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Whistle(Blowing) While You Work

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On May 30, the U.S. Supreme Court decided, in *Garcetti v. Ceballos*, 2006 WL 1458026, 24 IER Cases 737, that public employees do not enjoy First Amendment protections when speaking in the course of their official duties. While drawing strong reactions as a restriction on the free speech rights of government whistleblowers, the ruling may also be viewed in a different light — as giving public whistleblowers the same rights as private ones.

First Amendment Rights

The Supreme Court's leading opinion on the First Amendment rights of public employees — *Pickering v. Board of Education*, 391 U.S. 563 (1968) — requires courts "to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matter of public concern and the interest of the State, as employer, in promoting the efficiency of the public services it performs through its employees." *Id.* at 568. *Garcetti* rejects the two-part test distilled by the Ninth Circuit from *Pickering*: first, whether the speech addresses a matter of public concern, and if so, second, whether the employee's interest in expressing himself outweighs the government's interests in promoting workplace efficiency and avoiding workplace disruption. On the first prong, a public employee was deemed to have addressed a matter of public concern when his speech related to an issues of political, social, or other concern to the community. Because so much of what a public employee does in the course of a day conceivably falls into this definition of public concern, the analysis often shifted to the second prong, much to the dismay of the employer, which was required to bear the burden of proving that the balance of interests weighed in its favor. Further, the "more tightly the First Amendment embraced the speech," the more vigorous a showing of disruption was required. *Ceballos v. Garcetti*, 361 F.3d 1168, 1178 (9th Cir. 2004). In fact, the First Amendment was ordinarily also held to protect even false statements to encourage "free debate," absent a showing of actual injury to the employer. *Id.* at 1179.

Garcetti adds another element to the first prong of the *Pickering* test: when a public employee makes a statement pursuant to his official duties, the employee *is not speaking out as a citizen* for First Amendment purposes, and the Constitution does not insulate the employee's communications from employer discipline.

The Case

The facts of *Garcetti* are fairly simple. Richard Ceballos, a Los Angeles County prosecutor, expressed concerns to his supervisors that a deputy sheriff may have lied in a search warrant affidavit. Ceballos' recommendation to drop the charges was rejected by Ceballos' supervisor, and the prosecution continued. Ceballos repeated his concerns when called to testify by the defense at a hearing challenging the warrant, but the trial court rejected the challenge. Ceballos asserted that he then was the target of retaliation — he was reassigned from his calendar deputy position to a trial deputy position, transferred to another courthouse, and denied a promotion. Ceballos filed suit in Federal district court under 42 U.S.C. § 1983. He claimed that he had suffered retaliation for voicing his concerns about the search warrant, in violation of his free speech rights under the First and Fourteenth Amendments.

The 5-4 majority started its analysis by affirming the principle that public employees are free "to speak as a citizen addressing matters of public concern," just like any other person. But at the same time, public employees are *not* like other persons. Their position gives their speech special weight, even when they are speaking outside the scope of their employment. "[T]hey can express views," the majority cautioned, "that contravene government policies or impair the proper performance of governmental functions." Nevertheless, when a public employee is speaking "as a citizen addressing matters of public concern," the government bears the burden of demonstrating "an adequate justification for treating the employee differently from other members of the general public."

The majority did not articulate precisely what amounts to an "adequate justification" because they were focused on providing

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guidance for determining when a public employee is — and is not — speaking "as a citizen addressing matters of public concern." When a public employee is not speaking in that capacity, he or she is speaking purely as an employee, and no First or Fourteenth Amendment values are implicated.

The Decision

The court rejected two potential benchmarks — whether the speech took place within the office (rather than a public forum), and whether the subject of the speech is the employee's employment. Both are over-inclusive. People address public concerns in nonpublic places, such as their place of employment, and what goes on in the workplace can certainly be a topic of public concern. Instead, the majority focused on whether the speech is made "pursuant to [the employee's] official duties." The test is not whether the speech is "about" the employee's official duties — such a test was squarely rejected by the majority. The test is whether the statement is made *in order to discharge the public employee's duties*. If it is, then it is fundamentally different from public comment — it is job performance in the form of speech.

The majority justified drawing the line at speech made "pursuant to [the employee's] official duties" by pointing out that such a rule "does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." Public employers, no less than private ones, need "sufficient discretion to manage their operations. Official communications have official consequences," they observed, "creating a need for substantive consistency and clarity. Supervisors must ensure that their employee's official communications are accurate, demonstrate sound judgment, and promote the employer's mission."

The majority concluded by issuing two cautionary notes about the reach of its holding. First, it warned against using "[f]ormal job descriptions" as the basis for determining whether a public employee's speech is made in the discharge of official duties. Rather, the "proper inquiry is a practical one." Job descriptions "often bear little resemblance" to an employee's real official duties. "We reject … the suggestion that employers can restrict employee's rights by creating excessively broad job descriptions." Second, the majority held that the test articulated in their opinion does not apply to public teachers and academics, who enjoy heightened free speech protections for scholarship and teaching. Both of these limitations are offered in response to Justice Souter's vigorous dissent, joined by Justices Stevens and Ginsburg.

The Dissent

In his dissent, Justice Souter agreed with the majority that a government employee has "greater leverage to create office uproars and fracture the government's authority to set policy to be carried out coherently through the ranks … government needs civility in the workplace, consistency in policy, and honesty and competence in public service." However, the Justice argued, why not respect the unchallenged individual and public interests in the speech through *Pickering*'s balancing test? He proposed to modify *Pickering* to protect a public employee's speech "by setting in effect a minimum heft for comments with any claim to outweigh" the "government's legitimate authority over subjects of speech required for a public job … " Only speech concerning "official dishonesty," "deliberately unconstitutional action," "serious wrongdoing" or "threats to health and safety," in Justice Souter's view, would have enough "heft" to trump the government's authority as an employer.

The foundation of the majority's analysis is the premise that, irrespective of the content of a public employee's speech, the distinction between speaking as a "private citizen," and speaking in the course of official duties, is a meaningful one for First Amendment purposes. Justice Souter rejected this premise. He did so for the sake of those who are drawn to public service precisely because they desire to amplify the messages they advocate as private citizens. He called them "citizen servants" and literally waxed poetic over them, quoting Robert Frost to describe them as those who seek "to unite [m]y avocation and my vocation." In his view, the proper distinction was based on a spectrum bracketed by "speech by a private citizen of a matter of public importance" (highest value) and "a statement by a governmental employee complaining about nothing beyond treatment under personnel rules" (lowest value). Somewhere in the middle "lies a public employee's speech unwelcome to the government but on a significant public issue." Where the majority drew a distinction based on the capacity in which speech is made ("private citizen" versus pursuant to official duties) regardless of content, Justice Souter drew a distinction based on content (public concern versus private concern), in which capacity plays a role only on the low end of the scale. His primary concern was that speech on "significant public issue[s]" is protected.

However, one might question whether public employees speaking as private citizens should receive First Amendment protections not provided their private sector counterparts. When public employees speak in the course of their official duties, they speak as the government, and it is axiomatic that the government does not enjoy First Amendment protections.

Conclusion

Garcetti does not leave public employees completely without recourse if they are victimized for speaking out against government misdoings. First, because whistleblowing by its very nature is not done in the course of the whistleblower's official duties, it cannot fall outside the scope of the First Amendment. The subject matter of the speech in question may concern the whistleblower's duties, but *Garcetti* squarely rejects any test based on the content of speech. The focus is instead on the role the speech plays in performance of the speaker's official duties. Furthermore, there are statutes, such as Gov't Code § 8547.8 and Labor Code § 1102.5 in California, and a patchwork-quilt of federal statutes, which may protect government whistleblowers.