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Balancing First Amendment Rights with the Interests of Public Employers: The Origins and Legacy of *Garcetti v. Ceballos*

I. Introduction

Does a governmental employee lose her First Amendment rights when she walks through the door of her office? Are public employees afforded a reduced level of constitutional protection than the common man? Can a government entity regulate its own employees' speech? Is a public agency worker subject to employer discipline for statements made during the workday?

Courts have wrestled with balancing the countervailing interests between public employees, who are also citizens, and their employer, who is also the government, for many years. In 2006, this issue of the dual role of public employees came to a head in *Garcetti v. Ceballos*,1 in which the United States Supreme Court addressed the question of whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties.

In *Garcetti*, the Supreme Court held that a public employee cannot maintain a First Amendment retaliation claim against a governmental employer when the employer required the speech.2 The decision has been controversial. Critics have decried it as the end of First Amendment rights, providing governments with virtual immunity to retaliate against speech.3 Supporters have lauded it as a sensible approach to preserving the concerns of governmental employers who could not function if every employment decision became a constitutional issue.4

Regardless of the position taken, however, there is one truth about *Garcetti*: for a defendant, it is another powerful weapon in an already well-stocked arsenal to defend against First Amendment claims in the public employment context.

This Monograph examines the history of First Amendment jurisprudence that led to *Garcetti*, the *Garcetti* decision itself, and subsequent interpretations of that decision.

II. *Garcetti*'s Origins: Balancing Government Employers' Interests with Free Speech

Although First Amendment rights are considered "our most cherished liberties," First Amendment jurisprudence has long attempted to balance competing interests of free speech with governmental interests such as maintaining order.5 For example, the First Amendment does not protect a person against repercussion from "falsely shouting fire in a theatre and causing a panic."6 Likewise, school officials can censor speech that materially disrupts the work and discipline of a school;7 and government officials can impose "reasonable time, place, and manner" restrictions on speech.8

In the public employment context, the tests established in *Connick v. Myers*9 and *Pickering v. Board of Education of Township High School District 205*10 set the stage for *Garcetti*. Indeed, the Supreme Court's jurisprudence suggests that the further one strays from the classic First Amendment retaliation case embodied by *Pickering*, the less likely it is that a plaintiff has a claim.

Public employees did not always have First Amendment rights in the workplace. Once their rights were recognized, however, the Supreme Court struggled to strike an appropriate balance between the free speech rights of employees, who are also citizens, and the interests of their employer, which is also the government.

The Historical Origins of First Amendment Rights in Public Employment

In the 1800s, it was an unchallenged principle "that a public employee had no right to object to conditions placed upon the terms of employment – including those which restricted the exercise of constitutional rights."11 As Oliver Wendell Holmes famously quipped: "[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."12

The height of McCarthyism and the Cold War in the 1950s and 1960s gave birth to First Amendment rights in public employment. In a series of cases, the Supreme Court struck down efforts to require government employees to swear loyalty oaths,13 reveal their past political affiliation to the Communist Party,14 or deny employment because of association with "subversive organizations."15

By the time the Supreme Court decided *Pickering* in 1968, the Court had recognized in a series of opinions that an individual does not leave her First Amendment rights at the door just because she accepts employment with the government.16 The *Pickering* Court recognized that public employees have free speech rights, precisely because they are also citizens.17 At the same time, however, the Court recognized that when the government acts as an employer, it has interests to protect.18

Subsequently, in *Connick v. Myers*, the Court stated that "government offices could not function if every employment decision became a constitutional matter."19Not surprisingly, therefore, the government has a greater ability to regulate the speech of its employees than it has the ability to regulate the speech of the public in general.20

The resulting jurisprudence, frequently known as the *Connick-Pickering* balancing test, seeks to balance the rights of governmental employees to speak as citizens on matters of public concern with the right of governmental employers to effectively manage their operations.

The Paradigmatic First Amendment Case: *Pickering v. Board of Education*

Pickering v. Board of Education stands as the classical embodiment of a free speech claim: a letter published in the newspaper. In *Pickering*, a teacher in Will County, Illinois, was fired for sending a letter to the local newspaper that questioned the Board of Education's (the Board) proposed tax increase and criticized handling of past proposals to raise revenues.21 The letter at issue was written and published immediately before a special election on the Board's proposal to raise taxes for educational purposes, and also in response to two articles published in the newspaper that supported the proposal.22 The Board took offense to the letter and terminated the teacher after a due process hearing through which it found that the letter was detrimental to the efficient operation and administration of its schools.23 Specifically, the Board claimed that the letter contained false statements and impugned the motives, honesty, integrity, truthfulness, responsibility, and competence of the Board and its individual members.24 The Illinois Supreme Court affirmed the termination, finding that substantial evidence supported the Board's decision.25

The United States Supreme Court granted *certiorari* and criticized the suggestion in the Illinois Supreme Court's decision that teachers relinquish their First Amendment right to comment on matters of public concern by accepting public employment.26 At the same time, the Court recognized that government has an interest and a greater ability to regulate speech of its employees than of the general citizenry.27 Thus, the central issue was how to strike a "balance between the interests of the teacher, as a citizen, in commenting on matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."28

The *Pickering* Court held that the topic of the teacher's letter – the allocation of school funds between athletics and education and its methods of informing taxpayers about the need for additional revenue – was "a matter of legitimate public concern" upon which "free and open debate is vital to informed decision-making by the electorate."29 The Court found that, although the letter might have been detrimental to the Board members' individual interests, the interests of the Board did not outweigh the First Amendment interests of the teacher, because the letter was not detrimental to the schools themselves or the informed public debate.30

Defining "Matters of Public Concern": *Connick v. Myers*

In *Connick v. Myers*, the United States Supreme Court followed its decision in *Pickering* and provided clarity about when an issue touches on a matter of public concern. Under *Connick*, when a government employee's speech touches on issues that are inherently of a private matter, or when the motivation behind the speech is personal to the speaker, then the speech is not a matter of public concern.31

In *Connick*, a prosecutor was unhappy about a proposed transfer to a different section in the Louisiana criminal court. She expressed her displeasure to her supervisors, but was notified that she would be transferred anyway. She then prepared a questionnaire to solicit the views of others in the office about the office transfer policy, office morale, the need for a grievance committee, the level of confidence in the supervisors, and whether employees felt pressured to work in political campaigns. She was fired the same day for insubordination and her refusal to accept the transfer.32

The Supreme Court reversed the appellate court's affirmation of judgment for the plaintiff, holding that the vast majority of the questionnaire did not address a matter of public concern. The Court held that "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record."33 The Court recognized that the "questionnaire, if released to the public, would convey no information at all other than the fact that a single employee is upset with the status quo."34 Rather, the Court held that the employee's real aim had been

> to gather ammunition for another round of controversy with her superiors. These questions reflect one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celèbre.
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> . . . .
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> While as a matter of good judgment, public officials should be receptive to constructive criticism offered by their employees, the First Amendment does not require a public office to be run as a roundtable for employee complaints over internal office affairs.35

Nevertheless, the Supreme Court found that one question36 on the questionnaire concerning pressure to participate in political campaigns did address a matter of public concern, particularly given the bar on employment decisions based on political affiliation in *Branti v. Finkel*37 and *Elrod v. Burns*.38 With regard to that question, the Supreme Court proceeded to balance the interests of the government, as employer, with the interests of the employee. The Court concluded that the question impeded the ability of the government to operate effectively and that it disrupted both the performance of work and working relationships.39 Notably, the Court focused on the employee's motivation for her speech, stating that "[w]hen employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office."40 Indeed, because the "survey . . . is most accurately characterized as an employee grievance concerning internal office policy," the employer did not violate the First Amendment by firing the prosecutor.41

The Unanswered Question: When Does an Employee "Speak as a Citizen?"

From these cases, the *Connick-Pickering* balancing test was derived, asking whether the employee "spoke as a citizen" on matters of public concern, and if so, whether the interest of the employee as a citizen in commenting upon matters of public concern outweighed the interest of the government as an employer in promoting the efficiency of the public services it performs through its employees.42

Decades passed without the courts addressing the meaning of "speak as a citizen." Instead, courts focused on whether the speech touched on issues of public concern and balancing competing interests. All of that changed with *Garcetti*.

III. *Garcetti v. Ceballos*: Where the First Amendment Collides with the Duties of Public Employees

Garcetti v. Ceballos answered the question of what it means to "speak as a citizen." Specifically, a person does not "speak as a citizen" when her employer requires the speech.

In *Garcetti*, the United States Supreme Court clarified that a public employee's speech is not protected by the First Amendment if made pursuant to the employee's official job duties and responsibilities.43 On behalf of a five-member majority, Justice Anthony Kennedy wrote that "[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created."44 In other words, the Supreme Court recognized that public employees may speak in two capacities: one as a citizen and the other as an employee. When a public employee makes a statement required by her employer, *Garcetti* recognizes her to be speaking in her capacity as an employee.

Garcetti concerned a Los Angeles County supervising deputy district attorney named Richard Ceballos. A criminal defense attorney asked Ceballos to review a case in which an affidavit used by the police to obtain a critical search warrant was inaccurate. Ceballos reviewed the affidavit and found that there were "serious misrepresentations."45 He relayed his findings to his supervisors and followed up with a disposition memorandum recommending dismissal of the case. Despite Ceballos' concerns, the prosecution proceeded. At a hearing on a defense motion to challenge the warrant, Ceballos testified about his findings. Subsequently, Ceballos claimed that he was subjected to a series of retaliatory employment actions, including reassignment to a different position, transfer to another courthouse, and denial of a promotion. He initiated an employment grievance, but the grievance was denied based on a finding that he had not suffered any retaliation.46

Ceballos sued, claiming that his employer retaliated against him for his memorandum in violation of the First and Fourteenth Amendments and 42 U.S.C. § 1983. His employer responded that there was no retaliatory action and that Ceballos' complaints were explained by legitimate reasons, such as staffing needs. The employer further contended that Ceballos' memorandum was not protected speech.47

The United States District Court for the Central District of California granted the employer's summary judgment motion, finding that the memorandum was not protected speech, because Ceballos wrote it pursuant to his employment duties. The United States Court of Appeals for the Ninth Circuit reversed, holding that the memorandum's allegations of wrongdoing were protected speech under the First Amendment *Connick-Pickering* balancing test. The Ninth Circuit recognized that *Connick* required a test of whether the expressions were made "as a citizen upon matters of public concern,"48 and determined that Ceballos' memorandum dealt with government misconduct, which is "inherently a matter of public concern."49 The court then balanced Ceballos' interest in his speech against his supervisors' interests in responding to it. The court struck the balance in Ceballos' favor, noting that his employer "failed even to suggest

disruption or inefficiency in the workings of the District Attorney's Office" as a result of the memorandum.50 Unsurprisingly, the Ninth Circuit did not consider whether the speech was made in Ceballos' capacity *as a citizen*, as most courts did not focus on the citizen aspect of the *Connick-Pickering* balancing test at the time of the decision.

The United States Supreme Court granted *certiorari* and reversed. The Court held that, when a government employee makes statements in his official capacity, he is not speaking as a citizen, and so the First Amendment does not protect the employee from discipline by his employer related to this unprotected speech.51

The Court began its analysis by recounting a historical summary of the overarching objectives and principles found in *Pickering*.52 The Court reiterated that *Pickering* and its progeny identified a two-step analysis to guide the interpretation of constitutional protections for public employee speech.

The first step in the *Connick-Pickering* balancing test requires a determination of whether the employee spoke as a citizen on a matter of public concern. "If the answer is no, the employee has no First Amendment cause of action against the employer's reaction to the speech."53 If the answer is yes, then the second step of the analysis evaluates whether the employer "had an adequate justification for treating the employee differently from any other member of the general public."54 The Court noted that "[a] government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations."55

The Court rejected several arguments before pronouncing the dispositive factor for determining whether speech is made in an individual's capacity as a citizen. It rejected the notion that the speech had to be presented to the public at large—as was the case in *Pickering*—in order to be protected:

> That Ceballos expressed his views inside his office, rather than publicly, is not dispositive. Employees in some cases may receive First Amendment protection for expressions made at work. Many citizens do much of their talking inside their respective workplaces, and it would not serve the goal of treating public employees like "any member of the general public," to hold that all speech within the office is automatically exposed to restriction.56

Similarly, the Court noted that the fact that the speech touched on Ceballos' employment was not dispositive.57

The Court reiterated that the First Amendment protects some expressions related to the speaker's job, because their proximity to issues of public importance adds to informed public debate. For example, the *Pickering* Court found that "[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal."58

The *Garcetti* Court recognized that cases dealing with the public employment context are fact-specific and require an assessment of particular employment circumstances. The Court, however, determined that the dispositive factor in such cases is whether the employer required the employee to make the statement as part of his job duties:

> *The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy*. That consideration—the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case—distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline. *We hold that when public employees made 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*.
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> *Ceballos wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do*. It is immaterial whether he experienced some personal gratification from writing the memo; his First Amendment rights do not depend on his job satisfaction. *The significant point is that the memo was written pursuant to Ceballos' official duties. Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen*. It simply reflects the exercise of employer control over what the employer itself has commissioned or created. Contrast, for example, the expressions made by the speaker in *Pickering*, whose letter to the newspaper had no official significance and bore similarities to letters submitted by numerous citizens every day.59

It is important to remember that even if courts refuse to recognize government employees' First Amendment claims based on their work product, the employees are not prevented from engaging in public debate. Public employees still retain the prospect of constitutional protection for their contributions to the civic discourse. Nevertheless, this prospect of protection "does not invest them with a right to perform their jobs however they see fit."60

In *Garcetti*, the Supreme Court recognized the need to afford government employers sufficient discretion to manage their operations. Employers have heightened interests in controlling speech made by an employee in his or her professional capacity.

> Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission.
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> Ceballos' proposed contrary rule, adopted by the Court of Appeals, would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business. . . . When an employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences. *When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny. To hold otherwise would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.*61

The Court, however, was careful to point out that exposure of government inefficiency or misconduct is a matter of considerable significance. Justice Kennedy noted that various measures already have been adopted to protect employees and provide checks on supervisors who would order unlawful or inappropriate actions. These protections include federal and state whistleblower protection statutes, labor laws, and ethical rules of conduct for government attorneys.62 The Court's precedents, however, "do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job."63

Therefore, the crux of the *Garcetti* holding is that when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes and the Constitution does not insulate their communications from employer discipline. Without a significant degree of control over its employees' words and actions, a government employer would have little chance to provide public services efficiently. On the other hand, a citizen who works for the government is nonetheless still a citizen.

IV. When Is Speech Required by a Government Employer?

In the wake of *Garcetti*, courts and parties have struggled to define its limits. When litigating a *Garcetti* issue, government employers should be prepared to deal with arguments arising from the dual role that government employees play as both public officials and ordinary citizens. Although *Garcetti* provides government employers with a significant amount of protection against First Amendment retaliation claims brought by government employees, such protection under *Garcetti* is not unlimited.

As such, a plaintiff's first line of attack against *Garcetti* is to argue that she was retaliated against for speaking out as an ordinary citizen, and not as a public official. Government employers should, therefore, be prepared to respond to these attacks with facts that lock complaining employees into their capacities as public officials, and dispel any arguments that they were really speaking as ordinary citizens.

Oftentimes, this task is very difficult, if not impossible, to do. For example, if a police officer alleges that he was fired in retaliation for attending an environmental protest, the officer would have a strong argument that he attended the protest in his capacity as an ordinary citizen, as opposed to his capacity as a public official. In such cases, it is very unlikely that *Garcetti* will protect the government employer.

On the other extreme are cases that should almost always be slam-dunks for the government. For example, if a police officer alleges that he was fired for what he wrote in a police report, the government likely would have a strong argument that the speech was made in the officer's official capacity as an employee, because police officers are required to prepare police reports.

Somewhere in the middle of these two extremes, however, lies a very fine line between what qualifies as speech made in an employee's official capacity and speech made in his capacity as an ordinary citizen. For example, when a police officer complains about the environmental condition of a police firing range that is open to the public, it may be difficult to know whether he is complaining in his official capacity or in his capacity as an ordinary citizen.64 These cases become fodder for federal motion practice and potential traps for the unwary. Fortunately, the United States Court of Appeals for the Seventh Circuit recently has addressed several fine line

cases, shedding light on what to look for when determining whether alleged speech was made as an employee or as a citizen.

Abcarian v. McDonald

One of the most direct ways to establish that an employee's speech was required by the governmental employer is to show that the speech related to her job duties. For example, when the head of surgery at a public hospital raises internal complaints about controversial hospital management issues, he is speaking "as an employee," rather than "as a citizen." This situation was precisely the case in *Abcarian v. McDonald*.65

In *Abcarian*, the Seventh Circuit held that the plaintiff's speech relating to risk management and other practices at the University of Illinois College of Medicine at Chicago Hospitals was made within his employment capacity as the Head of the Department of Surgery for the hospital. The plaintiff alleged that his controversial comments relating to hospital practices such as its approach with respect to risk management caused his coworkers to retaliate against him, ultimately destroying his career by settling, for nearly $1 million, a medical malpractice lawsuit that had been filed against multiple persons, including the plaintiff, and then reporting the settlement to professional authorities.66 He argued that *Garcetti* did not apply to the hospital or his co-workers, because he was speaking out in his capacity as a citizen, not as a hospital employee. The plaintiff's argument was fatal, however, because it was completely conclusory. Indeed, he failed to allege in his complaint what his specific job duties were as head of surgery for the hospital, which left the court to speculate as to whether he was speaking as a citizen or as an employee.67 And, "a mere speculative possibility that Abcarian spoke as a citizen is no longer enough to satisfy federal notice pleading requirements."68 Therefore, the court presumed that the speech at issue related to the plaintiff's job duties as the head of surgery.

Thus, the Seventh Circuit rejected the plaintiff's argument and held that as the head of surgery speaking out regarding hospital management issues, the plaintiff was clearly speaking out as an employee and not as an ordinary citizen. Consequently, *Garcetti* applied and the plaintiff's First Amendment claims were dismissed.69

The significant takeaway from *Abcarian* is that courts look to the specific job duties of a complaining employee when determining whether the speech at issue was made in the employee's official capacity. If the complaining employee fails to set forth sufficient allegations regarding her job duties in the complaint, courts will not presume that the job duties were unrelated to the speech at issue. This principle is particularly true if the employee was a part of management, as "[a]n employee with significant and comprehensive responsibility . . . certainly has greater responsibility to speak."70 In light of these guiding principles, government employers facing First Amendment retaliation claims should be prepared to seize opportunities early in litigation to establish that the speech at issue was related to the complaining employee's job duties.

Bivens v. Trent

In addition to analyzing the complaining employee's job duties in First Amendment retaliation cases, courts also examine the circumstances surrounding the speech at issue in determining whether such speech was made pursuant to an employee's official job duties.

In *Bivens v. Trent*,71 the Seventh Circuit held that a police officer was acting in his capacity as a public official, and not as a citizen, when he complained about lead contamination at a firing range. There, the plaintiff was assigned by the Illinois State Police to the position of range officer at the firing range. As range officer, the plaintiff was responsible for overseeing the range's operation, including qualifying individuals on firearms and keeping the range clean and operational. The range functioned as a qualification and testing center for state police officers, as well as a training facility for other police officers, but was also open to the public, including hunters and occasionally school children on field trips.72

Within a few months of having been assigned to the position of range officer, the plaintiff began having headaches and other ailments, which he believed were caused by exposure to lead at the firing range. Shortly after a blood test revealed that his lead levels were elevated, the plaintiff made a number of complaints about the safety of the range. His first complaint was directed to his supervisor, through the proper chain of command. In addition, he filed a union grievance. The range was then tested and found to have elevated lead levels. As such, the range was closed for nearly nine months for a professional clean-up.73

Subsequently, the plaintiff filed a lawsuit against his supervisors at the Illinois State Police, alleging in part that he was reassigned, docked pay, and harassed in violation of his First Amendment rights because of his complaints about lead contamination.74 The Seventh Circuit agreed with the defendant-employer that the plaintiff did not speak as a citizen when he complained to his supervisors about environmental lead contamination at the range because "[i]t is undisputed that Bivens was responsible for the safe operation of the firing range and consequently that he had a responsibility, as part of his job duties, to report his concerns about environmental lead contamination."75 Central to the Seventh Circuit's analysis was that the plaintiff made complaints about lead contamination directly up the chain of command.76

Nevertheless, the court declined to go as far as holding that the union grievance was made within the plaintiff's official capacity. The court explained that it was less clear that the exact same speech was made in the plaintiff's official capacity when directed through a different channel. Because that issue could be decided under the public concern portion of the *Connick-Pickering* balancing test, the court declined to reach the issue in the case.77

Thus, according to the Seventh Circuit's analysis in *Bivens*, even when the speech at issue in a First Amendment retaliation case falls within the ambit of an employee's job duties, it might nevertheless fall outside of the employee's official capacity if it was not reported through the proper chain of command. Government employers should, therefore, beware of First Amendment retaliation claims in which the speech at issue was not reported by the employee through the usual chain of command.

Chaklos v. Stevens

The Seventh Circuit's holding in *Chaklos v. Stevens*78 further illustrates the significance of the chain of command within a governmental organization when it comes to *Garcetti*. In *Chaklos*, two scientists employed by the Illinois State Police to train forensic scientists filed a lawsuit against their supervisors, alleging that they were suspended for thirty days for writing a letter to an Illinois State Police procurement official protesting the Illinois State Police's decision

to award a no-bid contract to an out-of-state forensic science training company. The plaintiffs owned a forensic science training company as a side business, and they wrote a letter on that company's stationary, claiming that their company could provide superior training at a lower cost. Instead of investigating the no-bid contract, the Illinois State Police suspended the plaintiffs for thirty days, based on the plaintiffs' violation of a regulation banning secondary employment.79

The defendants claimed that *Garcetti* barred the plaintiffs' claim. The Seventh Circuit rejected that argument, because the plaintiffs signed the letter as employees of an outside company and did not send the letter to their own supervisors. This result was the case even though the plaintiffs had a duty to report anticompetitive practices to the Illinois Attorney General and the chief procurement officer. The Seventh Circuit rejected the argument that the letter submitted by the plaintiffs was done pursuant to that statutory duty. The letter was sent to a procurement official, not to the Attorney General or chief procurement officer.80 Moreover, the court noted that in *Garcetti*, the Supreme Court "rejected the idea 'that government employers cannot create excessively broad job descriptions to restrict the First Amendment rights of employees.'"81 Despite the plaintiffs' broad statutory duties as State employees, the court also was persuaded that the letter was not written pursuant to their official duties, because they were merely employed as scientists and not expected by their employer to protest the awards of no-bid contracts.82

Chaklos further demonstrates the significance of how the speech at issue in a First Amendment retaliation claim is communicated to the government employer. By drafting their letter of protest on their company's letterhead instead of voicing their complaints through their supervisors and up the chain of command, the plaintiffs successfully overcame the defendants' *Garcetti* argument. Thus, *Garcetti* might not apply to situations involving unconventional complaints from employees that are not raised through the chain of command.

Fuerst v. Clark

An additional pitfall that government employers should understand is that sometimes there is a fine line between a government employee's capacity as a public official and his or her capacity as a union representative. *Garcetti* does not apply to cases involving the latter. In *Fuerst v. Clark*,83 the Seventh Circuit held that speech made in a government employee's capacity as a union representative is the same as speech made as a citizen and, therefore, protected under the First Amendment.84

In *Fuerst*, the plaintiff, a deputy sheriff, brought a First Amendment retaliation action against the county sheriff, alleging that he had been denied promotion because of his public criticism of the county sheriff's political career. Specifically, the plaintiff alleged that he had been passed over for a promotion and told that he was not loyal to the sheriff's vision, in retaliation for criticizing the sheriff's decision to hire a public relations officer. The plaintiff had criticized the sheriff's decision publicly as a waste of taxpayer money, and the plaintiff's comments ultimately were published in the leading local newspaper.85

The sheriff claimed that *Garcetti* defeated the First Amendment claim. Because the speech was outside of the plaintiff's duties as a deputy sheriff, however, the Seventh Circuit, quickly rejected this argument. The court reasoned that the deputy sheriff's duties did not include commenting on the sheriff's decision to hire a public relations officer and, therefore, the

comments were made within the deputy sheriff's capacity as a union representative, as opposed to his official capacity.86

Thus, government employers should understand the significance of First Amendment retaliation claims made by union representatives. Based on the Seventh Circuit's holding in *Fuerst*, when the speech at issue can be interpreted as having arisen from a government employee's capacity as a union representative, *Garcetti* does not apply.

V. The Employer's Alternative Argument: Is the Challenged Speech on a Matter of Public Concern?

Even when an employee "speaks as a citizen," a governmental employer has additional ammunition to defeat a First Amendment retaliation claim. When an employee speaks as a private citizen, his speech might not be protected if it does not address a matter of public concern or if governmental interests outweigh the individual's First Amendment interests under the *Connick-Pickering* balancing test.87 If speech is determined to be a matter of public concern, it might be protected under the factors provided for under the *Connick-Pickering* balancing test. Under certain circumstances, however, speech is not protected. Specifically, if speech is determined not to be a matter of public concern, then it warrants no protection at all.

Speech that Is a Matter of Public Concern Is Protected

Speech that addresses the spending of public funds by the state typically garners a protective mantle. For example, in *Chaklos v. Stevens*,88 the plaintiff state police officers were suspended for submitting a letter protesting a decision not to solicit bids on training services. The Seventh Circuit affirmed the decision by the United States District Court for the Southern District of Illinois that the officers spoke as private citizens, because they signed their letter as employees of an outside company.89 In addition, the court determined that the plaintiffs' speech addressed a matter of public concern, because it protested inefficient spending of public funds on a service contract and argued that the state could save money by soliciting competitive bids.90 Thus, the officers' speech was protected, because it was made in their capacities as citizens on a matter of public concern and was not solely motivated by personal interests.91

Speech that addresses public safety or the correct operation of state law, or both, also typically is deemed protected by federal courts in Illinois. In *Shefcik v. Village of Calumet Park*,92 the plaintiff police officer was suspended, and he alleged that he was otherwise discriminated against for asserting, as a police union representative, grievances about reduction in manpower.93 He alleged reverse race discrimination and retaliation, in violation of Title VII, as well as retaliation for exercising First Amendment rights.94 The United States District Court for the Northern District of Illinois first held that *Garcetti* did not apply because the plaintiff made his speech in his capacity as a union representative and not as an employee. The court then determined that the plaintiff's grievances focusing on officer safety, public safety, and possible abuse of the state open meetings law addressed matters of public concern, and that speech was protected.95 The court also held, however, that the plaintiff's speech concerning his overtime pay, officer seniority, and similar issues did not address matters of public concern and was not

protected.96 The court determined that the plaintiff raised a genuine issue of material fact that his public concern grievances were a substantial or motivating factor behind the defendants' retaliatory conduct, and denied summary judgment to the defendants on the First Amendment retaliation claim.97 *Shefcik* thus provides good examples of the kinds of speech that courts in the Seventh Circuit consider to be of public concern.

Speech that Is a Matter of Public Concern But Is Not Protected Under the *Connick-Pickering* Balancing Test

There are several decisions by courts in the Seventh Circuit in which a public employee's speech has been determined to be a matter of public concern and protected. Whether a plaintiff receives judgment in his favor, however, depends on the *Connick-Pickering* balancing test of competing interests between employee's interest in free speech and employer's interest in protecting the public. The United States District Court for the Central District of Illinois recently issued a decision in which it determined that a public employee speaking as a private citizen on a matter of public concern was not entitled to protection for his speech, because the speech failed to tip the balance in the *Connick-Pickering* balancing test. Although the opinion is not a published decision, the facts of the case are instructive for government employers that find themselves defending a claim brought by an employee speaking in his or her capacity as a citizen on a matter of public concern.

In *Volkman v. Randle*,98 the plaintiff, a supervisory employee at the Department of Corrections (DOC), in his capacity as a citizen, used his personal cell phone to contact the state's attorney to express his opinion that a fellow employee's disciplinary charges and pending criminal charges for bringing a cell phone to work should be handled by the DOC internally, and not by the office of the state's attorney.99 The plaintiff then received a written reprimand, presumably for his call to the state's attorney, although the parties disputed the reason for the discipline.100

The district court held an evidentiary hearing to determine whether the plaintiff's speech was constitutionally protected. The court held that the plaintiff's speech was made off-duty and not as part of his professional responsibilities, so he spoke as a private citizen.101 The court also held that the plaintiff's remarks to the state's attorney about pending criminal charges was a subject of general interest and value to the public, and as such was of public concern.102 The court, however, determined that the plaintiff's speech was not protected because the DOC's interest in maintaining the security of the prison and the loyalty of its employees outweighed the plaintiff's interest in commenting on a state law.103

In reaching its decision, the court explained that it must consider seven factors when conducting an analysis under the *Connick-Pickering* balancing test:

> (1) whether the speech would create problems in maintaining discipline or harmony among coworkers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee's ability to perform [his] responsibilities; (4) the time, place, and manner of the speech; (5) the context within which the underlying dispute arose; (6) whether the matter was one on which debate was vital to informed decision-making; and (7) whether the speaker should be regarded as a member of the general public.104

The court then stated that the time, place, and manner of the plaintiff's speech was less likely to create problems for the DOC in maintaining discipline or harmony among co-workers, but the DOC had a significant interest in maintaining security in the prison and the loyalty of its employees.105 Also, the plaintiff, as a supervisor, had a responsibility to support the prison regulations, which prohibited bringing a cell phone into the facility, even accidentally.106 By encouraging the state's attorney not to bring criminal charges against his co-worker, the plaintiff offset the overall mission of the DOC and minimized the danger of bringing cell phones into the facility. For these reasons, the court entered judgment for the defendants.107

Volkman instructs that even if an employee's speech is a matter of public concern it is not necessarily protected. Although government employers constantly need to be aware of how they react to speech made by their employees, the *Volkman* decision provides reassurance that not all speech on matters of public concern are protected from retaliation. Time, place, and manner restrictions must factor into the analysis.

Speech that Is Not a Matter of Public Concern Is Not Protected

Frequently, an employee's speech addresses a personal grievance, rather than a matter of public concern, and federal courts in the Seventh Circuit, following in the footsteps of *Connick v. Myers*, have held that such grievances do not garner protection.108 The speech can also be of public interest, but not public concern, or it might not have any application to the context of a particular claim. When these situations arise, government employers are likely to receive a favorable result on the question of whether the employee's speech was protected.

As was shown in the *Bivens* case,109 an employer could prevail where a plaintiff is found to have spoken as a citizen on a matter of public interest, but where the plaintiff's speech is not one of public concern because it only addresses the personal effect of a condition on himself, and not the risk of harm that the condition could pose to the public at large.110

Thus, in *Bivens*, the employer was granted summary judgment where, as the Seventh Circuit explained, the plaintiff was responsible for reporting on the conditions at a firing range, but his complaint that he thought he had lead poisoning due to conditions at the range was made in his official capacity. Although of public interest, that complaint was not of public concern, because it affected no one but him.111

*Watkins v. Kasper*112 provides an example of the concept of public concern not applying to the situation presented in the case. In that case, the employee was an inmate in the Indiana state penitentiary and worked as a prison law clerk. The inmate sued the prison law librarian, alleging retaliation for the exercise of his free speech rights.113 After trial, the United States District Court for the Northern District of Indiana entered a jury verdict in favor of the inmate, and the librarian appealed.114 The Seventh Circuit held that the public concern test developed in the public employment context has no application to prisoners' First Amendment claims, even in the case of speech by a prisoner-employee.115 The court stated that the public concern test is unworkable in the context of prison employment, because prison officials already have substantial discretion in controlling the prison population and are not as constrained as other government employers.116 The inmate had to prove that he engaged in this speech in a manner consistent with legitimate penological interests, which he could not do, so his speech was not entitled to First Amendment protection. As a result, the Seventh Circuit reversed the judgment and remanded the case to the trial court with instructions to enter judgment in favor of the librarian.117

Finally, *McLaughlin v. Casler*118 addresses speech that is not of public concern, because it is of public interest only or is merely a personal grievance. In that case, the plaintiff expressed concerns about expanding the responsibilities of his department.119 The court held that this speech was made in the plaintiff's official capacity as a village executive, and thus was not protected. But even if he were speaking as private citizen, his speech took the form of either a personal grievance120 or a topic of public interest that did not rise to level of public concern.121 For these reasons, the District Court for the Northern District of Illinois determined that his speech was not protected.122

VI. Post-*Garcetti* Cases from Other Circuits

The *Garcetti* decision did not provide a clear guide for determining whether a public employee's speech is "pursuant to [an employee's] responsibilities," because the Court simply stated that "[t]he proper inquiry is a practical one."123 Cases from other circuits provide some additional guidance on the framework for analyzing whether a public employee's speech falls within or outside an employee's official duties. Not surprisingly, *Garcetti* opened the door for circuit courts to adopt their own unique approaches to these cases. The results vary among the individual circuits.

In *Bonn v. City of Omaha*,124 the United States Court of Appeals for the Eighth Circuit found an employee's speech to be made in her capacity as an employee rather than as a citizen, and affirmed summary judgment in favor of the employer.125 In *Bonn*, the plaintiff, who was the Public Safety Auditor for the City of Omaha, prepared a report describing traffic stops. The report was critical of fellow officers' actions, and the plaintiff also made critical comments when contacted by the media. As to the report itself, the court relied on the employee's admission in written discovery that she prepared the report "as a function or official duty of [her] position as the Public Safety Auditor of the City of Omaha."126 As a result, the court held the report was not speech by a citizen. In holding that the employee's statements to the press also served as speech by an employee rather than speech by a citizen, the court emphasized that the employee spoke to the media pursuant to her official duties and that "she acted in response to media inquiries about a report that she had published as part of her work as auditor."127

In an earlier decision, the Eighth Circuit held in *Bradley v. James*128 that a police officer's "unsubstantiated comments" about another officer were not made as a citizen, because the speaker made his allegations in the context of an official investigation where he was duty bound to respond to an investigator's questions.129 As such, the officer's speech was not entitled to First Amendment protection.130

Similarly, in *McGee v. Public Water Supply, District #2*,131 the Eighth Circuit addressed First Amendment claims by the manager of a county water district who had spoken to a board of directors against a particular project.132 There, the court looked to the manager's admission that his duties included advising the board regarding regulatory and legal requirements.133 The court also noted that the manager had supervisory duties over the project at issue and that his speech to the board concerned legal issues surrounding the project. As a result, the court held that the plaintiff spoke as an employee rather than as a citizen. In doing so, the court observed that "determining the scope of an employee's official duties . . . is a practical inquiry that focuses on the duties an employee is actually expected to perform rather than his formal job description."134

The United States Court of Appeals for the Second Circuit, in *Weintraub v. Board of Education of the City School District of the City of New York*,135 examined a public teacher's First Amendment retaliation claim arising out of a grievance filed with his union in response to an alleged inadequate discipline of a student who had thrown a book at him on two occasions.136 The court held that, under *Garcetti*, "the objective inquiry into whether a public employee spoke 'pursuant to' his or her official duties" is a practical one.137 The court held 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."138 In *Weintraub*, the plaintiff made his grievance pursuant to his official duties, because it was "part-and-parcel" of his concerns about his inability to properly execute his duties as a public school teacher – namely, to maintain classroom discipline.139 Therefore, his speech was made as an employee, not as a citizen, and was not protected by the First Amendment.

In another decision from the Second Circuit, *Anemone v. Metropolitan Transportation Authority*,140 the court held that a former New York Metropolitan Transit Authority (MTA) security director's contacts concerning corruption at the MTA with the district attorney's office were made pursuant to his official duties, rather than as a citizen, and therefore were not protected by the First Amendment.141 The court found it important that the employee regularly interacted with the district attorney's office as part of his duties, and viewed cooperating with these offices as among his duties.142

In *Chamberlin v. Town of Stoughton*,143 the United States Court of Appeals for the First Circuit rejected the plaintiff police officers' First Amendment action against town officials, alleging retaliation for cooperating with an investigation into police misconduct and for disclosing hostile work environment at the police department.144 The court found that the plaintiffs' speech was not protected by the First Amendment under *Garcetti.* As two senior officers in the police department, it was within the scope of both plaintiffs' duties to cooperate with the district attorney and the special prosecutor in investigating alleged criminal activity within the police department. The court noted that it was not suggesting that *Garcetti* applies every time a police officer has conversations with a prosecutor. Rather, the court recognized: "What constitutes official duties will necessarily vary with the circumstances including the rank of the officer, his areas of responsibility and the nature of the conversations . . . ."145

In another case from the First Circuit, *Foley v. Town of Randolph*,146 the court examined a fire chief's First Amendment claim against the defendant town and its officials, alleging they wrongfully retaliated against him in violation of his free speech rights when they suspended him based on public statements made to the press at the scene of a fatal fire criticizing inadequate funding and staffing of the fire department.147 The court held that the fire chief was speaking as an employee and not as a citizen when he made the statements and, therefore, his speech was not protected by the First Amendment under *Garcetti*. As fire chief, the plaintiff was in command of the fire scene, and when choosing to speak to the press, he "naturally [would] be regarded as the public face of the Department when speaking about matters involving the Department."148 Under these circumstances, the plaintiff "addressed the media in his official capacity, as Chief of the fire department, at a forum to which he had access because of his position."149

In *Nixon v. City of Houston*,150 the United States Court of Appeals for the Fifth Circuit defined "official duties" as those "activities undertaken in the course of performing one's job."151 *Nixon* involved a First Amendment claim by a police officer who made disparaging remarks concerning his department to the media while on duty and in uniform.152 The court

held that the officer's speech was not constitutionally protected, because it was made "pursuant to his official duties and during the course of performing his job."153

The Fifth Circuit again examined *Garcetti*'s reach in *Williams v. Dallas Independent School District,*154 which involved a high school athletic director's memorandum criticizing the school's handling of funds. The court in *Williams* held that the employee's speech was "made in the course of performing his employment," because he was responsible for consulting with his supervisors on his office's budget and, as such, the director spoke pursuant to his official duties.155

The United States Court of Appeals for the Sixth Circuit, in *Fox v. Traverse City Area Public School Board of Education,*156 held that "[s]peech by a public employee made pursuant to *ad hoc* or *de facto* duties not appearing in any written job description is nevertheless not protected if it 'owes its existence to [the speaker's] professional responsibilities.'"157

The United States Court of Appeals for the Third Circuit has used a different analysis in its application of *Garcetti*. In *Gorum v. Sessoms,*158 the court held that speech may be considered part of a public employee's official duties if it relates to "'special knowledge' or 'experience' acquired through his job."159 The court held that the protections of the First Amendment did not apply to a university professor's speech made in support of a student at disciplinary hearing, because his "special knowledge of, and experience with," the university's disciplinary code made him a "*de facto* advisor" to all students with disciplinary problems.160 As such, the professor's speech was made within his official duties.

In contrast to the majority of circuits, the United States Court of Appeals for the Ninth Circuit has applied *Garcetti* narrowly to public employee speech. For example, in *Anthoine v. North Central Counties Consortium,*161 the court reversed summary judgment in favor of the public employer, because it did not show that the employee's speech was "the product of performing tasks the employee was paid to perform" or that the employee "had a duty, like the . . . deputy district attorney in *Garcetti*, to report . . . misconduct within the proper channels."162

The United States Court of Appeals for the Tenth Circuit adopted a similar approach to the Ninth Circuit in *Rohrbough v. University of Colorado Hospital Authority,*163 holding that a transplant coordinator's complaints about her hospital's practices were not protected statements, because her "reporting about the conditions affecting her ability to fulfill her duties as Transplant Coordinator at the Hospital undoubtedly was an activity that 'stemmed from and [was of] the type . . . that she was paid to do.'"164

VII. Conclusion

Garcetti v. Ceballos is a powerful tool in the defense against lawsuits by public employees claiming First Amendment retaliation. The Supreme Court used the case to further define what it means to "speak as a citizen on matters of public concern." The opinion recognizes the dual role of a public employee as employee and citizen. In the wake of *Garcetti,* courts continue to test its limits. Nevertheless, it cannot be denied that *Garcetti* has radically altered the landscape for litigating First Amendment employment claims.

(Endnotes)

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

2 *Garcetti*, 547 U.S. at 421.

3 Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing and Section 1983: A Critique of* Garcetti v. Ceballos, 42 U. Rich. L. Rev. 561, 561-62 (2008) ("The Supreme Court's 2006 decision in *Garcetti v. Ceballos* is striking. In the course of limiting an important and respected thirty-eight-year-old First Amendment precedent, *Garcetti* effectively conferred absolute immunity on public employers by excluding employer discipline based on job-required public employee speech from First Amendment scrutiny." (footnotes omitted)).

4 Kermit Roosevelt III, *Not as Bad as You Think: Why* Garcetti v. Ceballos *Makes Sense*, 14 U. PA. J. Const. L. 631 (2012); Lawrence A. Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 Fordham L. Rev. 33 (2008).

5 *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 381 (1973).

6 *Schenck v. United States*, 249 U.S. 47, 52 (1919).

7 *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist*., 393 U.S. 503, 506 (1969).

8 *Renton v. Playtime Theatres, Inc*., 475 U.S. 41, 46-47 (1986).

9 *Connick v. Myers*, 461 U.S. 138, 143 (1983).

10 *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563 (1968).

11 *Connick*, 461 U.S. at 143.

12 *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220 (1892).

13 *Wieman v. Updegraff*, 344 U.S. 183 (1952) (holding that the state could not require teachers to swear loyalty oaths).

14 *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961) (holding that the government cannot deny employment because of past membership in the Communist Party).

15 *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

16 *Pickering v. Bd. of Educ. of Township High Sch. Dist. 205*, 391 U.S. 563, 568 (1968) (citing *Keyishian*, 385 U.S. at 605-06 ("[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Wieman*, 344 U.S. at 183).

17 *Pickering*, 391 U.S. at 568.

18 *Id.*

19 *Connick v. Myers*, 461 U.S. 138, 143 (1983).

20 *Pickering*, 391 U.S. at 568.

21 *Id.* at 564.

22 *Id.* at 566.

23 *Id.* at 564-67.

24 *Id.* at 567.

25 *Pickering*, 391 U.S. at 567.

26 *Id.* at 568.

27 *Id.*

28 *Id.*

29 *Id.* at 571-72.

30 *Pickering*, 391 U.S. at 571.

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

32 *Connick*, 461 U.S. at 140-41.

33 *Id.* at 147-48.

34 *Id.* at 148.

35 *Id.* at 148-49.

36 "11. Do you ever feel pressured to work in political campaigns on behalf of office supported candidates?" *Id*. at 155.

37 *Branti v. Finkel*, 445 U.S. 507 (1980).

38 *Elrod v. Burns*, 427 U.S. 347 (1976).

39 *Connick v. Myers*, 461 U.S. 138, 152 (1983).

40 *Connick*, 461 U.S. at 153.

41 *Id.* at 154.

42 *Sigsworth v. City of Aurora*, 487 F.3d 506, 509 (7th Cir. 2007) ("To ensure that public employee speech is afforded the proper constitutional protections, we have traditionally applied the balancing test first announced in *Pickering v. Board of Education* and clarified in *Connick v Myers* . . . . Under the *Connick-Pickering* [balancing] test, a public employee can establish that his speech is constitutionally protected if (1) the employee spoke as a citizen on matters of public concern, and (2) the interest of the employee as a citizen in commenting upon matters of public concern outweighs the interest of the State as an employer in promoting the efficiency of the public services it performs through its employees." (internal citations omitted)); *Schad v. Jones*, 415 F.3d 671, 674 (7th Cir. 2005) ("In determining whether a government employee's speech is constitutionally protected, we apply the two-step *Connick-Pickering* [balancing] test. . . . First, under *Connick*, we must determine whether the employee spoke as a citizen upon matters of public concern. . . . In making this determination, we examine the content, form, and context of a given statement, as revealed by the whole record. . . . Second, under *Pickering*, we balance the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." (internal quotations and citations omitted)).

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

44 *Garcetti*, 547 U.S. at 421-22.

45 *Id.* at 414.

46 *Id.* at 415.

47 *Id.*

48 *Id.* at 415-16 (quoting *Connick*, 461 U.S. at 147); *see also Ceballos v. Garcetti*, 361 F.3d 1168, 1187 (9th Cir. 2004).

49 *Ceballos*, 361 F.3d at 1174

50 *Id.* at 1180.

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

52 *Garcetti*, 547 U.S. at 417-18.

53 *Id.* at 418 (citing *Connick*, 461 U.S. at 147).

54 *Id.* (citing *Pickering*, 391 U.S. at 568).

55 *Id.* at 418.

56 *Id.* at 421-22 (citations omitted).

57 *Garcetti*, 547 U.S. at 421.

58 *Pickering*, 391 U.S. at 572, *quoted in Garcetti*, 547 U.S. at 421.
59 *Garcetti*, 547 U.S. at 422 (emphasis added) (citations omitted).
60 *Id.*
61 *Id.* at 422-23 (emphasis added).
62 *Id.* at 425.
63 *Id.* at 426.
64 *See Bivens v. Trent*, 591 F.3d 555 (7th Cir. 2010) (holding that a police officer was acting in his capacity as a public official, and not as a citizen, when he complained about suffering from lead contamination due to working at a firing range, where it was his responsibility in his official capacity to report safety concerns); *see also infra* text accompanying notes 71-77.
65 *Abcarian v. McDonald*, 617 F.3d 931 (7th Cir. 2010).
66 *Abcarian*, 617 F.3d at 933-34.
67 *Id.* at 937.
68 *Id.* (citing *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009)).
69 *Id.* at 938.
70 *Id.* at 937 (quoting *Tamayo v. Blagojevich*, 526 F.3d 1074, 1092 (7th Cir. 2008)).
71 *Bivens v. Trent*, 591 F.3d 555 (7th Cir. 2010).
72 *Bivens*, 591 F.3d at 557.
73 *Id.*
74 *Id.* at 559.
75 *Id.* at 560.
76 *Id.*
77 *Id.*
78 *Chaklos v. Stevens*, 560 F.3d 705 (7th Cir. 2009).
79 *Chaklos*, 560 F.3d at 708-09.
80 *Id.* at 712.
81 *Id.* (quoting *Garcetti*, 547 U.S. at 424).
82 *Id.*
83 *Fuerst v. Clark*, 454 F.3d 770 (7th Cir. 2006).
84 *Fuerst*, 454 F.3d at 774.
85 *Id.* at 772.
86 *Id.* at 774.
87 *See supra* Section II.
88 *Chaklos v. Stevens*, 560 F.3d 705 (7th Cir. 2009); *see also supra* Section IV.
89 *Chaklos*, 560 F.3d at 712.
90 *Id.* at 713-14.
91 In spite of these protections, the Seventh Circuit affirmed the district court's holding that the state officials were entitled to qualified immunity for their actions taken against the officers, because the defendants did not have fair warning that their actions were unconstitutional. *Id.* at 715-17.
92 *Shefcik v. Village of Calumet Park*, 532 F. Supp. 2d 965 (N.D. Ill. 2007).
93 *Shefcik*, 532 F. Supp. 2d at 971-72.
94 *Id.*

95 *Id.* at 975-77.
96 *Id.* at 977.
97 *Id.* at 979-80.
98 *Volkman v. Randle*, No. 10-2132, 2012 WL 996907 (C.D. Ill. Mar. 23, 2012).
99 *Volkman*, 2012 WL 996907, at *1-*2.
100 *Id.*
101 *Id.* at *3.
102 *Id.*
103 *Id.* at *4.
104 *Volkman*, 2012 WL 996907 at *4 (citing *Gustafson v. Jones*, 290 F.3d 895, 909 (7th Cir. 2002)).
105 *Id.*
106 *Id.*
107 *Id.* at *5. For additional examples of district court cases in which the defendant employers prevailed even though the employees' speech was determined to be a matter of public concern, see *Foster v. Adams*, No. 07-3333, 2011 WL 308471 (C.D. Ill. Jan. 27, 2011) (finding that, although the plaintiff in his capacity as a union member, and not as an employee in an official capacity, made complaints about building conditions, which touched on matters of public concern, that protected speech was not shown to be the but-for cause of his suspension and termination, as the plaintiff presented no evidence that most of the defendants were even aware of his reports about buildings), and *Fagbemi v. City of Chicago*, No. 08 C 3736, 2010 WL 1193809 (N.D. Ill. Mar. 19, 2010) (granting summary judgment in favor of the defendant employer, because the plaintiff could not show that the individual who allegedly retaliated against him had knowledge of his speech; the plaintiff had claimed that the defendants selected a less-qualified individual for higher-ranking position, and retaliated against the plaintiff when he complained about this selection; the plaintiff's complaints were made as a citizen, because he was seeking promotion to a new position, and some (but not all) of his complaints were matters of public concern (for example, a complaint to a compliance officer that the person chosen for the high-ranking position was not qualified was matter of public concern), but complaints to the mayor and to the head of the division overseeing the sought-after position claiming that the plaintiff was more qualified than the other individual were merely employee grievances).
108 *Connick v. Myers*, 461 U.S. 138, 148 (1983).
109 *See supra* Section IV.
110 *See id.* at 560-62.
111 *Id.* at 560.
112 *Watkins v. Kasper*, 599 F.3d 791 (7th Cir. 2010).
113 *Watkins*, 599 F.3d at 792-93.
114 *Id.* at 793.
115 *Id.* at 795-96.
116 *Id.* at 796.
117 *Id.* at 799.
118 *McLaughlin v. Casler*, 634 F. Supp. 2d 881 (N.D. Ill. 2009).
119 *McLaughlin*, 634 F. Supp. 2d at 885.

120 For an additional example of an employee grievance that was determined not to be a matter of public concern, see *Fagbemi v. City of Chicago*, No. 08 C 3736, 2010 WL 1193809 (N.D. Ill. Mar. 19, 2010); *see also supra* note 110.

121 *McLaughlin*, 634 F. Supp. 2d at 890-91.

122 *Id.* at 893.

123 *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006).

124 *Bonn v. City of Omaha*, 623 F.3d 587, 593 (8th Cir. 2010).

125 *Bonn*, 623 F.3d at 593.

126 *Id.* at 592.

127 *Id.* at 593.

128 *Bradley v. James*, 479 F.3d 536 (8th Cir. 2007).

129 *Bradley*, 479 F.3d at 537-38.

130 *Id.* at 538.

131 *McGee v. Pub. Water Supply, Dist. #2*, 471 F.3d 918 (8th Cir. 2006).

132 *McGee*, 471 F.3d at 919-20.

133 *Id.* at 921.

134 *Id.*

135 *Weintraub v. Bd. of Educ. of the City Sch. Dist. of the City of New York*, 593 F.3d 196 (2d Cir. 2010).

136 *Weintraub*, 593 F.3d at 203-04.

137 *Id*. at 202.

138 *Id.* at 203.

139 *Id.*

140 *Anemone v. Metro. Transp. Auth.*, 629 F.3d 97 (2d Cir. 2011).

141 *Anemone*, 629 F.3d at 116-17.

142 *Id.*

143 *Chamberlin v. Town of Stoughton*, 601 F.3d 25 (1st Cir. 2010).

144 *Chamberlin*, 601 F.3d at 35.

145 *Id.*

146 *Foley v. Town of Randolph*, 598 F.3d 1 (1st Cir. 2010).

147 *Foley*, 598 F.3d at 5-9.

148 *Id.* at 7.

149 *Id.*

150 *Nixon v. City of Houston*, 511 F.3d 494 (5th Cir. 2007).

151 *Nixon*, 511 F.3d at 498.

152 *Id.* at 498-99.

153 *Id.*

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

155 *Williams*, 480 F.3d at 694.

156 *Fox v. Traverse City Area Pub. Sch. Bd. of Educ.*, 605 F.3d 345 (6th Cir. 2007).

157 *Fox*, 605 F.3d at 348 (quoting *Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 544 (6th Cir. 2007)).

158 *Gorum v. Sessoms*, 561 F.3d 179 (3d Cir. 2009).
159 *Gorum*, 561 F.3d at 183.
160 *Id.*
161 *Anthoine v. N. Cent. Counties Consortium*, 605 F.3d 740 (9th Cir. 2010).
162 *Anthoine*, 605 F.3d at 750.
163 *Rohrbough v. Univ. of Colo. Hosp. Auth.*, 596 F.3d 741 (10th Cir. 2010).
164 *Rohrbough*, 596 F.3d at 748 (quoting *Green v. Bd. of County Comm'rs*, 472 F.3d 794, 801 (10th Cir. 2007)).

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John O'Driscoll is based out of the *Tressler LLP's* Bolingbrook and Chicago offices. His practice includes representing companies and individuals in business disagreements and providing general counsel services to local governmental bodies such as municipalities, school districts and park districts. Mr. O'Driscoll handles a wide variety of disputes such as business litigation, breaches of contract, construction issues, employment disputes, property damage, internet defamation, and complex litigation. He has been selected for inclusion in 2008, 2009, 2010 and 2011 Illinois Super Lawyers Rising Stars®. In 2010, he received the Illinois Association of Defense Trial Counsel's President's Award for his exceptional service, dedication and significant contributions to the IDC and its President. In 2011, he was named a recipient of the IDC Meritorious Service Award for his outstanding service as co-chair of the IDC Commercial Litigation Committee. John is the co-author of the Municipal Litigation chapter of the Illinois Municipal Law Series and co-author of the Park District chapter of Illinois Special District Series published by the Illinois Institute for Continuing Legal Education.

Darcy L. Proctor received her Bachelor's Degree from Loyola University of Chicago in 1985, and her JD from Loyola University of Chicago School of Law in 1988. Prior to joining *Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C.,* Darcy was a litigator at the Chicago law firm of *Hinshaw & Culbertson, LLP* where she developed an expertise in defending governmental entities in various tort, civil rights and employment litigation matters. She is a member of the bars of the State of Illinois, the Federal District Court for the Northern District of Illinois, the Federal District Court for the Central District of Illinois, the United States Court of Appeals for the Seventh Circuit, and the trial bar of the Federal District Court for the Northern District of Illinois.

Paul A. Rettberg is a shareholder in the Chicago firm of *Querrey & Harrow*. Mr. Rettberg has spent his entire legal career at *Querrey & Harrow* as a major case litigator and trial lawyer. Mr. Rettberg concentrates his practice in the handling of high exposure lawsuits involving municipalities and municipal common carriers, digital broadcast satellite television companies, major food retailers, construction companies, and manufacturers. Mr. Rettberg has extensive experience representing municipal governments in a wide variety of cases including false arrest and excessive force cases brought under Section 1983, retaliatory discharge actions brought against municipalities, and sexual abuse lawsuits brought against school districts and their employees.

About the IDC

The Illinois Association Defense Trial Counsel (IDC) is the premier association of attorneys in Illinois who devote a substantial portion their practice to the representation of business, corporate, insurance, professional and other individual defendants in civil litigation.
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