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ARTICLES

SILENCE IN THE HALLWAYS: THE IMPACT OF *GARCETTI V. CEBALLOS* ON PUBLIC SCHOOL EDUCATORS

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A public school special education teacher complained on several occasions to a district administrator that the district was not following federal law in providing a free appropriate public education to its students with disabilities. Her complaints remained unanswered. After she drafted a memo outlining where the school district had failed to meet the requirements of the law, she learned that her contract for the upcoming school year would not be renewed.

Before 2006, this teacher's speech would have been constitutionally protected unless it was proven to have a negative impact on workplace relationships or operations. However, as a result of a recent Supreme Court decision, if the teacher in this hypothetical situation was found to be speaking pursuant to her official job duties, she would have difficulty relying on the First Amendment for protection.

In 2006, the U.S. Supreme Court ruled in *Garcetti v. Ceballos* that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."¹ This decision has already begun to affect public educators' expression rights. To provide a context for understanding the impact of the *Garcetti* decision, this article initially presents background information on the evolution of the law governing public employee expression. The next section analyzes in some de-

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¹ *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

tail the *Garcetti* decision and subsequent litigation. Based on this analysis, we argue that the recent Supreme Court ruling was not in the public's best interest and refute arguments that federal and state whistleblower laws and civil rights laws provide adequate protections for public educators who expose questionable school practices.

I. BACKGROUND

The First Amendment states in part that "Congress shall make no law . . . abridging the freedom of speech, or of the press"² There have been longstanding conflicts over how to distinguish public employees' protected expression from expression that the First Amendment does not shield.³ Until the late 1960s, public employees' speech could be restricted with little justification.⁴ While serving on the Massachusetts Supreme Court in 1892, Justice Oliver Wendell Holmes wrote that a police officer "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."⁵ Although not a Supreme Court decision, Holmes's opinion captured the status of public employee expression during this time period. Importantly, this Massachusetts decision emphasized that public employment was not a right and was subject to restrictions regarding employee speech.⁶ The U.S. Supreme Court's 1952 decision in *Adler v. Board of Education of New York* affirmed limitations on the free expression rights of employees.⁷ In *Adler*, the Court upheld a statute that permitted school districts to dismiss teachers who were members of a "subversive" organization, noting that school officials have a duty to maintain the integrity of the public schools.⁸

Only fifteen years later, the Supreme Court overruled *Adler* in *Keyishian v. Board of Regents*.⁹ In *Keyishian*, the Court held that "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."¹⁰ This decision paved the way for the

² U.S. CONST. amend. I.

³ See Krystal LoPilato, Recent Case, *Garcetti v. Ceballos: Public Employees Lose First Amendment Protection for Speech within Their Job Duties*, 27 BERKELEY J. EMP. & LAB. L. 537, 538–44 (2006).

⁴ See Kathryn B. Cooper, Casenote, *Garcetti v. Ceballos: The Dual Threshold Requirement Challenging Public Employee Free Speech*, 8 LOY. J. PUB. INT. L. 73, 73–74 (2006); see also Shubha Harris, Casenote, *Silencing the Noise of Democracy—The Supreme Court Denies First Amendment Protection for Public Employees' Job-Related Statements in Garcetti v. Ceballos*, 33 WM. MITCHELL L. REV. 1143, 1145–48 (2007).

⁵ *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (Mass. 1892).

⁶ *Id.*

⁷ *Adler v. Bd. of Educ.*, 342 U.S. 485, 492–96 (1952).

⁸ *Id.* at 486–90.

⁹ *Keyishian v. Bd. of Regents*, 385 U.S. 589, 605 (1967).

¹⁰ *Id.* at 604 (quoting Nat'l Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 433 (1963)).

Supreme Court to render its landmark 1968 ruling, *Pickering v. Board of Education*, which held that teachers do not, by virtue of their status as public employees, give up their right to free expression under the First Amendment.¹¹ Specifically, the Court found that teachers have a First Amendment right to voice their opinions on public issues of social, political, or other interest to the citizenry.¹² In *Pickering*, the school board dismissed a teacher for sending a letter criticizing the board's fiscal policies to a local newspaper.¹³ School board members and district administrators contended that the letter contained false statements that damaged their professional reputations.¹⁴

The Supreme Court held that a teacher's right to speak about a matter of public concern is constitutionally protected.¹⁵ Justice Marshall, writing for the Court, outlined a balancing test that would become famous. In weighing a teacher's interest as a citizen in expressing views on public issues against the school board's interest in effectively and efficiently providing educational services, the expression can be curtailed only if it jeopardizes the employee's relationship with immediate supervisors or coworkers, impedes classroom performance, or interferes with school operations.¹⁶ Concluding that *Pickering's* letter did not negatively affect any of these areas, the Court reasoned that it is important for teachers to be able to address such public issues without fear of adverse job consequences, as teachers may be better informed than others regarding school district fiscal matters.¹⁷

For more than a decade following the *Pickering* ruling, both lower courts and the U.S. Supreme Court broadly interpreted what constitutes expression on matters of public interest that warrants First Amendment protection. In *Madison School District v. Wisconsin Employment Relations Commission*, the Court found that a teacher should have been permitted to speak at a public meeting about pending collective bargaining negotiations.¹⁸ Relying on *Pickering*, the Court stated that teachers may not be "compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work."¹⁹ Additionally, in *Givhan v. Western Line Consolidated School District*, where a teacher shared with her principal concerns that school

¹¹ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 565 (1968).

¹² *Id.* at 568–73.

¹³ *Id.* at 566.

¹⁴ *Id.* at 566–67.

¹⁵ *Id.* at 574. Although some statements in *Pickering's* letter were not accurate, the Court reasoned that there was no proof that his false statements were made "knowingly or recklessly." *Id.*

¹⁶ *Id.* at 569–70.

¹⁷ *Id.* at 572.

¹⁸ *Madison Sch. Dist. v. Wis. Employment Relations Comm'n*, 429 U.S. 167, 173–75 (1976).

¹⁹ *Id.* at 175 (quoting *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968)).

policies were racially discriminatory, the Supreme Court ruled that public employees do not forfeit their First Amendment rights in private conversations with superiors.²⁰ Comments on matters of public concern receive constitutional protection whether made during private meetings or submitted to the media.²¹

Lower courts also applied the balancing test in affording educators the right to express their views on public concerns. Educators successfully asserted First Amendment claims in raising issues about student safety,²² wearing black arm bands as a symbolic protest against the Vietnam War,²³ making public comments favoring a collective bargaining contract,²⁴ and voicing criticisms of the instructional program and other school policies.²⁵

Although never overturning *Pickering*, the Supreme Court since the late 1970s has recognized limitations on the use of its balancing test. *Mt. Healthy City School District v. Doyle* involved a challenge to a school board's decision not to renew a teacher's contract after he called a local radio station concerning a proposed teacher dress code.²⁶ The school board referred specifically to the radio call and to the teacher's obscene gestures toward two female students as the basis for its decision, although the teacher had been involved in other inappropriate incidents.²⁷ The Court ruled that the employee has the burden of proof in establishing that the speech was constitutionally protected and that it was a "substantial" or "motivating factor" in the school district's decision to replace him.²⁸ If proven, the school board would then need to demonstrate by a "preponderance of the evidence that it would have reached the same decision" regarding the teacher's re-employment in the absence of protected conduct.²⁹ Even if substantiated that the school board's adverse decision was predicated on the employee's exercise of protected expression, the board's decision might still be upheld under the *Pickering* balancing test if the expression interfered with classroom performance, impeded working relationships, or disrupted school operations.³⁰

The *Mt. Healthy* decision was significant in holding that public employees cannot avoid disciplinary action for other legitimate reasons simply by expres-

²⁰ *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 414 (1979).

²¹ *See id.*; *see also Madison Sch. Dist.*, 429 U.S. at 173-75.

²² *Swilley v. Alexander*, 629 F.2d 1018, 1020-21 (5th Cir. 1980).

²³ *James v. Bd. of Educ.*, 461 F.2d 566, 572-75 (2d Cir. 1972).

²⁴ *McGill v. Bd. of Educ.*, 602 F.2d 774, 778-79 (7th Cir. 1979).

²⁵ *See Bernasconi v. Tempe Elementary Sch. Dist. No. 3*, 548 F.2d 857, 862 (9th Cir. 1977); *Lemons v. Morgan*, 629 F.2d 1389, 1390-91 (8th Cir. 1980).

²⁶ *Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274, 281-86 (1977).

²⁷ *Id.* at 281-83.

²⁸ *Id.* at 287.

²⁹ *Id.* On remand, the school board demonstrated that the teacher's protected expression was not the motivating factor in the nonrenewal of his contract. *See Doyle v. Mt. Healthy City Sch. Dist.*, 670 F.2d 59, 61 (6th Cir. 1982).

³⁰ *See Pickering v. Bd. of Educ.*, 391 U.S. 563, 567 (1968).

sing opinions on public issues.³¹ In 1983, public employees' expression rights were further limited in *Connick v. Myers*.³² The majority reiterated that for expression to be protected, it must involve issues of public concern rather than personal grievances because the latter are not protected by the First Amendment.³³ The Court declared:

[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.³⁴

The Court also noted that "government offices could not function if every employment decision became a constitutional matter."³⁵

In *Connick*, an assistant district attorney, who was dissatisfied with her proposed transfer to another section of the court, disseminated a questionnaire to coworkers concerning office operations and morale, level of confidence in supervisors, and pressure to work in political campaigns.³⁶ She was then terminated and challenged this action as violating her constitutionally protected right to free speech.³⁷ The Supreme Court held that her dismissal did not offend the First Amendment because the questionnaire related primarily to a personal grievance rather than matters of public concern.³⁸ Only one question (regarding pressure on employees to participate in political campaigns) was found to involve a public issue.³⁹ Although ruling against *Connick*, the Court did not consider this decision a defeat for the First Amendment.⁴⁰ Rather, the majority emphasized that the decision was grounded in the Court's longstanding tradition that the First Amendment protects public employees' speech only if it is related to a matter of public concern.⁴¹ The decision in *Connick* was noteworthy because the Court concluded that the *form* and *context* of the expression should be considered in the *initial* assessment of whether the expression informs public debate and is thus protected at all.⁴²

³¹ *Mt. Healthy City Sch. Dist.*, 429 U.S. at 284–87.

³² See *Connick v. Myers*, 461 U.S. 138, 147 (1983).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 143.

³⁶ *Id.* at 141.

³⁷ See *id.*

³⁸ *Id.* at 154.

³⁹ *Id.* at 149.

⁴⁰ See *id.* at 154.

⁴¹ See *id.*

⁴² See Martha McCarthy, *Garcetti v. Ceballos: Another Hurdle for Public Employees*, 210 EDUC. L. REP. 867, 869 (2006).

Prior to the *Garcetti* decision, federal courts focused on the content of the expression and analyzed the distinction between matters of public concern and private grievances; they did not emphasize the role of the speaker.⁴³ To illustrate, in 2001, the Sixth Circuit relied on *Connick* in finding that “the key question is not whether a person is speaking in his role as an employee or a citizen, but whether the employee’s speech in fact touches on matters of public concern.”⁴⁴ Applying *Connick*, courts seemed more inclined to view public employees’ expression as relating to unprotected *private* employment disputes rather than to protected matters of public concern⁴⁵ than was true in the fifteen years following *Pickering*, but they did not categorically exclude all job-related expression from this assessment.

Another important pre-*Garcetti* Supreme Court decision, *Hazelwood School District v. Kuhlmeier*,⁴⁶ also has affected public educators’ speech rights. The *Hazelwood* case involved student expression, but its principle that expression representing the public school can be censored for legitimate pedagogical reasons applies to teachers as well.⁴⁷ Thus, several lower courts have interpreted the *Hazelwood* decision to mean that the Free Speech Clause does not protect teachers’ comments within the classroom.⁴⁸ As long as constitutional rights are not impaired, statutory guidelines are followed, and the specifications are based on educational reasons, school boards can prescribe what will be taught and can

⁴³ Supreme Court decisions dealing with public employees’ expression rights that were rendered from 1984 until 2006 did not alter the analytical framework articulated in *Pickering* and *Connick*. See *City of San Diego v. Roe*, 543 U.S. 77, 81–82 (2004) (holding that a police officer’s expression was not a matter of public concern where the officer sold sexually explicit videos of himself that harmed the officer’s employers); *Waters v. Churchill*, 511 U.S. 661, 680–81 (1994) (holding that a nurse’s criticisms of her employer might not be considered a matter of public concern); *Rankin v. McPherson*, 483 U.S. 378, 386–87 (1987) (finding that a public employee’s comment regarding the attempted assassination of Ronald Reagan related to a matter of public concern); see also *Bd. of County Comm’rs v. Umbehr*, 518 U.S. 668, 678–81 (1996) (holding that independent government contractors are protected from government retaliation for speech in accordance with the *Pickering* balancing test).

⁴⁴ *Cockrel v. Shelby County Sch. Dist.*, 270 F.3d 1036, 1052 (6th Cir. 2001) (citing *Connick v. Myers*, 461 U.S. 138, 148–49 (1983)).

⁴⁵ See McCarthy, *supra* note 42, at 870.

⁴⁶ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270–73 (1988) (allowing the school principal to withhold two pages from a school-sponsored newspaper because of concerns regarding the sensitive content of the articles and anonymity; ruling that school authorities can regulate expression in school publications and other school-related activities for legitimate educational reasons).

⁴⁷ See, e.g., *Conward v. Cambridge Sch. Comm.*, 171 F.3d 12, 23 (1st Cir. 1999) (holding that “those who work and study in a school environment do not abandon their First Amendment rights,” but school officials have broad discretion to restrict school speech through regulations reasonably related to legitimate pedagogical concerns).

⁴⁸ See, e.g., *id.*; *Ward v. Hickey*, 996 F.2d 448, 453 (1st Cir. 1993); *Miles v. Denver Pub. Sch.*, 944 F.2d 773, 777 (10th Cir. 1991).

restrict how it is taught.⁴⁹

II. *THE GARCETTI V. CEBALLOS DECISION*

The most recent Supreme Court decision pertaining to public employee expression, *Garcetti v. Ceballos*, focused on Richard Ceballos, a deputy district attorney employed by Los Angeles County as a calendar deputy (a position entailing some supervisory responsibilities).⁵⁰ Ceballos investigated an affidavit that had been used to obtain a search warrant in a pending criminal case and found that the affidavit included several misrepresentations.⁵¹ He then wrote a memorandum to one of his immediate supervisors suggesting that the criminal case be dismissed. Following a contentious meeting, the prosecution decided to proceed.⁵² Ceballos also informed the defense counsel about his concerns regarding the affidavit. As a result, Ceballos was subpoenaed to testify at the hearing on the motion challenging the warrant.⁵³ After the court denied the defendant's motion regarding the invalidity of the warrant, the case proceeded to trial and Ceballos was dropped from the prosecution team.⁵⁴

Ceballos subsequently alleged that his superiors retaliated against him for writing the memo and testifying at the court hearing.⁵⁵ Alleged acts of retaliation included a demotion from his position of calendar deputy to trial deputy; denial of a promotion; receiving rude, hostile, and threatening treatment from his supervisors; being offered a choice between an undesirable transfer or reassignment to filing misdemeanors, a position usually assigned to junior deputies; having the one murder case he was handling at the time reassigned to a deputy with no murder trial experience; and being barred from handling any future murder cases.⁵⁶ After Ceballos's internal grievance was denied, he filed suit in district court asserting that the retaliation violated his First and Fourteenth Amendment rights.⁵⁷ The district court granted summary judgment for the defendants.⁵⁸ The court found that Ceballos wrote his memo pursuant to his employment duties and, therefore, was not entitled to First Amendment protection.⁵⁹ The court held in the alternative that the facts entitled petitioners to qualified immunity, reasoning that Ceballos's asserted rights were not clearly

⁴⁹ McCarthy, *supra* note 42, at 872.

⁵⁰ *Garcetti v. Ceballos*, 547 U.S. 410, 413 (2006).

⁵¹ *Id.* at 413-14.

⁵² *Id.* at 414.

⁵³ *See id.* at 414-15.

⁵⁴ *See id.*

⁵⁵ *See id.* at 443 (Souter, J., dissenting).

⁵⁶ *See Ceballos v. Garcetti*, 361 F.3d 1168, 1171-72 (9th Cir. 2004), *rev'd*, 547 U.S. 410 (2006).

⁵⁷ *See Garcetti*, 547 U.S. at 415.

⁵⁸ *See id.*

⁵⁹ *See id.*

established.⁶⁰

The Ninth Circuit, relying heavily on the Supreme Court's distinction between private grievances and expression of public concern, disagreed with the district court.⁶¹ The appeals court declared that "when government employees speak about corruption, wrongdoing, misconduct, wastefulness, or inefficiency by other government employees, including law enforcement officers, their speech is inherently a matter of public concern."⁶² In so doing, the court applied the *Pickering* balancing test, ruling that Ceballos's speech enjoyed protection and therefore could not be the basis for adverse job consequences.⁶³ The appeals court found that the county "failed even to suggest disruption or inefficiency in the workings of the District Attorney's Office" because of the memo.⁶⁴

A. *The Supreme Court Decision*

In a five-to-four decision, the Supreme Court ruled against Ceballos.⁶⁵ Writing for the majority, Justice Kennedy distinguished this case from the Court's prior decisions in which the expression at issue was not within the scope of the speaker's job responsibilities.⁶⁶ Reasoning that *Pickering* "provides a useful starting point in explaining the Court's doctrine," the Court did not apply the *Pickering* balancing test that was modified by *Connick*.⁶⁷ Instead, the Court stated that it must first determine whether the individual spoke as an "employee" or as a "citizen" on a matter of public concern.⁶⁸ If the answer is "employee," there is no First Amendment protection of the expression.⁶⁹ Only if the answer is "citizen" might there be a valid First Amendment claim.⁷⁰ Specifically, the majority adopted a bright-line rule that excludes public employees' expression pursuant to their job duties from First Amendment consideration.⁷¹ The Court conceded, however, that although the government has broader latitude to restrict speech when acting as an employer, the restrictions imposed "must be directed at speech that has some potential to affect the entity's operations."⁷²

⁶⁰ See *id.*

⁶¹ See *id.* at 415-16; see also *Ceballos*, 361 F.3d at 1186-94.

⁶² *Ceballos*, 361 F.3d at 1174 (citing *Blair v. City of Pamona*, 223 F.3d 1074, 1079 (9th Cir. 2000) and *Johnson v. Multnomah County*, 48 F.3d 420, 425 (9th Cir. 1995)).

⁶³ See *id.* at 1178-80; see also *Pickering v. Bd. of Educ.*, 391 U.S. 563, 567 (1968).

⁶⁴ See *Ceballos*, 361 F.3d at 1180.

⁶⁵ *Garcetti*, 547 U.S. at 426.

⁶⁶ *Id.* at 421.

⁶⁷ *Id.* at 417.

⁶⁸ *Id.* at 418.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See *id.* at 421.

⁷² See *id.* at 418.

The majority found the suggestion that public employees would be protected for public statements made pursuant to assigned duties, when the same statements would be denied First Amendment protection if voiced internally, to misconceive “the theoretical underpinnings of our decisions.”⁷³ The Court noted that employee expression outside the performance of official job duties retains “some possibility” of First Amendment protection akin to expression by citizens who do not work for the government.⁷⁴ The majority emphasized that “[w]hen a public employee speaks pursuant to employment responsibilities . . . there is no relevant analogue to speech by citizens who are not government employees.”⁷⁵ Thus, the *Garcetti* majority reasoned that where the comments are made is immaterial as long as they are made pursuant to official duties.

The majority did recognize, however, the individual and societal interests at stake when public employees speak as citizens—rather than as a part of their job duties—on matters of public concern.⁷⁶ The majority acknowledged the public benefit of government employees engaging in civic discussion, but also asserted that “[w]hen a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom.”⁷⁷ According to the majority, the public employer must have a significant degree of control over speech it has commissioned.⁷⁸ In short, government employees are employees first and have no “right to perform their jobs however they see fit.”⁷⁹ Justice Kennedy suggested that the protections against retaliation under state and federal whistleblower laws are sufficient to protect public employees who uncover and report wrongdoing in the course of their duties.⁸⁰

In response to the dissenting Justices’ concern that employers will write very broad job descriptions to limit employees’ protected speech, the majority noted that the employee’s written job description is not all that a court considers in determining whether a task is within the scope of the employee’s duties.⁸¹ The Court remanded this case because questions remained regarding whether some of the retaliatory acts were related to expression outside of Ceballos’s job duties.⁸²

B. *The Dissenting Opinions*

In his dissent, Justice Stevens rejected the majority’s reasoning that a public

⁷³ *Id.* at 423.

⁷⁴ *See id.*

⁷⁵ *Id.* at 424.

⁷⁶ *See id.* at 418.

⁷⁷ *Id.*

⁷⁸ *See id.*

⁷⁹ *Id.* at 422.

⁸⁰ *Id.* at 425-26.

⁸¹ *See id.* at 424-25.

⁸² *See id.* at 426.

employee's speech *never* deserves protection if made pursuant to official duties.⁸³ Stevens contended that government employees should still be considered citizens when they are in the office.⁸⁴

Justice Souter's dissenting opinion, which Justices Stevens and Ginsburg joined, asserted that the majority chose an "odd place" to draw its bright line.⁸⁵ He noted that the decision would protect a school teacher complaining about racist hiring practices, whereas the ruling would not protect a school personnel officer's expression of the same observation.⁸⁶ Justice Souter specifically relied on prior Supreme Court decisions to illustrate that before *Garcetti*, the Court had not drawn a categorical distinction between an individual as an employee and an individual as a citizen.⁸⁷ Additionally, Souter rejected the majority's position that whistleblower laws offer adequate protection to public employees.⁸⁸

Justice Breyer, in his own dissenting opinion, also criticized the bright-line rule that public employees' speech related to official duties is never protected.⁸⁹ Although he agreed with much of Justice Souter's opinion, Breyer was more sympathetic to the roles and responsibilities of public employers.⁹⁰ Nevertheless, Breyer, too, would have applied the *Pickering* balancing test in *Garcetti*, concluding that because the speech at issue posed a small risk of interfering with the management of the government agency it deserved constitutional protection.⁹¹

C. *An Additional Barrier*

The Supreme Court in *Garcetti* establishes a new threshold question courts must ask when determining whether a public employee's expression will be subject to the *Pickering* balancing test. If the expression is pursuant to official job responsibilities, the constitutional inquiry ends; it is not necessary to substantiate that such expression pertains to a private grievance or has a negative

⁸³ *Id.* (Stevens, J., dissenting).

⁸⁴ *Id.* at 427.

⁸⁵ *Id.* at 430 (Souter, J., dissenting).

⁸⁶ *See id.*

⁸⁷ *Id.* at 428 (holding that an employee speaking as a citizen is protected from reprisals unless the expression damages the government agency's ability to function). The court referred to a case in which a schoolteacher was afforded *Pickering* protection "for criticizing pending collective-bargaining negotiations affecting professional employment." *See id.* at 429 (citing *Madison Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm'n*, 429 U.S. 167 (1976)).

⁸⁸ *Id.* at 439-40.

⁸⁹ *Id.* at 446 (Breyer, J., dissenting) (contending that "there may well be circumstances with special demand for constitutional protection of the speech at issue, where governmental justifications may be limited, and where administrable standards seem readily available").

⁹⁰ *Id.* at 447-48.

⁹¹ *Id.* at 450.

impact on agency operations.⁹² Under *Garcetti*, one must determine if the employee spoke “as a citizen” and on a “matter of public concern.”⁹³ Only if both of these requirements are met do courts proceed to the *Pickering* balancing test.⁹⁴ Thus, although *Pickering* has not been overruled, the broad protection once given to public educators’ expression under the balancing test is no longer available for expression in the course of one’s job. One justification the court offers for the rigid rule is to reduce the number of groundless lawsuits.⁹⁵ The irony, however, is that *Garcetti* may generate a new genre of cases asking courts to determine precisely what expression pertains to an individual’s job duties.⁹⁶

III. POST-GARCETTI DECISIONS

In the year following the *Garcetti* decision, approximately one hundred First Amendment cases addressed whether a public employee was speaking pursuant to a job duty.⁹⁷ Nearly one-fifth of these cases focused on employees in K-12 public schools. Courts in the majority of these decisions failed to protect the school employee who was found to be speaking pursuant to an official job duty. While it is too soon to identify a definitive trend, there are few indications that post-*Garcetti* decisions have expanded public employees’ expression rights, and, as discussed in this section, most signals are to the contrary. This is unfortunate, especially where school personnel are addressing matters of great importance, such as school budgets and safety issues. Further, in classroom speech cases, lower courts are not allowing much leeway for teachers to express personal views inside the classroom.

A. Whistleblower Cases

In a number of pre-*Garcetti* decisions, courts afforded constitutional protection to school personnel for voicing concerns about illegal or unethical actions or other wrongdoing in their school districts. To illustrate, federal appellate courts considered a special education teacher’s assertions that the adapted physical education program violated federal law⁹⁸ and a high school athletic director’s critical statements about hazing on the football team to be protected ex-

⁹² See *id.* at 410 (majority opinion).

⁹³ *Id.* at 418.

⁹⁴ See *id.*

⁹⁵ See *id.* at 423.

⁹⁶ See Harris, *supra* note 4, at 1182–83.

⁹⁷ Associated Press, *High Court Curbs Whistleblower Lawsuits*, May 30, 2006, available at <http://www.firstamendmentcenter.org/news.aspx?id=16949>.

⁹⁸ *Settlegoode v. Portland Pub. Sch.*, 371 F.3d 503, 516 (9th Cir. 2004) (denying defendants’ request for qualified immunity, so the teacher was entitled to the full jury award, including punitive damages, assessed against the school administrators for abridging her constitutional rights).

pression that could not be the motivating reason for adverse employment consequences.⁹⁹ These courts did not find the expression unprotected simply because it occurred pursuant to work responsibilities. As a result, it was assumed that such whistleblowing pertained to important matters of public concern and thus enjoyed constitutional protection under the *Pickering* and *Connick* standards.

However, post-*Garcetti* decisions contain less support for this general principle. For example, the Fifth Circuit ruled that an athletic director's voicing of concerns about athletic funds to his supervisor was not protected expression.¹⁰⁰ Although the athletic director repeatedly asked the school's office manager about funds that were appropriated for athletic activities, the manager never provided the information.¹⁰¹ The athletic director finally wrote a memo to the office manager and the principal regarding the funds. The school subsequently terminated the athletic director and did not renew his contract, for which he alleged retaliation.¹⁰² The Fifth Circuit found that the athletic director's expression regarding the funding of athletics was not protected because it was made pursuant to his official duties.¹⁰³

In an Eleventh Circuit case, a teacher contended that her contract was not renewed because she questioned the fairness of cheerleading try-outs.¹⁰⁴ She argued that her speech was protected under the First Amendment because she was raising an educational quality issue, rather than a private grievance.¹⁰⁵ Rejecting this argument, the Eleventh Circuit held that the teacher's First Amendment rights were not violated; the record revealed that she voiced her concerns pursuant to her duties as a cheerleading sponsor rather than as a citizen.¹⁰⁶

In another case, a Connecticut teacher's supervisor instructed the teacher not to contact the Department of Children and Families (DCF) after learning that a substitute teacher exhibited to middle school students a photo of himself and two females, all of whom were nude.¹⁰⁷ The teacher claimed that the superintendent and others retaliated against him when the teacher subsequently made a report to the DCF, contrary to instructions.¹⁰⁸ The Connecticut federal district

⁹⁹ *Cioffi v. Averill Park Cent. Sch. Dist. Bd. of Educ.*, 444 F.3d 158 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 382 (2006) (vacating summary judgment for the school district and school board, but granting summary judgment for the board president and superintendent on immunity grounds).

¹⁰⁰ *See Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689 (5th Cir. 2007).

¹⁰¹ *See id.* at 690.

¹⁰² *See id.* at 690–91.

¹⁰³ *See id.* at 694.

¹⁰⁴ *See Gilder-Lucas v. Elmore County Bd. of Educ.*, 186 F. App'x 885 (11th Cir. 2006).

¹⁰⁵ *See id.* at 887.

¹⁰⁶ *See id.*

¹⁰⁷ *Pagani v. Meriden Bd. of Educ.*, No. 3:05-CV-01115 (JCH), 2006 U.S. Dist. LEXIS 92267 (D. Conn. Dec. 19, 2006).

¹⁰⁸ *Id.* at *2.

court found that the report to DCF was made pursuant to his official job responsibilities; the teacher was not speaking as a citizen.¹⁰⁹ As such, the court refused to insulate the teacher from disciplinary action.¹¹⁰

In a New Mexico case, the Tenth Circuit ruled that a superintendent's comments about the Head Start Program and possible violations of federal law were not protected because they were made in the course of her job duties.¹¹¹ The court did find, however, that even though the superintendent's statements to the school board questioning the board's compliance with the Open Meeting Act were not protected under *Garcetti*, her comments to the New Mexico Attorney General regarding such noncompliance fell outside the scope of her office.¹¹² Thus, the court ruled that this claim remained legally viable and remanded the case for further proceedings on this issue.¹¹³

In another Tenth Circuit case, a teacher complained that his supervisor lacked proper certification for his position and that his supervisor abused students.¹¹⁴ The teacher alleged that the school district retaliated against him when it placed him on administrative leave after he made these accusations.¹¹⁵ At the district court level the teacher's speech was found to be protected under the First Amendment.¹¹⁶ On appeal, however, the school district relied on the intervening *Garcetti* ruling's modification of the threshold questions in arguing that the law had changed and that the teacher had spoken pursuant to his official job duties.¹¹⁷ On remand from the Tenth Circuit for further fact finding in light of *Garcetti*, the federal district court held that the expression was not protected.¹¹⁸

A security specialist in an Idaho school district alleged that school officials eliminated his position in retaliation for his complaints about discipline and safety issues on behalf of concerned students and faculty.¹¹⁹ The federal district court held in favor of the school district because under *Garcetti* the attendant was acting as an employee of the district when he made the complaints.¹²⁰ Likewise, a Maryland bus driver alleged that she was retaliated against after

¹⁰⁹ *Id.* at *4.

¹¹⁰ *See id.*

¹¹¹ *See* Casey v. W. Las Vegas Indep. Sch. Dist., 473 F.3d 1323, 1329–32 (10th Cir. 2007).

¹¹² *Id.* at 1332–33.

¹¹³ *Id.* at 1334.

¹¹⁴ Trujillo v. Bd. of Educ., 212 F. App'x 760, 764 (10th Cir. 2007).

¹¹⁵ *Id.* at 763.

¹¹⁶ *Id.* at 764.

¹¹⁷ *Id.* at 763–64.

¹¹⁸ Trujillo v. Bd. of Educ., No. CIV 02-1146 JB/LFG, 2007 U.S. Dist. LEXIS 56500, *15–16 (D.N.M. June 5, 2007).

¹¹⁹ *See* Posey v. Lake Pend Oreille Sch. Dist. No. 84, No. CV05-272-N-EJL, 2007 U.S. Dist. LEXIS 7829 (D. Idaho Feb. 2, 2007).

¹²⁰ *See id.* at *15.

she complained about bus safety issues.¹²¹ Relying on *Garcetti*, the federal district court found that the driver's complaint was not made as a citizen but was part of her official duties.¹²² The court noted that although the speech related to a school concern, it was not the type of speech that would interest the public.¹²³ Thus, the court granted summary judgment to the school district.¹²⁴

Two post-*Garcetti* cases from Delaware involved school psychologists who voiced concerns about complying with legal requirements governing the education of children with disabilities. In one, a school psychologist alleged that she was retaliated against after she raised issues about the school district not complying with the Individuals with Disabilities Education Act.¹²⁵ Relying on *Garcetti*, the federal district court found that the psychologist was not speaking as a citizen.¹²⁶ In dismissing the psychologist's complaint, the court held that she was speaking in connection with her official duties.¹²⁷ In the second case, a school psychologist asserted that the school district retaliated against her for voicing concerns about the treatment of special education students.¹²⁸ The district contended that the school psychologist's complaints were part of her job responsibilities. The federal court agreed, granting summary judgment to the school district.¹²⁹

In a few post-*Garcetti* cases, however, public school employees have succeeded at least in part in their expression claims. For example, colleagues advised a teacher to keep a journal documenting his co-teacher's tardiness and other unprofessional conduct because of fears that a student might get injured when the co-teacher was inappropriately absent from the room.¹³⁰ After the teacher refused to disclose to the principal the identity of those who advised him to keep the journal, the teacher alleged that he received disciplinary letters and that his contract subsequently was not renewed.¹³¹ Applying *Garcetti*, the federal district court reasoned that the teacher's journal was not written pursuant to his official duties because he was not employed to document the conduct of other teachers.¹³² The court also concluded that the co-teacher's performance was a matter of public concern and, thus, denied the school district's mo-

¹²¹ See *Cole v. Anne Arundel County Bd. of Educ.*, No. CCB-05-1579, 2006 U.S. Dist. LEXIS 89426, at *5-6 (D. Md. Nov. 30, 2006).

¹²² *Id.* at *17-19.

¹²³ *Id.* at *21.

¹²⁴ *Id.*

¹²⁵ *Houlihan v. Sussex Technical Sch. Dist.*, 461 F. Supp. 2d 252, 256 (D. Del. 2006).

¹²⁶ *Id.* at 260.

¹²⁷ *Id.*

¹²⁸ *Yatzus v. Appoquinimink Sch. Dist.*, 458 F. Supp. 2d 235, 245 (D. Del. 2006).

¹²⁹ *Id.* at 245, 248.

¹³⁰ *Wilcoxon v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 437 F. Supp. 2d 235, 239 (D. Del. 2006).

¹³¹ *Id.* at 239-40, 242.

¹³² *Id.* at 244.

tion to dismiss the claim.¹³³

Another teacher claimed that he suffered adverse employment consequences after he wrote letters to newspapers and other outlets about theft, flirtation by security guards with female students, grade padding, and several other issues at his school.¹³⁴ Applying *Garcetti*, the New York federal district court reasoned that in this case the teacher's letters were not part of his official duties because the letters concerned working conditions.¹³⁵ The court noted that the content of three of the teacher's letters might be considered matters of public concern.¹³⁶ Thus, the school district's motion to dismiss the First Amendment retaliation claim was denied.¹³⁷ Despite these few contrary rulings, the *Garcetti* bright-line rule clearly makes it more difficult for school personnel to blow the whistle on questionable school district practices

B. Classroom Expression

Traditionally, it has been assumed that restrictions can be placed on teachers expressing their personal views in the classroom. Teachers cannot use their classrooms—a nonpublic forum—to proselytize children in a captive student audience.¹³⁸ Since 1988, many courts have applied *Hazelwood v. Kuhlmeier*¹³⁹ to assess the constitutionality of teachers' classroom expression of personal opinions, holding that such expression could be curtailed for legitimate pedagogical reasons. This is an easy standard for school districts to satisfy. For example, the First Circuit held that a teacher's discussion of abortion of Downs Syndrome fetuses could be censored, noting that the school board may limit a teacher's classroom expression in the interest of promoting educational goals.¹⁴⁰ The Tenth Circuit relied on *Hazelwood* in upholding disciplinary action against a teacher who commented during class about rumors that two students had engaged in sexual intercourse on the school tennis court during lunch hour, reasoning that the ninth-grade government class was not a public forum.¹⁴¹ Also, a Missouri federal district court upheld termination of a teacher for making disparaging classroom comments about interracial relationships, finding no protected expression.¹⁴² The court noted that the teacher was aware

¹³³ *Id.*

¹³⁴ *McMahon v. New York City Bd. of Educ.*, No. CV-01-6205 (DGT), 2006 U.S. Dist. LEXIS 89627, at *11–12 (E.D.N.Y. Dec. 12, 2006).

¹³⁵ *Id.* at *25.

¹³⁶ *Id.* at *25, 34–35.

¹³⁷ *Id.* at *34–35.

¹³⁸ *See, e.g., Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993); *Roberts v. Madigan*, 921 F.2d 1047, 1054–56 (10th Cir. 1990).

¹³⁹ 484 U.S. 260 (1988).

¹⁴⁰ *Ward*, 996 F.2d at 552.

¹⁴¹ *Miles*, 944 F.2d at 776.

¹⁴² *Loeffelman v. Bd. of Educ.*, 134 S.W.3d 637, 647 (Mo. Ct. App. 2004).

of the school district's anti-harassment policy.¹⁴³

It is unclear how the *Garcetti* ruling will affect litigation pertaining to classroom expression. Indeed, the *Garcetti* majority emphasized that "we need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."¹⁴⁴ Thus, some ambiguity remains regarding whether courts will continue to apply *Hazelwood* or will rely on *Garcetti* in assessing teachers' expression pursuant to their instructional duties in contrast to speech outside the classroom.

One federal appellate court already has relied on *Garcetti* in a school case involving classroom expression. The Seventh Circuit recently decided that such expression clearly is part of public educators' official duties and can be censored to protect the captive student audience.¹⁴⁵ Ruling that the teacher's expression of negative views about the war in Iraq during a current events session was not constitutionally protected speech, the court reasoned that *Garcetti* directly applied because the teacher's current event lesson was an assigned classroom task.¹⁴⁶

Also, a few post-*Garcetti* lower court decisions have addressed classroom expression issues. For example, a Michigan teacher alleged that he was retaliated against after he wore a T-shirt to school which stated that the teacher's union was not under contract.¹⁴⁷ The federal district court held that the T-shirt worn while teaching caused or had the potential to cause disharmony in the workplace.¹⁴⁸ While recognizing that the issue of labor negotiations touched on a matter of public concern, the court found the school district's interest in ensuring a professional workplace outweighed the teacher's rights in this instance.¹⁴⁹ The court noted that under *Garcetti*:

When a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services.¹⁵⁰

In a New York case, a teacher claimed that she was forced to resign after she

¹⁴³ *Id.*

¹⁴⁴ *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).

¹⁴⁵ *Mayer v. Monroe County Community Sch. Corp.*, 474 F.3d 477, 480 (7th Cir. 2007).

¹⁴⁶ *Id.*

¹⁴⁷ *Montle v. Westwood Heights Sch. Dist.*, 437 F. Supp. 2d 652, 653–54 (E.D. Mich. 2006).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 656.

¹⁵⁰ *Id.* at 654 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006)).

refused to take down a picture of George Bush in her classroom.¹⁵¹ The teacher displayed the picture during an election year and discussed her support for the incumbent.¹⁵² The school district argued that it had no knowledge of the teacher's political activities and requested that she remove the picture or post one of his opponent, John Kerry, to appear balanced.¹⁵³ The federal district court denied the district's summary judgment motion because issues of fact existed, including whether *Garcetti* applied in this instance.¹⁵⁴

Classroom expression by its nature is related to a teacher's job, so such expression would appear *not* to enjoy First Amendment protection under *Garcetti*. Because public school authorities have always had more latitude to censor employees' expression in the classroom than their comments on public issues made outside school, the practical impact of *Garcetti* on classroom expression may be minimal.

C. Other Recent Decisions

In several post-*Garcetti* cases that did not involve whistleblowing or classroom expression, courts have ruled that public school personnel were not engaged in protected speech because their expression pertained to official job duties. Previously, courts focused on whether the content of the expression pertained to a public or private concern, regardless of the venue of the expression or the role of the speaker. For example, critical comments about a school district's method of disciplining students were considered protected as they addressed a public concern,¹⁵⁵ whereas protesting unfavorable performance evaluations was found to relate to an unprotected private grievance.¹⁵⁶ But in recent decisions, the overriding consideration seems to be whether the expression is pursuant to job responsibilities. As noted, the public/private distinction becomes important *only* if the expression is *not* job related.

To illustrate, the Eleventh Circuit rejected a terminated principal's claim that the Florida school board violated his First Amendment speech and association rights and his right to petition the government for redress of grievances.¹⁵⁷ He

¹⁵¹ *Caruso v. Massapequa Union Free Sch. Dist.*, 478 F. Supp. 2d 377, 380–81 (E.D.N.Y. 2007).

¹⁵² *Id.* at 380.

¹⁵³ *Id.* at 381.

¹⁵⁴ *Id.* at 384.

¹⁵⁵ *Rankin v. Indep. Sch. Dist.*, 876 F.2d 838, 843 (10th Cir. 1989); *see also* *Cook v. Gwinnett County Sch. Dist.*, 414 F.3d 1313, 1320 (11th Cir. 2005) (finding that a school bus driver's free speech interest in raising safety concerns outweighed scant evidence that the employee's expression impeded workplace efficiency).

¹⁵⁶ *Day v. S. Park Indep. Sch. Dist.*, 768 F.2d 696, 700 (5th Cir. 1985); *see also* *Roberts v. Van Buren Pub. Sch.*, 773 F.2d 949, 956 (8th Cir. 1985) (finding that a grievance expressing teachers' dissatisfaction with how parental complaints about a field trip were handled pertained more to the teacher/principal relationship than to a public concern).

¹⁵⁷ *D'Angelo v. Sch. Bd.*, 497 F.3d 1203, 1206 (11th Cir. 2007).

alleged that he was unconstitutionally dismissed in retaliation for urging his teachers to support conversion of their school to a charter school.¹⁵⁸ Noting that *Garcetti* shifted the threshold question from whether the employee is speaking on a matter of public concern to whether the employee is speaking as a private citizen, the Eleventh Circuit concluded that the principal was speaking in his professional role in seeking charter school status.¹⁵⁹ Thus, his expression was not protected and could be the basis for dismissal.¹⁶⁰ The court further found no evidence that the school board violated the principal's rights to association and to petition the government.¹⁶¹

A principal in North Carolina claimed that she was retaliated against after she expressed concerns that a new school district policy would hurt the overall test scores of her elementary school.¹⁶² She expressed these concerns to her superintendent and also discussed the drawback of this policy with her staff.¹⁶³ The superintendent then offered the principal only a two-year contract instead of the four-year contract that was initially promised to her.¹⁶⁴ The federal district court dismissed the claims against the superintendent, but the principal was allowed to proceed against the school board.¹⁶⁵ The court found that the principal's comments may have addressed a significant public issue because testing is an obvious concern for teachers, students, and parents.¹⁶⁶ The court did not determine if the principal's speech was made pursuant to her official duties under *Garcetti* because the record was not sufficiently developed at this stage in the case.¹⁶⁷

An Ohio federal district court considered an assistant principal's First Amendment retaliation claim in a case remanded from the Sixth Circuit for further consideration of this issue.¹⁶⁸ Specifically, the assistant principal claimed that the school district retaliated against her after she reported an affair that allegedly occurred between the principal of the school and a parent. Rejecting the school district's contention that the complaint about the affair was related to the assistant principal's job duties,¹⁶⁹ the federal district court found

¹⁵⁸ *Id.* at 1206–07.

¹⁵⁹ *Id.* at 1210.

¹⁶⁰ *Id.* at 1212.

¹⁶¹ *Id.* at 1212–13.

¹⁶² *Locklear v. Person County Bd. of Educ.*, No. 1:05CV00255, 2006 U.S. Dist. LEXIS 42203, *3–6 (M.D.N.C. June 22, 2006).

¹⁶³ *Id.* at *3–4.

¹⁶⁴ *Id.* at *2–4.

¹⁶⁵ *Id.* at *9–11, 53.

¹⁶⁶ *Id.* at *42–43.

¹⁶⁷ *Id.* at *45.

¹⁶⁸ *Black v. Columbus Pub. Schs.*, 79 Fed. App'x 735 (6th Cir. 2003), *on remand*, No. 2:96-CV-326, 2006 U.S. Dist. LEXIS 57768, at *5–6 (S.D. Ohio Aug. 17, 2006).

¹⁶⁹ *Id.* at *10.

no connection between the speech and official responsibilities.¹⁷⁰

As post-*Garcetti* cases demonstrate, the *Garcetti* decision has significant implications for school employees, especially in the limits it places on reporting troublesome practices in school systems. Arguably, whistleblowing serves the public interest, but, after *Garcetti*, educators who expose suspicious activities face adverse consequences for expression related to their jobs.

IV. THE IMPACT OF *GARCETTI*

In the cases decided between *Pickering* and *Garcetti*, federal courts applied a balancing test to assess constitutional protection afforded to public employees' expression rights. Under this test, it is possible for governmental interests to outweigh those of the employee, but an assessment of the competing interests is required. Although the Supreme Court in *Connick* made it somewhat easier for public employers to establish that the employee's expression pertained to an unprotected private grievance instead of a matter of public concern,¹⁷¹ courts still weighed the governmental interests in ensuring efficient agency operations against individual interests in expressing views. In fact, lower courts observed that determining whether a public employee's expression is protected requires a "fact-sensitive, context-specific balancing of competing interests"¹⁷² and that the "particularized balancing" must be "based on the unique facts presented in each case."¹⁷³ This statement appears to argue against applying the bright-line rule announced in *Garcetti* that expression pursuant to job duties does not enjoy First Amendment protection *at all*.¹⁷⁴

A. *Reconciling Garcetti with Other Rulings*

One can view the *Garcetti* rule as protecting government agencies and al-

¹⁷⁰ *Id.* at *15.

¹⁷¹ See, e.g., *Ifill v. Dist. of Columbia*, 665 A.2d 185, 190 (D.C. App. 1995) (finding a teacher's letters regarding overcrowded classrooms and other issues to involve personal grievances); *Hesse v. Bd. of Educ.*, 848 F.2d 748, 751–53 (7th Cir. 1988) (concluding that a teacher's memoranda containing personal attacks against school officials related mainly to matters of personal interest).

¹⁷² *Brewster v. Bd. of Educ.*, 149 F.3d 971, 980 (9th Cir. 1998).

¹⁷³ *Voigt v. Savell*, 70 F.3d 1552, 1560–61 (9th Cir. 1995).

¹⁷⁴ Even before *Garcetti*, courts had ruled that individuals who set policy for a public agency must relinquish some First Amendment protection, such as criticizing employers and/or negatively impacting agency operations, but this reduced protection pertained only to employees in policymaking roles. See, e.g., *Sharp v. Lindsey*, 285 F.3d 479 (6th Cir. 2002) (affirming grant of summary judgment to a school district where a high school principal demoted to a teaching position brought a § 1983 action alleging violation of free speech and due process rights); *Vargas-Harrison v. Racine Unified Sch. Dist.*, 272 F.3d 964 (7th Cir. 2001) (affirming grant of summary judgment to a school district where a grade school principal, who was demoted to assistant principal, brought action alleging a violation of First Amendment rights).

lowing them to manage their employees by taking some of the subjectivity out of many employee expression claims.¹⁷⁵ Proponents of the *Garcetti* decision assert that the denial of constitutional protection to job-related expression promotes efficiency in the workplace.¹⁷⁶ This argument sounds logical if public employers can be trusted to encourage their employees to disclose information when such disclosures serve the common good.

Yet, critics of *Garcetti* view the decision as providing a disincentive for public employees to expose workplace corruption or to address other important matters of public concern.¹⁷⁷ The critics contend that communication between public employees and employers should be encouraged, not curtailed.¹⁷⁸ Indeed, prior to *Garcetti*, the Supreme Court had long recognized the right of public employees to speak out on matters of public interest,¹⁷⁹ and several lower courts had ruled that expression about problematic school practices clearly addressed public concerns.¹⁸⁰

To illustrate, in a Sixth Circuit case, an assistant principal successfully alleged that he was unconstitutionally demoted to a teaching position after he complained about suspected cheating on student achievement tests.¹⁸¹ The Fourth Circuit also found that a special education teacher, who criticized the mismanagement of money by the school district, was entitled to First Amendment protection.¹⁸² In a more recent Fourth Circuit decision, the appellate court ruled that the demotion of an assistant principal violated the First Amendment because the demotion was based primarily on the assistant principal's voicing her concerns about possible racial discrimination toward students.¹⁸³ In addition, the Fifth Circuit held in favor of a public library employee who was demoted after expressing concerns regarding work place safety.¹⁸⁴ And in an Eighth Circuit ruling, a school nurse succeeded in establishing that her criticisms of immunization practices, the heavy nursing caseload, and student safety entailed protected expression.¹⁸⁵ Although the speech at issue in all of these cases related to the employee's job duties, none of the decisions suggested that

¹⁷⁵ See Harris, *supra* note 4, at 1163.

¹⁷⁶ *Id.* at 1168-70.

¹⁷⁷ *Id.* at 1172.

¹⁷⁸ *Id.* at 1171-74.

¹⁷⁹ See Rankin v. McPherson, 483 U.S. 378 (1987); Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

¹⁸⁰ See *supra* text accompanying notes 98-99.

¹⁸¹ Canary v. Osborn, 211 F.3d 324 (6th Cir. 2000).

¹⁸² Hall v. Marion Sch. Dist., 31 F.3d 183 (4th Cir. 1994).

¹⁸³ Love-Lane v. Martin, 355 F.3d 766 (4th Cir. 2004).

¹⁸⁴ Kennedy v. Tangipahoa Parish Library Bd. of Control, 224 F.3d 359 (5th Cir. 2000); see also Southside Pub. Sch. v. Hill, 827 F.2d 270 (8th Cir. 1987) (overturning disciplinary action against teachers who wrote a letter to the state department of education reporting a colleague's deficiencies in implementing programs for children with disabilities).

¹⁸⁵ Stever v. Indep. Sch. Dist. No. 625, 943 F.2d 845 (8th Cir. 1991); see also Delgado v.

this relationship should be controlling in determining whether the expression was protected. It is chilling to think that had the cases been heard after *Garcetti*, the public employees most likely would not have prevailed.

Not only are earlier lower court decisions difficult to reconcile with *Garcetti*, but prior Supreme Court rulings also do not appear to reflect the current Supreme Court majority's reasoning in *Garcetti*. As noted, in 1979 the Supreme Court in *Givhan v. Western Line Consolidated School District* held that statements made privately are constitutionally protected if the expression relates to a matter of public concern.¹⁸⁶ At issue were comments a teacher made to her principal regarding the school district's hiring policies, which the teacher considered to be racially discriminatory.¹⁸⁷ In a unanimous decision, the Supreme Court reasoned that views expressed in private are not beyond constitutional protection.¹⁸⁸ Justice Rehnquist emphasized in *Givhan* that Supreme Court precedent did not support the notion that a "public employee forfeits his protection against governmental abridgement of freedom of speech if he decides to express his views privately rather than publicly."¹⁸⁹

The *Garcetti* majority attempted to reconcile *Givhan* by emphasizing that, unlike Ceballos's remarks, *Givhan*'s comments were not made pursuant to her job duties.¹⁹⁰ Although the Court in *Garcetti* did not provide great detail, perhaps its distinction between the two cases is that *Givhan* did not actually hire personnel, so her speech was not pursuant to her job duties.¹⁹¹ If so, then the Court may be suggesting that the topic of the expression at issue must be part of the official job description for it to be considered pursuant to job responsibilities. But post-*Garcetti* decisions do not support such a narrow interpretation of expression related to job responsibilities.¹⁹² Despite efforts to reconcile these two Supreme Court decisions, concerns remain that if a *Givhan*-type case were brought today, the expression would not be protected under *Garcetti*, and no balancing of interests would be required.¹⁹³

B. *Public Versus Internal Expression*

Many analysts have lamented that *Garcetti* may silence the various employees who could serve society well by speaking out and may protect those least

Jones, 282 F.3d 511 (7th Cir. 2002) (finding employee's expression about a criminal investigation involving an elected official's relative to be a matter of public concern).

¹⁸⁶ *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 413 (1979).

¹⁸⁷ *Id.* at 412-13.

¹⁸⁸ *Id.* at 414.

¹⁸⁹ *Id.*

¹⁹⁰ *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

¹⁹¹ *Givhan*, 439 U.S. at 411 (describing *Givhan* as a junior high English teacher).

¹⁹² See, e.g., *Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323, 1330-31 (10th Cir. 2007); *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689 (5th Cir. 2007).

¹⁹³ McCarthy, *supra* note 42, at 879.

likely to voice informed opinions.¹⁹⁴ In fact, if a public employee's specific role is to uncover wrongdoing, there is no protection for doing so. Robert O'Neil, Director of the Thomas Jefferson Center for the Protection of Free Expression, asserted that "[t]he Court seems to be saying that if you don't know anything about a subject, you can speak freely about it."¹⁹⁵ Gerald McEntee, President of the American Federation of State, County and Municipal Employees, noted: "This decision gives constitutional sanction to those who would fire a public worker for stepping forward to preserve the integrity of our public institutions as a government whistleblower."¹⁹⁶ Similarly, Steven Shapiro, Legal Director for the American Civil Liberties Union, observed: "In an era of excessive government secrecy, the court has made it easier to engage in a government cover-up by discouraging internal whistle-blowing."¹⁹⁷

Some commentators further argue that in order for whistleblowers to be protected after *Garcetti*, they will need to voice their concerns in the public arena instead of internally to their supervisors.¹⁹⁸ And Justice Stevens' dissent in *Garcetti* proclaimed that "it seems perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors."¹⁹⁹ This sentiment may influence lower courts as they assess free expression claims. For example, the New Mexico Federal District Court relied in part on the fact that the comments at issue were made to the employee's supervisor and not to outside entities in concluding that the expression was not protected by the First Amendment.²⁰⁰

Yet, the *Garcetti* majority refuted the assertion that public employees must go public with their complaints to ensure constitutional protection. The majori-

¹⁹⁴ See, e.g., Joyce Howard Price, *Justices Ease Whistleblower Protections*, THE WASHINGTON TIMES, May 31, 2006, at A01; David G. Savage, *Supreme Court Limits Free Speech in Workplace for Public Employees*, SEATTLE TIMES, May 31, 2006, at A1; Jack M. Balkin, Ceballos – The Court Creates Bad Information Policy, May 30, 2006, available at http://balkin.blogspot.com/2006_05_28_balkin_archive.html.

¹⁹⁵ Tony Mauro, *Head-Scratching Follows Garcetti Ruling*, May 31, 2006, available at <http://www.firstamendmentcenter.org/analysis.aspx?id=16956>.

¹⁹⁶ Associated Press, *Excerpts from Reaction to Garcetti v. Ceballos*, June 1, 2006, available at <http://www.firstamendmentcenter.org/news.aspx?id=16964>.

¹⁹⁷ Savage, *supra* note 194. Stephen Kohn, chair of the board of the National Whistleblower Center, called *Garcetti* the "worst Supreme Court ruling on whistleblowing in 50 years" and asserted that, since most whistleblowing takes place as part of employees' duties, "[t]his ruling is a green light for corrupt politicians to fire whistleblowers." Price, *supra* note 194.

¹⁹⁸ Cooper, *supra* note 4; see also 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. Soc'y 45 (2007) (arguing that public employees may be forced to voice concerns to the media).

¹⁹⁹ *Garcetti v. Ceballos*, 547 U.S. 410, 427 (2006) (Stevens, J., dissenting).

²⁰⁰ *Trujillo v. Bd. of Educ.*, No. CIV 02-1146 JB/LFG, 2007 U.S. Dist. LEXIS 56500 (D.N.M. June 5, 2007).

ty emphasized that the expression's relationship to job duties, rather than the forum where the expression occurs, is the key consideration.²⁰¹ And in a post-*Garcetti* decision, the Tenth Circuit rejected the assertion that the First Amendment protected a superintendent who circumvented the school board and went to the federal government with concerns about the legality of the school district's implementation of the Head Start program.²⁰² The court reasoned that the focus of the expression fell within the superintendent's job responsibilities, so the external forum of the expression was not the controlling factor.²⁰³ Thus, public employees may be sadly mistaken if they think they are protected by voicing concerns that relate to their job through a public medium.²⁰⁴

Public employers should heed Justice Kennedy's advice in implementing protections for their employees to voice their concerns internally. Justice Kennedy stated:

A public employer that wishes to encourage its employees to voice concerns privately retains the option of instituting internal policies and procedures that are receptive to employee criticism. Giving employees an internal forum for their speech will discourage them from concluding that the safest avenue of expression is to state their views in public.²⁰⁵

C. *Defining Official Job Duties*

Although it is hazardous to attempt to delineate precisely the type of expression that pertains to official job duties, the post-*Garcetti* litigation to date provides some limited guidance in this regard. For example, courts have recognized that the expression does not have to be compelled by the job to be considered pursuant to official duties.²⁰⁶ Of course, in situations where the employee has a legal duty to address the topic, such as the duty to report child abuse, that expression clearly relates directly to job responsibilities.²⁰⁷ Also, where employees have reporting responsibilities, such as monitoring and documenting compliance with federal regulations governing programs for children with disabilities, the employees' expression of concerns about such compliance is pursuant to job duties.²⁰⁸

Just as the forum of the expression does not determine whether the content

²⁰¹ *Garcetti*, 547 U.S. at 421.

²⁰² *Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323 (10th Cir. 2007).

²⁰³ *Id.* at 1330–31.

²⁰⁴ McCarthy, *supra* note 42, at 882.

²⁰⁵ *Garcetti*, 547 U.S. at 424.

²⁰⁶ See, e.g., *Casey*, 473 F.3d 1323; *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689 (5th Cir. 2007).

²⁰⁷ See *Pagani v. Meriden Bd. of Educ.*, No. 3:05-CV-01115 (JCH), 2006 U.S. Dist. LEXIS 92267 (D. Conn. Dec. 19, 2006).

²⁰⁸ See *Houlihan v. Sussex Technical Sch. Dist.*, 461 F. Supp. 2d 252 (D. Del. 2006); *Yatzus v. Appoquinimink Sch. Dist.*, 458 F. Supp. 2d 235 (D. Del. 2006).

relates to a private grievance or a matter of political, social, or other concern to the community, as noted previously, the forum is not dispositive in identifying whether the comments are pursuant to job duties.²⁰⁹ However, in most of the post-*Garcetti* cases to date, the expression at issue has not involved the media or other public outlets. It remains an open question whether lower courts will conclude that public employees' chances of establishing that they are speaking as citizens rather than employees are strengthened if they are speaking publicly instead of to their superiors or coworkers.²¹⁰

D. *The Need for Whistleblower Laws*

Some observers have noted that despite the lack of constitutional protections, public employees could still rely on federal and state whistleblower laws.²¹¹ Addressing this issue, the *Garcetti* Court insisted that the "powerful network of legislative enactments" can provide adequate protection for whistleblowers.²¹² For example, Congress passed the Civil Service Reform of 1978 to protect whistleblowers in federal agencies.²¹³ In 1989, Congress passed the Whistleblower Protection Act in an effort to strengthen statutory protections for federal employees who "assisted in the elimination of fraud, waste, abuse, illegality, and corruption."²¹⁴ Some states also have laws that offer protections to whistleblowers.²¹⁵

Despite these laws, a recent study by the Congressional Research Service (CRS) states that "enacting statutory rights for whistleblowers . . . has not produced the protections that some expected."²¹⁶ The CRS study also claims: "the agencies created by Congress to safeguard the rights of whistleblowers have not in many cases provided the anticipated protections to federal employees."²¹⁷ Recent research suggests that fifty-eight percent of state whistleblower laws "do not protect internal whistleblowers" and ninety-five percent of the laws offer less protection than they would find under the First Amendment.²¹⁸

These findings likely explain a statement Ceballos's attorney made during oral arguments before the Supreme Court that whistleblower laws are "a com-

²⁰⁹ See *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 694, n.1 (5th Cir. 2007).

²¹⁰ See Cooper, *supra* note 4, at 91; see also Bice, *supra* note 198, at 80–83.

²¹¹ See Harris, *supra* note 4, at 1175.

²¹² *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).

²¹³ Cong. Research Serv. Report for Cong., National Security Whistleblowers 6, Dec. 30, 2005, available at <http://www.pogo.org/m/gp/gp-crs-nsw-12302005.pdf> [hereinafter CRS].

²¹⁴ *Id.* at CRS-30.

²¹⁵ See Bice, *supra* note 198, at 79.

²¹⁶ CRS Report, *supra* note 213, at CRS-2.

²¹⁷ *Id.*

²¹⁸ Cooper, *supra* note 4, at 92 (citing *What Price Free Speech?: Whistleblowers and the Garcetti v. Ceballos Decision Before the H. Comm. On Govt. Reform*, 109th Cong. 1 (2006)).

plete hit-or-miss situation across the country.”²¹⁹ To illustrate, an Indiana law states: “a public employer may not terminate an employee for reporting in writing a violation of law or misuse of public resources.”²²⁰ Despite the law’s good intentions, there is no private right of action and the employee’s remedy is limited to “appealing any disciplinary action.”²²¹ One commentator rightfully noted that, prior to the *Garcetti* decision, the First Amendment would have provided more protection for a public employee in Indiana than does the current state statute.²²²

Congress needs to pass laws to “close the loophole created by *Garcetti*.”²²³ Alternatively, states need to adopt laws that offer public employees the same protections that they enjoyed under the First Amendment before the *Garcetti* decision. A representative of the National Whistleblower Center recently testified before Congress that “the *Garcetti v. Ceballos* decision represents the most significant judicial threat to employee whistleblowers in nearly forty years, not only on the basis of its holding, but on the tone it has set for countless lower court rulings. Legislative action is now necessary.”²²⁴

Whistleblowers may under limited circumstances find protection in civil rights laws. For example, the Supreme Court interpreted Title IX of the Education Amendments of 1972, which bars sex discrimination in institutions with programs that receive federal funds,²²⁵ as protecting employees from retaliation based on their complaints under the law. In *Jackson v. Birmingham Board of Education*, a girls’ basketball coach complained to his supervisors when he learned that his team was not receiving equal funding or equal access to athletic equipment.²²⁶ The lack of funding made it difficult for the coach to perform his job functions.²²⁷ Some five months after his initial complaint, the coach was relieved of his coaching (but not teaching) duties.²²⁸ The Supreme Court held that Title IX’s private right of action encompasses claims of retaliation against an individual who complained about sex discrimination.²²⁹ The coach’s expression regarding sex-based inequity was clearly pursuant to job responsibilities; however, this case differed from *Garcetti* because it was brought under Title IX of the Education Amendments of 1972 instead of the First Amend-

²¹⁹ Bice, *supra* note 198, at 79.

²²⁰ IND. CODE § 36-1-8-8(a), (b) (2007).

²²¹ Bice, *supra* note 198, at 79 (citing IND. CODE § 36-1-8-8(c), (d) (2007)).

²²² *Id.*

²²³ See Harris, *supra* note 4, at 1185.

²²⁴ What Price Free Speech?: Whistleblowers and the *Garcetti v. Ceballos* Decision Before the H. Comm. on Govt. Reform, 109th Cong. 1 (2006).

²²⁵ See 20 U.S.C. § 1681 (2007).

²²⁶ *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171–72 (2005).

²²⁷ *Id.* at 171.

²²⁸ *Id.* at 172.

²²⁹ *Id.* at 182–84.

ment.²³⁰ It is important to note the limitations of *Jackson* in that this Title IX ruling would apply only to retaliation for a complaint based on sex discrimination in institutions receiving federal funds.

The Supreme Court also recently interpreted Title VII of the Civil Rights Act of 1964 as protecting a nongovernment employee from retaliation.²³¹ In *Burlington Northern & Santa Fe Railway Co. v. White*, a female railroad maintenance worker complained to her employer about sexual harassment by her supervisor.²³² Although the railroad disciplined the supervisor and reassigned the female employee, the railroad later suspended the female employee without pay.²³³ The employee sued, alleging unlawful retaliation under Title VII.²³⁴ Interpreting Title VII's anti-retaliation language, the Supreme Court concluded that actionable retaliation does not have to be confined to conduct affecting employment terms and conditions as is the case with substantive Title VII claims.²³⁵ The Court reasoned that enforcement of the law's substantive protections could be achieved only through a broad reading of the anti-retaliation provision, which was designed to reduce concerns of employees who want to file claims or serve as witnesses.²³⁶ Despite these favorable rulings toward whistleblowers, they apply only to limited claims.²³⁷

V. CONCLUSION

The *Garcetti* decision is especially noteworthy because, according to the Associated Press, approximately one hundred whistleblower retaliation lawsuits are filed each year.²³⁸ Public employees involved in such lawsuits will face an uphill battle because the Supreme Court has altered its analysis of the constitutionality of public employee speech. In changing the threshold question and establishing a new bright-line rule, the Supreme Court has removed constitutional protection for a large category of expression. Indeed, this decision may dissuade public employees from reporting misconduct about legitimate public concerns.

When relying on *Garcetti*, lower courts have taken seriously the Supreme Court's instruction for them to deny First Amendment protection to expression related to official job duties. Specifically, in eighty percent of the post-*Garcetti* lower court cases discussed in this article, the employees did not prevail because they were found to be speaking in the course of their jobs. Some of the

²³⁰ Compare *id.* at 171 with *Garcetti v. Ceballos*, 547 U.S. 410, 415-16 (2006).

²³¹ *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006).

²³² *Id.* at 2409.

²³³ *Id.*

²³⁴ *Id.*

²³⁵ *McCarthy*, *supra* note 42, at 881-83.

²³⁶ *White*, 126 S. Ct. at 2414-15.

²³⁷ *McCarthy*, *supra* note 42, at 881-83.

²³⁸ Associated Press, *supra* note 97.

remaining cases were remanded for additional consideration regarding how *Garcetti* applies, so they cannot be considered true wins for the employees. These lower court cases, although few in number, offer a glimpse of the new limitations placed on public educators' rights to free expression in the aftermath of *Garcetti*.

By departing from its traditional approach to public employee expression cases, the Supreme Court has left public employees who want to expose wrongdoing in their school districts in a precarious position. State whistleblower laws may be helpful to aggrieved employees, but most state laws do not afford as much protection as needed. Thus, the most promising sign may be efforts to enact comprehensive federal legislation to address the loophole created by the *Garcetti* decision. Without such statutory protection, children in our public schools may be the ultimate losers because unethical or illegal activities in their school districts may not be brought to light.

