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**The Fall-Out from Garcetti:  
How has the Decision Affected  
Public Employee Discipline?**

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### *The Impact of Garcetti on the First Amendment Analysis*

The United States Supreme Court significantly altered the landscape of First Amendment free speech retaliation claims in its decision in Garcetti v. Ceballos, 547 U.S. 410 (2006). In Garcetti, the Supreme Court held 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.” Id. at 421-425. “With the possible exception of free speech claims arising out of “academic scholarship or classroom instruction,” the Supreme Court established a bright-line exclusion of a public employee’s “work product” from the ambit of First Amendment protection. Id. When a public employee speaks or writes within the scope of his or her official employment responsibilities, his or her speech may no longer be shielded by the First Amendment from consequential, adverse employment action, even if such speech touches on a “matter of public concern.”

In the wake of Garcetti, the following questions arise:

1. Has Garcetti created an incentive for a public employee to make a dash to the media for a splashy public disclosure of real or perceived official wrong doing, without making any prior efforts to raise those allegations internally to his or her supervisors?
2. Does a patch-work of federal and state “whistleblower” statutes provide adequate protection to employees who make internal allegations of real or perceived wrong doing on matters within the scope of their employment?
3. How does the Garcetti analysis impact employees’ right to express themselves using social media?

An overview of the legal analysis underlying First Amendment retaliation claims, both prior to and after Garcetti, may help to bring those questions, and possible resolutions of the issues raised by those questions, into focus.

## **I. First Amendment Retaliation Cases in New York Before Garcetti**

Prior to the United States Supreme Court's landmark decision in Garcetti v. Ceballos, 547 U.S. 410 (2006), the United States Court of Appeals for the Second Circuit and other New York courts routinely applied the following analysis in deciding whether a plaintiff had established a prima facie case of retaliation for free speech in violation of the First Amendment:

1. whether plaintiff's speech addressed a matter of public concern;
2. whether plaintiff suffered an adverse employment decision; and
3. whether a causal connection exists between plaintiff's speech and the adverse employment decision.

See, e.g., Morris v. Lindau, 196 F.3d 102, 110 (2d Cir. 1999); Ezekwo v. NYC Health & Hosp. Corp., 940 F.2d 775, 780-81 (2d Cir. 1991), cert. denied, 502 U.S. 1013 (1991). Under this analysis, even if a plaintiff was able to establish that protected speech was a motivating factor for an adverse employment action, a defendant could nevertheless prevail by establishing that the defendant would have taken the same action even in the absence of the protected speech. See Mount Healthy City School Dist. Board of Educ. v. Doyle, 429 U.S. 274, 283-287 (1977); Morris, 196 F.3d at 110.

Prior to Garcetti, courts in New York consistently held that a public employee's speech was constitutionally protected if it addressed a matter of public concern. See Ezekwo, 940 F.2d at 780-81. This was consistent with the Supreme Court's mandate in Connick v. Myers, 461 U.S. 138 (1983) in which the Court distinguished between speech on a matter of public concern and a personal workplace grievance based on the "content, form and context of a given statement, as revealed by the whole record." Id. at 149-148.

Connick was decided on the basis of a "Pickering balancing test." Pickering v. Board of

Educ., 391 U.S. 563 (1968). Pickering applies when a public employer has admittedly taken adverse action against an employee because of his speech. The courts must then balance the interests of the employee “in commenting on matters of public concern,” against the interests of the employer. Id. at 568. To prevail, the employer must establish that the actual or potential disruptiveness of the employee’s speech “was sufficient to outweigh the First Amendment value of that speech,” such that the adverse action was justified. Pappas v. Giuliani, 290 F.3d 143, 146 (2d Cir. 2002), cert. denied, 539 U.S. 958 (2003). “The more the employee’s speech touches on matters of significant public concern, the greater the level of disruption to the government that must be shown.” Lewis v. Cowen, 165 F.3d 154, 162 (2d Cir. 1999), cert. denied, 528 U.S. 823 (1999).

In Connick, the plaintiff was an assistant district attorney who opposed her employer’s decision to transfer her to another office. 461 U.S. at 140-141. Plaintiff prepared and distributed a questionnaire soliciting the views of her coworkers concerning an office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work on political campaigns. Id. The employer became concerned that plaintiff “was creating a mini-insurrection within the office.” Id. Plaintiff was terminated for insubordination in refusing to accept her transfer and distributing the questionnaire. Id.

The Court in Connick distinguished between a public employee’s right to “speak as a citizen” on a “matter of public concern,” which is entitled to significant First Amendment protection, and a “personal workplace grievance,” which is not afforded a “grant of immunity.” Id. at 147. The Court acknowledged that the First Amendment “does not require a public office to be run as a roundtable for employee complaints over internal affairs.” Id. Thus, “every criticism directed at a public official” does not “plant the seed of a constitutional case.” Id. at

149. Applying this standard, the Connick Court concluded that most of the questions posed by plaintiff's questionnaire were not matters of public concern. Id. at 148. Instead, the Court found that the questionnaire's purpose was "to gather ammunition for another round of controversy with her superiors," and to turn her dissatisfaction with her transfer "into a cause célèbre." Id. Significantly, however, the Court also noted that the plaintiff was terminated in part due to her employer's concern that her question about pressure to work on political campaigns "would be damaging if discovered by the press." Id. at 141. The Court found that that this question, standing alone, touched on a matter of public concern. Id. at 149.

The Court's analysis did not stop there. The Court went on to carefully weigh the competing interests of the public employer and the employee under the Pickering balancing test, and to parse out the employee's speech to determine the extent of protection afforded to such speech. The Court ultimately concluded that the plaintiff's questionnaire only minimally touched on one matter of public concern, and that the employer's interests in preventing a "mini-insurrection" within the office outweighed the plaintiff's free speech rights with respect to these minimal concerns, justifying her termination. Id. at 152-154. The Court refused to "constitutionalize the employee grievance" that plaintiff's questionnaire presented. Id. at 154. The Court focused on the questionnaire's primary personal employment purpose, and concluded that the inclusion of one question that touched on a matter of public concern did not turn the entire questionnaire into protected speech. Id.

## **II. The Supreme Court's Decision in Garcetti**

On May 30, 2006, the United States Supreme Court significantly altered the landscape of First Amendment analysis in handing down its decision in Garcetti v. Ceballos, 547 U.S. 410 (2006). The Court held 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.” Garcetti, 547 U.S. at 421. The plaintiff in Garcetti was a deputy district attorney whose First Amendment claim arose out of a “disposition memorandum,” in which plaintiff recommended to his supervisors that a pending criminal case should be dismissed because of misrepresentations in an affidavit used to obtain a search warrant. Id. at 410-426. The “controlling factor” was that the plaintiff “spoke as a prosecutor fulfilling a responsibility to advise his supervisor how to best proceed with a pending case.” Id. at 419-422.

With the possible exception of free speech claims arising out of “academic scholarship or classroom instruction” (Id. at 425), the Supreme Court established a bright-line exclusion of a public employee’s “work product” from the ambit of First Amendment protection. Id. at 421-423. Accordingly, when a public employee speaks or writes within the scope of his or her official employment responsibilities, his or her speech may no longer be shielded by the First Amendment from consequential adverse employment action. Supervisors have a right to “ensure that their employees’ official communications are accurate, demonstrate sound judgment, and promote the employer’s mission.” Id. at 422-423. If a supervisor believes that such communications are “inflammatory or misguided,” adverse employment action may ensue. Id. at 423. Put simply, a public employer pays for its employees’ work product, and under Garcetti, has the right to control the content of such work product, without fear of a retaliation claim.

The foundations of the Court’s decision in Garcetti lie in Connick v. Myers, 461 U.S. 138 (1988) and Pickering v. Board of Educ., Township High School Dist., 391 U.S. 563 (1968), which instructed that only a public employee’s speech “as a citizen upon matters of public concern” warrants First Amendment protection. Connick, 461 U.S. at 146-47; Pickering, 391

U.S. at 568. Garcetti, however, sharply limited the reach of Connick and Pickering by clarifying that a public employee cannot be commenting “as a citizen” upon a matter of public concern when “the employee is simply performing his or her job duties.” 547 U.S. at 424.

As an illustrative example, a public school teacher remains protected under the First Amendment when complaining to the principal about alleged race discrimination in a school district’s employment practices, because her job involves classroom instruction, and does not include responsibility for the school district’s employment practices. See Givhan v. Western Line Consol. School Dist., 439 U.S. 410, 413-16 (1979). The effect of Garcetti, however, is that if the school district’s “personnel officer” made a similar complaint to his supervisors, his complaint would not be protected under the First Amendment, because the school district’s employment practices fall within the scope of his official duties. Garcetti, 547 U.S. at 430-431 (Souter, J., dissenting); see also Wilburn v. Robinson, 480 F.3d 1140, 1150-1151 (D.C. Cir. 2007) (holding that criticisms by a public agency’s interim director, made to her supervisor, that the agency’s salary policies resulted in race and gender discrimination were not protected speech “as a citizen” because her job responsibilities included salary and hiring matters).

Garcetti thus teaches that a public employee may not wear his or her “official duties” hat and “citizen” hat simultaneously. This is a logical corollary of the demarcation drawn by the Supreme Court between “speech that owes its existence to a public employee’s professional responsibilities,” which can no longer be sheltered under the First Amendment, and a public employee’s speech as a citizen, which remains protected, even when carried out in the workplace. Garcetti, 547 U.S. at 421-423. This distinction recognizes that the right of public employees to make “contributions to the civic discourse . . . does not invest them with a right to perform their jobs however they see fit.” Id. at 422. Public employers now have some latitude

to control and supervise “speech made by an employee in his or her professional capacity” without giving rise to a retaliation claim under the First Amendment. Id.

In sum, the Supreme Court has now instructed that for First Amendment protection it is not sufficient for a public employee’s speech to merely touch on a matter of public concern. To warrant protection, such speech must have been made as a citizen, while the employee was acting outside the scope of his or her employment. Id. at 419-424. Under Garcetti, a public employer may no longer be required to defend at trial a First Amendment claim predicated solely upon a finding by a court that a public employee’s speech touched on a matter of public concern.

### **III. How New York Courts Have Applied Garcetti**

#### **A. Notable Cases in the Court of Appeals for the Second Circuit**

The United States Court of Appeals for the Second Circuit has applied Garcetti numerous times since it was handed down. The Court’s first extensive treatment of a First Amendment issue following the decision in Garcetti arose in Ruotolo v. City of New York, 514 F.3d 184 (2d Cir. 2008). In Ruotolo the plaintiff, a retired police sergeant, alleged a violation of his First Amendment rights for his speech regarding health concerns at his precinct, which included a report that he had been directed to prepare in his role as Safety Officer for the precinct, and a lawsuit he filed in the wake of an alleged retaliatory personnel action taken against him after the report was submitted. Id. at 186. The plaintiff conceded that Garcetti mandated dismissal of the First Amendment claim premised on the report, but argued that his claim arising out of the lawsuit against the City was protected, because it was filed in his capacity as a private citizen. Id. at 188-189. The Second Circuit disagreed. Applying the standards set out in Garcetti, the court held that the plaintiff’s lawsuit concerned essentially personal grievances, that the relief he sought was for himself alone, and that, therefore, his speech was not on a matter of public



concern sufficient to sustain a First Amendment retaliation claim. Id. at 190. Specifically, the court considered that the acts of alleged retaliation which served as the basis for Ruotolo's complaint arose out of his specific circumstances of employment including reassignment, transfer, time off and discipline and adverse career, financial and emotional impacts he suffered. Id. at 189-190. The court was not persuaded by plaintiff's attempt to broaden the purpose by accusing the City of "routinely tolerating the violation of whistleblower rights." Id. at 190.

Following Ruotolo, the Second Circuit has consistently adopted and applied the standards set forth by the Supreme Court in Garcetti, and has held that for a public employee to succeed on a First Amendment claim, the employee must establish that the speech which is the basis of his or her claim was spoken as a public citizen (rather than as a public employee) and addressed a matter of public (not personal) concern. See, e.g., Platt v. Incorporated Village of Southampton, 391 Fed.Appx. 62 (2d Cir. 2010); Paola v. Spada, 372 Fed.Appx. 143 (2d Cir. 2010); Ricioppo v. County of Suffolk, 353 Fed.Appx. 656 (2d Cir. 2009); Matthews v. Lynch, 2012 WL 1873657 (2d Cir. 2012).

Most Second Circuit cases interpreting Garcetti deal with whether the employee spoke as a citizen or as a public employee. In Ezuma v. City University of New York, 367 Fed.Appx. 178 (2d Cir. 2010), however, the Court dismissed the employee's claim because the speech did not address a matter of public concern. There, the employee, a city university professor, made comments regarding a colleague's failure to obtain a doctoral degree from a properly accredited university. Id. at 180. The Court concluded that this topic was a matter of concern within the "academic community and not [the] public at large," and thus was not protected under First Amendment. Id. Applying Ruotolo, the Court specifically noted that the employee's challenge to his colleague's credentials was "intended to express his personal dissatisfaction with the

university's choice of acting chair and implications of that choice on his department's image" – not to accomplish some broader public purpose. Id.; see also Nagle v. Marron, 663 F.3d 100 (2d Cir. 2011) (also discussed below) (assistant principal's forgery of teacher's signature on teaching observation report of her class was not a matter of public concern, even if such conduct were criminal, and therefore was not protected under First Amendment; the forgery had no practical significance to the general public since the teacher's signature did not indicate agreement with the document or have any other effect beyond confirming its receipt, which was not disputed).

Other Second Circuit cases have been resolved quite easily, based on employees' admissions that their speech fell within the scope of their employment duties. For example, in Healy v. City of N.Y. Dep't of Sanitation, 286 Fed. Appx. 744, 746 (2d Cir. 2008), the plaintiff was employed as a sanitation officer. He alleged that his rights were violated as the result of his report to his supervisor of fraud and corruption within the DOS inventory system. Id. At his deposition, the plaintiff admitted that he was in charge of inventory and sent the report because it was his duty. Id. Accordingly, the court affirmed the lower court's grant of summary judgment based on plaintiff's admissions as to the scope of his duties. Id. Likewise, in Mulcahey v. Mulrenan, 328 Fed.Appx. 8 (2d Cir. 2009), the Second Circuit affirmed the dismissal of a plaintiff's complaint where his speech consisted of a memorandum to his superiors denying responsibility for his actions or decisions because he believed that he lacked proper training for his position. Id. The Court found that the memorandum amounted to "a refusal to perform an official duty" – not protected speech. Id. at 9. The fact that "one of the stated reasons for the request touche[d] upon the training and preparedness of the FDNY neither convert[ed] the memo into private speech nor evince[d] a 'broader public purpose.'" Id. (quoting Ruotolo, 514 F.3d at 189). Instead, the memo was clearly written in the performance of official duties and was

“calculated to redress personal grievances.” Mulcahey, 328 Fed.Appx. at 9; see also Woodlock v. Orange Ulster B.O.C.E.S., 281 Fed. Appx. 66, 67-68 (2d Cir. 2008).

Similarly, in Glicksman v. New York City Environmental Control Bd., 345 Fed.Appx. 688 (2d Cir. 2009), an administrative law judge (“ALJ”) was terminated for failing to adhere to adjudication procedures at inquest hearings. The ALJ did not deny that he failed to follow the procedures. Id. at 690. Instead, he claimed that it would have been illegal or otherwise inappropriate for him to follow the procedures. Id. The ALJ brought a First Amendment retaliation claim against his employer based on his refusal to follow what he believed to be improper procedures. Id. The ALJ conceded that his First Amendment claim was based on the decisions he issued as an ALJ. Id. Therefore, the court dismissed the case based on Garcetti, finding that the speech at issue fell “squarely within the scope of [the ALJ’s] official duties as an administrative law judge—deciding cases.” Id. The ALJ attempted to argue that Garcetti was inapplicable, because he was “terminated for speech that constitute[d] a refusal to undertake wrongful conduct.” Id. at 690-91. The Court did not need to reach the question of whether, under Garcetti, “a public employee’s refusal to engage in clearly wrongful conduct while acting within his job responsibilities may be protected speech.” Id.<sup>1</sup> This was because as “Garcetti made clear,” the ALJ’s “mere disagreement with government policy [did] not give him license to carry out his employment as he [saw] fit (and specifically, to disregard agency policy because there may be a colorable argument as to its impropriety) merely because such employment involve[d] speech.” Glicksman, 345 Fed.Appx. at 691.

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<sup>1</sup> However, the Court seemed somewhat doubtful that such protection existed. See id. (citing Garcetti, 547 U.S. at 425-26 [noting that a powerful network of legislative enactments, such as whistle-blower protection law and labor codes, available to those who seek to expose wrongdoing, “as well as obligations arising from ... other applicable constitutional provisions and mandates of the criminal and civil laws, protect employees and provide checks on supervisors who would order unlawful or otherwise inappropriate actions”]).

In other cases, however, the Second Circuit has declined to dismiss First Amendment retaliation claims at the summary judgment level. For example, in Nagle v. Marron, 663 F.3d 100 (2d Cir. 2011), the Court found that triable issues of fact existed regarding a teacher’s claims that her employer’s decision not to grant her tenure was based on reports she had made at her former school in Virginia, to both the school principal and other outside entities,<sup>2</sup> that a teacher in a neighboring classroom had been abusing children. Id. at 103. The employer conceded that these statements “would have enjoyed First Amendment protection when uttered had [the teacher] not violated school protocols.” Id. at 107. Therefore, the Court did not consider whether the reports were protected. Id. Instead, the Court considered whether to uphold the lower court’s determination that “First Amendment protection for these statements was lost because of (1) non-compliance with employer protocols, and (2) the passage of time and distance between their utterance in Virginia and the complained-of adverse employment action in New York.” Id. The Second Circuit rejected both of the district court’s conclusions. Id. The Court held that the “failure to abide by rules [cannot] deprive[ ] the speech of First Amendment protections.” Id. The Court also clarified the “[w]hether speech pertained to a matter of public concern and whether it was uttered in the speaker’s capacity as a private person are not facts that change over time.” Id. at 109. Instead, “[w]hat can grow stale, over time and distance” is the speech’s “relevance to the plaintiff’s employers.” Id. Although the teacher’s reports occurred four years prior to her employer’s tenure decision, her employer did not learn about the reports until shortly before the tenure decision. Id. Therefore, the Court found that, at the time, the information could have been particularly relevant. Id.

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<sup>2</sup> Namely, the Early Childhood Special Education Program Department chair, Virginia’s Department of Child Protective Services, and the Virginia state police.

In other cases, the Second Circuit has been forced to deal with more complicated issues, and has further refined the scope of Garcetti's holding. For example, in Anemone v. Metropolitan Transp. Authority, 629 F.3d 97, 115-16 (2d Cir. 2011), the Second Circuit addressed whether an employee speaks as a citizen when he persists in speech after a supervisor has told him not to do so. The Court concluded that when an "employee concededly engages in speech pursuant to his official duties, the fact that he persists in such speech after a supervisor has told him to stop does not, without more, transform his speech into protected speech made as a private citizen." Id. at 116. In Anemone, the employee was a former MTA security director, who communicated with a district attorney's office about suspected corruption in the MTA, seeking the office's cooperation with an official investigation by a MTA taskforce that he created as part of his official duties. Id. He was later informed by his supervisor that the taskforce would no longer be handling the case, but he chose to continue working with the office on the case anyway. Id. He argued that communications he had with the office after the case was transferred were "outside the chain of command," and beyond his role as an employee. Id. The court rejected this argument, and held that the employee's communications with the office were made pursuant to his official duties, rather than as a citizen, and were therefore not protected by the First Amendment. Id. at 116.

In Weintraub v. Board of Education of the City School District of the City of New York, 593 F.3d 196 (2d Cir. 2010), a public teacher filed a grievance with his union representative in response to the allegedly inadequate discipline imposed on a student who had thrown a book at him during class. Id. at 198-99. The teacher argued that by filing a grievance, he was not speaking "pursuant to" his official duties. Id. The Court rejected the teacher's argument. Id. The Court acknowledged that under Garcetti, "[t]he objective inquiry into whether a public

employee spoke ‘pursuant to’ his or her official duties is ‘a practical one.’” Id. at 202. The Court then joined other Circuits by holding that, “under the First Amendment, speech can be ‘pursuant to’ a public employee’s official job duties even though it is not required by, or included in, the employee’s job description, or in response to a request by the employer.” Id. at 203. The Court then found that the teacher’s grievance “was ‘pursuant to’ [the plaintiff’s] official duties because it was ‘part-and-parcel of his concerns’ about his ability to ‘properly execute his duties’ as a public school teacher – namely, to maintain classroom discipline, which is an indispensable prerequisite to effective teaching and classroom learning.” Weintraub, 593 F.3d 196 at 203 (citation omitted) (quoting Williams v. Dallas Independent Sch. Dist., 480 F.3d 689, 694 (5th Cir. 2007)). Therefore, the Court held, the teacher’s speech challenging the school’s decision not to discipline a student in his class was a “means to fulfill,” and “undertaken in the course of performing,” his primary employment responsibility of teaching. Weintraub, 593 F.3d 196 at 203. The Court also specifically noted that its conclusion was “supported by the fact that his speech ultimately took the form of an employee grievance, for which there is no relevant citizen analogue.” Id. at 203-04 (“lodging of a union grievance is not a form or channel of discourse available to non-employee citizens, as would be a letter to the editor or a complaint to an elected representative or inspector general”).

In Jackler v. Byrne, 658 F.3d 225 (2d Cir. 2011), the Court continued to build on the “citizen analogue” theory. There, a probationary police officer was successful in convincing the Court that Garcetti did not apply to his First Amendment claim against his police chief and other police officers. The plaintiff alleged retaliation for his refusals to make false statements in an investigation into a civilian complaint charging another police officer with the use of excessive force. Id. at 234. The plaintiff submitted a report corroborating the complaint. Id. Other

officers repeatedly asked the plaintiff to retract the report, and to submit a second false report, but he refused to do so. Id. The plaintiff argued that Garcetti did not apply to his First Amendment claims, because these claims were based solely on his “refus[als] to commit a blatantly wrongful—if not criminal—act,” not on allegations that he had been fired for engaging in job-related speech. Id. at 230. He also argued that he “had a First Amendment right as a private citizen to decline the defendants’ invitation to falsify his official report,” and that, accordingly, it was “his refusal to speak or report falsely about a matter of serious public concern [that] form[ed] the basis of [his claims of a] First Amendment violation.” Id.

The Court agreed with the plaintiff, and declined to apply Garcetti to his refusal to withdraw the report and file a false one in its place, because that “refusal to comply with orders . . . [had] a clear civilian analogue.” Id. The Court found that the officer, having witnessed the other officer’s attack and corroborated the complainant’s allegation, was entitled to the same constitutional protection as the complainant against being forced to retract his true statement and make a second statement that would falsely exculpate the other officer. Id. at 241. The Court then expressly held that “the First Amendment protects the rights of a citizen to refuse to retract a report to the police that he believes is true, to refuse to make a statement that he believes is false, and to refuse to engage in unlawful conduct by filing a false report with the police.” Id.<sup>3</sup>

#### B. Notable New York Federal District Court Cases

Not surprisingly, New York’s federal district courts have generally followed the Second Circuit’s holdings. Additionally, “[s]ince Garcetti, some lower courts have developed more guidelines for determining whether speech is made pursuant to a public employee’s official

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<sup>3</sup> See below. This case has been sharply criticized by the D.C. Circuit.

duties.” Frisenda v. Incorporated Village of Malverne, 775 F.Supp.2d 486, 506 (E.D.N.Y. 2011). For example, one district court set forth certain non-dispositive factors that courts may consider, including: “the plaintiff’s job description,” the persons to whom the speech was directed, and “whether the speech resulted from special knowledge gained through the plaintiff’s employment.” Caraccilo v. Vill. of Seneca Falls, N.Y., 582 F.Supp.2d 390, 405 (W.D.N.Y. 2008). Another district court acknowledged two additional non-dispositive factors, including: “whether the speech occurs in the workplace and whether the speech concerns the subject matter of the employee’s job.” Frisenda, 775 F.Supp.2d at 506-11. Other more recent district court cases have also recognized that “[i]n determining whether a plaintiff spoke as an employee or a citizen, the Court may also consider whether the form of the speech had a ‘relevant citizen analogue,’ or ‘channel of discourse available to non-employee citizens.’” Kiehle v. County of Cortland, 2011 WL 2680713, \*5 (N.D.N.Y. 2011) (quoting Williams v. County of Nassau, “Although not a dispositive factor, the existence of a citizen analogue may serve as a proxy ‘for the controlling question of what role the speaker occupied when [she] spoke.’” Kiehle, 2011 WL 2680713 at \*5 (quoting Williams, 2011 WL 1240699 at \*4). “This inquiry focuses on whether a non-employee citizen would have the same opportunity to convey the speech through the channel utilized.” Kiehle, 2011 WL 2680713 at \*5; see Williams, 2011 WL 1240699 at \*7. In general, “[a]lthough there is no simple checklist or formula by which to determine whether the employee was speaking as a private citizen or as a public employee...‘the cases distinguish between speech that is the kind of activity engaged in by citizens who do not work for the government and activities undertaken in the course of performing one’s job.’” Id. (quoting Caraccilo, 582 F.Supp.2d at 410).

District courts in this State have also dealt with other aspects of the Garcetti analysis. For



example, in Benvenisti v. City of New York, 2006 WL 2777274 (S.D.N.Y. Sept. 23, 2006), the plaintiff was a computer operations manager who alleged that he was terminated following his threat to complain publicly about an alleged conflict of interest between the chief of staff and her nephew (Khedouri) whom plaintiff supervised. Id. at \*2. The plaintiff's First Amendment retaliation claim was also predicated, in part, on his weekly complaints to his supervisors about Khedouri. In an attempt to avoid Garcetti, plaintiff argued that he was not really Khedouri's "direct supervisor" because Khedouri was "unmanageable," and under the protection of his aunt, the chief of staff. Id. at \*9.

The court set out the Garcetti test, to be applied by the court, as follows:

The threshold question is whether the plaintiff was speaking as a citizen upon matters of public concern. In Garcetti, the Supreme Court clarified that this question involves two distinct inquiries. First, the court must determine whether the plaintiff was speaking as a "citizen" for First Amendment purposes. After that, the court must turn to the traditional Connick analysis and ask whether, viewing the record as a whole and based on the content, context, and form of a given statement, the plaintiff's speech was made as a citizen upon "matters of public concern." The inquiry into the protected status of speech is one of law, not fact.

Id. at \*7 (emphasis added). The court concluded that the plaintiff was responsible for supervising his subordinates, including Khedouri, "whether he was successful in that endeavor or not." Id. Plaintiff's complaints to his supervisors "involved precisely the sorts of internal office affairs and employment matters that the plaintiff, as a manager and supervisor, had a duty to address." Id. These complaints were part of plaintiff's official duties, and "were not made in his capacity as a citizen for First Amendment purposes." Id.; see also Ricioppo v. County of Suffolk, 2009 WL 577727 (E.D.N.Y. Mar. 4, 2009), aff'd, 353 Fed. Appx. 656 (2d Cir. 2009).

Further, in Caruso v. Massapequa Union Free School Dist., 478 F.Supp.2d 377 (E.D.N.Y.

2007), the court concluded that, in considering a First Amendment retaliation claim following Garcetti, the court's first task was to consider whether the plaintiff's statements were made as part of her official duties or as a citizen. Id. at \*3. Only in cases when the employee is determined by the court to be speaking as a citizen does the court then consider whether the plaintiff's speech related to a matter of public concern. Id. at \*4. At the summary judgment stage, the Caruso court found that questions of fact, including questions of fact as to whether the plaintiff's speech was within the scope of her job duties, necessitated a trial. The determination at trial as to whether plaintiff's speech was protected under Garcetti would nevertheless remain the province of the court. The court stated:

The court is aware that issues of whether an employee speaks pursuant to his official duties and whether such speech falls into the category of protected speech present questions of law for the court. In the context of this summary judgment motion, however, the presence of factual issues precludes the court from making those legal determinations at this time. Such conclusions must await the trial of this matter. Id. at \*5.

To summarize, the district courts have generally upheld the standards articulated in the Second Circuit cases applying Garcetti. These cases also provide greater clarity as to the elements and factors that weigh into a court's analysis of First Amendment retaliation claims.

#### **IV. How Garcetti has been Applied in Other Circuits**

##### **A. Possible Circuit Split**

Like the Second Circuit in Weintraub and Jackler, a majority of circuit courts have relied extensively on the Supreme Court's restriction of speech that "owes its existence to a public employee's professional responsibilities," (Garcetti, 547 U.S. at 421) and consequently has "no relevant analogue to speech by citizens who are not government employees." Id. at 424; see, e.g., Morris v. Philadelphia Housing Authority, 2012 WL 2626991 (3d Cir. 2012); Evans-

Marshall v. Board of Educ. of Tipp City Exempted Village School Dist., 624 F.3d 332, 340-41 (6<sup>th</sup> Cir. 2010); Abdur-Rahman v. Walker, 567 F.3d 1278, 1285-86 (11<sup>th</sup> Cir. 2009). However, exclusive reliance on the citizen analogue approach has also drawn severe disapproval from the District of Columbia Circuit. Bowie v. Maddox, 653 F.3d 45 (D.C. Cir. 2011), cert. denied, -- U.S. --, 132 S.Ct. 1636 (2012).

Criticizing the Second Circuit’s analysis in Jackler as “get[ting] Garcetti backwards,” the D.C. Circuit, in Bowie, stressed that “[t]he critical question under Garcetti is not whether the speech at issue has a civilian analogue, but whether it was performed ‘pursuant to. . . official duties.’” Id. The Court went on to explain that any “test that allows a First Amendment retaliation claim to proceed whenever the government employee can identify a civilian analogue for his speech is about as useful as a mosquito net made of chicken wire: All official speech, viewed at a sufficient level of abstraction, has a civilian analogue.” Id. The Bowie decision was appealed to the U.S. Supreme Court. Many speculated that the Supreme Court would take the opportunity to clarify this issue.<sup>4</sup> The Supreme Court, however, denied certiorari. Accordingly, this issue has not yet been resolved. Unless and until the issue is revisited, when practicing in the Second Circuit, it may be particularly important to emphasize whether or not a civilian analogue exists for the employee’s speech.

#### B. Noteworthy Cases in Other Circuits – Generally

Following the Garcetti decision, like the Second Circuit, other Circuit courts in the United States Courts of Appeals have closely examined language in the Garcetti opinion for guidance as to the proper manner to determine an employee’s “official duties.” Many circuits

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<sup>4</sup> See, e.g., D.C. Circuit Review, Supreme Court Could Reexamine the Scope of First Amendment Protection for Government Employees (January 20, 2012), available at <http://dccircuitreview.com/2012/01/20/supreme-court-could-reexamine-the-scope-of-first-amendment-protection-for-government-employees>.

have explicitly engaged in contextual examinations of the employee’s speech, focusing especially on the audience. See, e.g., Decotiis v. Whittemore, 635 F.3d 22, 33-34 (1<sup>st</sup> Cir. 2011) (“speech made to an audience to which an employee only has access through her job is generally less akin to citizen speech”); Clairmont v. Sound Mental Health, 632 F.3d 1091, 1104 (9<sup>th</sup> Cir. 2011) (“although not dispositive, a small or limited audience ‘weigh[s] against [a] claim of protected speech”); Weisbarth v. Geauga Park Dist., 499 F.3d 538, 546 (6<sup>th</sup> Cir. 2007) (in evaluating the speech of a public employee, the court may look to the employee’s duties, “the impetus for her speech, the setting of her speech, the speech’s audience, and its general subject matter”). Other circuits have specifically considered the speech’s location in relation to the official chain of command. See, e.g., Morris v. Philadelphia Housing Authority, 2012 WL 2626991 (3<sup>d</sup> Cir. 2012) (“complaints up the chain of command about issues related to an employee’s workplace duties—for example, possible safety issues or misconduct by other employees—are within an employee’s official duties”); Rohrbough v. Univ. of Colo. Hosp. Auth., 596 F.3d 741, 747 (10<sup>th</sup> Cir. 2010) (“speech directed at an individual or entity within an employee’s chain of command is often found to be pursuant to that employee’s official duties under Garcetti / Pickering”). A few courts have also paid special attention to formal job descriptions, but have acknowledged Garcetti’s instruction that such listings are “neither necessary nor sufficient.” Garcetti, 547 U.S. at 425; see, e.g., Brown v. School Bd. of Orange County, Florida, 459 Fed.Appx. 817, 820 (11<sup>th</sup> Cir. 2012) (“relevant, but nondispositive factors in this inquiry include an employee’s job description”); Elizondo v. Parks, 431 Fed.Appx. 299 (5<sup>th</sup> Cir. 2011) (“[f]ormal job descriptions, although relevant, are not dispositive, as they ‘often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee’s written job description is neither necessary nor sufficient to

demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes”). The following examples illustrate the different types of factors that other circuit courts have considered.

In Foley v. Town of Randolph, 598 F.3d 1 (1<sup>st</sup> Cir. 2010), the First Circuit determined that a fire chief’s statements to the media, which included details about a fire as well as critical remarks on budgetary and staffing issues, were part of his official duties. It was “not dispositive that [the fire chief] was not required to speak to the media.” Id. at 7. The court concluded that, because the chief chose to speak to the press while on duty, in uniform, and at the scene of a fire, “he would naturally [have been] regarded as the public face of the Department when speaking about matters involving the Department.” Id. Accordingly, “there [was] no relevant analogue to speech by citizens.” Id. Therefore, the court held, there was “no doubt that Foley was speaking in his official capacity and not as a citizen.” Id. at 9.

In Gorum v. Sessoms, 561 F.3d 179 (3<sup>rd</sup> Cir. 2009), the Third Circuit dismissed a tenured professor’s First Amendment retaliation claim. The basis for the professor’s termination was an investigation and finding that he had changed student withdrawals, incompletes, and failing grades to passing grades within his academic department. Id. at 182. Plaintiff claimed that the president had recommended his termination in retaliation for the professor’s: (1) voiced opposition to the university president’s selection and appointment; (2) comments in support of a student at a disciplinary hearing; and (3) withdrawal of the university president’s invitation to speak at a fraternity’s prayer breakfast. Id. at 183-184. The court found that all three speech-related instances fell within the scope of the plaintiff’s official duties. Id. at 182, 184. The court concluded that “a claimant’s speech might be considered part of his official duties if it relates to ‘special knowledge’ or ‘experience’ acquired through his job.” Id. at 185. The court held that

each of the plaintiff's speech-related activities was the result of his position within the institution and he was, therefore, not speaking as a public citizen. Id. at 186. Moreover, the court found that the content of plaintiff's speech did not raise issues of public concern. Id. at 187.

In Williams v. Dallas Indep. School Dist., 480 F.3d 689 (5<sup>th</sup> Cir. 2007), the Fifth Circuit determined that the plaintiff, a former athletic director, spoke in the course of performing his duties when he wrote several memos to the office manager and principal about alleged mishandling of athletic account funds. Id. at 694. Plaintiff argued that he wrote these memos as a "taxpayer and a father," as part of his "crusade against misappropriated and discriminatory funding." Id. at 692. Plaintiff further argued, and defendants conceded, that plaintiff was not specifically required to write memoranda regarding athletic account funds. Id. at 693. However, the Fifth Circuit concluded that "simply because plaintiff wrote memoranda which were not demanded of him, does not mean he was not acting within the course of performing his job." Id. The memos "were not written from plaintiff's perspective as a father and taxpayer" because: 1) plaintiff needed information about the athletic accounts so that he could fulfill his responsibilities as athletic director; and 2) plaintiff had specialized knowledge, unavailable to other citizens, as to how the athletic funds had been raised and expended. Id. Therefore, the court determined, the plaintiff's accusations of wrongdoing by the principal were "part-and-parcel of his concerns about the program he ran." Id.

In McGee v. Public Water Supply District No. 2, 471 F.3d 918 (8<sup>th</sup> Cir. 2006), the Eighth Circuit rejected a retaliation claim by a public water supply district manager whose position was abolished after he raised concerns with the board of directors regarding compliance with environmental regulations and the manner in which two water supply projects should be completed. Id. at 919. The plaintiff argued that Garcetti did not apply to his First Amendment

retaliation claim “because he was removed from the water pipe relocation project and was told not to concern himself with the septic tank problem” for the other project at issue. *Id.* at 921. The Eighth Circuit nevertheless concluded that the water supply projects “clearly fell within both McGee’s overall supervisory duties district manager and his admitted duty to advise the board regarding legal and regulatory requirements.” *Id.*

In *Chavez-Rodriguez v. City of Santa Fe*, 596 F.3d 708 (10th Cir. 2010), the Tenth Circuit considered whether statements made by the director of a city’s Division of Senior Services to the Speaker of the New Mexico House of Representatives were protected. The court held that they were not, and found that the director’s statements were made pursuant to her official duties and not as a private citizen. *Id.* This was true even though her comments were made at a luncheon banquet to a long-time family friend. *Id.* In reaching this determination, the court specifically noted that the banquet was held during work hours, that her attendance was part of her job responsibilities, and that she served as “Mistress of Ceremonies” as a result of her job position. *Id.*

## **V. Social Media and Networking**

The Second Circuit has not yet applied the *Garcetti* analysis to a First Amendment retaliation claim arising out of the use of social media. A few cases in other circuits, however, have specifically grappled with *Garcetti*’s impact on public employees’ use of social media to express themselves in a public forum. These cases could provide guidance regarding how courts in the Second Circuit may deal with this issue.

In one case, *Curran v. Cousins*, 509 F.3d 36 (1st Cir. 2007), a disgruntled public employee, while on suspension for disruption of work and repeated references to Nazis when addressing decisions made by his superiors, posted on the union website with similar references.

After receiving a reprimand for this, he later posted additional comments regarding World War II, not following orders, and associating various members of the Sheriff's Department with Nazi leaders. Curran, 509 F.3d at 42-43. The employee was subsequently terminated. Id. His termination letter specifically referenced content that had been posted on the employee's blog. Id.<sup>5</sup> The employee then sued his employer, claiming that it had violated his First Amendment rights. Id. The court applied Garcetti, and found that, while at least a portion of the employee's posts could be related to matters of public concern, such as the Sheriff's patronage in hiring decisions, this alone was insufficient to establish a violation of the First Amendment. Id. at 46; see Heil v. Santoro, 147 F.3d 103, 110 (2d Cir. 1998) (“[i]t is well settled that “an unprotected statement is not immunized from discipline by the fact that this statement is surrounded by protected statements”).

Moreover, the court found that, even if the speech had been a matter of public concern, it would not have been protected, because it impaired “discipline by superiors, disrupt[ed] harmony and creat[ed] friction in working relationships.” Curran, 509 F.3d at 49-50. Therefore, as with other speech, “while a blog post to a website may be couched in terms of public concern, the employer can look at the intent and actual import of the post to assess whether it can discipline over [the] same.” See Mary Louise Conrow, MANAGING MUNICIPAL EMPLOYEE AND EMPLOYER RIGHTS IN THE TECHNOLOGICAL AGE, 2011 WL 6740830, at \*7 (Aspatore 2011).

In Dible v. City of Chandler, 515 F.3d 918 (9th Cir. 2008), a police officer maintained a personal website with his wife that contained sexually explicit content. Viewers of the website paid a fee for viewing the sexually explicit material. Id. at 924. The City terminated him based

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<sup>5</sup> The letter stated that it was “clear that [the employee] identif[ied] Hitler as the Sheriff, the Jews as the Correctional Officers, the Nazi generals as the Department's deputies and captains, and another group, including [himself], as ones who may attack the Nazis.” Id.



on his website and the fact that he was earning revenue from the sale of the site. Id. The police officer argued that his First Amendment right was violated by the adverse action. Id. The Court acknowledged that, under Garcetti, when “government employees speak or write on their own time on topics unrelated to their employment, the speech can have First Amendment protection, absent some governmental justification ‘far stronger than mere speculation’ in regulating it.” Id. at 925. However, the court acknowledged that the “interest of the City in maintaining the effective and efficient operation of the police department is particularly strong.” Id. Accordingly, the court found that “[i]t would not seem to require an astute moral philosopher or a brilliant social scientist to discern the fact that [the employee’s] activities, when known to the public, would be ‘detrimental to the mission and functions of the employer.’” Id. (citing City of San Diego v. Roe, 543 U.S. 77, 84 (2004)). Adding to this analysis was the court’s conclusion that “police officers ‘are quintessentially public servants’ and part of their job is to safeguard the public’s opinion of them.” Id. at 929 (quoting Locurto v. Giuliani, 447 F.3d 159, 179 (2d Cir. 2006)). Therefore, the actions of the officer while off-duty could have seriously impaired the functions of the employer, and the employee’s freedom of speech was outweighed by the employer’s right to maintain decorum in its workplace. Id. at 929.

In a notable district court case, Ranck v. Rundle, 2009 WL 1684645 (S.D.Fla. 2009), the plaintiff, an Assistant State Attorney, was removed from an investigation of a police shooting. Following his removal, he wrote an internal memo critical of the decision. Id. at \*2. Three years later, he made a public records request for his memo, and received a copy pursuant to his request. Id. Then, with the investigation of the shooting still ongoing, he posted the memo and other critical comments on his blog site, and linked it to “a well-known public forum used by lawyers practicing criminal law in [his] County.” Id. Plaintiff was subsequently suspended for 30 days,

in part because “of his public posting of information about an ongoing police shooting investigation, the positing of derisive and offensive comments about senior ASAs, and inflicting harm to the integrity, reputation, and well-being of the [State Attorney Office].” Id. at \*3.

The plaintiff then sued, claiming a violation of his First Amendment rights. The court found that, when the plaintiff originally wrote the memo, he did so pursuant to his official duties, because “his position required him to make findings and recommendations concerning investigations on which he is assigned.” Id. at \*5. However, the court held “that Plaintiff’s [later] speech, in the form of the . . . blog posting of the Memo, would be an appropriate exercise of Plaintiff’s First Amendment rights meriting protection against adverse employment action by his employer.” Id. at \*13. In contrast to the authorship of the memo, the publication of the memo was done after a public record request for the memo was made and complied with. Id. at \*6. Although the blog entry owed its existence to the plaintiff’s memo, which was written pursuant to his professional responsibilities, this did not render it automatically speech by an employee. Id. This was because “a public employee can speak as a citizen even when discussing the subject matter of his or her employment.” Id. The plaintiff’s claim ultimately failed, based on the court’s finding that his posting of derisive comments was insubordinate and constituted other, legitimate grounds to suspend him. Id. at \*13. The court, however, expressly went out of its way to emphasize that the blog posting would have been protected. Id.

In Stengle v. Office of Dispute Resolution, 631 F.Supp.2d 564 (M.D. Pa. 2009), a special education due process hearing officer alleged that her employer’s failure to renew her contract, because of her advocacy in a blog regarding issues such as the “least restrictive environment” in special education cases, violated her First Amendment rights. As in Ranck, the Court analyzed the hearing officer’s claims using the Garcetti analysis. Id. at 577. The Court rejected her

contentions, however, and held that, even if the speech did not occur within the ambit of her official duties, and involved a matter of public concern, the government had other legitimate grounds for the nonrenewal. Id. This was because the government had a strong interest in ensuring that impartial due process was afforded to those seeking resolution of special education issues, and the hearing officer's comments had the potential to raise questions as to her impartiality and to increase filing of recusal motions. Id.

It is unclear whether the Second Circuit would adopt the analysis articulated by the courts in any of these cases. The Second Circuit's "civilian analogue" case law will likely play a significant role in any future adjudication of an employee's right to speak on the internet. This is because it seems that there would always be a "clear civilian analogue" to social media use by a public employee. Id. Therefore, arguably, Garcetti would never apply. As demonstrated in the cases above, however, even if an employee's internet speech has a clear civilian analogue, it is still possible that, for other reasons, the speech may not be protected. For example, if internet speech outside of the workplace would tend to promote or cause disruption in the workplace or to the services provided by the governmental entity, then the individual's speech may not be protected. See Mary Louise Conrow, MANAGING MUNICIPAL EMPLOYEE AND EMPLOYER RIGHTS IN THE TECHNOLOGICAL AGE, 2011 WL 6740830, \*8 (Aspatore 2011). Similarly, the internet speech may not be protected by the First Amendment if it does not reflect on a matter of public concern. Accordingly, employers must look closely at the nature of the speech and the content of what is being posted by their employees. Id. Simply complaining about a day at work or about certain aspects of a job may not rise to a level warranting disciplinary action. Id. It is only when this speech crosses the line and affects the operations or mission of the employer that the employee could be subject to discipline. Id.

## Conclusion

One common thread that runs throughout all of the above-described cases is the courts' tendency to distinguish between internal or external disclosures of real or perceived wrongdoing that a public employee was required to make in the course of carrying out his or her official duties, and disclosures (either internal or external) which were not within the ambit of the employee's official duties. The former is no longer protected under Garcetti, while the latter category remains protected for purposes of a First Amendment retaliation claim. It should be noted, however, that the scope of both Garcetti and this article extends only to First Amendment retaliation claims – not to statutory whistleblower claims or other common law claims. Where a public employee speaks out either internally or externally on a matter of public concern which is within the scope of his or her official duties, federal and state whistleblower and common law claims may be available to the employee. An outline of statutory whistleblower claims follows. These and other claims should be considered, even where Garcetti applies, and where it seems that the public employee speech would not be protected by the First Amendment.

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