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Analysis&Perspective

Garcetti: Nine Months Later, How Have the Federal Courts Analyzed 'Duty Speech' By Government Employees With First Amendment Claims?

BY LYNNE BERNABEI
AND ALAN R. KABAT*

On May 30, 2006, a sharply divided U.S. Supreme Court issued its 5-4 decision in *Garcetti v. Ceballos*.[1] The court addressed the issue of whether a state or local government employee could bring a First Amendment claim based on speech that the employee made in the course of his or her job duties, or if only speech made outside the scope of the employee's job duties was protected. The majority opinion, by Justice Anthony M. Kennedy, held that ''duty'' speech by government employees was *not* protected under the First Amendment, such as the reports made by Richard Ceballos, a county prosecutor, about how a case should be litigated.[2] The result is a significant narrowing of the scope of First Amendment claims brought by state and local government employees under 42 U.S.C. § 1983, since many claims are based, at least in part, on retaliation for speech that could fall within the scope of an employee's job duties. Although the four dissenting justices issued three separate opinions, all four recognized that at least some ''duty'' speech should be protected under the First Amendment.[3]

In the ensuing nine months, the federal and state courts have had numerous occasions to apply *Garcetti* to First Amendment claims by government employees. As of Feb. 14, 2007, there were 177 reported court opinions citing *Garcetti*, of which 42 are from the U.S. circuit courts, 127 from the U.S. district courts, 7 from the state appellate courts, and 1 from the Merit Systems Protection Board. Although the majority of these opinions are unpublished and not of precedential value, a survey of these opinions indicates that while some courts are rejecting First Amendment claims on the grounds that the speech was ''duty'' speech, other courts are taking a closer look and finding that, under *Garcetti*, the plaintiff's speech was not within the scope of his or her job responsibilities, and, therefore, not ''duty'' speech.

Courts are denying motions to dismiss and summary judgment motions where the plaintiff is able to show that there is a factual dispute as to whether the speech was within the scope of his or her job responsibilities. Several courts, when faced with a plaintiff who has made multiple reports, are carefully dividing the speech between that which is protected (and can be considered by the jury in determining liability and damages) and that which is not protected. As to the non-protected speech, in some cases the trial courts will allow the plaintiff to present evidence that he or she also made complaints as part of his or her job duties in order to provide ''context'' to his or her protected speech. A plaintiff should be able to show that it was only after his or her supervisors ignored his or her repeated complaints that he or she went outside her job duties by complaining publicly, and that the whole set of complaints are relevant in proving the employer's retaliatory animus in taking adverse actions.[4]

Re-Assessing a Jury Verdict in Light of *Garcetti*. Most decisions applying *Garcetti* are made on summary judgment or a motion to dismiss, since few cases proceed to trial. One notable exception, *Freitag v. Ayers*, from the U.S. Court of Appeals for the Ninth Circuit, involved a female prison guard at the Pelican Bay State Prison, a maximum security prison in northern California.[5] Deanna Freitag brought Title VII of the 1964 Civil Rights Act and First Amendment claims based on the prison's failure to address the hostile work environment created by severe and pervasive harassment of female prison guards by the male prisoners, particularly exhibitionist masturbation by the prisoners in front of the female guards. After her supervisors refused to discipline the prisoners or take any other remedial action in response to her internal complaints, Freitag complained not only to the agency director, but also to a California state senator and the California Office of the Inspector General (IG). In response, the prison management initiated several pretextual investigations of Freitag, and terminated her employment. The IG issued a report confirming her allegations, and harshly criticized the prison management for failing to take action. For example, the prison's EEO coordinator justified the harassment by telling the IG that it only happened be-

[1] *Garcetti v. Ceballos*, 126 S. Ct. 1951, 24 IER Cases 737 (2006) (44 GERR 601, 6/6/06).
[2] *Id.* at 1959-61.
[3] *Id.* at 1962-76.

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[4] *See, e.g., National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113, 88 FEP Cases 1601 (2002) (40 GERR 629, 6/18/02) (''Nor does the statute [of limitations] bar an employee from using the prior acts as background evidence in support of a timely claim.'').
[5] *Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006) (44 GERR 1039, 10/3/06).

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cause the inmates thought the female guards were ''a bunch of lesbians.''[6]

At Freitag's trial, Judge Thelton Henderson of the U.S. District Court for the Northern District of California instructed the jury that there were six examples of her speech protected under the First Amendment: (1) reporting inmates' conduct to her supervisors; (2) documenting her supervisors' failure to respond; (3) reporting the foregoing to the Director of the California Department of Corrections; (4) reporting the foregoing to a state senator; (5) reporting the foregoing to the Office of the Inspector General; and (5) cooperating with the IG's investigation.[7] In April 2003, a jury awarded her $500,000 in economic damages and $100,000 in noneconomic damages.[8]

The Ninth Circuit, after upholding liability under Title VII, then discussed whether the intervening *Garcetti* decision affected her First Amendment claim. The court held that under *Garcetti*, the first three categories of speech encompassed by the jury instructions were not protected speech. However, the court squarely rejected the defendants' arguments that her letters to the state senator and her reports to the IG were not protected, since ''her 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.'' Critically, the court recognized that ''it was certainly not part of her official tasks to complain to the Senator or the IG about the state's failure to perform its duties properly, and specifically its failure to take corrective action to eliminate sexual harassment in its workplace.''[9]

Since the jury instructions combined both protected and unprotected speech, the Ninth Circuit remanded to determine whether that erroneous jury instruction had affected the jury's verdict or if it ''was more probably than not harmless.''[10]

Those courts that have ruled in the employee's favor have recognized that the determination of whether speech was protected under *Garcetti* requires careful examination of the scope of the employee's job duties in relation to that speech.

Appellate Decisions on Motions to Dismiss and Summary Judgment Motions. Of the 13 federal circuit courts, all but the D.C., First, Fourth, and Federal circuits have issued opinions that cited *Garcetti*. To date, the Seventh Circuit has issued the most opinions: nine. Nearly all of these appellate decisions have reviewed a decision on an employer's dispositive motion. Most of the circuit decisions have found that the speech in question was duty speech, and ruled in favor of the employer. Those courts that have ruled in the employee's favor have recognized that the determination of whether speech was protected under *Garcetti* requires careful examination of the scope of the employee's job duties in relation to that speech.

Judge Richard A. Posner of the Seventh Circuit issued a noteworthy opinion in *Fuerst v. Clarke*, based on the claims of James Fuerst, a deputy sheriff in Milwaukee, and president of the deputy sheriff's union. Fuerst alleged that he was passed over for a promotion for his criticisms, as quoted in a newspaper article, of the county sheriff's filling of a position with someone whom Fuerst ''believed would be a public relations 'mouthpiece' for promoting [Sheriff David] Clarke's political career . . . [and] a waste of taxpayer's money.''[11] The newspaper interviewed Fuerst because he was the spokesperson for the deputy sheriff's union. Clarke conceded ''that it was Fuerst's public denunciation of [Clarke's choice] that doomed his promotion.''[12] The district court granted summary judgment for the employer, but the Seventh Circuit reversed. Posner explained that Fuerst's comments ''were made in his capacity as a union representative . . . [since] his duties as deputy sheriff did not include commenting on the sheriff's decision to hire a public relations officer, [thus] the Supreme Court's recent decision in *Garcetti* . . . is inapposite.''[13] The Seventh Circuit reversed and remanded to the district court.

The Second Circuit, in *Skehan v. Village of Mamaroneck*, upheld the district court's denial of the defendants' motions for summary judgment based on qualified immunity in a case involving four police officers in a suburb of New York, on the grounds that for at least three of the officers, their speech was protected speech under *Garcetti*.[14] This case arose from complaints by one officer (Jeremy Skehan) that his supervisors were engaged in serious misconduct and cover-ups by making enforcement and arrest decisions based on the race of the alleged offender. Skehan's complaints were made both internally, and to the district attorney.[15] After the police department initiated investigations of Skehan, two other officers (John DiCioccio and Peter Monachelli), the president and vice president of the local Police Benevolent Association, posted a memorandum in the police locker room that ''disputed the conclusions of the internal investigation'' and ''supported Skehan's contention that the department was engaged in race-based enforcement.''[16] A fourth officer (Paul Micalizzi) complained to the Board of Police Commissioners and testified on behalf of Skehan, DiCioccio, and Monachelli at their disciplinary hearings. The commissioner then disciplined Micalizzi as well.

[6] *Id.* at 533-36.
[7] *Id.* at 544.
[8] *Id.* at 537.
[9] *Id.* at 545.
[10] *Id.* at 546. On remand, Henderson referred the case to a mandatory settlement conference with a magistrate judge, scheduled for March 16, 2007, so there may be no further court resolution of these issues. *Freitag v. Ayers*, No. 3:00-CV-02278-TEH, Order (Doc. No. 474) (N.D. Cal. Jan. 5, 2007).

[11] *Fuerst v. Clarke*, 454 F.3d 770, 24 IER Cases 1525 (7th Cir. 2006) (44 GERR 868, 8/15/06).
[12] *Id.* at 772.
[13] *Id.* at 774.
[14] *Skehan v. Village of Mamaroneck*, 465 F.3d 96, 25 IER Cases 247 (2d Cir. 2006) (44 GERR 1120, 10/24/06).
[15] *Id.* at 101-02.
[16] *Id.* at 102.

In *Skehan*, all four officers filed First Amendment and equal protection claims, and the district court denied the defendants' motion for summary judgment, finding that they were not entitled to qualified immunity. The defendants filed an interlocutory appeal in early 2006. The Second Circuit found that DiCioccio's and Monachelli's posting the memo in the locker room was not duty speech as it was ''in their capacities as leaders of the PBA.'' The court also found that Micalizzi's speech, including testifying in the disciplinary hearing, was not duty speech. However, as to the lead plaintiff, Skehan, the court found that there was insufficient evidence in the record as to whether his reports to the district attorney ''were made pursuant to his official duties as a police officer,'' so the Second Circuit remanded to the district court to develop the factual record on that issue.[17] As did the Seventh Circuit in *Fuerst*, the Second Circuit recognized that public employees can ''wear two hats,'' making it necessary to examine with care the speech and determine in which capacity the employee engaged in that speech.[18]

In perhaps the most favorable decision for plaintiffs, the Tenth Circuit, in a decision involving a superintendent of a school district, *Casey v. West Las Vegas Indep. Sch. Dist.*, recently reached a split decision as to her First Amendment claims against the school district and the school board members.[19] Barbara Casey alleged that she was terminated based on her complaints to the board, federal authorities, and the state's attorney general about various violations of federal and state law, including those relating to the Head Start program. The district court denied the defendants' motion for summary judgment on qualified immunity. While the case was on interlocutory appeal, the *Garcetti* decision was issued. The Tenth Circuit ruled that, after *Garcetti*, Casey's reports to the school board and to the federal authorities were clearly made within the scope of her job responsibilities, and therefore were unprotected.[20] However, the court also found that her statements to the New Mexico attorney general about the board's violation of the Open Meetings Law ''are another kettle of fish,'' since they were made after ''she had lost faith that the Board would listen to her advice,'' and her job duties did not encompass any ''responsibility for the Board's meeting practice.''[21] Upon remand, the district court will decide whether to allow her to present evidence at trial of the nonprotected ''duty'' speech as background evidence of defendants' motivation to retaliate against her for her protected reports.

District Court Decisions on Dispositive Motions. The vast majority of district court decisions addressing *Garcetti* issues are unpublished. One published district court decision, *Kodrea v. City of Kokomo, Ind.*, issued only three weeks after *Garcetti*, is of particular interest as it recognized that the courts need to scrutinize with care a public employee's job duties, since the existence of a factual dispute as to the scope of the job duties would preclude summary judgment. Matthew Kodrea was the recreational programmer for the city Parks Department, and was responsible for ''supervising and coordinating recreational programs and supervising the seasonal staff for concession stands.''[22] However, he had no responsibility for time cards, payment of fees, or other financial issues. Shortly after he was hired, Kodrea reported that another employee (Jim Campbell) was paid for hours that he did not work, and was mishandling funds.[23] His supervisor gave him a negative evaluation, and told him he would be terminated and prohibited from getting any other city job, but then relented to allow him to enter into a probationary period, after which he was terminated.[24] The court recognized that ''[u]nlike the situation in *Garcetti*, however, there is a factual dispute in this case concerning whether Kodrea's complaints . . . were made pursuant to his ordinary job duties,'' since ''nothing in his job duties required him to monitor or report misconduct.''[25] Because of the factual dispute, the court denied summary judgment to defendants. It further held that ''*Garcetti* does not preclude Kodrea from presenting his claims to a jury for consideration.''[26]

An unpublished district court decision is of interest in that the court rejected the defendant's attempt to argue that the plaintiff's ethical obligations under state regulations governing his profession meant that the obligations were part of his job duties. In *Shewbridge v. El Dorado Irrigation Dist.*, the plaintiff, an engineer for a county irrigation district in eastern California, alleged that he was terminated after reporting wrongdoing in water management and supply issues, not only internally but also at public meetings and to a number of state agencies.[27] At his deposition, Scott Shewbridge testified that the reason he made his reports arose from his obligations under the California state regulations governing professional engineers. The district court denied the defendants' motion for summary judgment, since there was a factual dispute as to whether his reports ''fell within any specific job duties he had,'' as he ''may have acted as a concerned citizen'' complying with his ''professional and ethical obligation to report wrongdoing.''[28]

***Garcetti* and Jury Instructions.** At least two cases have gone to trial since the *Garcetti* decision in which the district court had to determine its effect in drafting jury instructions. Given that other courts have held that the existence of a factual dispute as to whether an employee's speech was protected conduct could not be re-

[17] *Id.* at 106.

[18] On remand, the parties reached a settlement. *Skehan, et al. v. Kelly, et al.*, Nos. 7:03-CV-05977, 7:03-CV-06824, 7:03-CV-02968, Order of Dismissal (Doc. Nos. 139, 140) (S.D.N.Y. Jan. 31, 2007).

[19] *Casey v. West Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323 (10th Cir. 2007) (45 GERR 230, 2/20/07).

[20] *Id.* at 1329-32.

[21] *Id.* at 1332.

[22] *Kodrea v. City of Kokomo, Ind.*, 458 F. Supp. 2d 857, 863 (S.D. Ind. 2006),

[23] *Id.* at 863-64.

[24] *Id.* at 864.

[25] *Id.* at 867.

[26] *Id.* at 868. The individual defendants then filed an interlocutory appeal, which was dismissed after the parties reached a settlement. *Kodrea v. McKillip, et al.*, No. 06-2824 (7th Cir. Oct. 31, 2006). The Seventh Circuit denied the city's separate petition for permission to appeal. *In re: City of Kokomo, Ind.*, No. 06-8025, Order (7th Cir. Aug. 25, 2006).

[27] *Shewbridge v. El Dorado Irrigation Dist.*, No. CIV. S-05-0740 FCD/EFB, 2006 WL 3741878, at *3 (E.D. Cal. Dec. 19, 2006).

[28] *Id.* at *6-*7; see also Shewbridge Dep., at 32-33, citing California Code of Regulations, Title 16, Section 475 (attached to Def. Summ. J. Mot.) (Doc. No. 29) (E.D. Cal. Aug. 29, 2006).

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solved on a dispositive motion, *supra*, it would be expected that the jury would be asked to determine, for each meeting or communication that the plaintiff alleged was protected, whether each such event was job duty speech. However, it appears from the two recent jury trials that the parties are instead resolving this issue through proposed jury instructions and through motions *in limine*, so that the issue of whether a plaintiff's speech constitutes ''protected activity'' or ''duty speech'' does not get to the jury.

In *Hare v. Zitek*, a case involving a policeman who worked in a suburb of Chicago, the parties filed competing motions *in limine* as to the scope of the protected speech. The magistrate judge held that the plaintiff's speech to the State's Attorney's Office about corruption within the police department was ''as a matter of law . . . constitutionally protected.''[29] However, the court also ruled that the plaintiff's reports to the police chief (John Zitek) about problems with the evidence locker were not protected under *Garcetti* as they were ''unquestionably made in the course of Mr. [Richey] Hare carrying out his job duties.'' Critically, the judge still allowed plaintiff to present evidence about that speech to show retaliatory animus: ''Testimony and evidence on this issue may still be offered, however, to give context to the relationship between Mr. Hare and Mr. Zitek.''[30] After a five-day jury trial, the jury awarded plaintiff compensatory damages of $1,767,498, and punitive damages of $1,000,000 against each of the two individual defendants (Zitek and the town's mayor).[31]

In *Longfellow v. Jackson County*, the plaintiff, who worked at a county airport in southern Oregon, alleged that she was terminated after reporting security problems. The plaintiff's proposed jury instructions set forth 13 discrete letters, reports, and contacts that she alleged were protected by the First Amendment.[32] After the pretrial conference on jury instructions, the district judge issued an order stating, ''Whether a communication is protected by the First Amendment is, under the circumstances presented here, a question of law for the court to decide.''[33] The court cited the Supreme Court's *Connick v. Myers* decision, which stated, in a footnote, that ''the inquiry into the protected status of speech is one of law, not fact.''[34] As a result, the judge drafted significantly revised jury instructions, which listed only five of the 13 letters, reports, and contacts identified by plaintiff.[35] After a three-day jury trial, the jury returned a verdict on the third day, awarding plaintiff $4,853 in economic damages (the parties had stipulated as to that amount), and $360,000 in noneconomic damages.[36]

***Garcetti* and Federal Employees.** Since *Garcetti* involved First Amendment claims, it will seldom be applicable to federal sector employees, who are usually covered exclusively by the Whistleblower Protection Act (WPA), 5 U.S.C. § 2302, with respect to retaliation claims based on protected speech and cannot bring such claims in federal district court, as the existence of a comprehensive statutory framework generally precludes constitutional claims by federal employees.[37] It is unclear that *Garcetti* should even apply to federal employees, since their speech is governed by a much narrower statutory remedy, under which the ''duty speech'' distinction has no relevance.

However, at least one federal employee brought a First Amendment claim, claiming that her employer engaged in prohibited personnel practices under 5 U.S.C. § 2302(b)(12). The Merit Systems Protection Board (MSPB), in *Chambers v. Interior Dep't*, rejected the claim of a former chief of the U.S. Park Police, who alleged that she was terminated after publicly complaining, both to *The Washington Post* and to a committee staffer of the U.S. House of Representatives, that there was inadequate protection for the monuments and memorials on the National Mall. In response to these reports, her supervisors told her not to grant any more interviews without permission, put her on paid administrative leave, and then proposed to remove her.[38] MSPB found that Teresa Chambers did not engage in protected disclosures under either the WPA or the First Amendment. Critical to its decision was MSPB's finding that, under *Garcetti*, her statements to the *Post* and the House staffer ''were made pursuant to [her] official duties.''[39]

Conclusion. The jury is still out as to whether the courts will take a broad or narrow view of the scope of ''duty speech'' under *Garcetti*. However, some courts are recognizing that each report or complaint made by a state or local government employee must be separately and carefully analyzed to determine whether it qualifies as protected speech.

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[29] *Hare v. Zitek*, No. 02 C 3973, 2006 WL 2088427, at *3 (N.D. Ill. July 24, 2006).

[30] *Id.* at *6.

[31] On post-trial motions, the court upheld the award of compensatory damages, but vacated the award of punitive damages against the mayor, and reduced the award of punitive damages against Zitek to $90,000. *Hare v. Zitek*, No. 02 C 3973, 2006 WL 4069052 (N.D. Ill. Dec. 28, 2006). The parties then entered into a settlement agreement.

[32] *Longfellow v. Jackson County*, No. 1:06-CV-03043-PA, Plaintiff's Proposed Jury Instructions (Doc. No. 29) (D. Or. Nov. 20. 2006). Although captioned as ''Joint'' instructions, the court's docket reveals that the defendants objected to these instructions. *Id.*, Minutes of Proceedings (Doc. No. 34) (D. Or. Nov. 22, 2006).

[33] *Id.*, Record of Order (Doc. No. 41) (D. Or. Nov. 27, 2006).

[34] *Connick v. Myers*, 461 U.S. 138, 148 n.7, 1 IER Cases 178 (1983).

[35] *Longfellow v. Jackson County*, No. 1:06-CV-03043-PA, Jury Instructions (Doc. No. 46) (D. Or. Nov. 29, 2006).

[36] The defendants moved for remittitur and a new trial on damages, and the court scheduled a bench trial on plaintiff's claim under the Oregon Whistleblower Law on February 26, 2007.

[37] *Bush v. Lucas*, 462 U.S. 367, 388 (1983) (Civil Service Reform Act precludes constitutional claims by federal employees).

[38] *Chambers v. Interior Dep't*, 103 M.S.P.R. 375, 380 (M.S.P.B. 2006) (44 GERR 1044, 10/3/06).

[39] *Id.* at 392. Chambers appealed the MSPB decision to the Federal Circuit. *Chambers v. Interior Dep't*, No. 2007-3050 (Fed. Cir.).