmed from" what she was paid to do); see also *Hong v. Grant*, 516 F. Supp. 2d 1158 (C.D. Cal. 2007); *infra* notes 147–156 and accompanying text.

50. See, e.g., *Freitag v. Ayers*, 468 F.3d 528, 545 (9th Cir. 2006) (holding that plaintiff "does not lose her right to speak as a citizen simply because [the communications] concerned the subject matter of her employment"); *Barber v. Louisville and Jefferson County Metro. Sewer Dist.*, No. 3:05-CV-142-R, 2007 WL 121361 (W.D. Ky. Jan. 12, 2007) (holding that *Garcetti* applies where the speech in question is part of a directed duty of employment).

51. It is difficult to know what to make of this. It may indicate that parties have shied away from emphasizing such descriptions in light of the Supreme Court's skepticism about them. Or it may indicate that such descriptions tend to be terse, ambiguous, plainly disconnected from reality, or nonexistent, and therefore of little use to either party. Courts have, however, attended to them at some length where they have been sufficiently specific and/or dictated by state law. See, e.g., *Jackson v. Jimino*, Civ. No. 1:03-CV-722, 2007 WL 189311 (N.D.N.Y. Jan. 19, 2007) (holding that the scope of plaintiff's duties as director of a state tax bureau were defined by statute and by an opinion of counsel for that public office); *Renken v. Gregory*, No. 04-C-1176, 2007 U.S. Dist. LEXIS 55640 (E.D. Wis. July 31, 2007); *infra* notes 122–131 and accompanying text.

52. See, e.g., *Jaworski v. N.J. Tpk. Auth.*, No. 05-4485 (AET), 2007 WL 275720, at \*5 (D.N.J. Jan. 29, 2007) (alluding to the "tenor" and details of the written communication, along with the fact that plaintiff signed it over his official title); *DeLuzio v. Monroe County*, No. 3:CV-00-1220, 2006 WL 3098033, at \*7 (M.D. Pa. Oct. 30, 2006) (noting that plaintiff "wrote the memorandum [at issue] on his own paper, rather than [on] official complaint forms").



As one would expect, courts have generally treated communications made to external audiences as the speech of a citizen rather than an employee.<sup>53</sup> Of course, this pattern admits of some exceptions. For example, the analysis changes where an employee's official duties include responsibilities for external communications.<sup>54</sup> Also, speech made through government-owned media will often flow from the performance of an official duty even though it may reach an external audience and otherwise resemble speech made through privately owned media.<sup>55</sup>

In contrast, courts have typically found that communications made within the workplace and addressed solely to fellow workers were made pursuant to the employee's official duties.<sup>56</sup> Still, this pattern does not amount to a rule, and factual nuances have led courts in some cases to conclude that speech occurring entirely within the workplace nevertheless qualified as the speech of a citizen.<sup>57</sup> In one case that presented an

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53. See, e.g., *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006) (dealing with external communications with state senator and state office of inspector general); *Kokomo v. Kern*, 852 N.E.2d 623 (Ind. Ct. App. 2007) (discussing statements made in newspaper article by member of fire department); *Sassi v. Lou-Gould*, No. 05 Civ 10450 (CLB), 2007 WL 635579, at \*3 (S.D.N.Y. Feb. 27, 2007) (regarding a police chief's public letters written to the city council "as a resident taxpayer"); *Barber v. Louisville and Jefferson County Metro. Sewer Dist.*, No. 3:05-CV-142-R, 2006 WL 3772206 (W.D. Ky. Dec. 20, 2006) (discussing a sewer department employee's letter to state attorney general); *Hailey v. City of Camden*, Civ. No. 01-3967, 2006 WL 1875402, at \*16 (D.N.J. July 5, 2006) (addressing statements made by public employees to newspapers and at city council meetings). Indeed, in *Myles v. Richmond County Bd. of Educ.*, No. CV 106-66, 2007 WL 2453588 (S.D. Ga. Aug. 22, 2007), *aff'd*, No. 07-14468, 2008 WL 596772 (11th Cir. 2008), the court declared that "where a plaintiff does not address her concerns to the public or in a public forum, the speech is generally not protected, barring extraordinary circumstances." *Myles*, 2007 WL 2453588, at \*8.

54. See, e.g., *Kougher v. Burd*, Civ. No. 1:04-CV-2209, 2007 WL 216844, at \*10 (M.D. Pa. Jan. 25, 2007) (holding that plaintiff's "action in responding to media inquiries about a pending matter falls squarely within the scope of his employment").

55. See, e.g., *Hogan v. Twp. of Haddon*, Civ. No. 04-2036 (JBS), 2006 WL 3490353 (D.N.J. Dec. 1, 2006) (holding that statements made by township commissioner in a township's monthly newsletters, on the township's cable channel, and on the township's official website were unprotected).

56. See, e.g., *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689 (5th Cir. 2007) (focusing on an internal memoranda from athletic director and football coach to school's office manager and principal); *Haynes v. City of Circleville*, 474 F.3d 357 (6th Cir. 2007) (analyzing an internal memoranda regarding personnel training issues); *Iott v. Carter*, No. 06-6001-TC, 2007 WL 764321 (D. Or. Mar. 8, 2007) (analyzing statements made at work to fellow employees); *Thampi v. Collier County Bd. of Comm'rs*, 510 F. Supp. 2d 838 (M.D. Fla. 2007) (looking at internal communications regarding waste, personality conflicts, and management style); *Posey v. Lake Pend Oreille Sch. Dist.* No. 84, No. CV05-272-N-EJL, 2007 WL 420256 (D. Idaho Feb. 2, 2007) (looking at internal communications by school parking lot attendant about school safety and security concerns).

57. For example, in *Wilcoxon v. Red Clay Consol. Sch. Dist.*, 437 F. Supp. 2d 235 (D. Del. 2006), the court concluded that a journal prepared by a physical education instructor to document the tardiness and absenteeism of a fellow instructor was "not

interesting twist, a court held that an employee did not transform “official duty speech” into “private citizen speech” by preparing a memorandum as part of his job but then providing a copy of it to the media.<sup>58</sup>

E. Whether Speech Was Made Pursuant to an Employee’s “Official Duties” May Raise a Fact Question the Court Cannot Resolve in the First Instance.

In his *Garcetti* dissent, Justice Souter cautioned that the Court’s opinion invited “factbound litigation” over the question of whether the employee’s statements were made “pursuant to . . . official duties” in light of “the totality of employment circumstances.”<sup>59</sup> Certainly, courts in a number of cases have reviewed the undisputed facts and have ruled that the employee did or did not speak as part of her or his official duties.<sup>60</sup> In a substantial number of cases, however, courts have concluded that material factual questions existed as to whether a communication was made as part of an employee’s official duties.<sup>61</sup>

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written pursuant to [plaintiff’s] official duties as a teacher.” *Id.* at 243. Interestingly, the court went on to hold that although the speech was “private” and “personal” in nature it nevertheless addressed a matter of “public concern” and so was entitled to First Amendment protection. *Id.* at 245; *see also* Harris v. Tunica County, No. 2:05CV 126, 2007 WL 397056 (N.D. Miss. Feb. 1, 2007) (holding that statements of jail employee to internal affairs investigators were not made pursuant to official job duties); Rohrbough v. Univ. of Colo. Hosp. Auth., No. 06-CV-00995-REB-MJW, 2006 WL 3262854, at \*3 n.2 (D. Colo. Nov. 9, 2006) (holding that reports created by the employee at the direction of the hospital’s risk management department were not “necessarily” within the plaintiff’s duties); DeLuzio v. Monroe County, No. 3:CV-00-1220, 2006 WL 3098033 (M.D. Pa. Oct. 30, 2006) (holding that employee’s communications challenging her supervisors were not made pursuant to official job duties). In one interesting case, a plaintiff contended his workplace was so rife with retaliation that it created a duty *not* to communicate. Batt v. City of Oakland, No. C 02-04975 MHP, 2006 WL 1980401, at \*4 (N.D. Cal. Oct. 12, 2006). The plaintiff argued that raising complaints in such an environment necessarily falls outside an employee’s job duties. *See id.*

58. Andrew v. Clark, 472 F. Supp. 2d 659, 663 (D. Md. 2007).

59. *Garcetti*, 547 U.S. at 436 (Souter, J., dissenting).

60. *See, e.g.,* Ryan v. Shawnee Mission Unified Sch. Dist., 437 F. Supp. 2d 1233, 1249–52 (D. Kan. 2006) (holding there was “not room for serious debate” that numerous statements were made by plaintiff pursuant to her official duties). In some cases the parties have simply stipulated that the communications in question were not made pursuant to the employee’s official duties, leaving the court to conduct the traditional *Pickering-Connick* analysis. *See, e.g.,* Benvenisti v. New York, No. 04 Civ. 3166(JGK), 2006 WL 2777274 (S.D.N.Y. Sept. 23, 2006); Coles v. Moore, No. 3:04-CV-1623(JCH), 2007 WL 2790436 (D. Conn. Sept. 25, 2006). In *Bessent v. Dyersburg State Cmty. Coll.*, 224 Fed. App’x 476 (6th Cir. 2007), the plaintiff’s counsel conceded at oral argument that his client’s statements had been made pursuant to her official duties. *Id.* at 479.

61. *See, e.g.,* Caruso v. Massapequa Union Free Sch. Dist., 478 F. Supp. 2d 377 (E.D.N.Y. 2007); Gordon v. Marquis, Civ. No. 3:03CV01244(AWT), 2007 WL 987553 (D. Conn. Mar. 31, 2007); Burke v. Nittman, Civ. Action No. 05- CV-01766-

The various patterns described above are generally apparent in the lower court cases applying *Garcetti* in the higher education context. In those cases, courts have recognized that *Garcetti* changed the law, have pursued the *Garcetti* inquiry as an initial and distinct issue, and have paid close attention to whether the plaintiff communicated with an external or internal audience. Interestingly, courts applying *Garcetti* in the higher education context have tended to view the plaintiffs as having broad job duties and have usually *not* found a factual issue that required further development. This may be a function of the facts of those specific cases. Or this may signal a coming trend for the application of *Garcetti* in higher education, where the culture often fosters broad notions of institutional involvement and responsibility.

### III. HIGHER EDUCATION CASES APPLYING *GARCETTI*

Most of the higher education cases decided to date have involved non-faculty employees and therefore have not implicated the specific academic freedom concerns articulated by Justice Souter. As a result, the courts in those cases have applied *Garcetti* in a fairly straightforward manner and with unspectacular results. Interestingly, and for some observers distressingly, courts have applied *Garcetti* in much the same way in cases involving faculty speech.

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WYD-PAC, 2007 WL 691206 (D. Colo. Mar. 2, 2007); Abbatiello v. County of Kauai, Civ. No. 04-00562 SOM/BMK, 2007 WL 473680 (D. Haw. Feb. 7, 2007); Jackson v. Jimino, Civ. No. 1:03-CV-722, 2007 WL 189311 (N.D.N.Y. Jan. 19, 2007); Barclay v. Michalsky, 451 F. Supp. 2d 386 (D. Conn. 2006); Kodrea v. City of Kokomo, 458 F. Supp. 2d 857 (S.D. Ind. 2006); Shrewbridge v. El Dorado Irrigation Dist., No. CIV. S-05-0740 FCD EFB, 2006 WL 3741878 (E.D. Cal. Dec. 19, 2006); Cheek v. City of Edwardsville, No. 06-2210-JWL, 2006 WL 2802209 (D. Kan. Sept. 29, 2006); Skrutski v. Marut, No. 3: CV-03-2280, 2006 WL 2660691 (M.D. Pa. Sept. 15, 2006); Milde v. Greenwich Hous. Auth., Civ. No. 3:00-CV-2423 (AVC), 2006 WL 2583086 (D. Conn. Sept. 5, 2006). It is worth noting that when *Garcetti* was decided the parties in some pending cases made an abrupt about-face regarding their version of the “undisputed” facts. Thus, plaintiffs who initially claimed they were speaking pursuant to their official duties (perhaps so they did not look like uninformed rabble rousers) suddenly changed their story and claimed their speech had nothing to do with their jobs. *See, e.g.,* Dennis v. Putnam County Sch. Dist, No. 5:05-CV-07 (CAR), 2007 WL 891517 (M.D. Ga. Mar. 21, 2007); Levy v. Office of Legislative Auditor, 459 F. Supp. 2d 494 (M.D. La. 2006); Yatzus v. Appoquinimink Sch. Dist., 458 F. Supp. 2d 235 (D. Del. 2006); Dunleavy v. Wayne County Comm’r, Civ. Action No. 04-CV-74670-DT, 2006 WL 2375679 (E.D. Mich. Aug. 16, 2006). In at least one case, the plaintiff even sought leave to amend her complaint so she could remove some troublesome concessions from it. *See* McLaughlin v. Pezzolla, No. 06-CV-00376, 2007 WL 676674 (N.D.N.Y. Feb. 28, 2007). Of course, defendants who had sought to paint plaintiffs as troublemakers acting outside the scope of their authority also had to reverse course, and these tensions came to a head in *Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323 (10th Cir. 2007), where the court observed that after *Garcetti* came down the parties literally swapped positions on the question of whether plaintiff’s speech had been made within her official duties. *Id.* at 1330.

## A. Lower- and Mid-Level Non-Faculty Employees

*Bradley v. James*<sup>62</sup> offers a good example of the application of *Garcetti* to a lower-level non-faculty employee of an institution of higher education. In that case, Arch Bradley, a police officer at the University of Central Arkansas, allowed others to respond when a shooting incident occurred at a university dormitory.<sup>63</sup> James, the university police chief, ordered his second-in-command to investigate Bradley's failure to respond.<sup>64</sup> In the course of that investigation, Bradley alleged that James was intoxicated on the night of the incident.<sup>65</sup> Bradley was subsequently fired.<sup>66</sup> Bradley sued, alleging that he had been retaliated against for exercising his First Amendment rights when he said that James had been intoxicated.<sup>67</sup> The court rejected Bradley's claim that the First Amendment protected his statements regarding James.<sup>68</sup> The court concluded that Bradley had made those statements as an employee and not as a citizen: "[a]s a police officer, Bradley had an official responsibility to cooperate with the investigation."<sup>69</sup>

As in the non-university context, lower- and mid-level university employees whose jobs include monitoring compliance with legal requirements may find that *Garcetti* poses an insurmountable obstacle for them.<sup>70</sup> Thus, in *Miles v. Baruch College*,<sup>71</sup> the plaintiff held positions that

62. 479 F.3d 536 (8th Cir. 2007).

63. *Id.* at 537.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 538.

69. *Id.* One of the earliest cases decided under *Garcetti* also involved a lower-level non-faculty employee. See *Battle v. Georgia*, 468 F.3d 755, 761 (11th Cir. 2006) (holding that the plaintiff, who worked in a university financial aid office, "had a clear employment duty" to report fraud in a work-study program and therefore was not speaking as a citizen when she made these statements). *Bowers v. Univ. of Va.*, No. Civ. 3:06CV00041, 2006 WL 3041269 (W.D. Va. Oct. 24, 2006), involved an interesting issue around a lower-level non-faculty member's use of e-mail. *Id.* at \*2. In that case, plaintiff became concerned that her university employer had decided to restructure its pay scale system to the detriment of some other workers. *Id.* The local chapter of the NAACP (of which plaintiff was a member) held a meeting and distributed materials in opposition to the plan. *Id.* A friend of plaintiff's who could not attend the meeting asked her to forward the materials distributed by the NAACP; plaintiff did so, using her university computer and university e-mail account. *Id.* The university argued that in light of her use of university resources she was not speaking as a citizen when she sent the e-mail and the First Amendment did not protect her communication. *Id.* at \*7. Plaintiff countered that she sent the documents before working hours, labeled the documents as materials from the NAACP, and sent them at the request of a friend and not as part of her job duties. *Id.* The court concluded that, for purposes of a motion under FED. R. CIV. P. 12(b)(6), the plaintiff had alleged sufficient facts to survive a motion to dismiss. *Id.* at \*8.

70. *E.g.*, *Dennis v. Putnam County Sch. Dist.*, No. 5:05-CV-07 (CAR), 2007 WL 891517 23598 (M.D. Ga. Mar. 21, 2007) (holding that a school district's Head Start

included responsibility for formulating affirmative action plans and other compliance activities.<sup>72</sup> She claimed that in the course of discharging her duties she uncovered alleged financial improprieties, which she reported to the President of Baruch, and that the college subsequently terminated her in retaliation for doing so.<sup>73</sup> The court found her speech analogous to the memorandum at issue in *Garcetti* and concluded the First Amendment did not protect it.<sup>74</sup>

A more complicated scenario involving an employee who handled compliance matters arose in *Davis v. McKinney*.<sup>75</sup> In that case, Cynthia Davis oversaw computer-related audits and created audit summaries and reports for the University of Texas Health Science Center in Houston (UTHSC).<sup>76</sup> At the request of a UTHSC vice-president, Davis initiated an investigation into whether employees were viewing pornography on work computers in violation of technology use policies.<sup>77</sup> Davis found evidence that more than three hundred employees of UTHSC had accessed such material.<sup>78</sup> As authorized, she then confiscated the computers of employees where the evidence suggested they had viewed these sites intentionally.<sup>79</sup>

Davis believed that upper management at UTHSC subsequently lost its enthusiasm for this investigation.<sup>80</sup> She claimed that her superiors declined to meet with her about the matter and directed her to return the confiscated computers to the employees.<sup>81</sup> She sent a letter complaining about these developments, and also about budgetary issues and alleged discriminatory employment practices, to the President of UTHSC and the Chancellor of the entire UT system.<sup>82</sup> She also contacted the FBI concerning possible child pornography on eight computers and the EEOC about her discrimination allegations.<sup>83</sup>

Davis filed suit against several arms of the University of Texas system

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fiscal officer's employment duties included monitoring for and reporting on financial misconduct).

71. No. CV-07-1214(CPS) (RLM), 2008 U.S. Dist. LEXIS 5534 (E.D.N.Y. Jan. 24, 2008).

72. *Id.* at \*5 n.5.

73. *Id.* at \*5–\*6.

74. *Id.* at \*20.

75. 518 F.3d 304, 307 (5th Cir. 2008).

76. *Id.* at 307.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 308.

81. *Id.*

82. *Id.* at 308–09.

83. *Id.* at 309 n.1. The FBI examined the hard drives of ten confiscated computers and found no child pornography. *Id.* at 310.

and a number of University of Texas officials, alleging that they had taken a variety of retaliatory actions against her as a result of these communications and had thereby forced her to resign.<sup>84</sup> The district court found that Davis wrote her complaint letter as a citizen, rather than an employee, and that the First Amendment therefore protected that communication from retaliation.<sup>85</sup> Defendants appealed, and the Fifth Circuit affirmed in part and reversed in part.<sup>86</sup>

Following the approach endorsed by the Seventh Circuit, the court announced that it would treat the *Garcetti* inquiry as a threshold one into “whether the plaintiff was speaking ‘as a citizen’ or as part of her public job.”<sup>87</sup> The court further endorsed the approach of focusing on the internal or external nature of the communication.<sup>88</sup> The court pointed out that other circuits had recognized that “when a public employee raises complaints or concerns up the chain of command at his [or her] workplace about his [or her] job duties [then] that speech is undertaken in the course of performing his [or her] job,” but that if “a public employee takes his [or her] job concerns to persons outside the work place” then “those external communications are ordinarily not made as an employee, but as a citizen.”<sup>89</sup> In this case, however, the court noted that its task was complicated by the fact that Davis’s communications concerned multiple topics, some of which related to her job duties and others of which did not.<sup>90</sup>

The court therefore disaggregated Davis’s communications and applied *Garcetti* to their various component parts.<sup>91</sup> The court concluded that statements made to her immediate superiors about her pornography investigation were “clearly made as an employee.”<sup>92</sup> This also held true for the statements in her letter to the President and the Chancellor that concerned her pornography investigation and management’s response to it.<sup>93</sup> On the other hand, statements in that same letter about her other concerns were “not written as part of her job duties as an internal auditor” and were therefore “made as a citizen.”<sup>94</sup> Similarly, since Davis’s job function did not include reporting to outside police authorities or other agencies, her communications with the FBI and the EEOC were not made

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84. *Id.*

85. *Id.*

86. *Id.* at 318.

87. *Id.* at 312 (quoting *Mills v. City of Evansville*, 452 F.3d 646, 647–48 (7th Cir. 2006)).

88. *Id.*

89. *Id.* at 313.

90. *Id.* at 314.

91. *Id.* at 315.

92. *Id.*

93. *Id.* at 315–16.

94. *Id.* at 315.

in her capacity as an employee.<sup>95</sup> The Fifth Circuit remanded with instructions for the district court to apply the *Pickering-Connick* standard to those of Davis's communications that were not job-related.<sup>96</sup>

#### B. High-Level University Administrators

Two cases have involved the application of *Garcetti* to high-ranking university administrators. In both cases, the court concluded that the speech in question fell within those administrators' broad responsibilities. These decisions may signal the direction of future cases involving high-level university administrators, whose job portfolios tend to be large and diverse.

*Vila v. Padron*<sup>97</sup> concerned a licensed attorney who served as the Vice President of External Affairs for the Miami-Dade Community College.<sup>98</sup> Pursuant to this broad policy-making position, Adis Vila supervised the college-wide units of grants, governmental affairs, legal affairs, and cultural affairs, and provided high-level strategic planning counsel.<sup>99</sup> Vila objected to a number of actions taken by the college and its president, which she believed to be unethical or illegal.<sup>100</sup> After she was informed that her contract would not be renewed, she sued the college for retaliatory discharge in violation of the First Amendment.<sup>101</sup> The district court entered judgment as a matter of law for the defendant.<sup>102</sup> On appeal, the Eleventh Circuit, noting that Vila admitted at trial that all of her communications related to the college and were under her jurisdiction and authority, concluded she was not speaking as a citizen when making her complaints.<sup>103</sup>

In *Johnson v. George*,<sup>104</sup> Marguerite Johnson served as a Vice-President of the Delaware Technical and Community College and as Director of one of its campuses.<sup>105</sup> After receiving complaints about Johnson's behavior, the President placed her on an administrative leave.<sup>106</sup> Johnson filed suit, alleging that these actions were in fact taken in retaliation against her for making statements regarding the information technology system at a

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95. *Id.* at 316.

96. *Id.* at 318.

97. 484 F.3d 1334 (11th Cir. 2007).

98. *Id.* at 1336.

99. *Id.*

100. *Id.*

101. *Id.* at 1337–38.

102. *Id.* at 1338.

103. *Id.* at 1339.

104. No. 05-157-MPT, 2007 U.S. Dist. LEXIS 35344 (D. Del. May 15, 2007).

105. *Id.* at \*2–\*4.

106. *Id.* at \*5.

meeting of the school's department chairs.<sup>107</sup>

Johnson claimed that those statements did not fall within her job duties because she did not supervise, manage, direct, or control the information technology department and she did not regularly attend meetings of the department chairs.<sup>108</sup> The district court summarily dismissed these arguments, ruling that in making her statements "Johnson was acting in her capacity as the Campus Director, with overall responsibility for the needs of students and faculty of the campus," including information technology.<sup>109</sup>

### C. Coaches

Applying *Garcetti* to coaches may at some point raise interesting issues in light of the teaching that can take place as part of college and university athletics. Resolution of those issues will have to wait, however, because the only decision concerning a coach so far does not require much analysis.

*Potera-Haskins v. Gamble*<sup>110</sup> involved statements made by the head women's basketball coach at Montana State University-Bozeman, one Robin Potera-Haskins.<sup>111</sup> In the spring of 2003, concerns arose regarding the university's women's basketball program.<sup>112</sup> As a result, the university's Athletic Director issued a series of instructions to Potera-Haskins.<sup>113</sup> Potera-Haskins responded through several memoranda, all of which indicated she had sent them in her official capacity,<sup>114</sup> all of which were directed to university administrators, and all of which related to her performance as head women's basketball coach.<sup>115</sup>

The university fired Potera-Haskins, who sued.<sup>116</sup> Among other things, Potera-Haskins alleged that she had been terminated in retaliation for statements made in those communications and that this violated her First Amendment rights.<sup>117</sup> Unsurprisingly, the court concluded that the record allowed "but one conclusion": that Potera-Haskins made these statements "in her official capacity as a public official."<sup>118</sup>

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107. *Id.* at \*1.

108. *Id.* at \*17–18.

109. *Id.* at \*17.

110. 519 F. Supp. 2d 1110 (D. Mont. 2007).

111. *Id.* at 1114.

112. *Id.*

113. *Id.*

114. All the memoranda stated they were from the "Head Coach, Women's Basketball, Montana State University." *Id.*

115. *Id.*

116. *Id.* at 1114–15.

117. *Id.* at 1115.

118. *Id.* at 1117.



#### D. Faculty Members

As noted briefly above, a number of commentators have argued that the application of *Garcetti* to college and university faculty members raises serious constitutional concerns. It has been posited that institutions of higher education do not simply transmit knowledge and values but also develop critical intellectual faculties, and that this mission requires “a great deal of speech autonomy” for both faculty and students—more autonomy than *Garcetti* appears to afford.<sup>119</sup> In a similar vein, it has been maintained that *Garcetti* reflects the current Supreme Court majority’s view that management should enjoy broad prerogatives in the employment relationship—a view that does not fit well with academic freedom’s protection of such “core values” as “dissent, disputation, experimentation, and expression of controversial ideas in teaching and research.”<sup>120</sup> And it has been argued that “much of what academic freedom exists to protect” is the precise speech that *Garcetti* leaves unprotected: “speech by university employees, as employees, discharging job responsibilities as employees,” including classroom lecturing, serving on academic panels, providing continuing education for graduates, communicating on behalf of professional organizations, and publishing.<sup>121</sup>

Very few cases have applied *Garcetti* to retaliation claims brought by faculty members. Still, the cases that have been decided are somewhat remarkable. They are not remarkable because they reveal the tension between *Garcetti* and academic freedom. Rather, they are remarkable because the discussion of any such tension is almost wholly absent. This may mean very little in light of the factually idiosyncratic nature of these cases; indeed, reading them may leave one with the impression that the forces of the universe conspired to generate decisions that have little use as

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119. See Nahmod, *supra* note 2, at 585–86. Nahmod contends that this difference in purpose distinguishes the higher education setting from the public primary and secondary school setting, along with the fact that college and university students are older and not a captive audience. *Id.* at 585. Nahmod acknowledges that autonomy in the higher education setting is still “subject to two uncontroversial educational requirements: first, discussion in the classroom must be related, even if loosely, to the subject matter, and second, the educational process must not be impeded by disruptive tactics.” *Id.*

120. Lieberwitz, *supra* note 7, at 168–69.

121. See R. George Wright, *The Emergence of Academic Freedom*, 85 NEB. L. REV. 793, 820–21 (2007); see also Cope, *supra* note 17, at 333 (“[F]aculty members disseminating their scholarship nearly always do it pursuant to their ‘official duties.’ If this is true, then the Supreme Court’s current academic freedom jurisprudence would provide faculty scholarship with almost no First Amendment protection whatsoever.”); Spurgeon, *supra* note 41, at 149 (“The significance of *Garcetti* is that if it is applied to public college or university employees, it could provide a blunt weapon to those who would challenge the content of a professor’s expression.”). Wright also points out that the *Garcetti* test does not allow for the fact that some activities—for example, blogging by a faculty member on an academic topic—might qualify as speech by a citizen *and* as job-related speech. Wright, *supra*, at 820–21.

precedent. Or it may mean a great deal; perhaps the courts' unblinking application of *Garcetti* to cases involving such core academic functions as conducting research, obtaining grants, selecting presidents, advising students, arranging speeches, and evaluating peers serves as an omen of what will follow.

A good place to begin is with *Renken v. Gregory*,<sup>122</sup> which involved core academic activity. Kevin Renken served as an associate professor at the University of Wisconsin–Milwaukee.<sup>123</sup> The National Science Foundation awarded him a grant to establish a thermal engineering laboratory, provided the university would share in the cost.<sup>124</sup> The university agreed to do so, but Renken disagreed with the school's proposed use of the grant money.<sup>125</sup> He expressed the opinion that the school's proposed use would violate federal law and filed complaints with several university committees.<sup>126</sup> He later sued in federal court, alleging that as a result of his speech various university administrators had unconstitutionally retaliated against him by refusing to pay his student assistants and by proposing to reduce his compensation.<sup>127</sup>

The district court granted summary judgment to the defendants and dismissed Renken's complaint.<sup>128</sup> Citing a provision of the Wisconsin Administrative Code, the court found that "[t]he primary duties of a [state university] faculty member are teaching, research, and service."<sup>129</sup> The court noted that Renken had criticized the university's proposed use of the grant money "because he wanted to use the grant for his research and teaching."<sup>130</sup> "Thus," the court reasoned, Renken "made the statements at issue as part of his effort to carry out two of his primary duties, research and teaching."<sup>131</sup>

*Gorum v. Sessoms*<sup>132</sup> concerned speech by a tenured faculty member while performing quasi-administrative functions.<sup>133</sup> In that case, Wendell Gorum served as a tenured professor and Chair of the Mass

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122. No. 04-C-1176, 2007 U.S. Dist. LEXIS 55640 (E.D. Wis. Jul. 31, 2007).

123. *Id.* at \*1.

124. *Id.*

125. *Id.*

126. *Id.* at \*1–2.

127. *Id.* at \*2.

128. *Id.* at \*7.

129. *Id.* at \*4.

130. *Id.* at \*4–\*5.

131. *Id.* at \*5. The court also highlighted some of the allegations of the plaintiff's complaint, for example that by terminating the grant defendants had "prevented [him] from fulfilling his job responsibilities to solicit education and research funds" and that his statements were made during the grant application process and implementation of the project. *Id.* (quoting Amended Complaint at P 1, *Renken*, 2007 U.S. Dist. LEXIS 55640 (No. 04-C-1176)).

132. No. 06-565 (GMS), 2008 WL 399641 (D. Del. Feb. 12, 2008).

133. *Id.* at \*1.

Communications Department of Delaware State University.<sup>134</sup> In 2003, he participated in the faculty senate's search process for the next president of the university.<sup>135</sup> When the senate narrowed its search to three finalists (including Allen Sessoms, whom the university ultimately selected) Gorum spoke out in protest and proposed reopening the process.<sup>136</sup> Gorum also acted as an official advisor to a fraternity and helped organize its 2004 Martin Luther King, Jr. Prayer Breakfast.<sup>137</sup> When another member of the speaker's committee asked President Sessoms to address the gathering Gorum revoked the invitation because he had already made arrangements for someone else to speak.<sup>138</sup> Finally, Gorum served as an advisor to students with disciplinary problems, including DaShaun Morris, an All-American football player who was suspended for being in possession of a firearm on campus.<sup>139</sup> But Gorum did not just advise Morris with respect to the suspension proceedings—he urged Morris to hire a lawyer, he suggested to Morris that he sue the university, and he paid the lawyer's \$600 retainer.<sup>140</sup> The university subsequently terminated Gorum when it discovered he had improperly altered many students' final grades in violation of controlling policies and procedures—conduct to which Gorum admitted.<sup>141</sup>

Gorum nevertheless sued the President and Board of Trustees of the university, arguing they had terminated him in retaliation for engaging in constitutionally protected speech.<sup>142</sup> Gorum claimed that this protected speech included his statements regarding the candidates, his revocation of the invitation to speak at the breakfast, and the assistance he provided to Morris.<sup>143</sup> Gorum stressed the fact that the Board and President had elected to terminate him even though the university disciplinary committee that had reviewed his offense had recommended placing him on two years of probation.<sup>144</sup>

Applying *Garcetti*, the district court had no difficulty concluding that the statements Gorum made in the course of the presidential search, with respect to the Prayer Breakfast arrangements, and while advising Morris fell within the ambit of his official duties.<sup>145</sup> The court therefore granted

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134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at \*2.

138. *Id.*

139. *Id.* at \*1.

140. *Id.*

141. *Id.* at \*2.

142. *Id.* at \*3.

143. *Id.*

144. *Id.*

145. Gorum made this a good deal easier by conceding the operative facts and failing to discuss *Garcetti* in his briefs. *Id.* at \*5. The court did not apply *Garcetti* to

the defendants' motion for summary judgment.<sup>146</sup>

*Hong v. Grant*<sup>147</sup> concerned speech by a faculty member made in the process of evaluating his fellow teachers.<sup>148</sup> In that case, Juan Hong, a professor in the Department of Chemical Engineering and Materials Science at the University of California, Irvine, participated in a peer review process that evaluated faculty members seeking appointment and promotion within his department.<sup>149</sup> Hong made critical statements in connection with the mid-career review of one faculty member, opposed another faculty member's application for an accelerated merit increase, and protested when the department extended an informal offer to a candidate before the faculty had voted.<sup>150</sup> In addition, he complained that six of the eight Materials Department classes were taught by lecturers rather than by tenured faculty members.<sup>151</sup> When the department denied Hong a merit increase he sued, alleging the institution had retaliated against him for his speech.<sup>152</sup>

The court applied *Garcetti* and had no difficulty in finding Hong engaged in this speech as part of his official duties.<sup>153</sup> The court stressed that "[a]n employee's official duties are not narrowly defined, but instead encompass the full range of the employee's professional responsibilities."<sup>154</sup> The court noted that "in accordance with [the university's] self-governance principle" the plaintiff's "official duties [were] not limited to classroom instruction and professional research" but also included "a wide range of academic, administrative and personnel functions."<sup>155</sup> Hong's statements about fellow faculty and teaching assistants easily met this standard. The court accordingly granted summary

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plaintiff's involvement with Morris's lawsuit, ruling that the defendants had shown they would have terminated plaintiff even if he had not engaged in those activities. *Id.* at \*6.

146. *Id.* at \*7.

147. 516 F. Supp. 2d 1158 (C.D. Cal. 2007).

148. *Id.* at 1160.

149. *Id.* at 1161–62.

150. *Id.* at 1162.

151. *Id.* at 1162–63.

152. The claim of retaliation seems deeply curious in light of the admissions Hong made in the course of the merit increase evaluation process. He acknowledged his success in attracting extramural research grants was "zero"; he described his participation in peer-reviewed publications as "average" and "minimal"; and he listed no achievements under "Professional Recognition and Activity," "Honors, Awards, Election," "Contracts, Grants or Fellowships," "Other Professional Service," or a number of other categories. *Id.* at 1164.

153. *Id.* at 1168.

154. *Id.* at 1166.

155. *Id.* The court based this conclusion on this institution's strong self-governance principle. In light of the strong traditions around faculty governance at many institutions, however, the same analysis may apply even where such responsibility is not formally or finally vested in the faculty.

judgment in favor of the defendants.<sup>156</sup>

To date, *Garcetti* has not been applied to a statement made by college or university faculty member as part of their classroom pedagogy. The closest case is *Piggee v. Carl Sandburg College*.<sup>157</sup> *Piggee* involved a part-time instructor of cosmetology at a community college who lost her post after distributing anti-homosexual literature to one of her students, who complained that she had created a hostile learning environment.<sup>158</sup> She sued, alleging violation of her due process rights, and her rights under Free Exercise, Equal Protection, and Free Speech clauses of Constitution.<sup>159</sup> The district court granted summary judgment in favor of the defendants.<sup>160</sup> On appeal, the Seventh Circuit, affirming the dismissal of *Piggee*'s claim of unlawful retaliation, held that *Garcetti* was "not directly relevant" to the case, but invoked it to show that courts must "give appropriate weight to the public employer's interests."<sup>161</sup>

It should be noted, however, that several courts have concluded—without apparent hesitation—that under *Garcetti* the First Amendment does not protect statements made in the classroom by secondary school teachers. Consider, for example, *Panse v. Eastwood*.<sup>162</sup> In that case, an art teacher made statements to his class about the portfolio requirements of college art programs, including the necessity for providing sketches of male and female nudes.<sup>163</sup> After the school superintendent took disciplinary action against him, the teacher sued, claiming that his statements were constitutionally protected.<sup>164</sup>

Applying *Garcetti*, the court reasoned that "[t]he official duties of high school teachers certainly encompass not only the formal lessons of the subject curriculum, but also . . . broader classroom discussions about the assigned subject[s]."<sup>165</sup> The court therefore concluded that this speech "was not the speech of a 'citizen' for the purposes of First Amendment

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156. *Id.* at 1170.

157. 464 F.3d 667 (7th Cir. 2006).

158. *Id.* at 668.

159. *Id.*

160. *Id.*

161. *Id.* at 672. The court's decision includes a brief discussion of academic freedom that concludes with this observation: "Classroom or instructional speech, in short, is inevitably speech that is part of the instructor's official duties, even though at the same time the instructor's freedom to express her views on the assigned course is protected." *Id.* at 671. It is unnecessary to divine what the court had in mind here—or to guess at which principle the court believed prevailed if these principles came into conflict—since *Piggee*'s speech was done for purposes of proselytizing and not for purposes of teaching.

162. No. 06 Civ. 6697(SCR), 2007 U.S. Dist. LEXIS 55080 (S.D.N.Y. July 20, 2007).

163. *Id.* at \*3.

164. *Id.* at \*2.

165. *Id.* at \*12.

analysis, and [was] not entitled to constitutional protection.”<sup>166</sup>

Other cases have reached similar conclusions.<sup>167</sup> Good grounds exist in reason and precedent to assume courts will provide greater protections to speech in college and university environs than they will to speech in K-12 environs.<sup>168</sup> To date, however, the most striking quality of the cases from these diverse settings is the similarity of the analysis employed by the courts.

As noted above, the faculty speech cases decided to date involve unique factual scenarios. Any attempt to extrapolate future patterns from them therefore carries with it a substantial risk of error. Nevertheless, this much might be said: if the courts decide a dozen or so more faculty speech cases through a simple application of *Garcetti*—with no consideration of competing academic freedom considerations—then a precedential consensus will begin to emerge. That consensus would probably have no impact on *institutional* academic freedom. But it could effectively extinguish constitutionally based faculty academic freedom in the classroom. Such a result would leave faculty members with a perfectly symmetrical “Catch-22.” On one hand, if their classroom speech does *not* pertain to their job then the First Amendment will not protect it because “discussion in the classroom must be related . . . to the subject matter.”<sup>169</sup> On the other hand, if their classroom speech *does* pertain to their job then the First Amendment will not protect it because of *Garcetti*.

In Ernest Hemingway’s novel *The Sun Also Rises*, a character is asked how he went bankrupt. He explains that it happened two ways: gradually and then suddenly.<sup>170</sup> If current trends continue, this is how constitutionally based faculty academic freedom may end as well.

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166. *Id.* at \*13.

167. See, e.g., *Mayer v. Monroe Cmty. Sch. Corp.*, 474 F.3d 477, 478–79 (7th Cir. 2007) (finding that a teacher’s statements to students regarding current political events were part of the teacher’s official duties); cf. *Lee v. York County Sch. Div.*, 484 F.3d 687, 695 (4th Cir. 2007) (declining to apply *Garcetti* to a case involving a public school teacher sanctioned for posting religious material on a classroom bulletin board in light of the Supreme Court’s express reservation of the question of whether the analysis would apply in the same manner to a case involving speech related to teaching); *Caruso v. Massapequa Union Free Sch. Dist.*, 478 F. Supp. 2d 377 (E.D.N.Y. 2007) (holding that fact issues prevented court from resolving question of whether teacher’s display of presidential portrait was done pursuant to official duties).

168. The Supreme Court has generally provided a somewhat lower level of protection to speech in K-12 environs because of the unique pedagogic goals of K-12 education and because of the presence of minors. For a general discussion of these issues, see RODNEY A. SMOLLA, *FREE SPEECH IN AN OPEN SOCIETY* 211–16, 328 (1992).

169. Nahmod, *supra* note 2, at 585.

170. ERNEST HEMINGWAY, *THE SUN ALSO RISES* 136 (Charles Scribner’s Sons Ed., 1970).

## CONCLUSION

There is no question that *Garcetti* has had, and will continue to have, a significant affect on the ability of public employees to maintain retaliation claims under the First Amendment. The cases decided to date suggest that *Garcetti* may prove particularly important in the higher education environment, where the duties of many lower- and mid-level employees include some element of compliance oversight and where higher-level employees often have a broad spectrum of responsibilities. Still, if there is no principled basis on which to distinguish these employees from those who work in analogous positions in other environments, then this result seems fair and sensible.

The matter is more complicated with respect to faculty members. The small number and idiosyncratic nature of the existing faculty cases render it substantially more difficult to predict how the courts will apply *Garcetti* to First Amendment retaliation claims involving employees who teach, research, and publish. We often think of college and university faculty members as having a unique position in a unique environment, as being the purveyors of thought in the peculiar marketplace that is the college or university campus. To date, however, courts have applied *Garcetti* to these employees much as they would to any others. Whether this continues, and ultimately becomes the controlling approach, may depend more on accident than on principle. So far no case has involved facts that presented a direct conflict between *Garcetti* and core issues of academic freedom, such as a statement made in a scholarly article. But this may have little significance if, by the time such a case arrives on a court's docket, a robust body of precedent dictates that the *Garcetti* standard applies to faculty members in the same way it applies to everyone else.

