ABSTRACT

YOUR TEACHER SAID WHAT ON FACEBOOK? APPLICATION OF FIRST AMENDMENT SPEECH RIGHTS TO TEACHER CYBER SPEECH

Anthony M. Scarsella, Ed.D.
Department of Leadership, Educational Psychology and Foundations
Northern Illinois University, 2015
Jon Crawford, Director

There have been many recent instances of teachers being disciplined or terminated due to their activity on social networking sites. School administrators will likely be confronted with a growing number of reports of alleged inappropriate online teacher speech and required to make determinations regarding disciplinary action. This study researched the relevant history of judicial application of the U.S. Constitution’s First Amendment free speech rights for public employees; investigated how the Supreme Court applied, modified and refined the judicial test outlined in Pickering v. Board of Educ. in public employee free speech cases and; examined how the United States federal Circuit Courts of Appeals applied Pickering and its progeny to public employee speech cases. The study concludes by providing public school administrators with a framework for investigating alleged inappropriate teacher cyber speech. This framework is designed to assist public school administrators in asking pertinent questions that will eventually aid school board attorneys in examining whether the alleged inappropriate teacher cyber speech in question is protected by the First Amendment.
YOUR TEACHER SAID WHAT ON FACEBOOK? APPLICATION OF FIRST AMENDMENT RIGHTS TO TEACHER CYBER SPEECH

BY

ANTHONY M. SCARSELLA

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A DISSERTATION SUBMITTED TO THE GRADUATE SCHOOL IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE DOCTOR OF EDUCATION

DEPARTMENT OF LEADERSHIP, EDUCATIONAL PSYCHOLOGY AND FOUNDATIONS

Doctoral Director:
Jon Crawford
ACKNOWLEDGEMENTS

I would like to thank my wonderful grandmothers and parents for instilling in me the value and importance of a good education. Without their encouragement, the completion of this dissertation would not be possible. Because of their unwavering support of my educational pursuits, I graduated from one of the worst public school systems in the State of Ohio and ended up the superintendent of one of the highest achieving school districts in Illinois. Education can change a person’s life. It certainly changed mine.

I would also like to thank Dr. Joseph M. Dubec, who has mentored me throughout my professional career as a school administrator and who was the first to encourage me to pursue my doctorate. As a result of his guidance and friendship, I completed my doctoral program and assumed my first superintendency. Thank you for your support. I am eternally grateful. Next, I’d like to thank my dissertation co-chairs, Drs. Jon Crawford and Christine Kiracofe. I can’t tell you how much I appreciated the not so subtle yet timely nudges to get moving and get this dissertation done! I’d still be writing Chapter 2 if it weren’t for both of you. Thank you also for your support and encouragement.
DEDICATION

J.M.G.
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CHAPTER ONE

INTRODUCTION

Background

In today’s electronic age public school teachers are being disciplined or terminated for their online activity on social networking sites. For example, a special education teacher in the Torrance Unified School District was recently placed on administrative leave pending an investigation for a Facebook posting that included derogatory comments about one of her students and insulting statements about the student’s parents. The teacher wrote, “Well I have an annual IEP [Individualized Education Plan] this morning with lawyers and crazy parents. The student is a hot mess but so sweet! So after work I’m hitting happy hour at least I have something to look forward too!!! Deep breath… I’m going in.” In June 2014, a music teacher was fired by Akron Public Schools for posting racist and derogatory comments on Facebook.

On Halloween night, the teacher posted,

I don’t mind if you come to my neighborhood from the ghetto to trick-or-treat. But when you whip out your teeny dicks and piss on the telephone pole in front of my front yard and a bunch of preschoolers and toddlers, you can take your nigger-

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3 Id.
ass back where it came from. I don’t have anything against anyone of any color, but niggers, stay out!\(^5\)

In 2011, a first grade teacher in Paterson, New Jersey, was fired for two posts on her Facebook page.\(^6\) The teacher wrote, “I’m not a teacher – I’m a warden for future criminals!” and “They had a scared straight program in school – why couldn’t [I] bring [first] graders?”\(^7\) The tenured teacher was afforded a hearing in front of an administrative law judge (“ALG”) who ruled in favor of the school district.\(^8\) The ALG recommended termination stating “the district’s need to operate efficiently trumped any free speech rights because ‘thoughtless words can destroy the partnership between home and school that is essential to the mission of the schools.’”\(^9\)

Teacher use of social media continues to make news headlines as a growing number of public school teachers are dismissed for posting comments, deemed inappropriate by school officials, on social media sites.\(^10\) The growing popularity of social media websites like Facebook, “has engendered a prurient interest in teachers’ ‘private’ lives by both school administrators and the media.”\(^11\) According to the National

\(^5\) Id.
\(^7\) Id.
\(^8\) Id.
Education Association ("NEA"), “Newspapers across the country have begun trolling social networking sites for embarrassing and titillating postings by local teachers.”\(^\text{12}\) In the past, public school teachers may have privately communicated their personal disapproval of certain school policies, dislike for their students, or shared a story about a drunken night out.\(^\text{13}\) However, today’s technology allows teachers to share, “the same information and feelings that formerly they privately expressed… to a large group of family, friends, and acquaintances” through electronic posts.\(^\text{14}\) In today’s technology infused world, many teachers do not recognize the line between their personal lives and professional lives is not black and white.\(^\text{15}\) This problem may only grow as an increasing number of millennials (defined as persons born between 1982 and 2002) enter the teaching profession.\(^\text{16}\) These young teachers have used Facebook for years and consider it part of their daily lives.\(^\text{17}\) The NEA has observed some young teachers, “seem oblivious to the devastating consequences of posting really stupid things in cyberspace.”\(^\text{18}\)

The NEA believes many teachers think they have an absolute First Amendment right to post anything they want on social networking sites.\(^\text{19}\) Young non-tenured teachers are in most danger of being fired for inappropriate social media postings because

\(^\text{12}\) Id.
\(^\text{14}\) Id.
\(^\text{16}\) Id.
\(^\text{17}\) Rachel A. Miller, *supra* note 13.
\(^\text{18}\) Mike Simpson, *supra* note 11.
\(^\text{19}\) Id.
school officials may non-renew their employment without an accompanying substantial justification whereas, “tenured teachers, by contrast, have far greater job security than probationary teachers and don’t need to rely on the First Amendment for protection.”

Online social networking is, “an uncharted landscape where legal systems have not yet established a precedent about how educational institutions should deal with the ideal of social networking, especially during what could be considered off-duty participation in online spaces.” Case law on teacher cyber speech is only now emerging as more and more teachers find themselves proverbial “hot water” by posting inappropriate comments on social networking sites. This makes it difficult for school administrators to decide if and when a teacher can be dismissed for alleged inappropriate cyberspace postings. Disagreement in the judicial system over public employees’ First Amendment speech rights only muddies the water for public school administrators.

For public school administrators, determining whether a public school teacher’s speech (including cyber speech) is protected by the First Amendment is no easy task. The Supreme Court outlined the required legal test to determine public employee First Amendment speech protections through a series of cases, most notably, Pickering v. Board of Educ., Connick v. Myers and Garcetti v. Ceballos. In Pickering, the Court established a balancing test that weighted the interest of a public employee in exercising his freedom of speech against the public employer’s interest in maintaining the efficient

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20 Mike Simpson, supra note 11.
22 Rachel A. Miller, supra note 13.
provision of public services. In Connick, the Court clarified the application of the balancing test by requiring courts to first consider as a threshold inquiry whether a public employee’s speech addressed a matter of public concern before applying Pickering’s balancing test. The Supreme Court’s most recent public employee speech decision in Garcetti established a new threshold inquiry for courts in deciding public employee speech cases. Garcetti required courts to first determine whether a public employee was speaking as a public employee or as a private citizen, before determining whether the speech in question was on a matter of public concern. If courts determined a public employee was not speaking as a private citizen or if the public employee’s speech did not touch on a matter of public concern, the Pickering balancing test was not to be applied as a result of the Garcetti decision.

As a result of these cases, school administrators must analyze the following when attempting to determine if a teacher has engaged in protected speech, including cyber speech:

1. Was the teacher speaking as a private citizen or as a public employee pursuant to their official duties;
2. Did the teacher’s speech address a matter of public concern; and
3. If the teacher was speaking as a private citizen on a matter of public concern; does the school district’s interest in maintaining the efficient provision of public services outweigh the teacher’s in exercising his freedom of speech?

It is reasonable to believe, however, that given the same set of facts and circumstances different public school administrators may draw different conclusions in answering the questions above. As the circuit court decisions discussed in Chapter 2 demonstrate, even the federal appellate courts are split on how to best answer these questions and none of the cases at the federal appellate level deal specifically with cyber speech.

One widely cited case dealing with public employee cyber speech at the federal district level is Spanierman v. Hughes.\(^{27}\) In Spanierman, the United States District Court for the District of Connecticut ruled a school district did not violate a teacher’s First Amendment speech rights when school district officials non-renewed the teacher for what was deemed unprofessional interactions with students through the teacher’s MySpace page.\(^{28}\) Jeffery Spanierman was an English teacher at Emmett O’Brien High School in Ansonia, Connecticut.\(^{29}\) During that time, another teacher at the high school, Elizabeth Michaud, received complaints from students regarding Spanierman’s personal MySpace page.\(^{30}\) Michaud investigated Spanierman’s page and discovered pictures of naked men and what she alleged were inappropriate “peer-to-peer like” conversations between Spanierman and some of his students.\(^{31}\) The school district determined Spanierman had “exercised poor judgment as a teacher” and notified him his contract would not be renewed for the following school year.\(^{32}\)


\(^{28}\) Id.

\(^{29}\) Id. at 297.

\(^{30}\) Id. at 297.

\(^{31}\) Id. at 297.

\(^{32}\) Id.
Spanierman sued the school district in part for violating his First Amendment free speech rights. Applying the *Pickering-Connick-Garcetti* test outlined above, the district court found Spanierman met the threshold requirement in *Garcetti* concluding he spoke as a private citizen and not as a public employee when corresponding on his MySpace page.33 Turning to the question of whether the speech touched on a matter of public concern, the district court found, “the majority of the profile page consisted of personal conversations between the Plaintiff and other MySpace users or creative writing,” except for a political poem regarding the Iraq War.34 The district court found, however, Spanierman failed to establish a causal connection between his non-renewal and the political poem. The district court also concluded regardless of the lack of causal connection between the poem and his non-renewal, if the Pickering balancing test was applied, Spanierman’s speech “was likely to disrupt school activities, and the likely disruption was sufficient to outweigh the First Amendment value of [his] speech.”35

**Problem Statement**

The application of First Amendment rights to public employee cyber speech is an emerging area of law and most school administrators are ill prepared to deal with cyber speech issues involving teachers. It is important for school administrators to understand the legal issues surrounding public employee First Amendment speech rights and

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33 *Id.* at 309.
34 *Id.*
35 *Id.* at 312.
carefully consider the specific set of circumstances of each case prior to disciplining teachers for alleged inappropriate cyber speech.

Research Questions

This study investigated the following research questions:

1. What is the relevant history of judicial application of the U.S. Constitution’s First Amendment free speech rights for public employees, including public school teachers?\(^{36}\)

2. How has the Supreme Court applied, modified and/or refined the balancing test outlined in *Pickering v. Board of Educ.*?\(^{36}\)

3. How have the United States federal Circuit Courts of Appeals applied *Pickering* and its progeny to public employee speech cases?

4. Based upon the review of the legal literature, Supreme Court decisions and United States federal Circuit Courts of Appeals decisions, what questions should administrators ask before they consult with the school district’s attorney?

Procedures

Standard legal research methodology will be used in this study. This methodology includes paying particular attention to the language the courts use in

\(^{36}\) “Public school teachers” and “public employees” are used synonymously throughout this study.
deciding public employee speech cases; reviewing the historic background of public employee speech case law as addressed in legal reviews and scholarly publications; analyzing the ways in which public employee speech cases have been interpreted in subsequent case law and legal reviews; and examining major public employee speech cases and arguments presented by the Supreme Court and the United States Courts of Appeals in crafting their decisions. The literature review of cases is arranged in chronological order of Supreme Court decisions and chronological order of Courts of Appeals decisions.

**Significance of the Study**

There have been many recent instances of teachers being disciplined or terminated due to their activity on social networking sites. A 2009 study of pre-service teachers found 88% had a social networking website account. A 2010 survey conducted by the Pew Research Center’s Pew Internet & American Life Project found, “tech experts generally believe that today’s tech savvy young people – the ‘digital natives’ who are known for enthusiastically embracing social networking – will retain their willingness to share personal information online even as they get older and take on more responsibilities.” These trends indicate young public school teachers entering the workforce are more likely to embrace social networking and more willing to share

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38 Emily H. Fuller, *supra* note 1.

39 http://www.pewInternet.org/topics/Future-of-the-Internet.aspx//.
personal information online than the previous generation of teachers. At the same time, curiosity about teachers’ private lives has led students and parents to search online about teachers. As a result, school administrators will likely be confronted with a growing number of reports of alleged inappropriate online teacher speech and required to make determinations regarding disciplinary action. Therefore, it is critical that school administrators understand the current legal issues surrounding public employee speech rights so they understand the need to be extremely careful when disciplining a public school teacher for their online speech.

**Delimitations**

This study was designed to analyze court decisions regarding public employee First Amendment speech rights. A delimitation of this study is that only federal, appellate-level case law was considered. Case law on public employee cyber speech rights is an emerging sector of the law. The majority of suits brought by teachers for alleged violations of their First Amendment speech rights dealing specifically with cyber speech have been or are in the process of being adjudicated in federal court system.

**Limitations**

Litigation is an expensive proposition for most school districts and it is likely many disputes over disciplinary action taken by school districts against teachers for alleged inappropriate cyber speech are settled outside of court. Because many of these

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settlement agreements contain confidentiality clauses, it is not possible to know how many of these situations exist and how courts would have ruled had the cases gone to trial.
CHAPTER TWO

LITERATURE REVIEW

Public employees’ First Amendment free speech rights have evolved over time since Justice Oliver Wendell Holmes famously wrote in an 1892 Massachusetts Supreme Court decision, “The petitioner (a police officer) may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” This literature review examines a series of Supreme Court decisions that have defined and redefined the free speech rights of public employees. As public employees, each Court decision has impacted public school teachers. This review focuses on Supreme Court decisions pre- and post- Pickering v. Board of Educ., the seminal 1968 Court decision that reversed the Holmesian view of public employment as privilege. Pickering laid out a test for balancing public employee free speech rights against interests of public employers in maintaining their efficient provision of public services.

Pre-1960’s

Prior to the Supreme Court’s 1968 Pickering decision, public employees were routinely denied First Amendment speech protections in the workplace. Courts consistently upheld the

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43 Id.
notion that public sector employment was a privilege and public employers had the right to impose conditions upon employment without regard for constitutional protections otherwise afforded private citizens.\(^{44}\) In deciding public employee speech cases prior to the 1960’s, courts relied heavily on the Supreme Judicial Court of Massachusetts’ 1892 decision in *McAuliffe v. Mayor of New Bedford.*\(^{45}\) In *McAuliffe*, petitioner John J. McAuliffe was removed from his position as a policeman with the City of New Bedford by the city’s mayor for violating Rule 31 of police regulations that prohibited members of the police department from soliciting money or any aid for any political purpose and for being a member of a political committee.\(^{46}\) It was alleged McAuliffe had engaged in political canvassing at two elections in the previous year and solicited votes, aid and assistance from voters in the interests of certain political parties and candidates for political office. It was alleged McAuliffe took part in these activities while off duty. Upon his removal, McAuliffe appealed to the Massachusetts Supreme Judicial Court to overturn the mayor’s decision to remove him from his position as a policeman on the grounds that the mayor lacked the authority to remove him for any cause other than an act of bad behavior and the acts. McAuliffe argued his conduct was not tantamount to bad behavior.\(^{47}\) The


\(^ {46}\) Id. McAuliffe was charged with violating Rule 31 of the police regulations of the city specifically for engaging in political canvassing, soliciting votes and seeking aid and assistance from voters. McAuliffe was afforded a hearing prior to his removal.

\(^ {47}\) Id. McAuliffe specifically asked the local judge to rule that he could be removed only for an act of bad behavior; that the hearing he was afforded should have been before the committee on police; that he did not receive due hearing; that the notice of the hearing and the complaint was irregular and insufficient law; that it was a question of law for the court to determine whether the acts found by the mayor to have been committed by the petitioner amounted to bad behavior or to soliciting aid within the meaning of Rule 31; and that the act so found did not constitute bad behavior and was not in violation of the rule.
local judge denied McAuliffe’s petition finding the mayor had sufficient cause to remove McAuliffe from his position.

After his petition was denied by the local judge, McAuliffe petitioned the Supreme Judicial Court of Massachusetts for a writ of mandamus asking the court to overturn the lower court’s affirmation of the termination of his employment. McAuliffe argued his removal violated his First Amendment rights in that it infringed upon his right to express his political opinions.\(^4\) Writing for the majority, Justice Oliver Wendell Holmes famously wrote, “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.”\(^5\) The court further stated government employers could “impose any reasonable condition upon holding offices within its control” and therefore a government employee “takes the employment on the terms which are offered.”\(^6\) According to the court, anyone wishing to benefit from the privilege of public employment could do so only by accepting the conditions of employment placed upon him or her by his or her employer even if the restrictions infringed upon rights the employee would otherwise enjoy as a private citizen. The court’s reasoning in McAuliffe would be widely cited in court decisions for the next sixty years, upholding the right of public employers to discipline or terminate their employees for their expressive activities.\(^7\)

In its 1952 decision in Adler v. Board of Education, the Supreme Court again ruled public employers had the legal authority to limit the constitutional speech rights of public employees the employees would otherwise enjoy as private citizens.\(^8\) The Court continued to rely upon

\(^{4}\) Id.
\(^{5}\) Id.
\(^{7}\) Mary-Rose Papandrea, supra note 50.
Holmes’ *McAuliffe* decision to frame public employment as a privilege. In *Adler*, the Court upheld a New York state law that provided for the disqualification and removal of superintendents of schools, teachers, and employees of public schools in any city or school district in New York who advocated for the overthrow of the government by unlawful means or who were members of organizations that had a like purpose. The case was brought to the Supreme Court on appeal by a group of public school teachers who had been dismissed from their positions for refusing to answer whether or not they were members of the Communist Party. Writing the majority opinion, Justice Minton acknowledged it was clear public school teachers had the right to assemble, speak, think and believe as they pleased but it was, “equally clear that they have no right to work for the State in the school system on their own terms.” The Court further held dismissal from public employment for membership in an organization advocating for the overthrow of the government did not result in the denial of an individual’s right to free speech and assembly. Expressing this view Justice Minton wrote, “His freedom of choice between membership in the organization and employment in the school system might be limited, but not his freedom of speech or assembly, except in the remote sense that limitation is inherent in every choice.” The Court’s decision in *Adler* was one of the last decisions prior to *Pickering*.

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53 Id. at 490. During the “Red Scare” when paranoia of communist infiltration was rampant across the country, the State of New York passed the Feinberg Law in 1949. The law allowed the state’s Board of Regents, which governs public school districts in that state, to compile a list of organizations deemed subversive and to disqualify members of such groups from teaching in the state’s public schools. See N.Y. Laws 1949, c. 360.

54 Id. at 492. The Court relied on its previous ruling in *United Public Workers v. Mitchell* in support of their opinion that public employers could restrict constitutional rights as a condition of employment, including First Amendment rights of speech and assembly. In *Mitchell*, the Court concluded that, “no rights guaranteed by the Constitution are absolute, and that all rights ‘are subject to the elemental need for order without which the guarantees of civil rights to others would be a mockery.’” See *United Public Workers v. Mitchell*, 330 U.S. 75, 95 (1947).

55 Id. at 493.
in which the Court invoked Justice Holmes’ view of public employment as a privilege and upheld the right of public employers to restrict their employees’ First Amendment speech protections as a condition of continued employment.

1960’s

The 1960’s brought the reversal of the Court’s Adler decision, the rejection of Justice Holmes’ view of public employment as a privilege and the expansion of free speech rights for public employees. In Keyishian v. Board of Regents, faculty members at the State University of New York at Buffalo sought review by the Court of a decision from the United States District Court for the Western District of New York upholding the constitutionality of New York’s teacher loyalty laws and administrative regulations that required faculty members of the State University system to sign a certificate stating they were not a Communist, and if they had ever been a Communist, they had communicated that fact to the President of the State University of New York. The faculty members had refused to sign the certification and were dismissed from their positions. In reversing the Court’s previous Adler decision, Justice Brennan, writing for the majority reasoned, “constitutional doctrine which has emerged since that decision has rejected its major premise… that public employment, including academic employment, may be conditioned upon the surrender of constitutional rights which could not be abridged by direct government action.” Citing the Second Circuit Court of Appeals’ earlier decision in this case, Brennan reaffirmed “the theory that public employment…may be subjected to any conditions, regardless

57 Id. at 605.
of how unreasonable, has been uniformly rejected." As a result of the Court’s Keyishan decision, public employees could no longer arbitrarily restrict public employees’ First Amendment constitutional protections as a condition of employment.

The Keyishan decision was followed by the Court’s landmark 1968 decision in Pickering v. Board of Educ. In 1967, Marvin Pickering, a high school teacher, wrote a letter to the editor of the local newspaper criticizing the Board of Education’s management of school district finances. Pickering was critical of the Board’s handling of a 1961 bond issuance that generated proceeds used to build two new high schools as well as the Board’s subsequent attempts to pass a referendum to increase the district’s property tax rate. Pickering was most critical of athletic spending and accused the superintendent of suppressing faculty opposition to the proposed referendum. In response to his letter, the Board of Education dismissed Pickering, charging that numerous statements in the letter were false and, “unjustifiably impugned the ‘motives, honesty, integrity, truthfulness, responsibility and competence’ of both the Board and the school administration.” The Board further charged the false statements would be “disruptive of faculty discipline, and would tend to foment ‘controversy, conflict and dissension’ among teachers, administrators, the Board of Education, and the residents of the district.” Pickering brought suit in the Circuit Court of Will County challenging his terminate. He argued his statements contained in the letter were protected by the First and Fourteenth Amendments. The Circuit

58 Id. Brennan cited several cases to support the ascertain that the decision in Adler had been “expressly rejected.” See Wieman v. Updegraff, 344 U.S. 183; Slochower v. Board of Education, 350 U.S. 551; Cramp v. Board of Public Instruction, supra; Baggett v. Bullitt, supra; Shelton v. Tucker, supra; Speiser v. Randall, supra, see also Schware v. Board of Bar Examiners, 353 U.S. 232; Torcaso v. Watkins, 367 U.S. 488.
60 Id. at 567.
61 Id.
Court affirmed the Board’s decision to terminate Pickering. Claiming a constitutional question was involved in the case, Pickering appealed directly to the Supreme Court of Illinois. The Illinois high court upheld the termination on the grounds the statements were “detrimental to the interests of the school system” and the interests of the Board of Education’s interest in operating the school district efficiently overrode Pickering’s First Amendment speech rights.\(^6^2\)

The U.S. Supreme Court granted certiorari and reversed the decision of the lower courts. In overturning the decision of the Illinois Supreme Court, Justice Marshall, writing the majority, stated,

> to the extent that the Illinois Supreme Court’s opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of the Court.\(^6^3\)

The Court stated “free and open debate is vital to informed decision-making by the electorate;” and, “teachers are, as a class, the members of a community most likely to have informed and definite opinions” regarding school matters and should be “able to speak out freely on such questions without fear of retaliatory dismissal.”\(^6^4\) While the Court acknowledged Pickering had the right to speak out about matters of public concern, its decision did not ban outright the ability of public employers to restrict their employees’ speech.\(^6^5\) Rather, the Court created a test to strike a, “balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, an as employer, in promoting the efficiency of the

\(^6^2\) *Id.* (citing the lower court’s ruling in 36 Ill. 2d 268, 225 N. E. 2d 1 (1967)).


\(^6^4\) *Id.*

\(^6^5\) *Id.*
public services it performs through its employees.”\textsuperscript{66} The Court concluded Pickering’s “exercise
of his right to speak on issues of public importance may not furnish the basis for his dismissal
from public employment.”\textsuperscript{67}

In \textit{Pickering}, the Court laid out a two-part test. The test’s first prong determined whether
or not the speech in question addressed a matter of public concern. The second prong weighted
the interest of the public employee in exercising his freedom of speech against the employer’s
interest in maintaining the efficient provision of public services. Applying this two-part test, the
Court first considered whether Pickering’s speech addressed a matter of public concern. The
Court held “the question whether a school system requires additional funds is a matter of
legitimate public concern.”\textsuperscript{68} Additionally, the Court observed Pickering’s accusations against
the Board reflected “a difference of opinion that clearly concerns an issue of general public
interest.\textsuperscript{69} After determining Pickering was speaking on a matter of public concern, the Court
turned to the second part of the balancing test: determining whether or not Pickering’s comments
jeopardized his relationships with his immediate supervisors or harmony with co-workers;
impeded his ability to perform his teaching duties; or interfered with the efficient operation of
the school district. In regards to Pickering’s relationship with his supervisors, the Court found
his relationship with the Board and the superintendent was “not the kind of close working
relationships for which it can persuasively be claimed that personal loyalty and confidence are
necessary to their proper functions.”\textsuperscript{70} The Court also rejected the Board’s argument that
Pickering’s comments would, “foment controversy and conflict among the Board, teachers,

\textsuperscript{66} Id.
\textsuperscript{67} Id. at 575.
\textsuperscript{68} Id. at 571.
\textsuperscript{69} Id.
\textsuperscript{70} Id. at 570.
administrators, and the residents of the district,” noting his letter was greeted by most readers with “massive apathy and disbelief.” Lastly, turning to the question of whether Pickering’s statements impeded his ability to teach or interfered with the efficient operation of the school district, the Court concluded the statements, “neither show[ed] nor [could] be presumed to have in any way either impeded the teacher’s proper performance of his daily duties in the classroom or… interfered with the regular operation of the schools generally.”

The *Pickering* decision forged a balancing test to determine whether the interests of the public employee in exercising his freedom of speech on matters of public concern outweighed the interest of the employer in maintaining the efficient provision of public services. The Court’s intent was to provide a broad framework for deciding cases in which public employees claimed infringement of their free speech rights. In writing for the Court, Justice Marshall acknowledged, “because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.” Rather, the *Pickering* balancing test “established some factors to consider in determining whether the balanced should be tipped in favor of the rights of the employee or toward the interest of the employer.”

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71 Id.
72 Id. at 571.
73 Id. at 569.
The first factor was the proximity of the relationship between the employee and the employer. Here, the Court concluded the relationship between Pickering and his superiors was not sufficiently close to warrant disciplinary action. In a footnote, Justice Marshall acknowledged that in some instances, “the relationship between superior and subordinate is of such a personal and intimate nature that certain forms of public criticism of the superior by the subordinate would seriously undermine the effectiveness of the working relationship between them can also be imagined.” The second factor considered by the Court, “concerned the extent to which the employer had been harmed or was unable to continue to carry out its function.” Here, the Court concluded Pickering’s statements could not “reasonably be regarded as per se detrimental to the district’s schools.” The third factor considered was the degree to which the ideas expressed by a public employee constituted a matter of public concern. In considering this factor, “the Court held that where the issue [was] one which is in the public interest and addresses concerns which the electorate may harbor, ‘it is essential that [public employees] be able to speak out freely on such questions without fear of retaliatory dismissal.’” By examining these factors, the Pickering Court, “laid the groundwork for determining what factors should be considered in upholding a public employee’s right to free speech on matters of public concern.”

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75 Id.
77 W. Eric Dennison, supra note 74.
79 W. Eric Dennison, supra note 74.
80 Id.
81 Id.
During the 1970’s, the Court refined and expanded the Pickering balancing test with decisions in *Perry v. Sindermann* (1972), *Mt. Healthy v. Doyle* (1977) and *Givhan v. Western Line Consolidated School District* (1979). In *Sindermann*, the Court ruled the Board of Regents of a community college could not base the nonrenewal of a professor’s contract on his public criticism of the Board.\(^8^2\) Robert Sindermann was employed by the Board of Regents of Odessa Junior College as a professor of Government and Social Science. Sindermann was employed under a series of one-year contracts beginning in 1965. During the 1968-1969 academic year, Sindermann was elected president of the Texas Junior College Teachers Association and was involved in public disagreements with the Odessa Board of Regents, including testimony he gave before the Texas Legislature. In May 1969, the Board of Regents voted not to renew Sindermann’s contract for an additional year.\(^8^3\) Sindermann brought suit alleging in part that the Board of Regents’ decision not to rehire him was based on his public criticism of the policies of the college administration and thus infringed his right to freedom of speech.\(^8^4\) Although not making a determination on whether Sindermann’s nonrenewal was based on his constitutionally protected speech rights, the Court applied Pickering and held “a teacher’s public criticism of his superiors on matters of public concern may be constitutionally protected and may, therefore, be

\(^8^2\) *Perry v. Sindermann*, 408 U.S. 593 (1972).
\(^8^3\) *Id.* at 594. The Board issued a press release setting forth allegations of the Sindermann’s insubordination, including defying his superiors’ order not to leave his teaching duties to testify before legislative committees. The Board did not, however, provide Sindermann an official statement of reasons for the nonrenewal of his contract.
\(^8^4\) *Id.* at 595.
an impermissible basis for termination of his employment.”\textsuperscript{85} Writing for the Court, Justice Stewart stated the government “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests – especially, his interest in freedom of speech.”\textsuperscript{86} The Court upheld the Court of Appeals judgment remanding the case back to the District Court for a determination on the actual basis for Sindermann’s nonrenewal.\textsuperscript{87}

In \textit{Mt. Healthy v. Doyle}, the Court expanded the \textit{Pickering} balancing test to include causation as a factor in public employment. In cases involving both protected and unprotected factors in employment decision, the Court reasoned an employee’s speech was not automatically protected just because it involves a matter of public concern.\textsuperscript{88} In 1966, Fred Doyle was employed as a non-tenured teacher by the Mt. Healthy City School District. Beginning in 1970, Doyle was involved in several incidents of questionable behavior with both district employees and students.\textsuperscript{89} In February 1971, the principal circulated a memo relating to teacher dress and appearance. Doyle shared the memo with a local radio station that in turn reported it as news on the air. A month later in his annual employment recommendations to the board, the superintendent recommended that Doyle not be rehired for the subsequent school year, along with nine other non-tenured teachers. Doyle requested a statement of reasons for the Board’s decision not to rehire him. The Board provided Doyle with a statement citing “a notable lack of

\textsuperscript{85} Id. at 596. Citing \textit{Pickering v. Board of Education}, 391 U.S. 563, 571 (1968).
\textsuperscript{86} Id. at 597.
\textsuperscript{87} Id. at 596.
\textsuperscript{89} \textit{Mt. Healthy v. Doyle}, 429 U.S. 274, 281 (1977) Incidences involving Doyle include an argument with another teacher that culminated in the other teacher’s slapping him; an argument with school cafeteria workers on the amount of spaghetti which had been served him; referring to students as “sons of bitches” and; making an obscene gesture to two girls in connection with their failure to obey his commands as the cafeteria supervisor.
tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships.”

This general statement was followed by two examples of incidents in which Doyle was involved, including the release of his principal’s memo to the local radio station and the obscene gestures Doyle made to students while he was supervising in the cafeteria.

Doyle sued claiming the Board’s refusal to renew his contract violated his rights under the First and Fourteenth Amendments to the United States Constitution. The District Court held Doyle’s speech rights were violated thus entitling him to reinstatement with backpay. The Court of Appeals for the Sixth Circuit affirmed the judgment and the Supreme Court granted the Board’s petition for certiorari. Applying the Pickering balancing test, the Court affirmed the District Court’s finding that Doyle’s communication with the local radio station was protected by the First Amendment.

The Court disagreed, however, with the District Court’s conclusion that the state could never fire an employee anytime if such action was based in substantial part on constitutionally protected behavior. Writing for the majority, Justice Rehnquist explained “a rule of causation which focuses solely on whether or not protected conduct played a part, ‘substantial’ or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had

90 Id. at 282.
91 Id. at 284. Citing Pickering v. Board of Educ., 391 U.S. 563, 568 (1968). “That question of whether speech of a government employee is constitutionally protected expression necessarily entails striking ‘a balance between the interests of the teacher, 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.’”
he done nothing.”93 The rationale behind this conclusion was based on the Court’s “reasoning that an incompetent public employee, near termination, should not be placed in a more favorable legal position because he engaged, at the last minute, in constitutionally protected behavior.”94 Rehnquist explained an employee “ought not be able, by engaging in such [protected] conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.”95

In deciding Mt. Healthy, the Court expanded the Pickering balance test by reasoning, “in cases involving both protected and unprotected factors, the proper test of causation when protected speech is a factor in termination should focus on whether or not the agency would have terminated the employee for adequate non-speech reasons, despite consideration of the protected speech.”96 The Court noted it was not sufficient to simply determine if the protected conduct was a substantial, or motivating, factor in the government’s employment decision. If the employee can carry the burden of proving the speech was both protected and a motivating factor in the decision, the test should be expanded to place the burden on the government employer to prove by a preponderance of evidence that the employer would have terminated the employee even in the absence of the protected speech.97

In expanding the Pickering balancing test in Mt. Healthy, the Court provided government employers an additional defense to a free speech claim. Pickering originally gave the

94 Peter C. McCabe III, supra note 92.
97 Id.
government the ability to argue the interest in promoting efficient government services
outweighed an employee’s interest in speaking out on matters of public concern. *Mt. Healthy*
promoted government employers an additional path to avoiding liability by demonstrating a
protected activity, such as speech, was merely one illegitimate reason among several legitimate
reasons for its employment decision.98

In *Givhan v. Western Line Consol. School Dist.*, the Court expanded speech protections
to include private as well as public expression.99 Bessie Givhan, a junior high English teacher,
was dismissed from employment at the end of the 1970-1971 school year as a consequence of a
series of private encounters between Givhan and her school principal. During the encounters,
Givhan made what school officials described as “petty and unreasonable demands” in a manner
the principal described as “insulting, hostile, loud and arrogant.”100 Givhan subsequently
brought suit against the school district in the United States District Court for the Northern
District of Mississippi arguing she was dismissed for questioning the school district’s
employment policies and practices, which Givhan alleged were racially discriminatory. She
claimed her dismissal violated her First and Fourteenth Amendment rights and sought
reinstatement. The District Court held Givhan’s termination violated the First Amendment and
ordered her reinstatement.101 The Fifth Circuit Court of Appeals reversed, concluding “because
[Givhan] had privately expressed her complaints and opinions to the principal, her expression

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100 Id. at 412.
101 In their decision, the district court held that the dismissal violated petitioner’s First Amendment rights, as enunciated in *Perry v. Sindermann*, 408 U.S. 593 (1972) and *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).
was not protected under the First Amendment.” The Supreme Court granted certiorari, vacated the ruling of the appeals court and remanded the case for further proceedings.

In vacating the Fifth Circuit’s decision, the Court ruled the appellate court incorrectly relied on the Court’s decisions in Pickering, Perry and Mt. Healthy in reasoning Givhan’s private expression was not constitutionally protected. Delivering the unanimous opinion of the Court, Justice Rehnquist observed, “while those cases each arose in the context of a public employee’s public expression, the rule to be derived from them is not dependent on the largely coincidental fact.” In referencing the Court’s earlier decisions in Perry and Mt. Healthy, Rehnquist further noted, “the fact that each of these cases involved public expression by the employee was not critical to the decision.” Rehnquist concluded, “Neither the [First] Amendment itself nor our decisions indicate that this freedom [of speech] is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public.”

The Givhan ruling afforded constitutional protections to the private expression of speech regarding matters of public concern and added another factor to consider when applying the Pickering balancing test. The Court stated the “manner, time and place” of protected speech must be taken into consideration in determining whether or not the protected speech would have a negative impact on the efficient and effective functioning of government. In a footnote to their ruling in Givhan, the Court noted the content of the employee’s statement must be taken into consideration when applying the Pickering balance test in cases dealing with public expression.

103 Id. at 413.
104 Id. at 415.
but in cases of private expression, “the employing agency’s institutional efficiency may be threatened not only by the content of the employee’s message but also by the manner, time, and place in which it is delivered.” The Court would elaborate on this conclusion in its subsequent decision in *Connick v. Myers*.

1980’s

During the 1980’s, one of the seminal employee speech cases was decided. In *Connick v. Myers*, the Court established a new threshold requirement for courts to consider prior to applying the *Pickering* balancing test in employee speech cases. Sheila Myers was employed as an assistant district attorney in New Orleans for five and a half years when she was informed by the District Attorney, Harry Connick, she would be transferred to prosecute cases in a different section of the criminal court. Myers objected to the transfer and expressed her opposition to her supervisors, including Connick. Myers first spoke with Dennis Waldron, one of the First Assistant District Attorneys and expressed not only her objection to the transfer but also her concerns regarding internal office matters. After Waldron suggested her views were not shared by her peers in the District Attorney’s Office, Myers prepared and distributed a questionnaire to the fifteen assistant district attorneys in the New Orleans’s office soliciting their views regarding internal office matters. The topics in the questionnaire included the office transfer policy, office morale, the need for a grievance committee, the level of confidence in superiors, and whether

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105 *Id.*
employees felt pressured to work on political campaigns of candidates supported by the District Attorney.\textsuperscript{107} Shortly after learning of the questionnaire, Connick fired Myers.

In response to her termination, Myers filed suit in the United States District Court for the Eastern Division of Louisiana, alleging her employment was wrongfully terminated because she exercised her constitutionally protected right to free speech.\textsuperscript{108} The District Court agreed with Myers, ruling the termination was the result of Myers distribution of the questionnaire. The court concluded the questionnaire addressed matters of public concern and “that the state had not ‘clearly demonstrated’ the survey ‘substantially interfered’ with the operations of the District Attorney’s office.”\textsuperscript{109} The District Court concluded Myers free speech rights had been violated and ordered Myers reinstated with backpay, damages and attorney’s fees. On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the lower court’s ruling.\textsuperscript{110} The Supreme Court granted certiorari.\textsuperscript{111}

In \textit{Connick}, the Court ruled application of the \textit{Pickering} balancing test was required only if a court concluded the speech under scrutiny addressed matters of public concern. Delivering the opinion of the Court, Justice White stated, “\textit{Pickering}, its antecedents, and its progeny lead us to conclude that if Myers’ questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge.”\textsuperscript{112} If the subject matter in Myers’ questionnaire did not address a matter of public

\textsuperscript{108} \textit{Id}.
\textsuperscript{112} \textit{Id}. at 146. Justice White further concluded, “When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community,
concern, the Court reasoned there would be no need to balance Myers’ right to express herself freely with Connick’s interest in efficiently and effectively running the District Attorney’s Office.

Establishing this new threshold requirement, the Court first turned its attention to determining whether or not Myers’ questionnaire addressed matters of public concern. Citing its previous decision in Bishop v. Wood, the Court explained, “when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee’s behavior.”

In reviewing Myer’s questionnaire, the Court concluded only one of the fourteen questions touched on a matter of public concern and the remaining questions reflected, “one employee’s dissatisfaction with a transfer and an attempt to turn that displeasure into a cause celebre.”

Question 11 of Myers’ questionnaire asked assistant district attorneys if they ever felt pressured to work on political campaigns for candidates supported by the District Attorney’s Office. Citing their previous decisions in CSC v. Letter Carriers, and Public Workers v. Mitchell, the Court ruled it was “apparent that the issue of whether assistant district attorneys are pressured to work in political campaigns is a matter of interest to the community upon which it is essential that public employees be able to

government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.”

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113 Id. at 147.  
114 Id.  
115 Id. at 155.  
speak out freely without fear of retaliatory dismissal.”

Because Question 11 touched on a matter of public concern, the Court concluded the Pickering balancing test should be applied to determine if Connick was justified in terminating Myers.

The Court concluded Myers’ creation and distribution of the questionnaire had no impact on her ability to discharge her duties in the District Attorney’s Office. The Court focused their attention singularly upon the questionnaire’s impact on the working relationships between the assistant district attorneys and their supervisors. The Court agreed with the District Court’s conclusion that the efficient and effective functioning of the District Attorney’s office required close working relationships between the assistants and their supervisors. Writing for the Court, Justice White stated, “when close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer’s judgment is appropriate.”

The Court also noted it was not necessary for the employer to wait until an actual disruption in the office occurred prior to taking action. The Court concluded asking assistant district attorneys if they had confidence in their supervisors was, “is a statement that carries the clear potential for undermining office relations” thus indicating Connick acted appropriately in discharging Myers.

In considering the questionnaire’s impact on the efficient and effective operation of the District Attorney’s Office, the Court acknowledged in some situations, additional factors must be considered in balancing the interest of the employee in freely expressing themselves and the

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121 Id.
interest of the state in efficiently and effectively operating an agency.\textsuperscript{122} Citing Given, the Court noted, “When a government employee personally confronts his immediate superior, the employing agency’s institutional efficiency may be threatened not only by the content of the employee’s message but also by the manner, time, and place in which it is delivered.”\textsuperscript{123} In examining the timeframe and location of Myers’ actions, the Court found that because the questionnaire was produced at work and completed by assistant district attorneys during work hours, Connick was justified in his belief that the questionnaire would have a negative impact on the functioning of his office. Further, the Court reasoned the context in which the questionnaire was produced was also significant.\textsuperscript{124} Here, the questionnaire was produced by Myers not long after she received the transfer notice. The Court concluded, “when 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.”\textsuperscript{125} Concluding additional weight must be given to his concern over the efficient and effective operation of his office, the Court reversed the decision of the Court of Appeals and held in favor of Connick.

In Connick, the Court modified the Pickering balancing test by requiring courts to first determine as a threshold requirement whether an employee’s speech addresses a matter of public concern before even applying the Pickering balancing test.\textsuperscript{126} Additionally, the Court explained

\begin{itemize}
  \item \textsuperscript{122} Id. “Private expression… may in some situations bring additional factors to the Pickering calculus. When a government employee personally confronts his immediate superior, the employing agency’s institutional efficiency may be threatened not only by the content of the employee’s message but also by the manner, time, and place in which it is delivered.”
  \item \textsuperscript{123} Id. at 154.
  \item \textsuperscript{124} Id. at 153.
  \item \textsuperscript{125} Id. at 152.
  \item \textsuperscript{126} Mary-Rose Papandrea, supra note 50, at 2125.
\end{itemize}
that in making this determination, “the content, form and context of a given statement, as revealed by the whole record” must be considered.\textsuperscript{127} If the employee’s speech did not address a matter of public concern, the Court concluded government officials should “enjoy wide latitude in managing their offices” and “absent the most usual circumstances” federal courts are not the proper venue for reviewing personnel decisions made by public employers.\textsuperscript{128}

The \textit{Connick-Pickering} framework was applied four years later in \textit{Rankin v. McPherson}.\textsuperscript{129} Ardith McPherson was a deputy in the office of the Constable of Harris County, Texas. As a deputy constable, McPherson performed clerical duties for the Constable’s Office. These clerical duties included entering data from paper documents into a computer that maintained an automated record of the status of civil process in the county. McPherson was not a commissioned peace officer and her clerical duties were performed in a room with limited public access. On March 30, 1981, a radio broadcast announced the attempted assassination of President Reagan. In response, McPherson remarked to a coworker “if they go for him [Reagan] again, I hope they get him.”\textsuperscript{130} The comment was overheard by another coworker, who reported it to Constable Rankin. Upon learning about the comment, Rankin summoned McPherson to his office to inquire about her comment. In response to Rankin’s inquiry, McPherson admitted to making the statement but added she “didn’t mean anything by it.”\textsuperscript{131} Upon her admission, Rankin promptly terminated McPherson’s employment.

In response to her dismissal, McPherson brought suit in the United States District Court for the Southern District of Texas alleging that her constitutional right to free speech had been

\textsuperscript{128} \textit{Id.} at 147.
\textsuperscript{130} \textit{Id.} at 381.
\textsuperscript{131} \textit{Id.}
violated. The District Court ruled McPherson’s speech was not protected speech and granted summary judgment in favor of Rankin.\textsuperscript{132} The United States Court of Appeals for the Fifth Circuit vacated the judgment and remanded the case after concluding substantial issues of material fact regarding the context in which the statement had been made precluded the entry of summary judgment.\textsuperscript{133} Upon remand, the District Court again ruled in favor of Rankin determining for a second time that McPherson’s speech was unprotected. The Court of Appeals reversed, holding McPherson’s speech did address a matter of public concern and that her position in the Constables Office was “so utterly ministerial and her potential for undermining the office’s mission so trivial” as to preclude Rankin’s from successfully arguing that the expression of her political opinion undermined his ability to maintain efficiency and discipline in the workplace.\textsuperscript{134} The Court of Appeals remanded the case for determination of an appropriate remedy where upon the Supreme Court granted certiorari to determine whether or not McPherson’s speech was protected under the First Amendment.

Following Connick’s modifications to the Pickering balancing test, the Court first turned to the threshold question of whether McPherson’s speech addressed a matter of public concern determined by “the content, form and context of a given statement.”\textsuperscript{135} In answering this threshold question, the Court concluded McPherson’s speech “plainly” dealt with a matter of public concern in that her speech addressed the policies of the Reagan administration and a

\begin{flushleft}
\textsuperscript{134} Id.
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“matter of heightened public attention: an attempt on the life of the President.”136 In Rankin, the speech in question was not directly related to the employee’s workplace.137 In previous public employee speech cases, the employee’s speech had some direct relation to the activities of the public employer for whom the employee worked.

After establishing Connick’s threshold requirement had been met, the Court applied the Pickering balancing test to balance McPherson’s interest in making a statement on a matter of public concern against Rankin’s interest in promoting the efficiency of the public services provided by his office through its employees. Citing Given, the Court considered the time, place and manner in which McPherson’s statement was made.138 The Court pointed out while made at the workplace the area within which McPherson made the statement had limited public access. This fact when considered in the absence of evidence the statement led to a conclusion the utterance had not interfered with the efficient functioning of the Constable’s office. The Court further observed that, “not only was McPherson’s discharge unrelated to the functioning of the office, it was not based on any assessment by the Constable that the remark demonstrated a character trait that made respondent unfit to perform her work.”139

In Rankin, the Court not only considered the time, place, manner and context in which McPherson made her remark but also the level of responsibility McPherson had in the Constable’s Office. Writing for the majority, Justice Marshall stated, “in weighting the State’s interest in discharging an employee based on any claim that the content of a statement made by the employee somehow undermines the mission of the public employer, some attention must be

136 Id. at 386.
137 Mary-Rose Papandrea, supra note 50, at 2128.
139 Id.
paid to the responsibilities of the employee within the agency.”140 The Court concluded where an “employee serves no confidential, policymaking, or public contact,” the ability of that employee to undermine the efficient functioning of the public office is “minimal.”141 Concluding McPherson’s clerical role in the Constable’s Office precluded her from having any significant ability to undermine the efficient functioning of the office; the Court upheld the decision of the Court of Appeals ruling that McPherson’s speech was protected under the First Amendment.

1990’s

The Court next took up the question of disputed speech in their 1994 Waters v. Churchill ruling.142 Petitioner Cheryl Churchill was an obstetrics nurse at McDonough District Hospital (MDH), a public hospital. During a work dinner break, Churchill was having a private conversation regarding working conditions at the hospital with Melanie Perkins-Graham, a nurse working in another department who was considering a transfer to obstetrics. That conversation was overheard by two other nurses, Mary Lou Ballew and Jean Welty, and by the clinical head of the obstetrics department, Dr. Thomas Koch. Several days after the incident, nurse Ballew reported to Churchill’s supervisor, Cynthia Waters that Churchill had spoken disparagingly about the working conditions in the obstetrics department and about Waters. In response to the report, Waters along with Kathleen Davis, the hospital’s vice president of nursing, met with Perkins-

140 Id.
141 Id. at 392. The Court further concluded, “At some point, such concerns are so removed from the effective functioning of the public employer that they cannot prevail over the free speech rights of the public employee.”
Graham to corroborate Ballew’s report. Perkins-Graham reported Churchill had spoken negatively about Waters and that Churchill blamed the hospital administration and Davis specifically for “ruining MDH.”

Churchill offered a different perspective of her conversation with Perkins-Graham. According to Churchill, the conversation revolved primarily around the hospital’s cross-training policy that required nurses from one department to work in another when their own department was overstaffed. Churchill did admit to criticizing Davis but only in the context of the cross-training policy and stated she actually defended Waters and encouraged Perkins-Graham to transfer to obstetrics.

Relying on the Ballew’s version of the conversation, the hospital terminated Churchill. In response, Churchill filed an internal grievance and met with hospital president, Stephen Hopper. After reviewing the written reports provided by Waters and Davis, Hopper denied Churchill’s grievance. Churchill then sued the hospital claiming the firing violated her First Amendment rights because her speech was protected, citing the Court’s previous decision in Connick v. Myers. Concluding neither version of the conversation was protected under Connick, the U.S. District Court for the Central District of Illinois granted summary judgment to hospital officials ruling Churchill’s speech was not a matter of public concern and even if it was the speech had the potential to disrupt hospital operations thereby stripping its First Amendment protection. Churchill’s termination was upheld.

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143 Id. at 666.
144 Id.
145 Id. at 667.
146 Id.
Churchill next appealed to the U.S. Court of Appeals for the Seventh Circuit. The Court of Appeals reversed the District Court’s ruling, finding the speech both addressed a matter of public concern and was not disruptive. Ruling in favor of Churchill, the court also concluded the determination of whether or not the speech was protected must hinged on what the speech actually was and not what the employer thought it was. In response to conflicting rulings in the federal circuit courts regarding disputed speech, the Supreme Court granted certiorari.

In Waters v. Churchill, the central question was not what legal test to apply to the facts of the case. Rather the plurality opinion authored by Justice O’Connor stated, “There is no dispute in this case about when speech by a government employee is protected under the First Amendment.” The Court made it clear the legal test to be applied was the Connick-Pickering test. The central question in Waters was whether courts should apply the Connick-Pickering test to the employee’s speech as perceived by the employer or as perceived by a jury. Justice O’Connor framed the central question as, “Should the court apply the Connick test to the speech as the government employer found it to be, or should it ask the jury to determine the facts for

147 Id. “The [Appeals] Court held that Churchill’s speech, viewed in the light most favorable to her, was protected speech under the Connick test: It was on a matter of public concern – ‘the hospital’s [alleged] violation of state nursing regulations as well as the quality and level of nursing care it provides its patients, -- and it was not disruptive.’

148 Id. Citing the Court of Appeals, “If the employer chooses to discharge the employee without sufficient knowledge of her protected speech as a result of an inadequate investigate into the employee’s conduct, the employer runs the risk of eventually being required to remedy any wrongdoing whether it was deliberate or accidental.” 977 F.2d 1114 (1992).

149 Id. at 668.

150 Id.
itself?"\textsuperscript{151} And if the courts were to rely on the employer’s version of the speech, to what standard should an employer be held when collecting evidence during an investigation?\textsuperscript{152}

To determine whether or not the Court should apply the \textit{Connick-Pickering} test to speech as the government employer believed it to be, the justices first turned to the standard to which an employer’s investigation must be held. Justice O’Conner reasoned, “We agree that it is important to ensure not only that the substantive First Amendment standards are sound, but also that they are applied through reliable procedures.”\textsuperscript{153} Here, the Court attempted to determine what constituted a reasonable investigation by a government employer. The Court found the standard applied to employer investigations by the Court of Appeals in this case, “would force the government employer to come to its factual conclusions through procedures that substantially mirror the evidentiary rules used in court.”\textsuperscript{154} The Court concluded an investigation was appropriate if conducted with, “the care that a reasonable manager would use before making an employment decision – discharge, suspension, reprimand, or whatever else – of the sort involved in the particular case.”\textsuperscript{155} In applying the “reasonable manager” standard to the facts in \textit{Waters}, the Court concluded the employer’s investigation into Churchill’s speech was reasonable.\textsuperscript{156}

However, the Court cautioned even if the employer’s investigation met the “reasonable manager” standard, the potential still existed for the employer to violate an employee’s First

\textsuperscript{151} Id. at 669.
\textsuperscript{152} Id. at 676. “The problem with the Court of Appeals’ approach – under which the facts to which the \textit{Connick} test is applied are determined by the judicial factfinder – is that it would force the government employer to come to its factual conclusions through procedures that substantially mirror the evidentiary rules used in court.”
\textsuperscript{153} Id. at 669.
\textsuperscript{154} Id. at 676.
\textsuperscript{155} Id.
\textsuperscript{156} Id. “Applying the foregoing to this case, it is clear that if petitioners really did believe Perkins-Graham’s and Ballew’s story....”
Amendment rights. The Court concluded it was required not only to consider the reasonableness of the employer’s investigation but also the reasonableness of the conclusions the employer drew from the investigation. In its ruling, the Court stated it did not have to apply the Connick test “only to the facts as the employer though them to be, without considering the reasonableness of the employer’s conclusions.” In its consideration of the hospital’s conclusions resulting from their investigation of Churchill’s speech, the Court found the hospital “really did” believe Perkins-Graham’s and Ballew’s recollection of the conversation between Churchill and Perkins-Graham and the hospital’s conclusion that Churchill’s speech had the potential for disrupting hospital operations was indeed reasonable. The Court vacated the judgment of the Court of Appeals and remanded the case for further proceedings to determine if the Churchill’s dismissal was actually the result of her speech or something else. In Waters, the Court recognized the right of public employers to terminate an employee for what the employer thought they said as long as the employer could prove a “reasonable” investigation was conducted and the conclusions drawn from that investigation were “reasonable.”

A year after Waters, the Court considered the constitutionality of a broad ban on the speech rights of federal employees in United States v. Nat’l Treasury Employees Union (NETU). Here, the Court did not consider employee’s actual speech but rather the statutory impediment to an employee’s ability to freely express themselves. Passed by Congress in

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157 Id. at 677.
158 Id.
160 Id. at 454. “Although Section 501 (b) neither prohibits any speech nor discriminates among speakers based on the content or viewpoint of their message, its prohibition on compensation unquestionably imposes a significant burden on expressive activity,” id. at
1989, the *Ethics Reform Act*\(^{161}\) in part amended Section 501(b) of the *Ethics in Government Act of 1978*\(^{162}\) creating a ban on the acceptance of honoraria by nearly all employees working for the federal branch of the government. The 1989 Act defined “honorarium” to include any compensation paid to a Government employee for “an appearance, speech or article.“\(^{163}\) Two unions and several career federal civil servants filed suit in the United States District Court for the District of Columbia alleging the honoraria ban infringed upon their First Amendment free speech rights. The District Court certified the National Treasury Employees Unions as the representative of a class composed of all Executive Branch employees below grade GS-16. The District Court granted the employees’ motion for summary judgment. In its decision, the court held the ban was “unconstitutional insofar as it applied to Executive Branch employees of the United States government,” and enjoined the government from further enforcement of the ban against Executive Branch employees.\(^{164}\) Recognizing the government had an interest in maintaining “the integrity of, and popular confidence in and respect for, the federal government,” the court nevertheless concluded while the government’s intention was reasonable the ban was

\(^{161}\) 5 USCS Section 501(1989).

\(^{162}\) Id.

\(^{163}\) *United States v. Nat’l Treasury Employees Union*, 513 U.S. 454, 459 (1995). “(3) The term ‘honorarium’ means a payment of money or any thing of value for an appearance, speech or article (including a series of appearances, speeches, or articles if the subject matter is directly related to the individual’s official duties or the payment is made because of the individual’s status with the Government) by a Member, officer or employee, excluding any actual and necessary travel expenses incurred by such individual (and one relative) to the extent that such expenses are paid or reimbursed by any other person, and the amount otherwise determined shall be reduced by the amount of any such expenses to the extent that such expenses are not paid or reimbursed.” 5 U.S.C. App Section 505(3) (1988 ed., Supp. V.).

\(^{164}\) Id.
overly broad in suppressing employees’ free speech rights. Upon appeal by the government, the United States Court of Appeals for the District of Columbia affirmed the lower court’s ruling noting, “even though Section 501(b) prohibits no speech, the denial of compensation places a significant burden on employees.” The appeals court agreed with the lower court’s finding that the government had an interest in “protecting the integrity and efficiency of public service” but ruled “the absence of evidence of either corruption or the appearance of corruption among lower level federal employees receiving honoraria with no connection to their employment” made the honoraria ban unconstitutional. The Court of Appeals modified the ban limiting application to members of Congress, officers and employees of Congress, judicial officers and judicial employees. Following the denial of the Court of Appeals for rehearing en banc, the U.S. Supreme Court granted certiorari.

Justice Stevens’ opinion highlighted the literary works of federal employees such as Nathaniel Hawthorne and Herman Melville and their “significant contributions to the marketplace of ideas” in suggesting the honoraria ban could limit federal employees from making such future contributions. Citing Pickering, the Court reasoned although respondents worked for the federal government, “they [had] not relinquished ‘the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public concern.’” In examining the employees’ speech, the Court found that except for a limited number of

165 Id. at 462. “The court concluded, ‘Regulatory legislation having the effect of suppressing freedom of expression to the slightest degree’ could ‘go no farther than necessary to accomplish its objectives.”
166 Id. at 461.
167 Id. at 463. The court also rejected the Government’s argument that administrative and enforcement difficulties justify Section 501(b)’s broad prophylactic rule.
168 Id.
169 Id.
exceptions, the banned speech had nothing to do with the employees’ work with the federal government and the audiences were not composed of co-workers or supervisors but were members of the general public. Justice Stevens wrote, “Neither the character of the authors, the subject matter of their expression, the effect of the content of their expression on their official duties, nor the kind of audiences they address has any relevance to their employment.”\textsuperscript{170} The Court concluded the employee speech in this case fell within the constitutionally protected category of “citizen comment on matters of public concern” thereby shifting the burden to the government to justify the ban’s existence.\textsuperscript{171}

According to the Court, the burden placed on the government to demonstrate the need for the broad honoraria was “heavy.” This was because the ban had the potential to “chill” speech before it happened. Therefore, the Court reasoned the government would need to “show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by the expression’s ‘necessary impact on the actual operation’ of the Government.”\textsuperscript{172} The government’s argument for the ban was that it reduced the potential of federal officers using their influential positions within government for personal profit and thereby negatively impacting the federal government’s operational efficiency. Although primarily concerned with Members of Congress, the government argued that a more limited ban would place an undue burden upon federal agencies charged with monitoring the ban. The Court disagreed. Citing the \textit{Rankin} decision, Justice Stevens wrote “Although operational efficiency is undoubtedly a vital government interest, several features of the honoraria ban’s text cast serious doubt on the Government’s submission that Congress perceived

\textsuperscript{170} Id. at 465.
\textsuperscript{171} Id. at 466.
\textsuperscript{172} Id.
honoraria as so threatening to the efficiency of the entire federal service as to render the ban a reasonable response to the threat.”173 The Court noted that only expressive activities were included in the ban even though several government commissions recommended banning payments for activities such as consulting and serving on boards. After examining the actual text of the ban, the Court concluded, “These anomalies in the text of the statute and regulations underscore our conclusion: The speculative benefits the honoraria ban may provide the Government are not sufficient to justify this crudely crafted burden on respondents’ freedom to engage in expressive activities.” Refusing to modify the ban, the Court and remanded the case for further proceedings.

2000’s

In City of San Diego v. Roe, the Supreme Court decided a case involving off duty speech.174 John Roe was a police officer with the San Diego Police Department (SDPD). Roe’s supervisor discovered Roe was selling copies of a video showing himself stripping off a police uniform and masturbating. However, the police uniform was not an official SDPD uniform. Roe sold the videos on the adults-only section of eBay with the username Code3stud@aol.com. Roe also sold custom videos and police equipment, including official SDPD uniforms. Upon discovering Roe’s activities, Roe’s supervisor notified a SDPD police captain who in turn reported Roe’s activities to the SDPD’s internal affairs department. Internal affairs investigated Roe’s activity and concluded Roe had violated SDPD policies, including engaging in conduct

173 Id. at 474.
unbecoming of an officer and immoral conduct. Roe admitted selling the videos, equipment and uniforms and was ordered by SDPD to “cease displaying, manufacturing, distributing or selling any sexually explicit materials or engaging in any similar behavior.”\textsuperscript{175} As a result of SDPD’s orders, Roe removed some of the items but did not change his eBay profile, which described his videos and listed their prices. Discovering the profile had not been deleted, the SDPD terminated Roe for disobedience by failing to follow lawful orders.

In response to his termination, Roe brought suit in the United States District Court for the Southern District of California arguing his termination violated his First Amendment right to free speech. Citing \textit{Connick v. Myers}, the District Court found in favor of the City, concluding Roe did not demonstrate his activities constituted expression relating to a matter of public concern. Roe appealed to the Court of Appeals for the Ninth Circuit. Relying on \textit{NTEU}, the Court of Appeals reversed the decision of the District Court finding Roe’s conduct fell within the protected category of citizen comment on a matter of public concern and Roe’s expression was not “an internal workplace grievance, took place while he was off duty and away from his employer’s premises, and was unrelated to his employment.”\textsuperscript{176} The Supreme Court granted the City’s petition for a writ of certiorari.

Reviewing the decision, the Supreme Court found the appellate court’s reliance on \textit{NTEU} was “seriously misplaced.”\textsuperscript{177} In \textit{NTEU}, the Court held “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

\begin{thebibliography}{177}
\bibitem{175} Id. at 79.
\bibitem{176} Id. at 80.
\bibitem{177} Id.
\end{thebibliography}
speculation’ in regulating it. In examining Roe’s activities, the Court disagreed with the Appeals Court’s finding Roe’s activities were unrelated to his employment. In its per curiam decision, the Court concluded “far from confining his activities to speech unrelated to his employment, Roe took deliberate steps to link his videos and other wares to his police work, all in a way injurious to his employer.” Rather than relying NTEU, the Court found the proper precedential cases were Pickering and Connick.

The Court first turned to the threshold test established in Connick, requiring courts to first determine whether or not the speech in question was on a matter of public concern. In its opinion, the Court reviewed Connick’s instruction “direct[ing] courts to examine the ‘content, form and context of a given statement, as revealed by the whole record’ in assessing whether an employee’s speech addresses a matter of public concern.” Applying Connick’s directive, the Court concluded Roe’s expression was not on a matter of public concern and therefor failed the threshold test. As a result, the Court concluded it was not required to apply the Pickering balancing test and reversed the judgment of the Court of Appeals upholding Roe’s termination.

In Garcetti v. Ceballos, the Court modified the threshold requirement outlined in Connick and in doing so created a new bright-line rule for deciding public employee speech cases. Richard Ceballos was employed as a calendar deputy for the Los Angeles County District Attorney’s Office. As a calendar deputy, Ceballos exercised certain supervisory responsibilities over other lawyers. A defense attorney contacted Ceballos in February 2000 regarding what the defense attorney believed to be inaccuracies in an affidavit used to obtain a search warrant in a

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pending criminal case. The defense attorney asked Ceballos to investigate the inaccuracies. Upon the completion of his investigation, Ceballos concluded the affidavit contained “serious misrepresentations” and contacted the deputy sheriff from the Los Angeles County Sheriff’s Department responsible for affidavit.\textsuperscript{182} Not satisfied with the deputy sheriff’s explanation of the perceived inaccuracies, Ceballos informed his superiors, Carol Najera and Frank Sundstedt of his findings.\textsuperscript{183} Ceballos also prepared a memo recommending dismissal of the pending criminal case.

In response to Ceballos’s memo, a meeting was held to discuss the affidavit. The meeting attendants included Ceballos, Sundstedt, Najera, the deputy sheriff responsible for the affidavit and other representatives from the sheriff’s department. The meeting was alleged to have been heated with representatives from the sheriff’s department criticizing Ceballos for his handling of the case.\textsuperscript{184} After the meeting and over Ceballos’s objections, Sundstedt decided to proceed with the case. Ceballos informed Najera he was constitutionally obligated to disclose his memo to defense counsel. As a result of this disclosure Ceballos was called by the defense to testify during the trial.\textsuperscript{185} Following his testimony, Ceballos claimed he was subjected to a series of retaliatory employment actions including reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse and denial of a promotion.\textsuperscript{186}

\textsuperscript{182} Id. at 414. According to Ceballos, the affidavit called a long driveway what Ceballos thought should have been referred to as a separate roadway. He also questioned statements regarding tire tracks leading from a stripped-down truck to the premises.

\textsuperscript{183} Id. at 410. Najera was Ceballos’s immediate supervisor. Sundstedt was the head deputy district attorney at the time.

\textsuperscript{184} Id. at 414.


In response to these perceived retaliatory actions, Ceballos initiated an employment grievance, which was denied. He subsequently filed suit in the United States District Court for the Central District of California alleging his First and Fourteenth Amendment rights had been violated. Ceballos argued he had been retaliated against for his memo regarding the affidavit. The District Court granted summary judgment holding because Ceballos wrote the memo pursuant to his employment duties, he was not entitled to First Amendment protection from the memo’s contents.\footnote{Id.} Ceballos appealed his case to the Court of Appeals for the Ninth Circuit. The Ninth Circuit reversed, “holding ‘Ceballos’s allegations of wrongdoing in the memorandum constitute protected speech under the First Amendment.’”\footnote{Id.} The Court of Appeals applied the \textit{Connick-Pickering} test to the facts of the case and found Ceballos’s memo recited what he thought to be governmental misconduct, which the court concluded was inherently a matter of public concern.\footnote{Id.} Concluding Ceballos’s speech touched on a matter of public concern, the court next applied the \textit{Pickering} balancing test and concluded the District Attorney’s Office failed to “even suggest” Ceballos’ memo resulted in any actual or perceived disruption to services.\footnote{Id. at 416.}

Judge O’Scannlain, in his concurrence to the court’s opinion, argued “the Supreme Court’s use of the words ‘as a citizen’ and ‘upon matters of public concern’ in \textit{Pickering} clearly indicated a twofold threshold requirement for First Amendment protection of public employee speech.”\footnote{Garcetti v. Ceballos: The Dual Threshold Requirement Challenging Public Employee Free Speech, 8 Loy. J. Pub. Int. L. 73, 76 (2006).} O’Scannlain also emphasized the distinction between speech offered by a public
employee acting as an employee and that spoken by an employee acting as a citizen expressing their personal beliefs.\textsuperscript{192} According to O’Scannlain, “when public employees speak in the course of carrying out their routine, required employment obligations, they have no personal interest in the content of that speech that gives rise to a First Amendment right.”\textsuperscript{193} The Supreme Court granted certiorari to decide whether speech made pursuant to an employee’s official duties was protected under the First Amendment.

Delivering the Court’s opinion, Justice Kennedy stated \textit{Pickering} and the cases that followed established “two inquiries to guide interpretation of the constitutional protections accorded to public employee speech.”\textsuperscript{194} Citing \textit{Connick}’s threshold requirement, the Court first needed to decide if an employee spoke as a citizen on a matter of public concern.\textsuperscript{195} If the threshold requirement could not be reached, the speech in question should be afforded constitutional protections. If the speech in question met the threshold requirement, “then [the] question [became] whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.”\textsuperscript{196} Justice Kennedy acknowledged applying these tests to speech cases sometimes proved to be difficult due to the “enormous variety of fact situations” in public employee speech cases.\textsuperscript{197} Nevertheless, Justice Kennedy concluded the Court’s overarching objectives were evident.\textsuperscript{198}

After reviewing the Court’s previous decisions in public employee speech cases, the Court returned to the threshold inquiry required by \textit{Connick}. Focusing on the relationship

\begin{itemize}
\item \textsuperscript{192} \textit{Garcetti v. Ceballos}, 547 U.S. 410, 416 (2006).
\item \textsuperscript{193} Id. at 417.
\item \textsuperscript{194} Id. at 418.
\item \textsuperscript{195} \textit{Connick v. Myers}, 461 U.S. 138 (1983).
\item \textsuperscript{196} \textit{Garcetti v. Ceballos}, 547 U.S. 410, 418 (2006).
\item \textsuperscript{197} Id.
\item \textsuperscript{198} Id.
\end{itemize}
between Ceballos’ speech and his employment as a calendar deputy, Justice Kennedy wrote “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.”199 The Court held “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.”200 The Court further concluded, “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.”201 The Court ruled public employers have the right to control speech they commissioned or created.

In Garcetti, the Court focused not on whether Ceballos’ statements were on a matter of public concern but upon whether Ceballos was speaking as a public citizen or a government employee. Justice Kennedy reasoned the Court’s precedents on public employee speech supported their decision to pay particular attention to the relationship between the speaker and his employment. Justice Kennedy pointed out prior decisions recognized the importance of government employers’ need to manage their operations.202 The Court reasoned, “Supervisors must ensure that their employees’ official communications are accurate, demonstrate sound judgment, and promote the employer’s mission.”203 The Court held if Ceballos’ employers found his memo to be “inflammatory or misguided” they had the right to “take proper corrective

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199 Id. at 421.
200 Id.
201 Id.
202 Id. at 410.
203 Id. at 422.
action.” 204 The Court concluded only when an employee speaks as a citizen addressing a matter of public concern is the Court required to balance the competing interests of employee and employer, as outlined in Pickering. The Court found to do 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.” 205 In reversing the Court of Appeal’s decision, the Supreme Court suggested a possible avenue to deal with speech made pursuant to an employee’s official duties was through “internal policies and procedures that are receptive to employee criticism,” but not through judicial intervention. 206

Justice Stevens’ dissent joined by Justices Souter and Breyer argued, “the notion that there is a categorical difference between speaking as a citizen and speaking in the course of one’s employment is quite wrong.” 207 Citing Givhan, Justice Stevens argued the Court had no difficulty in recognizing the First Amendment rights of Bessie Givhan, the public school teacher that spoke out about her school’s racist employment practices. In Givhan, the Court did not deliberate over whether or not Bessie Givhan spoke as a citizen on a matter of public concern or as a public employee pursuant to her job responsibilities. Justice Stevens argued the Court’s silence as to whether or not her speech was made pursuant to her job duties demonstrated the point was immaterial. 208 Also dissenting, Justice Souter joined by Justices Stevens and Ginsburg argued “private and public interests in addressing official wrongdoing and threats to health and safety can outweigh the government’s stake in the efficient implementation of policy, and when

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204 Id. at 423.
205 Id.
206 Id. at 424.
207 Id. at 427.
208 Id.
they do public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection.”

Garcetti created a new bright line rule to be applied to public employee speech cases. Prior to Garcetti, courts first applied Connick’s threshold requirement to determine if the public employee’s speech touched on a matter of public concern. For almost forty years, courts paid little attention to whether the employee spoke as a citizen. As a result of the Garcetti decision, courts now must first determine if a public employee spoke as a citizen or as an employee pursuant to their official duties. If a public employee speaks pursuant to their official duties, they run afoul of Garcetti’s bright line rule and their speech is not entitled to First Amendment protections. The Court refused to define what constituted speech pursuant to an employee’s official duties. Writing for the majority Court, Justice Kennedy stated because the parties did not dispute that Ceballos’ speech was made pursuant to his employment duties, the Court had “no occasion to articulate a comprehensive framework for defining the scope of an employee’s duties in cases where there is room for serious debate.” The Court rejected the argument that employers could restrict an employee’s speech right by creating broad job descriptions. Noting job descriptions often don’t reflect an employee’s actual duties, the Court argued “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

209 Id at 428.
210 Matthew R. Schroll. Garcetti v. Ceballos: Misconstruing Precedent to Curtail Government Employees’ First Amendment Rights, 67 Md. L. Rev. 485 (2008). A bright line rule is a clearly defined rule or standard, composed of objective factors which leaves little or no room for varying interpretation.
First Amendment purposes.” The Court suggested the proper inquiry into whether an employee spoke pursuant to his official duties was “a practical one.” This vague language has led to varying interpretations among the Circuit Courts.

**Post *Garcetti* Circuit Court Decisions**

Post *Garcetti*, the federal appellate courts have been left to decide what constitutes speech pursuant to a public employee’s official duties. As a result, the United States Circuit Courts of Appeal have relied on a variety of factors for determining if an employee’s speech is made pursuant to their official duties. These factors have been applied on a case-by-case basis and have led to differing approaches among the circuit courts in deciding First Amendment public employee speech cases. Some circuits have broadly defined speech made pursuant to an employee’s official duties, while other circuits have relied on a much more narrow reading of the Supreme Court’s *Garcetti* decision. Some circuits apply a standard that asks whether the employee’s speech is required by their job while other circuits ask whether the speech aids or furthers the execution of the employee’s responsibilities and duties. This section provides a

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213 Id.
214 Id.
chronological overview of post-Garcetti circuit court decisions in which the appellate courts explained their varying interpretations of Garcetti and provided frameworks or rules in which future cases before their circuit would be decided.\textsuperscript{220}

\textbf{2006}

In 2006, the Seventh Circuit was one of the first circuit courts to interpret Garcetti. In\textit{ Mills v. City of Evansville}, the Seventh Circuit held critical statements made by a police sergeant at a work meeting were not protected by the First Amendment.\textsuperscript{221} Brenda Mills was a sergeant with the police department in Evansville, Indiana, in charge of supervising crime prevention officers (CPOs) during her shift.\textsuperscript{222} After a meeting where Chief David Gulledge outlined plans to reduce the number of CPOs under Mills command, Mills told senior managers the chief’s plan would not work and community organizers would “not let the change happen.”\textsuperscript{223} Following the exchange, Mills had a negative review of the incident placed in her personnel file, was moved from her supervisory position to patrol duty and stripped of the unlimited use of a department car.\textsuperscript{224} Although restored to her supervisory position, Mills brought suit against her employer in the United States District Court for the Southern District of Indiana, alleging she had been retaliated against on account of her speech.\textsuperscript{225} The district court ruled, “Mills’s statements at the

\textsuperscript{220} Sarah R. Kaplan, \textit{supra} note 216.
\textsuperscript{221} \textit{Mills v. City of Evansville}, 452 F.3d 647 (7th Cir. 2006).
\textsuperscript{222} \textit{Id}.
\textsuperscript{223} \textit{Id}.
\textsuperscript{224} \textit{Id}. The negative review criticized Mills’ attitude at the meeting, her choice of time and place for presenting her views and her failure to work through the chain of command.
\textsuperscript{225} \textit{Id}.
meeting [were] protected...because she addressed issues of public concern but that the
department’s interest in efficient management of its operations must prevail."

The Seventh Circuit granted Mills’ appeal. Examining the Garcetti decision, the Seventh
Circuit concluded courts must first decide whether an employee was speaking as a citizen or “as
part of [their] public job,” before considering whether the subject matter of the speech touched
on a matter of public concern. Considering the context of her speech, the court found, “Mills
was on duty, in uniform, and engaged in discussion with her superiors,” and “spoke in her
capacity as a public employee contributing to the formation and execution of official policy.”
After examining the context of Mills’ statements, the court ruled her statements were made
pursuant to her official duties and “the Constitution [did] not insulate [her] communications from
employer discipline.”

In McGee v. Pub. Water Supply, the Eighth Circuit held a public employee’s speech was
unprotected by the First Amendment because the employee’s speech owed its existence to the
employee’s professional responsibilities. Mark McGee was employed by Jefferson County
Public Water Supply District #2 as District Manager. In this capacity, McGee was responsible
for the operation of the water treatment plant. During the course of his employment, McGee
made critical comments regarding repairs made at the water treatment plant. In addition, McGee
initiated several arguments regarding the repairs with other District #2 employees and two
members of the District #2 Board. During one exchange with a District #2 board member,
McGee threatened to bulldoze an area of the water treatment plant, alleging contractors had

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226 *Id.* at 647.
227 *Id.*
228 *Id.* at 648.
229 *Id.*
improperly repaired a septic tank leaving a nearby river at risk for contamination. A day after McGee’s exchange with the District #2 Board Member, McGee expressed concern that a contractor was not performing required water tests while removing sections of a pipe containing asbestos. The following day, the District #2 Board eliminated McGee’s position.

In response to the elimination of his position, McGee brought suit against his employer in the United States District Court for the Eastern District of Missouri alleging he was discharged in retaliation for exercising his First Amendment rights. The district court ruled McGee’s speech criticizing the repairs undertaken at the water treatment plant, “did not involve protected speech because he ‘was not speaking as a concerned citizen but rather was speaking and functioning as an employee who was performing his job.’” McGee appealed the decision.

On appeal from the district court, the Eighth Circuit applied its interpretation of the Supreme Court’s recent ruling in Garcetti to affirm the lower court’s ruling. Citing Garcetti, the Eighth Circuit noted, “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.” McGee argued “that Garcetti ‘does not impact’ [his] appeal because he was removed from the water pipe relocation project and was told not to concern himself with the septic tank problem.” Because he was told not to be involved with the repairs at the plant, McGee argued his comments regarding the septic tank and asbestos removal projects were made as a citizen and not pursuant to his official job duties as District Manager. The court disagreed, finding McGee’s statements about the

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231 Id. at 920.
232 Id. at 919.
233 Id. at 921.
234 Id.
235 Id.
repairs at the water treatment plant fell under his general supervisory duties as District Manager and his admitted duty to advise the Board regarding regulatory and legal requirements. The court further concluded the Board’s elimination of the McGee’s position, “was an exercise of the Board’s managerial discretion that Garcetti expressly leaves to public employers, not to the federal courts applying the First Amendment.” Because McGee’s comments were related to duties he would, “actually be expected to perform,” as District Manager, the Eighth Circuit found his comments were not protected under the First Amendment.

The Eleventh Circuit also decided a 2006 public employee speech case in the wake of Garcetti. In Battle v. Bd. of Regents, the Eleventh Circuit held a financial aid advisor’s attempts to expose alleged fraud by her superior were not protected by the First Amendment. Lillian Battle was a financial aid counselor in the Office of Financial Aid and Veteran Affairs (“OFA”) at Fort Valley State University (“FVSU”). As a financial aid counselor, Battle was required to verify the completion and accuracy of student files and report potential fraud. Upon examining files previously handled by her supervisor, OFA Director Jeanette Huff, Battle discovered what she believed to be “fraudulent mishandling and mismanagement of Federal financial aid funds.” In 1996, Battle confronted Huff about the alleged fraud and met with FVSU President Oscar Prater. Battle explained to Prater that Huff, “was falsifying information,

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236 Id.
237 Id.
238 Id.
239 Battle v. Bd. of Regents, 468 F.3d 755, 757 (11th Cir. 2006).
240 Id. at 758.
241 Id.
awarding financial aid to ineligible recipients, making excessive awards, and forging
documents.” 242 No action was taken by either Huff or Prater.

In 1998, Battle’s evaluation contained criticisms of her performance, Battle responded in
the comments section stating, “I feel that I am being treated unfairly.” 243 In response to the
criticisms, Battle met with FVSU Vice-President of Student Affairs Cynthia Sellers. At that
meeting, Battle informed Sellers about Huff’s alleged misconduct and warned that, “she was
going to tell.” 244 Battle also met for a second time with President Prater regarding her evaluation
and “to reiterate the improprieties” in the OFA. 245 In May 1998, Battle was informed her
contract would not be renewed. Battle appealed to the Board of Regents of the University
System of Georgia. A grievance committee investigated and the decision to not renew Battle’s
contract was upheld. 246 Following the non-renewal of her contract, Battle met with officials
from the Department of Education (“DOE”) and provided documents to support her claims of
alleged fraud in the OFA. In April 2002, FVSU reached a $2,167,941 settlement with the DOE
to settle questioned costs in state audits that revealed a “series [of] noncompliance with federal
regulations.” 247

In June 2002, Battle filed suit in the United States District Court for the Northern District
of Georgia alleging in part she was discharged in violation of the First Amendment for reporting
her concerns about fraud. 248 The district court ruled against Battle, finding her employer did not
violate Battle’s free speech rights, “because the motivation for [Battle’s] speech was unclear and

242 Id.
243 Id.
244 Id.
245 Id. at 759.
246 Id.
247 Id.
248 Id.
preexisting case law did not give [her employer] a fair warning that [Battle’s] speech must be treated as ‘a matter of public concern’ under the circumstances.\footnote{249} Battle appealed the district court’s ruling to the Eleventh Circuit.

In its opinion, the Eleventh Circuit laid out the central question in the case stating, “In determining whether a public employee’s speech is entitled to constitutional protection, we must first ask ‘whether an employee spoke as a citizen on a matter of public concern.’”\footnote{250} Citing \textit{Garcetti}, the court asserted, “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.”\footnote{251} Turning to the specific facts of the case, the Eleventh Circuit acknowledged Battle, “admitted that she had a clear employment duty to ensure the accuracy and completeness of student files as well as to report any mismanagement or fraud she encountered in the student financial aid files.”\footnote{252} The court pointed out Department of Education guidelines required all financial aid workers, including Battle, to report suspected fraud.\footnote{253} The court also acknowledged Battle herself alleged her contract was not renewed because of her, “continuous efforts to expose fraud within FVSU’s Financial Aid Department.”\footnote{254} Because Battle admitted it was within her employment duty to report fraud and Department of Education guidelines required her to report fraud, the Eleventh Circuit ruled Battle’s speech was made pursuant to her official duties and therefore not

\footnotetext[249]{\textit{Id.}}\footnotetext[250]{\textit{Id.} at 760. Citing \textit{Garcetti v. Ceballos}, 547 U.S. 410, 418 (2006).}\footnotetext[251]{\textit{Id.} Citing \textit{Garcetti v. Ceballos}, 547 U.S. 410, 418 (2006). The court also cited its own decision in Morgan v. Ford, 6 F.3d 750, 754 (11th Cir. 1993), stating “[W]e consider whether the speech at issue was made primarily in the employee’s role as citizen, or primarily in the role of employee.”}\footnotetext[252]{\textit{Id.} at 761.}\footnotetext[253]{Christine Elzer, \textit{supra} note 211.}\footnotetext[254]{\textit{Battle v. Bd. of Regents}, 468 F.3d 758, 761 (11th Cir. 2006).}
protected by the First Amendment. According to the court, FVSU could constitutionally fire Battle for reporting suspected fraud even though she was required both by law and her job to do so.

2007

In 2007, the circuit courts decided a number of post-<i>Garcetti</i> public employee speech cases including: <i>Curran v. Cousins</i>, 509 F.3d 36 (1<sup>st</sup> Cir. 2007); <i>Foraker v. Chaffinch</i>, 509 F.3d 231 (3<sup>rd</sup> Cir. 2007); <i>Williams v. Dallas Independent School District</i>, 480 F.3d 689 (5<sup>th</sup> Cir. 2007); <i>Haynes v. City of Circleville</i>, 474 F.3d 357 (6<sup>th</sup> Cir. 2007); <i>Vose v. Klement</i>, 506 F.3d 564 (7<sup>th</sup> Cir. 2007); <i>Casey v. West Las Vegas Independent School District</i>, 473 F.3d 1323 (10<sup>th</sup> Cir. 2007); <i>Brammer-Hoelter v. Twin Peaks</i> (10<sup>th</sup> Cir.); <i>D’Angelo v. School Board of Polk County</i>, 2007 U.S. App. LEXIS 18235 (11<sup>th</sup> Cir.); <i>Khan v. Fernandez-Rundle</i>, 287 Fed. Appx. 50 (11<sup>th</sup> Cir. 2007).

In <i>Curran v. Cousins</i>, the First Circuit held the Essex County Sheriff’s Department did not violate the free speech rights of an officer when it terminated the officer for making threats against his superiors in the department. Joseph Curran was employed by the Essex County Sheriff’s Department as a corrections officer in June 1991. Frank Cousins, Jr. was appointed Sheriff of Essex County in 1996. During Cousins’ 2004 reelection, Curran served as campaign manager for Cousins’ opponent. Cousins won reelection. Thereafter, Curran was removed from the Department’s Tactical Team. In October 2005, Curran was confronted by Department

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<sup>255</sup> Christine Elzer, <i>supra</i> note 211.
<sup>256</sup> Id. at 383.
Captain Arthur Statezni regarding the legitimacy of a sick day taken by Curran the previous month. During that exchange, Curran threatened Statezni telling him he and the other captains were “gonna get shot.” A disciplinary hearing was held thereafter and the Department found Curran’s comments to Statezni to be “threatening and menacing.” Curran was suspended for thirty days.

Curran also utilized the public discussion board on his union’s website to disparage both the department and his superiors. On August 1, 2004, Curran posted a message comparing the sheriff and senior officers to Hitler and Nazi officers. On November 30, 2005, Curran posted a message on the discussion board alleging administrators were failing to speak out against the “unfairness of the discipline and harassment being doled out to political/union rivals of the sheriff.” At the end of his message, Curran gave a, “totally unrelated history lesson.” It read:

During WWII Adolf Hitler’s (whose motto was “Have no pit! Act brutally!”), generals were deathly afraid of him followed orders regardless of how immoral/wrong the orders were. Near the end, some of the generals realized just how wrong the orders were and started to plot against him knowing that the end was inevitable. Well you know how the story ended. My point is that the right thing is not always the easy thing. Stay strong my brothers/sisters and I’ll see you at the Union Party.

In response to the posting, Curran was subjected to another disciplinary hearing on February 13, 2006, and subsequently terminated for his “threatening and/or insubordinate manner while on

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257 Curran v. Cousins, 509 F.3d 36, 40 (1st Cir. 2007). In reference to the department’s policy on conducting home visits when officer’s call in sick, Curran told Statezni, “I’ll see you tomorrow at my house… I’ll be out sickness in family [sic]… you[‘re] not welcome… a cruiser would be parked in [my] driveway.”

258 Id. at 40.

259 Id. In his message, Curran referred to corrections officers as “Jews that got marched into the death chambers,” Sheriff Cousins as “Hitler” and senior officers as “The Nazi – SS that pushed the Jews in.”

260 Id. at 42.

261 Id.
duty,” and conduct, “tend[ing] to adversely affect the operations of the Department by prompting employees to second-guess direct orders.”

On March 30, 2006, Curran brought suit in the United States District Court for the District of Massachusetts against Sheriff Cousins and Special Sheriff Thomas C. Goff alleging in part the violation of his First Amendment rights. The district court found, “while Curran’s November 30 posting narrowly involved a matter of public concern, the interests served by his speech were outweighed by the Department’s legitimate interests in preventing disruptions in carrying out its mission of law enforcement and maintenance of a correctional institution.”

Curran appealed the district court’s decision to the United States Court of Appeals for the First Circuit.

In its decision, the First Circuit cited Garcetti stating, “Garcetti [had] clarified and expanded on the earlier [public employee speech] law.” In its analysis of Garcetti, the First Circuit concluded the threshold inquiry in public employee speech cases was to determine “whether the employee spoke as a citizen on a matter of public concern.” The First Circuit further concluded the threshold inquiry had two parts. The first part required courts to determine if the employee spoke as a private citizen before turning to the second part requiring courts to determine if the speech was on a matter of public concern. Applying this test to Curran’s threatening exchange with Statezni over his use of a sick day, the First Circuit found, “Curran’s

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262 Id. at 43.
263 Id.
264 Id. at 44.
265 Id.
266 Id.
initial threats were made not as a citizen, but were made in the course of his duties within the Department, to his superiors, and during a discussion of official Department policy."²⁶⁷

The court next turned to examining Curran’s November 30 posting on the union discussion board. Here, the court held because the union website was “open to public posting and viewing,” Curran was acting as a citizen when posting to the message board.²⁶⁸ The court also held the first and second paragraphs of Curran’s November 30 posting could, “be read as accusing Cousins of using political favoritism rather than merit in making personnel decisions as to non-policymaking employees,” and, “a public official basing personnel actions, as to non-policymaking employees, on political affiliation rather than merit is a topic of public concern.”²⁶⁹

In regards to Curran’s November 30 posting, the First Circuit found Curran spoke as a citizen on a matter of public concern, passing the threshold inquiry outlined in Garcetti. Next, the court turned to determining if the Department had “adequate justification” for terminating Curran.²⁷⁰ In their determination, the court found the speech in Curran’s November 30 posting, “included speech going far beyond providing information in which there was a legitimate public interest,” and contained speech that was, “vulgar, insulting, and defiant.”²⁷¹ The court reasoned such speech was “entitled to less weight in the Pickering balance.”²⁷² The court found Curran’s statements, “went directly to impairing discipline by superiors, disrupting harmony and creating friction in working relationships, undermining confidence in the administration, invoking

²⁶⁷ Id.
²⁶⁸ Id.
²⁶⁹ Id. at 46.
²⁷⁰ Id. at 47.
²⁷¹ Id.
²⁷² Id. at 49.
oppositional personal loyalties, and interfering with the regular operation of the [department]."  

In applying the Pickering balancing test, the First Circuit concluded the department’s interest in efficiently and effectively managing its operations outweighed Curran’s interest in exercising his freedom of speech. The decision court’s decision was affirmed.

In Foraker v. Chaffinch, the Third Circuit held the First Amendment did not protect the concerns raised to supervisors by two Delaware State Troopers over working conditions at a Delaware State Police (DSP) firing range. Troopers Price and Warren were employed as instructors in the DSP Firearms Training Unit and assigned to a DSP indoor firing range. The range and those who used it encountered problems since its opening. Price and Warren described the working conditions at the firing range as “intolerable.” The troopers specifically expressed to their DSP supervisors concerns with malfunctioning equipment and the detection of elevated levels of heavy metals in blood samples taken from personnel working at the firing range. In March 2004, the DSP closed the firing range and an investigation by the State Auditor ensued. Price and Warren met with the State Auditor during the course of the investigation. After their meeting, the troopers’ attorney released to the local newspaper verbatim statements made by the troopers to the State Auditor regarding conditions at the firing range. As a result of their failure to follow DSP policy prohibiting troopers from speaking to the press without supervisory approval, Price and Warren were placed on light duty.

In response to being placed on light duty, Price and Warren brought suit against DSP in the United States District Court for the District of Delaware alleging in part the violation of their

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273 Id.
274 Foraker v. Chaffinch, 504 F.3d 231, 233 (3rd Cir. 2007).
275 Id.
First Amendment free speech rights. The district court held the First Amendment did not protect the troopers’ speech, “because their reports to the DSP chain of command and statements to the Auditor were part of their official duties as Troopers and they had been ordered to cooperate.” The troopers appealed the district court’s ruling. The Third Circuit considered whether their speech was protected in light of *Garcetti*.

In their appeal, the troopers argued the First Amendment protected expressing their concerns about the working conditions at the firing range up the chain of command and to the State Auditor, “because it exposed serious health and safety concerns and exposed government incompetence and wrongdoing.” The troopers asserted *Garcetti* had no impact on their case because as fire arms instructors their job duties entailed instructing students on how to fire weapons; not speaking out about health and safety problems at the firing range. The troopers further argued the release of their statements to the State Auditor by their attorney was not pursuant to their job duties, and therefore protected by the First Amendment.

The Third Circuit disagreed. The court concluded because Price and Warren possessed specialized knowledge of the proper functioning of the equipment at the firing range and that properly functioning equipment was required to successfully conduct their educational programs, it was within the troopers’ job function to report problems with the equipment to their superiors within

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276 *Id.* at 234. The troopers also alleged Petition Clause violations, claiming they suffered an adverse employment action as a result of their constitutionally protected right to petition the government. 277 *Id.* at 233. The court also dismissed the alleged Petition Clause violations. 278 *Id.*. The court also granted the Troopers’ appeal to determine whether the activities they engaged in were protected by the Petition Clause. 279 *Id.* at 238. 280 *Id.*. 281 *Id.* at 243.
DSP. The court found, “Price and Warren were expected, pursuant to their job duties, to report problems concerning the operations at the range up the chain of command.”

The court also rejected Price and Warren’s argument that they were not functioning within the scope of their employment duties when they made their statements to the State Auditor. The court recognized giving statements to the State Auditor was not part of the troopers’ everyday duties, however, the court found the troopers’ statements to the State Auditor were prompted by previous statements made by the troopers up the chain of command within DSP and the Troopers were ordered to speak to the State Auditor by the Governor’s Office. The court concluded the Troopers were “expected to report truthfully to the State Auditor upon being ordered to do so.”

Because Price and Warren were speaking pursuant to their employment duties when they made their concerns about conditions at the firing range known to their supervisors up the chain of command and the State Auditor, the Third Circuit ruled their speech was not protected under the First Amendment.

In *Williams v. Dallas Indep. Sch. Dist.*, the Fifth Circuit ruled the First Amendment did not protect a high school’s athletic director’s memos to a school district office manager and school principal expressing his concerns over an athletic department account. Gregory Williams was employed as the Athletic Director and Head Football Coach with the Dallas Independent School District. Prior to the start of the 2003 school year, Williams requested information regarding an athletic account from the school’s office manager. Upon the office manager’s refusal to give Williams information regarding the account, Williams composed

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282 Id. at 240.
283 Id. at 241.
284 Id. at 233.
285 Id. at 241.
286 *Williams v. Indep. Sch. Dist.*, 480 F.3d 689 (5th Cir. 2007).
several memos to the office manager and principal expressing his dismay over their refusal to provide him the information he requested. Four days after receiving the memo from Williams, the principal of the school removed Williams as athletic director. Williams was later placed on administrative leave and his contract was not renewed that spring.\textsuperscript{287}

In response to the non-renewal of his contract, Williams filed suit against the school district in the United States District Court for the Northern District of Texas alleging retaliation for engaging in speech protected by the First and Fourth Amendments. The district court found in favor of the school district, holding Williams’s memo to the principal did not address a matter of public concern and therefore was not protected under the First Amendment.\textsuperscript{288} Williams appealed the district court’s decision. On appeal the Fifth Circuit considered whether Williams’s speech was protected under the First Amendment.

In his appeal, William’s asserted his memos to the office manager and principal were protected under the First Amendment because he wrote them as a “taxpayer” and a “father.”\textsuperscript{289} Williams further argued his memos were “identical to that in \textit{Pickering v. Board of Education},” suggesting like Pickering, he too was protesting the misappropriation and discriminatory funding of his school district and therefore speaking as a citizen on a matter of public concern.\textsuperscript{290} The school district conceded Williams was not required as the Athletic Director to write memos regarding athletic accounts. \textit{Garcetti}, the Fifth Circuit stated, required a review the facts of the case and a determination of, “the extent to which… a public employee is protected by the First

\textsuperscript{287} \textit{Id.} at 690.
\textsuperscript{288} \textit{Id.} at 691.
\textsuperscript{289} \textit{Id.} at 692.
\textsuperscript{290} \textit{Id.}
Amendment if his speech is not necessarily required by his job duties but nevertheless is related to his job duties.”

In interpreting *Garcetti*, the Fifth Circuit concluded public employee speech cases, “when viewed as a whole, distinguish 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.” Turning to the facts of the case, the court concluded the speech contained in Williams’s memos pertained to his “daily operations” as Athletic Director. The court found as Athletic Director, Williams needed information about the athletic account to “operate the athletic department.” Because Williams’s memos were written in the course of performing his job as Athletic Director, the Fifth Circuit ruled the First Amendment did not protect his speech.

In *Haynes v. City of Circleville*, the Sixth Circuit held a police officer’s speech regarding cutbacks to his department’s canine unit was not protected speech under the First Amendment because the officer’s speech was made pursuant to his professional duties. David Hayes was employed as a patrolman and a canine handler for the City of Circleville. Hayes claimed the canine unit established in 1996 was created in part due to his input. Hayes also claimed the department considered him to be the administrator of the canine program as well as a handler. As the department’s canine handler, Hayes spent 12 hours per week traveling and training his dog at a training facility located outside of Circleville. In February of 2003, Chief of Police Harold Gray instituted cutbacks in the canine unit limiting travel and training time for canine

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291 *Id.* at 693.
292 *Id.*
293 *Id.* at 694.
294 *Id.*
295 *Id.*
296 *Haynes v. City of Circleville*, 474 F.3d 357, 364 (6th Cir. 2007).
297 *Id.*
handlers to eight hours every three weeks. Hayes objected to the cutbacks and wrote a lengthy memo to Chief Gray expressing his displeasure with the reduced training time. In the memo, Hayes warned the chief of a “series negative consequences” resulting from the cutbacks to the canine unit and suggested the chief would later be accused of “deliberate indifference,” “negligence” and “failure to train” as a result of the reduction in training time.

Three days after delivering the memo to Chief Gray, a scheduling officer called Hayes not long before the start of his regular work shift and asked him to report early to assist with a drug search. Hayes refused. After his refusal, Chief Gray relieved Hayes of his canine handler duties and subsequently placed Hayes on administrative leave pending a psychological examination. Sometime shortly thereafter, officers were dispatched to Hayes’s house to pick up his canine equipment. Hayes provided the officers his equipment wrapped up as a Christmas gift with a Daffy Duck tag addressed to Chief Gray stating, “Do not open until Christmas.” At a subsequent disciplinary hearing, Hayes was accused of “multiple counts of insubordination, neglect of duty, unsatisfactory performance, disrespect, failure to report to duty as required, conduct unbecoming an officer, and sick-leave violations.” Thereafter, Hayes was fired. In response to his termination, Hayes brought suit against the City of Circleville and Chief Gray in the United States District Court for the Southern District of Ohio alleging retaliatory discharge based on the exercise of his First Amendment rights.

In considering Hayes’s allegations of First Amendment violations, the Sixth Circuit first examined the context of the police officer’s speech to determine if his statements were made

298 Id. at 360.
299 Id.
300 Id.
301 Id. at 361.
302 Id.
“pursuant to his duties as a canine handler and patrolman for Circleville.” The court found Hayes was involved in the development of the canine program; was the author of the program’s standard operating procedures and; was considered the de facto administrator of the canine program. Hayes admitted both his “Christmas present” and memo to Chief Gray were in response to the cutbacks in the canine unit. The court concluded Hayes’ memo to the Chief Gray was written as a result of the officer’s concern over the cutbacks in the canine training program and, “the context of the memo as a whole [was] best characterized as that of a disgruntled employee upset that his professional suggestions were not followed as they had been in the past.” The court ruled the officer was acting not as a private citizen but as a public employee carrying out his professional duties when he lodged his complaints to the chief about the cutbacks. In support of their conclusion Hayes was acting pursuant to his official duties, the Court noted the officer, “communicated solely to his superior… indicating that he was speaking ‘in [his] capacity as a public employee contributing to the formation and execution of official policy.’” After considering both the context of the speech and the audience to whom it was directed, the Sixth Circuit cited Garcetti, to support the conclusions Hayes’ speech was unprotected because it was made pursuant to his official duties.

In another 2007 decision, Weisbarth v. Geauga Park Dist., the Sixth Circuit held a park ranger’s comments to a consultant hired by her employer as part of a departmental evaluation

303 Id. at 364.
304 Id.
305 Id.
306 Id.
307 Id.
308 Id.
309 Id.
were not protected by the First Amendment. \(^{310}\) Denise Weisbarth was employed as a park ranger with the Geauga Park District. In 2003, the park district hired a paid consultant, Richard Sherwood, to evaluate the department, including allegations of morale and performance problems. \(^{311}\) As part of his evaluation, Sherwood rode along with Weisbarth in her patrol vehicle on one of her shifts. At this time Weisbarth discussed with Sherwood a recent disciplinary letter she received from the park district and her intention to write a rebuttal. \(^{312}\) At Sherwood’s prompting, Weisbarth also shared her thoughts regarding “morale and performance problems within the Ranger Department.” \(^{313}\) Weisbarth alleged as a result of her conversation with Sherwood during the ride along, Sherwood labeled Weisbarth a “source of friction” and reported she had, “a personal dislike for nearly all of her co-workers.” \(^{314}\) Weisbarth alleged Sherwood designed a plan to fire her and that plan was put into place after Weisbarth failed to notify her supervisors when she left town to deal with a family crisis. \(^{315}\) Weisbarth’s supervisor reported when she was questioned about her failure to provide advanced notification of her absence, Weisbarth became “emotional” and “slammed open a couple of doors as she left the meeting.” \(^{316}\) As a result of her behavior, the park district ordered Weisbarth to undergo psychological testing to determine her fitness for duty. The psychologist, hired by the park district, found Weisbarth unfit for duty. Weisbarth then obtained a second evaluation from a psychologist recommended by her employees’ union. The second psychologist found Weisbarth fit for duty. The park district insisted on a third evaluation, which agreed with the first

\(^{310}\) Weisbarth v. Geauga Park Dist., 499 F.3d 538 (6th Cir. 2007).
\(^{311}\) Id. at 539.
\(^{312}\) Id. at 540.
\(^{313}\) Id.
\(^{314}\) Id.
\(^{315}\) Id.
\(^{316}\) Id.
psychologist’s evaluation and found Weisbarth unfit for duty. Weisbarth was terminated after the third evaluation.\textsuperscript{317}

In response to her termination, Weisbarth filed a grievance through her union.\textsuperscript{318} She also filed suit in the United States District Court for the Northern District of Ohio alleging retaliation and asserting she was terminated for her comments to Sherwood during the ride along in violation of her First Amendment rights.\textsuperscript{319} The district court found “\textit{Garcetti} did not preclude Weisbarth’s claim,” concluding Weisbarth’s comments to Sherwood during the ride along were not “explicitly part of her official job description as a park ranger.”\textsuperscript{320} The district court ruled, however, Weisbarth’s speech did not touch on a matter of public concern and therefore was not protected by the First Amendment.\textsuperscript{321} Weisbarth appealed to the Sixth Circuit.

Citing \textit{Garcetti}, the Sixth Circuit stated, “when public employees make statements \textit{pursuant to their official duties}, the employees are not speaking as citizens for First Amendment purposes.”\textsuperscript{322} The court reasoned, “the ride along conversation between Weisbarth and Sherwood… took place in the context of Sherwood’s official duty to interview Weisbarth” and “that the GPD desired Sherwood to ask and Weisbarth to answer the job-related questions that Sherwood posed.”\textsuperscript{323} The court found, “\textit{Garcetti} leads us to the conclusion that such speech is not protected under the First Amendment.”\textsuperscript{324} Weisbarth argued speaking to Sherwood was not

\textsuperscript{317} \textit{Id.} Weisbarth alleged the psychologists conspired with the park district in its attempt to fire her.

\textsuperscript{318} \textit{Id.} The arbitrator ultimately agreed with Weisbarth and suggested the park district and Weisbarth attempt to work out a separation agreement.

\textsuperscript{319} \textit{Id.} at 539.

\textsuperscript{320} \textit{Id.} at 542.

\textsuperscript{321} \textit{Id.} at 543.


\textsuperscript{323} \textit{Id.} at 543.

\textsuperscript{324} \textit{Id.}
part of her official duties as a park ranger and therefore her comments were protected under the First Amendment.\textsuperscript{325} The Sixth Circuit disagreed reasoning Weisbarth’s obligation to comply with Sherwood’s evaluation was an “ad-hoc duty that arose in the course of [her] duties” and “\textit{Garcetti}… implicitly recognized that such ad hoc or de facto duties can fall within the scope of an employee’s official responsibilities despite not appearing in any written job description.”\textsuperscript{326} The Sixth Circuit cited its recent decision in \textit{Haynes v. City of Circleville} in support of its reasoning.\textsuperscript{327} In \textit{Hayes}, the court “held that [a canine trainer’s] complaints about the reduction in dog training, although obviously not part of his official written job description, occurred as part of ‘carrying out his professional responsibilities’ of training dogs, and therefore were made ‘pursuant to his official duties.’”\textsuperscript{328} The court also considered the fact that Weisbarth’s comments were made to a third party consultant and not directly to her employer, as had been the case in both \textit{Garcetti} and \textit{Hayes}. Here, the court found, “The reasoning of \textit{Garcetti} and \textit{Hayes}, however, [made] clear that the determinative factor in those cases was not where the person to whom the employee communicated fit within the employer’s chain of command, but rather whether the employee communicated pursuant to his or her official duties.”\textsuperscript{329} The court ruled, “Although firing Weisbarth based on her assessment of department morale and performance [as voiced to Sherwood] may seem highly illogical or unfair, the relevant question is whether the

\begin{itemize}
\item[$\textsuperscript{325}$] \textit{Id.} at 544.
\item[$\textsuperscript{326}$] \textit{Id.}
\item[$\textsuperscript{327}$] \textit{Id.} Citing \textit{Haynes v. City of Circleville}, 474 F.3d 357 (6\textsuperscript{th} Cir. 2007).
\item[$\textsuperscript{328}$] \textit{Id.} Citing \textit{Haynes v. City of Circleville}, 474 F.3d 357, 364 (6\textsuperscript{th} Cir. 2007).
\item[$\textsuperscript{329}$] \textit{Id.} at 545.
\end{itemize}
firing violated her free-speech rights under the First Amendment.” The Sixth Circuit held it did not.

In *Vose v. Kliment*, the Seventh Circuit ruled a police sergeant’s voicing of alleged misconduct by detectives from the major case unit was not protected under the First Amendment because the sergeant was speaking pursuant to his official duties as the supervisor of the narcotics unit, and not as a citizen. Ronald Vose had been employed as a police sergeant in the narcotics unit of the City of Springfield Police Department for 26 years, including 13 years in the narcotics unit. As sergeant, Vose supervised the narcotics unit. In 2004, Vose learned detectives in the major case unit were using alleged drug investigations as a means to gather evidence in order to have a lawful basis to obtain search warrants. Vose conducted his own independent investigation of the major case unit detectives and determined the detectives were not following the Department’s procedures for obtaining search warrants, violating laws applicable to the search warrant process and filing false or misleading affidavits with the courts in order to obtain search warrants. In the fall of 2004, Vose presented his findings to his superiors, Donald Kliment, Chief of Police and William Rouse, Deputy Chief of Policy in charge of the investigations unit. In November 2006, Vose notified Rouse that some detectives from the major case unit were schedule to give testimony at a criminal trial and Vose believed “there [might] be a problem with their testimony.” Vose was directed by Rouse to attend the trial and report back any allegations of misconduct. At the trial, Vose was confronted by one of the detectives from the major case unit and was accused of working for the defendant. Two weeks

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330 *Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 545 (6th Cir. 2007).
331 *Vose v. Kliment*, 506 F.3d 565, 569 (7th Cir. 2007).
332 *Id.* at 566.
333 *Id.*
334 *Id.* at 567.
after the confrontation, Vose was served with an internal affairs complaint related to the incident and was directed by Rouse to produce a written report about Vose’s findings of alleged misconduct by the major case unit. Vose presented his written report to Rouse in February 2005. The report, Vose criticized Rouse’s handling of the alleged misconduct.

Vose alleged after presenting his written findings, a number of retaliatory actions were taken against him. Vose alleged Rouse began interfering with Vose’s operations of the narcotics unit and in April 2005 Kliment gave Vose a directive to either, “get along” with the detectives Vose had implicated in his independent investigation or to request a transfer out of the narcotics unit.\textsuperscript{335} That same month, Vose presented Kliment with a memorandum requesting a transfer out of the narcotics unit, noting he considered the transfer to be involuntary.\textsuperscript{336} In May 2005, Vose was issued a written reprimand for the November 2004 incident with the major case unit detective at the trial Vose had been directed to attend. In May 2005, Vose was transferred to the patrol division. At the time, Vose found two empty boxes with his name on them outside his office suggesting he had been “sent packing.”\textsuperscript{337} In January 2006, Vose “felt forced” to resign from the Department, and did so that same month.\textsuperscript{338}

In response to his alleged forced resignation, Vose brought suit in the United States District Court for the Central District of Illinois stating his First Amendment rights were violated when Kliment and Rouse retaliated against him for voicing his concerns about the conduct of the major case unit detectives.\textsuperscript{339} Kliment and Rouse moved to dismiss the case, claiming in light of \textit{Garcetti}, the speech rights of public employees at the time of the alleged retaliation were unclear.

\textsuperscript{335} \textit{Id.}
\textsuperscript{336} \textit{Id.}
\textsuperscript{337} \textit{Id.} at 568.
\textsuperscript{338} \textit{Id.}
\textsuperscript{339} \textit{Id.}
and had since been “clarified and narrowed.”\textsuperscript{340} The district court denied their motion and ruled, “Vose’s right to speak out on matters relating to police misconduct… was clearly established before the events of [the] case, and \textit{Garcetti} did not affect nor create this right.”\textsuperscript{341} Kliment and Rouse appealed the ruling to the Seventh Circuit, additionally arguing Vose did not have a constitutionally protected right to speak.

In its decision, the Seventh Circuit reviewed \textit{Garcetti} and noted although the lower court’s opinion stated police misconduct was a matter of public concern, after \textit{Garcetti} the threshold inquiry in public employee speech cases required courts to first determine whether the employee spoke as a citizen regardless of whether or not the matter was one of public concern.\textsuperscript{342} Vose argued it was not within his official duties as supervisor of the narcotics unit to investigate potential misconduct of officers in major crimes unit and therefore he had been speaking not as an employee but as a citizen. The Seventh Circuit disagreed, finding, “Vose may have gone above and beyond his routine duties by investigating and reporting suspected misconduct,” however, “th[e] focus on ‘core’ job functions is too narrow after Garcetti, which asked only whether an ‘employee’s expressions [were] made pursuant to official responsibilities.’’\textsuperscript{343} The court reasoned, “A public employee’s more general responsibilities are not beyond the scope of official duties for First Amendment purposes.”\textsuperscript{344} The court stated Vose himself had admitted his own interests in the investigation stemmed from his concern the alleged misconduct could directly affect his narcotics unit.\textsuperscript{345} As a result, the Seventh Circuit ruled, “While Vose may

\textsuperscript{340} \textit{Id.}
\textsuperscript{341} \textit{Id.}
\textsuperscript{342} \textit{Id.} at 569.
\textsuperscript{343} \textit{Id.} at 570.
\textsuperscript{344} \textit{Id.} at 571.
\textsuperscript{345} \textit{Id.} at 570.
have gone beyond his ordinary daily job duties in reporting the suspected misconduct outside his unit, it was not beyond his official duty as a sergeant of the narcotics unit to ensure the security and propriety of the narcotics unit’s operations.”

Because Vose’s reporting of alleged misconduct in the major crimes unit fell within his “more general responsibilities” as defined by the Seventh Circuit, the appellate panel concluded his speech was not protected under the First Amendment.

In *D’Angelo v. Sch. Bd.*, the Eleventh Circuit ruled a school board did not violate a principal’s First Amendment speech rights when it terminated the principal’s employment as a consequence for his attempts to convert his high school to a charter school. Michael D’Angelo was employed by the School Board of Polk County as principal of Kathleen High School. In the Spring of 2003 after learning his school would not receive additional resources from the School Board, D’Angelo attended a seminar on charter schools, met with Kathleen High School teachers, consulted with principals of other local high schools, and held two faculty votes in an attempt to convert Kathleen High School into a charter school. The faculty voted twice against charter school conversion. After the votes, D’Angelo modified his plan for full charter conversion of Kathleen High School and pursued partial conversion instead. On May 3, 2014, D’Angelo scheduled another faculty vote on partial conversion. Before the vote could occur, D’Angelo was summoned to the district office and terminated.

In response to his termination, D’Angelo filed suit in the United States District Court for the Middle District of Florida alleging the school board had terminated him in retaliation for

**Footnotes:**

346 *Id.* at 572.
347 *Vose v. Kliment*, 506 F.3d 565, 571 (7th Cir. 2007).
349 *Id.* at 3.
350 *Id.* at 5.
exercising his First Amendment speech rights. Relying upon *Garcetti*, the court concluded D’Angelo’s attempts to convert Kathleen High School to charter status were, “part and parcel of his official duties… done in his capacity as the principal of [the school]” and therefore not protected by the First Amendment. D’Angelo appealed the decision to the Eleventh Circuit Court of Appeals.

In its decision, the Eleventh Circuit also considered *Garcetti* noting, “the Supreme Court emphasized a public employee must speak both on a matter of public concern and as a citizen to be protected under the First Amendment.” The Eleventh Circuit reasoned it had to first determine whether D’Angelo had spoken as a citizen in his attempts to convert his school to charter status. To do so, the court examined the Florida statute governing the establishment of charter schools that stated, “An application for a conversion charter school shall be made by the district school board, the principal, teachers, parents, and/or the school advisory council.” Because D’Angelo was neither a parent nor teacher, the Eleventh Circuit concluded D’Angelo’s efforts to convert his school to charter status, “necessarily were in his capacity as the principal of the school,” and not as a private citizen. The court reasoned as principal, D’Angelo was among the limited class of individuals granted the power to convert a public school to a charter school by state statute. Therefore it followed he must have been speaking pursuant to his job responsibilities as principal. The court also noted D’Angelo “admitted that he pursued charter

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351 Id. at 6.  
352 Id. at 8.  
353 Id. at 10.  
354 Id. at 18.  
355 Id. at 13.  
356 Id. at 14.  
conversion to, ‘explore any and all possibilities to improve the quality of education at [his
school]’ which he described as part of his ‘job as a principal.’”\textsuperscript{358} Again turning to \textit{Garcetti}, the
Eleventh Circuit stated, “a public employee who ‘make[s] statements pursuant to [his] official
duties… [is] not speaking as [a] citizen.”\textsuperscript{359} Because D’Angelo spoke pursuant to his official
job duties as principal and not as a private citizen, the Eleventh Circuit found his speech was
unprotected by the First Amendment.

In \textit{Khan v. Rundle}, the Eleventh Circuit ruled the First Amendment did not protect an
assistant state’s attorney in-court statements because they “owed their existence to his role as a
government lawyer.”\textsuperscript{360} Neil Khan was employed as a Miami-Dade assistant state attorney.
According to Khan, he was fired for refusing to follow his superior’s orders to also lie to a judge
by saying he was ready to go to trial when Khan believed he was not ready and to lie to a judge’s
question about the existence of a prior plea offer in a criminal case. Additionally, Khan alleged
he was terminated for telling a judge he could not deliver a plea offer because his supervisors
had been unavailable to meet with him.\textsuperscript{361} In response to his termination, Khan filed suit against
his employer in the United States District Court for the Southern District of Florida alleging he
was fired in violation of his First Amendment rights. The district court ruled Khan’s speech
unprotected by the First Amendment because it, “was directly related to his employment
responsibilities.”\textsuperscript{362} Khan appealed the district court’s decision to the United States Court of
Appeals for the Eleventh Circuit.

\textsuperscript{358} \textit{D’Angelo v. Sch. Bd.}, 2007 U.S. App. LEXIS 18235, 14 (11\textsuperscript{th} Cir. 2007).
\textsuperscript{359} \textit{Id}.
\textsuperscript{360} \textit{Khan v. Rundle}, 287 Fed. Appx. 50, 52 (10\textsuperscript{th} Cir. 2007).
\textsuperscript{361} \textit{Id}. at 51.
In its decision, the Eleventh Circuit relied upon Garcetti noting the Supreme Court had concluded the “First Amendment, ‘did not invest [government employees] with a right to perform their jobs however they see fit.’” Khan argued because he was expected to lie in court as part of his official duties, when he told the truth contrary to his superior’s orders he was speaking as a citizen and not a government employee. The Eleventh Circuit disagreed, concluding Khan had misinterpreted Garcetti by lifting the word “expected” from a paragraph of the Court’s decision focusing on the role of formal job descriptions in analyzing public employee speech cases. The Eleventh Circuit stated a correct interpretation of the Garcetti required courts to analyze, “whether the public employee was acting as an agent of the government at the time of the relevant speech.” Focusing on its own interpretation of Garcetti, the Eleventh Circuit found, “Khan’s in court statements ‘owe[d] [their] existence’ to his role as a government lawyer. Because Khan was not speaking as a citizen but as an assistant state attorney, [his] statements were not entitled to protection under the First Amendment.” The court further concluded, “Khan’s truth-telling occurred while he was representing the state of Florida as an assistant state attorney in open court” and “therefore [he] was speaking as a public employee and not as a private citizen.” The Eleventh Circuit ruled Khan’s speech was unprotected by the

363 Khan v. Rundle, 287 Fed. Appx. 50, 52 (10th Cir. 2007).
364 Id. at 52.
365 Id. In Garcetti, the Supreme Court stated, “Formal job descriptions 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.”
366 Id. at 53.
367 Id. at 52.
368 Id. at 53.
First Amendment, concluding he was acting as an agent of the government at the time of the relevant speech.\(^{369}\)

In *Casey v. W. Las Vegas Indep. Sch. Dist.*, the Tenth Circuit ruled a superintendent’s reporting of irregularities in her school district’s Head Start Program to federal authorities was not protected by the First Amendment but the reporting of her school board’s Open Meetings Act violations may have been protected.\(^{370}\) Barbara Casey was superintendent of the West Las Vegas Independent School District. As superintendent, Casey was responsible for the school district’s federally funded Head Start program. During her tenure, Casey discovered as many as 50% of the families enrolled in the Head Start program had either intentionally omitted family income information or inflated the size of their family in order to qualify for the program.\(^{371}\) Casey reported her findings to her school board on several occasions but was told to ignore her findings. Concerned with her board’s failure to act, Casey instructed a subordinate to report her findings to federal authorities. During the same school year, Casey informed the Board they were violating the New Mexico Open Meetings Act by making personnel and other decisions in executive session. When the Board ignored her warnings, Casey filed a written complaint with the New Mexico Attorney General’s Office. The Attorney General’s Office responded in writing to the school board president, enclosed a copy of Casey’s complaint and requested a response.\(^{372}\) Shortly thereafter, the school board demoted Casey to Assistant Superintendent and decided not to renew her contract for the following school year, effectively terminating her employment as superintendent. In response to her termination, Casey filed suit in the United States District


\(^{370}\) *Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323 (10th Cir. 2007)

\(^{371}\) Id. at 4.

\(^{372}\) Id. at 5.
Court for the District of New Mexico alleging retaliation for exercising her First Amendment right to freedom of speech.\textsuperscript{373}

In its decision, the Tenth Circuit noted \textit{Garcetti}, “significantly modified” the first prong of the \textit{Pickering} analysis and, “obligated [the court] to ask whether Ms. Casey met her burden [of meeting the threshold inquiry outlined in \textit{Garcetti}] by providing evidence her expressions were made in her capacity as a citizen and not pursuant to her ‘official duties.’”\textsuperscript{374} According to the court, Casey’s comments regarding the Head Start program were of two types – those statements directed to the School Board about the program and her directive to a subordinate to report findings to federal officials. Analyzing Casey’s statements made to the School Board, the court found it was within Casey’s responsibilities as superintendent to advise the School Board on, “the lawful and proper way to conduct school business,” and therefore her comments regarding the Head Start program were, “made pursuant to her official duties,” as superintendent and unprotected under the First Amendment.\textsuperscript{375}

Examining Casey’s directive to a subordinate to report irregularities in the Head Start program to federal authorities, the court noted Casey had not advised the School Board of her directive, “but instead went very much around them,” in doing so.\textsuperscript{376} The court stated, “the question before [it] [was] whether, in doing so, Ms. Casey used [a subordinate] as her agent to engage in protected citizen whistleblowing, or whether Ms. Casey acted pursuant to her official duties in ordering a subordinate to report the District’s regulatory noncompliance to federal

\textsuperscript{373} \textit{Id.} at 6.
\textsuperscript{374} \textit{Id.} at 10.
\textsuperscript{375} \textit{Id.}
\textsuperscript{376} \textit{Id.} at 14.
authorities.”  The court noted during a deposition, Casey “effectively acknowledged” her responsibilities to report the irregularities in the Head Start program to federal authorities because she “would be held legally responsible for having knowledge of something that was wrong and not reporting [it].” The court concluded Casey’s directive to report illustrated, “an individual striving diligently to fulfill a federal regulatory obligation directly bearing on her by virtue of the office she held,” and “deemed it appropriate to order a subordinate… to contact Head Start officials.” However, the court ruled Casey’s actions were taken pursuant to her official position as superintendent and unprotected by the First Amendment.

The court next considered Casey’s complaint filed with the New Mexico Attorney General’s Office regarding the school board’s repeated Open Meetings Act violations. The court stated it had no evidence the Board or any other legal authority assigned Casey the responsibility for policing the School Board’s meeting practices. The court stated the evidence before it suggested board members held the responsibility for ensuring compliance with the Open Meetings Act and concluded, “Ms. Casey’s conduct fell sufficiently outside the scope of her office to survive even the force of the Supreme Court’s decision in Garcetti.” In so finding, the court remanded the matter back to the District Court for further proceedings.

In Brammer-Hoelter v. Twin Peaks Charter Academy, the Tenth Circuit ruled a teachers’ comments regarding student behavior, curriculum and pedagogy, spending on instructional aids, furniture, and classroom computers were unprotected by the First Amendment but statements made regarding potential illegal actions by their school’s board of directors and statements

377 Id.
378 Id. at 17.
379 Id. at 18.
380 Id. at 24.
381 Id.
referring to upcoming board of director elections were protected. Jody Brammer-Hoelter, Laura Kilduff, Melissa Perry, Amy Sulzbach, Shelley Crews and Bonnie Gould (“the teachers”) were employed at Twin Peaks Charter Academy (“the Academy”) within the boundaries of the St. Vrain Valley School District in Longmont, Colorado. During their employment at the Academy, the teachers developed a number of concerns or grievances about the Academy’s operation, management and mission. The teachers began meeting off campus to discuss their concerns. Parents and other community members attended some of these meetings.

Upon learning about the meetings, the Academy’s principal, Dr. Dorothy Marlatt, directed the teachers not to discuss issues regarding the Academy outside of work in order to maintain personnel and student confidentiality. Ignoring Dr. Marlatt’s directive, the teachers continued to meet and made their concerns and grievances known to the Twin Peaks Academy Board of Directors both orally and in writing. After making their concerns and grievances known, the teachers contended they received less favorable performance reviews from Dr. Marlatt. The teachers also alleged Dr. Marlatt began ignoring them and created what they believed to be a hostile work environment. Sometime thereafter, the teachers submitted letters of resignation to the Academy Board of Directors. At the time the Board met to discuss the resignations, Dr. Marlatt presented the Board with her own letter of resignation. Upon learning of Dr. Marlatt’s resignation, the teachers attempted to rescind their resignations. The Board refused to rescind the teachers’ resignations. In response to the Board’s refusal, the teachers filed a grievance alleging the Board acted in bad faith. The grievance was denied. All but one

382 Brammer-Hoelter v. Twin Peaks Charter Academy, 492 F.3d 1192, 1203 (10th Cir. 2007)
383 Id. at 1199.
384 Id.
385 Id. at 1199. Prior to making their concerns and grievances known, the teachers received satisfactory performance evaluations by Dr. Marlatt.
teacher reapplied for teaching positions at the Academy. After the Board refused to rehire them, the teachers filed suit in the United States District Court for the District of Colorado alleging they were retaliated against for exercising their First Amendment speech rights.\textsuperscript{386} The district court ruled the matters discussed by the teachers were not matters of public concern and the teachers failed to show they had suffered an adverse employment action as a result of their speech.\textsuperscript{387} The teachers appealed the district court’s decision to the United States Court of Appeals for the Tenth Circuit.

In analyzing the facts of the case, the Tenth Circuit stated in light of \textit{Garcetti}, “it [was] apparent that the ‘\textit{Pickering}’ analysis of freedom of speech retaliation claims [was] a five step inquiry which [the court] now [referred] to as the ‘\textit{Garcetti/Pickering}’ analysis.”\textsuperscript{388} Outlining the steps of its \textit{Garcetti/Pickering} analysis, the court stated the first step of the analysis was to determine whether or not the employee spoke pursuant to their official duties. Focusing on this first step of the analysis, the court turned to \textit{Garcetti} to define speech pursuant to an employee’s official duties. Interpreting \textit{Garcetti}, the Tenth Circuit concluded, “speech may be made pursuant to an employee’s official duties even if it deals with activities that the employee is not expressly required to perform.”\textsuperscript{389} Further, the court noted, “if an employee engages in speech during the course of performing an official duty and the speech reasonably contributes to or facilitates the employee’s performance of the official duty, the speech is made pursuant to the

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 1198. The Board alleged that its refusal to rehire the teachers was a result of their concern regarding the teachers’ intent to serve for an entire school year given their prior resignations resulted in their leaving prior to the end of the previous school year. The Board also alleged that hiring decisions for the subsequent school year had already been made.
\item \textit{Id.} at 1201.
\item \textit{Id.} at 1202.
\item \textit{Id.} at 1203.
\end{enumerate}
\end{footnotesize}
employee’s official duties. “390 Turning to the facts of the case, the court concluded by entering into employment contracts with the Academy, the teachers agreed to, “support the philosophy and curriculum of the Academy without reservation.”391 The court ruled as contractual employees, “nearly all matters [the teachers] discussed were made pursuant to their duties as teachers….. and could be freely regulated by the Academy.”392 Those comments regarding matters made pursuant to their duties as teachers were unprotected by the First Amendment and required no further consideration as outlined in the court’s Pickering/Garcetti five step analysis.

The Eleventh Circuit did find, however, some of the matters discussed by the teachers were not made pursuant to their official duties and did require further consideration under the court’s Pickering/Garcetti analysis. As a result, the court turned to the second step of the analysis to determine whether or not those matters unrelated to the teachers’ official duties touched on matters of public concern. The court found matters discussed by the teachers regarding “potential illegal conduct by [the Board] [was] inherently a matter of public concern,” as was, “political speech regarding upcoming Board elections.”393 Continuing with its Pickering/Garcetti analysis, the third step required the court to next balance the teachers’ free speech rights with the Board’s interest in maintaining an efficient and disciplined work environment.”394 Here the court noted the Board, “made no argument regarding their interest as employers either in their motion for summary judgment or in their appellate brief.”395 As a

390 Id.
391 Id. at 1204.
392 Id. The court found that speech relating to student behavior, curriculum and pedagogy, money spent on instructional aids, furniture, and classroom computers were all made pursuant to the teachers’ official duties.
393 Id. at 1206.
394 Id.
395 Id.
result, the Tenth Circuit ruled the teachers’ free speech rights on these two specific matters outweighed the Board’s interest in maintaining the efficient operation of the Academy.

Finding the teachers’ free speech rights outweighed the Board’s interest in maintaining the efficient operation of the Academy, the court applied the fourth step of the analysis to determine whether the teachers’ speech was a, “substantial factor or a motivating factor in [a] detrimental employment decision.”\(^{396}\) Again turning to the facts of the case, the court concluded Dr. Marlott’s “surly” attitude toward the teachers and the teachers’ poor performance evaluations were examples of adverse employment actions resulting from the teachers’ protected speech.\(^{397}\) The court then applied the final step of its Pickering/Garcetti analysis to determine if the Board would have taken the same action against the teachers even in the absence of their protected speech. The Tenth Circuit found the Board provided no alternative reasons or evidence other than the teachers’ protected speech for the adverse employment actions.\(^{398}\)

2008

In \textit{Davis v. Cook County}, the Seventh Circuit ruled a registered nurse’s memo describing concerns she had with the operation of the emergency room were not constitutionally protected because the memo was written pursuant to the nurse’s duties as a public employee.\(^{399}\) Tonya Davis was employed as a registered nurse and assigned to the Emergency Room at Stroger

\(^{396}\) \textit{Id.} at 1203.
\(^{397}\) \textit{Id.} at 1208.
\(^{398}\) \textit{Id.}
\(^{399}\) \textit{Davis v. Cook County}, 534 F.3d 650, 653 (7th Cir. 2008).
Hospital of Cook County, Illinois.\textsuperscript{400} Within a sixth month span, Davis had several unpleasant encounters with various hospital employees, the last of which was with Nursing Coordinator Clanton.\textsuperscript{401} Clanton directed Davis to change a patient’s sheets, a directive Davis ignored because she felt completing patient assessments was more important.\textsuperscript{402} After the encounter, Davis sent a memo to several hospital officials complaining she was being “harassed and abused.”\textsuperscript{403} Davis’ direct supervisor, Cynthia Przislicki, investigated the allegations and became concerned about Davis’ behavior and ordered Davis to submit to a fitness-for-duty examination.\textsuperscript{404} Davis refused and filed a union grievance.\textsuperscript{405} Several weeks later, Davis received an apology, was allowed to return to work and given back pay for work missed.\textsuperscript{406} Thereafter, Davis file suit against her employer in the United States District Court for the Northern District of Illinois, Eastern Division alleging in part the violation of her First Amendment rights.\textsuperscript{407} The district court found the subject matter contained in Davis’ memo “utterly insufficient” to be protected by the First Amendment.\textsuperscript{408} Davis appealed the ruling to the Seventh Circuit.\textsuperscript{409}

Citing Garcetti, the Seventh Circuit stated the threshold inquiry in the case was whether the Davis memo was, “something done pursuant to [her] professional duties.”\textsuperscript{410} According to the court, Davis admitted during trial the memo’s subject matter contained related to the

\textsuperscript{400} \textit{Id.} at 651.
\textsuperscript{401} \textit{Id.}
\textsuperscript{402} \textit{Id.}
\textsuperscript{403} \textit{Id.} at 652.
\textsuperscript{404} \textit{Id.}
\textsuperscript{405} \textit{Id.}
\textsuperscript{406} \textit{Id.}
\textsuperscript{407} \textit{Id.} at 651.
\textsuperscript{408} \textit{Id.} at 652.
\textsuperscript{409} \textit{Id.}
operation of the hospital’s ER.\textsuperscript{411} Examining the memo the court found, “the memo reflect[ed] the concern of the conscientious nurse to ensure and contribution to the smooth functioning of the ER and to advocate for the well-being of the patients under her care.”\textsuperscript{412} The court next considered the job description of a registered ER nurse, finding an ER registered nurse’s job responsibilities included taking care of the patients, expediting patients through the system and acting as an advocate on behalf of patients.\textsuperscript{413} Considering the responsibilities outlined in the job description, the court reasoned the issues “discuss[ed] in the memo concern[ed] particular job responsibilities of a registered nurse.”\textsuperscript{414} As a result, the court held Davis’ speech was not protected by the First Amendment because her job arguably addressed her work responsibilities as a registered nurse. As a result, the court held Davis speech was not protected by the First Amendment because her speech arguably addressed her work responsibilities.\textsuperscript{415}

2009

In \textit{Freitag v. Ayers}, the Ninth Circuit held a California Department of Corrections and Rehabilitation correction officer’s internal reports to her supervisors regarding inmate sexual misconduct were not protected under the First Amendment but her communications to a state senator and inspector general were protected.\textsuperscript{416} Deanna Freitag was employed as a correctional officer with the California Department of Corrections and Rehabilitation (CDCR) at Pelican Bay

\begin{footnotes}
\item[411] \textit{Davis v. Cook County}, 534 F.3d 650, 653 (7\textsuperscript{th} Cir. 2008).
\item[412] \textit{Id}.
\item[413] \textit{Id}.
\item[414] \textit{Id}. at 653.
\item[415] Sarah R. Kaplan, \textit{ supra} note 216, at 460.
\item[416] \textit{Freitag v. Ayers}, 468 F.3d 528 (9\textsuperscript{th} Cir. 2009).
\end{footnotes}
State Prison (Pelican Bay). In September 1998, Freitag witnessed an inmate standing naked in the exercise yard masturbating. In response, Freitag directed the inmate to return to his cell. The inmate responded by ripping a temperature gauge off a wall and screaming sexually derogatory obscenities and threatening to kill Freitag. Freitag’s supervisor directed her not to document the incident. However, she nevertheless did by completing a disciplinary report charging the inmate with threatening a public official. In late 1998 and early 1999, Freitag reported several additional incidents of inmate masturbation. After she reported another instance of inappropriate sexual behavior by an inmate in February 1999, Freitag’s supervising captain, Lieutenant David Carmichael, discarded Freitag’s written report and informed Freitag, “she was the only officer who had a problem with [the particular inmate] and ‘it’s only sex.’” In March 1999, Freitag reported another instance of inmate inappropriate sexual behavior. During a disciplinary hearing, that inmate was given a lessor punishment for his inappropriate behavior because of prison administration’s delay in processing the paperwork.

That same month, Freitag sent a memorandum to Barry O’Neill, David Carmichael’s supervisor and Robert Ayers, warden at Pelican Bay, “complaining that her reports of inmate misbehavior were being ‘denied or thrown away,’ thus causing her, ‘authority and discretion [to be] undermined.’” In April 1999, Freitag sent a letter to Teresa Schwartz, associate warden in charge of Freitag’s unit, “complaining that her supervisors were ‘procrastinating’ in responding to the sexually abusive behavior of inmates” stating, “For the supervisor’s calloused exchange of me, and other female staff, as a sexual favor to gain [inmates] cooperation, I should be

417 Id. at 533.
418 Id.
419 Id.
recompensed for my injury.” That same month, Freitag wrote another letter to Cal Terhune, Director of the CDCR, alleging an inmate was creating a hostile work environment and her supervisors had failed to respond to her allegations. Days later, Freitag was relieved of her duty pending a psychiatric evaluation prompted by what her supervisors described as her “incoherent” memoranda regarding inmate harassment. She was returned to duty after the evaluation deemed her fit for duty.

In July 1999, Ayers initiated an internal affairs (IA) investigation of Freitag for purported factual inaccuracies in Freitag’s memorandum regarding a July incident of inmate misconduct. Ayers initiated a second IA investigation against Freitag in August 1999, alleging Freitag had made “slanderous accusations against other staff.” Following the August IA investigation, Freitag filed a formal complaint with the California Department of Fair Employment and Housing (DFEH), alleging sexual harassment by inmates at Pelican Bay, her supervisors’ lack of response to reported harassment and retaliation by supervisors for her complaints. After an investigation by DFEH, Freitag’s allegations were found to be unsubstantiated.

In August 1999, Freitag sent a letter to California State Senator Richard Polanco, alleging she and other female corrections officers were regularly subjected to sexually abusive behavior and that supervisors had failed to respond. Freitag sent a follow up letter to Polanco in September 1999, this time copying CDCR Director Terhune. In response to her letters, Polanco contacted the California Office of the Inspector General (IG), requesting an investigation into the allegations. In January and February 1999, while the IG’s investigation ensued, Frietag received

420 *Id.*
421 *Id.* at 534.
422 *Id.* at 534.
423 *Id.*
two notices of adverse action from Schwartz alleging wrongdoing by Freitag.\textsuperscript{424} Shortly thereafter, Freitag was terminated prior to the issuance of the IG’s report.\textsuperscript{425}

In response to her termination, Freitag filed suit in the United States District Court for the Northern District of California alleging in part retaliation for exercising her First Amendment right to free speech. The jury ruled in favor of Freitag.\textsuperscript{426} The district judge’s instructions to the jury included Freitag’s internal communications with her employer as an example of free speech.\textsuperscript{427} Her communications with Senator Polanco and cooperation with the IG’s investigation were also provided as examples of free speech.\textsuperscript{428} Freitag’s employers appealed to the Ninth Circuit arguing under \textit{Garcetti}, Freitag had not spoken as a citizen and therefore her speech was not protected.

The Ninth Circuit examined both Freitag’s internal memos regarding inmate sexual misconduct and her external communications to Senator Polanco and the California IG’s office. According to the court, the critical inquiry was whether Freitag had spoken pursuant to her official duties as a corrections officer.\textsuperscript{429} In regards to Freitag’s internal communications, the court concluded, “it [was] clear” under \textit{Garcetti} her internal memos regarding inmate sexual misconduct were not constitutionally protected because Freitag, “submitted those reports

\textsuperscript{424} \textit{Id.} at 535. The first notice of adverse action alleged Freitag had falsified facts in a written memorandum describing inmate misbehavior. The second notice of adverse action alleged Freitag made false accusations regarding a fellow officer contaminating the inmate’s food.\textsuperscript{425} \textit{Id.} The IG’s report, published in July 2000, found in part that inmates regularly subjected female correctional officers to lewd exhibitionism and exhibitionist masturbation; supervisors and top administrative staff at the prison did not respond appropriately to complaints from female staff members; and Warden Ayers had taken no action to address exhibitionist masturbation directed at female officers by male inmates.\textsuperscript{426} \textit{Id.} at 536.

\textsuperscript{427} Christine Elzer, \textit{supra} note 211, at 375.

\textsuperscript{428} \textit{Id.}

\textsuperscript{429} \textit{Freitag v. Ayers}, 468 F.3d 528, 545 (9\textsuperscript{th} Cir. 2009).
pursuant to her official duties as a corrections officer.” The court did not elaborate on how they drew this conclusion. Finding the district court judge’s jury instructions stated Freitag’s internal memos were protected, the Ninth Circuit remanded to the district court the question of whether the jury would have reached the same conclusion had the unprotected speech not been included.

The Ninth Circuit concluded, “Under [Garcetti], Freitag [did] not lose her right to speak as a citizen simply because she initiated the communications while at work or because they concerned the subject matter of her employment.” With respect to Freitag’s letters to Senator Polanco and her cooperation with the IG, the court ruled, “it was certainly not part of her official tasks to complain to the Senator or the IG about the state’s failure to perform its duties properly, and specifically its failure to take corrective action,” but rather, “it was [her] responsibility as a citizen to expose… official malfeasance to broader scrutiny.” The court concluded Freitag’s, “right to complain both to an elected public official and to an independent state agency [was] guaranteed to any citizen in a democratic society regardless of [her] status as a public employee.” Because a relevant citizen analogue to the speech in question existed, the Ninth Circuit found Freitag’s external communications to Senator Polanco and her cooperation with the IG’s investigation were protected speech.

430 Id. at 546.
431 Christine Elzer, supra note 211, at 376.
432 Freitag v. Ayers, 468 F.3d 528, 545 (9th Cir. 2009).
433 Id.
434 Id.
The Second Circuit clearly laid out its framework for considering public employee speech in *Weintraub v. Bd. of Educ.*\(^{435}\) In *Weintraub*, the court considered three factors in determining whether or not a public employee’s speech was protected by the First Amendment. These factors included: whether the employee’s speech was made “in furtherance” of the employee’s official duties; whether “a relevant analogue to citizen speech” exists; and whether complaints and concerns expressed by the employee were made to superiors “up the chain of command.”\(^{436}\)

In 1998, David Weintraub was employed by the Board of Education of the City School District of the City of New York (“Board”) as a fifth grade teacher at P.S. 274 in Brooklyn. In November 1998, Weintraub referred a student to the school’s assistant principal, Douglas Goodman, after the student threw a book at Weintraub during class. Goodman returned the student to class and the next day the same student again threw books at Weintraub. Again, Weintraub referred the student to Goodman who in turn again returned the student to class. Upset with Goodman’s decision not to discipline the student, Weintraub told Goodman, “If nothing is going to be done, [Weintraub] [would] file a grievance with the union to have something done about this…”\(^{437}\) Weintraub told other teachers about the incident and subsequently filed a grievance with the union. Weintraub alleged in response to his grievance, Goodman and other school officials retaliated against him by giving him unfounded negative classroom evaluations, performance reviews, and disciplinary reports; wrongly accusing him

\(^{435}\) *Weintraub v. Bd. of Educ.*, 593 F. 3\(^{rd}\) 196 (2d Cir. 2010).
\(^{436}\) *Id.*
\(^{437}\) *Id.* at 199.
of sexually abusing a student and abandoning his class; having him arrested for on false grounds for misdemeanor attempted assault of another teacher; and ultimately wrongfully terminating his employment.\textsuperscript{438}

In response to his termination, Weintraub filed suit against his employer in the United States District Court for the Eastern District of New York alleging adverse employment retaliation in violation of the First Amendment. In April 2006, the district court found in favor of Weintraub observing, “the content of speech questioning an administrative response, or lack thereof, to discipline problems in the classroom relates to a matter of public concern…”\textsuperscript{439} Relying upon \textit{Garcetti}, the district court granted a motion to reconsider. The district court acknowledged its belief that, “a substantial ground for difference of opinion [existed] on” the precise issue of “whether a public employee acts as an ‘employee,’ and not as a ‘citizen,’ when he notifies his supervisors, either formally or informally, of an issue regarding the safety of his workplace that touches upon a matter of public concern, as well as on the employee’s own private interest.”\textsuperscript{440} Relying on \textit{Garcetti}, the district court ruled against Weintraub but encouraged him to file an interlocutory appeal, “on the basis the case involved a controlling question of law for which there is substantial ground for difference of opinion.”\textsuperscript{441} Weintraub’s interlocutory appeal was granted by the Second Circuit.

In its ruling, the Second Circuit expanded upon the Supreme Court’s definition of speech made pursuant to a public employee’s job duties as outlined in \textit{Garcetti} by adding “speech that government employers have not expressly required may still be made pursuant to the employee’s

\begin{footnotes}
\item[438] \textit{Id.}
\item[439] \textit{Id.}
\item[440] \textit{Id.}
\item[441] \textit{Id.}
\end{footnotes}
official duties, “so long as the speech is in furtherance of such duties.” Applying this expanded definition, the Second Circuit concluded Weintraub’s grievance was “made ‘pursuant to’ his 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.”

The Second Circuit next turned to examining whether a “relevant citizen analogue” to the Weintraub’s speech existed. In *Garcetti*, the Supreme Court ruled, “a public employee speaks pursuant to employment responsibilities [when] there is no relevant analogue to speech by citizens who are not government employees.” Examining whether Weintraub’s speech had a relevant citizen analogue, the Second Circuit ruled, “the lodging of a union grievance is not a form or channel of discourse available to non-employee citizens.” The court further concluded Weintraub had not voiced his concerns through “channels available to citizens generally,” but rather through “internal communication pursuant to an existing dispute-resolution policy established by [the teacher’s] employer, the Board of Education.” Because citizens lack access to a formal grievance process afforded Weintraub as an employee of the Board of Education, the Second Circuit ruled his speech was unprotected under the First Amendment.

The last factor considered by the Second Circuit was whether Weintraub’s complaints and concerns were expressed to the teacher’s superiors “up the chain of command.” The Second Circuit ruled when an employee expresses complaints and concerns to supervisors “up the chain of command at his workplace,” the employee’s speech is unprotected because it is made pursuant

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442 Id. at 200.
443 Id. at 202. Citing *Williams v. Dallas Indep. Sch. Dist.*, 480 F. 3d 689, 694 (5th Cir. 2007).
444 *Weintraub v. Bd. of Educ.*, 593 F. 3rd 196, 203 (2d Cir. 2010).
446 *Weintraub v. Bd. of Educ.*, 593 F. 3rd 196, 204 (2d Cir. 2010).
447 Id.
448 Id.
to his official duties.\textsuperscript{449} Because Weintraub’s grievance was made in furtherance of his official duties as a teacher; filed in a manner and forum unavailable to private citizens; and presented to his superiors up the chain of command within the public school system, the Second Circuit ruled his speech was unprotected by the First Amendment because a relevant citizen analogue did not exist.\textsuperscript{450}

In \textit{Fox v. Traverse City Sch. Bd.}, the Sixth Circuit ruled a special education teacher’s complaints about class size were unprotected by the First Amendment.\textsuperscript{451} Susan Fox was employed as an elementary special education teacher with the Traverse City Are Public Schools. During that time, Fox volunteered to participate in a reading program designed to improve the reading skills of both general and special education students.\textsuperscript{452} While participating in the reading program, Fox alleged her caseload reached 34 students, over the legally required maximum of 21 students.\textsuperscript{453} She voiced her concern about her caseload to the principal of the building and the school district’s special education director.\textsuperscript{454} Fox acknowledged she never filed a formal grievance with her union and her building principal disputed Fox ever complained that her caseload violated the law.\textsuperscript{455}

During this time, numerous deficiencies were noted in Fox’s performance including failure to complete the required student Medicaid and IEP reports in an appropriate and timely manner, the unauthorized delegation of responsibilities to teaching assistants, and the failure to

\begin{itemize}
\item \textsuperscript{449} \textit{Id.}
\item \textsuperscript{450} Caroline A. Flynn, \textit{supra} note 215, at 773.
\item \textsuperscript{451} \textit{Fox v. Traverse City Sch. Bd.}, 605 F.3d 345 (6th Cir. 2010).
\item \textsuperscript{452} \textit{Id.} at 347.
\item \textsuperscript{453} \textit{Id.}
\item \textsuperscript{454} \textit{Id.}
\item \textsuperscript{455} \textit{Id.}
\end{itemize}
provide the minimum required instructional time for students.\textsuperscript{456} Fox’s performance evaluations noted complaints from parents as well.\textsuperscript{457} She was ultimately relieved of her duties in the volunteer reading program for allegedly falling behind in her other duties.\textsuperscript{458} Fox alleged she encountered hostility that ultimately led to the non-renewal of her contract.\textsuperscript{459} Following the non-renewal of her contract, Fox filed suit in the United States District Court for the Western District of Michigan alleging retaliation in violation of her First Amendment right to express her concerns regarding her caseload.\textsuperscript{460} The district court held, “the speech in question… was made not in her role as a ‘public citizen’ but as an employee, that it was made to her immediate supervisors, and that it did not address a matter of ‘public concern’ but, rather, only the conditions of her employment.”\textsuperscript{461} The district court concluded Fox’s speech was unprotected by the First Amendment. Fox appealed to the Sixth Circuit.

Citing Weisbarth, the Sixth Circuit stated, “For a public employee’s statements to receive First Amendment protection, the public employee must speak ‘as a citizen’ and ‘address matters of public concern.’”\textsuperscript{462} The court stated, “Under Garcetti, even employee speech addressing a matter of public concern is not protected if made pursuant to the employee’s official duties.”\textsuperscript{463} Taking into consideration the court’s own decision in Weisbarth and the Supreme Court’s Garcetti decision, the Sixth Circuit reasoned, “in reviewing a public employee’s statements under Garcetti, we must consider both its content and context – including to whom the statement

\textsuperscript{456} Id. at 347.
\textsuperscript{457} Id. Parents complained Fox was making inappropriate recommendations regarding medications for their students.
\textsuperscript{458} Id.
\textsuperscript{459} Id.
\textsuperscript{460} Id. at 348.
\textsuperscript{461} Id. at 347.
\textsuperscript{462} Id. Citing Weisbarth v. Geauga Park Dist., 499 F.3d 358, 542 (6\textsuperscript{th} Cir. 2007).
\textsuperscript{463} Fox v. Traverse City Sch. Bd., 605 F.3d 345, 347 (6\textsuperscript{th} Cir. 2010).
was made – to determine whether the plaintiff made the statement pursuant to her individual duties.\textsuperscript{464} The court also noted, “speech 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.’”\textsuperscript{465} Looking at the specific facts of the case, the court noted, “Fox’s complaints were directed solely to her supervisor, not to the general public.”

2011

In \textit{Jackler v. Byrne},\textsuperscript{466} the Second Circuit held the existence of a relevant civilian analogue for an employee’s speech entitled the speech to First Amendment protection, despite the fact the employee spoke pursuant to his official duties as well.\textsuperscript{467} Jason Jackler was employed as a probationary police officer with the Middletown Police Department (MPD). On January 5, 2006, Jackler responded to a call to assist a fellow MPD officer, Sergeant Gregory Metakes, arrest and transport a suspect, Zachary Jones.\textsuperscript{468} At the scene, Jackler witnessed Metakes open the rear door of his patrol car and strike the handcuffed Jones in the face after Jones called Metakes a “dick.”\textsuperscript{469} At the police station, MPD desk officer, Sal Garetto, questioned Jones about a large bump on Jones’s head and abrasions to his face.\textsuperscript{470} Jones indicated Metakes smashed his head into the ground and punched him during the arrest. The

\textsuperscript{464} Id. at 348.  
\textsuperscript{465} Id.  
\textsuperscript{466} Jackler v. Byrne, 658 F.3d 225 (2d Cir. 2011).  
\textsuperscript{467} Caroline A. Flynn, \textit{supra} note 215, at 774.  
\textsuperscript{468} Jackler v. Byrne, 658 F.3d 225, 229 (2d Cir. 2011).  
\textsuperscript{469} Id.  
\textsuperscript{470} Id. at 230.
next night, Jones filed a civilian complaint against Metakes for the use of excessive force during his arrest.\footnote{471} In response to Jones’s civilian complaint, MPD Lieutenant Patrick Freeman ordered Jackler to file a supplementary report detailing the events of January 5.\footnote{472} Jackler’s report corroborated Jones’s civilian complaint regarding Jones allegation that he was struck in the face.\footnote{473}

On January 11, Freeman and Lieutenant Paul Rickard met with Jackler and attempted to, “coerce” Jackler to withdraw his supplemental report and refile a new report… in an effort to conceal the illegal actions and misconduct of Sgt. Metakes.\footnote{474} These attempts were repeated in several subsequent meetings but Jackler refused.\footnote{475} On January 19, Police Chief Matthew Byrne and Rickard appeared at a monthly meeting of the Board of Police Commissioners and recommended Jackler be terminated as a probationary officer, to which the Commissioners agreed.\footnote{476} In response to his termination, Jackler filed suit in the United States District Court for the Southern District of New York alleging in part retaliation for his “refusal to cooperate with [his MPD supervisors] and commit a criminal act by altering or falsifying his supplemental report” in violation of his First Amendment rights.\footnote{477} Applying Garcetti and the Second Circuit’s recent decision in Weintraub, the district court ruled Jackler’s speech was made in his

\footnote{471} Id. In his complaint, Jones alleged Metakes punched Jones in the face after he had been handcuffed and that Jackler had witnessed the assault.\footnote{472} Id. at 231.\footnote{473} Id. In his report, Jackler also noted that he “observed Jones to have multiple abrasions on his face.”\footnote{474} Id.\footnote{475} Id.\footnote{476} Id. The court noted that the Board of Commissioners had never before terminated a probationary police offer prior to Jackler’s termination.\footnote{477} Jackler v. Byrne, 708 F. Supp. 2d 319, 2010 U.S. Dist. LEXIS 51619 (S.D.N.Y., 2010).
capacity as a police officer and not a citizen and therefore unprotected by the First Amendment. Jackler appealed to the Second Circuit.

In its decision, the Second Circuit created a significant exception to *Garcetti*. The court reasoned, “Whereas the plaintiff in *Garcetti* had been fired for engaging in speech that was required as part of his job, Jackler’s First Amendment claims were based not on his [written report of Metakes’ excessive force], but only on his subsequent refusals to commit a blatantly wrongful – if not criminal – act.” Jackler argued he had a First Amendment right as a private citizen to refuse to falsify his official report. The court agreed. The court found, “a citizen has a First Amendment right to decide what to say and what not to say, and, accordingly, the right to reject governmental efforts to require him to make statements he believes are false.” The court reasoned, “Of course a police officer has a duty not to substitute a falsehood for the truth, i.e., a duty to tell ‘nothing but the truth’; but he plainly has that duty as a citizen as well.” The court ruled, “Jackler’s refusal to comply with orders to retract his truthful Report and file one that was false has a clear civilian analogue and that Jackler was not simply doing his job in refusing to obey those orders from the [MPD’s] top administrative officers and the chief of police.” According to the Second Circuit, “the existence of a relevant civilian analogue for Jackler’s speech triggered First Amendment protection despite the fact that he spoke pursuant to his official duties.”

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478 *Id.*
479 Id.
482 *Id.* at 241.
483 *Id.*
484 *Id.* at 242.
cases relying on *Garcetti* because the Second Circuit did not conclude Jackler’s speech was unprotected simply because he spoke pursuant to his official duties as a police officer.\(^{486}\)

In *Bowie v. Maddox*, the Court of Appeals for the District of Columbia Circuit disagreed with the Second Circuit’s *Jackler* decision when it ruled an inspector general’s refusal to sign an affidavit his employer drafted for him in response to a former subordinate’s employment discrimination claim was not protected by the First Amendment.\(^ {487}\) David Bowie was employed by the District of Columbia Office of the Inspector General (“OIC”) as an Assistant Inspector General for Investigations.\(^ {488}\) In February 2000, Bowie participated in a meeting with his supervisor, Alfred Miller, regarding the unsatisfactory job performance of another OIG employee, Emanuel Johnson.\(^ {489}\) Although remedial measures were considered, it was ultimately decided Johnson be terminated; a decision with which Bowie did not agree.\(^ {490}\) In response to his termination, Johnson filed a discrimination complaint, alleging wrongful termination. Gail Davis, Deputy Attorney General for the OIG drafted a position statement in response to the discrimination complaint as well as an affidavit regarding the February meeting Bowie had attended.\(^ {491}\) Dissatisfied with the accuracy of Davis’s affidavit, Bowie refused to sign the document and prepared his own affidavit critical of OIG’s decision to terminate Johnson and submitted it to the OIG’s general counsel.\(^ {492}\) Bowie then testified for Johnson in his wrongful

\(^{486}\) *Id.*
\(^{487}\) *Bowie v. Maddox*, 653 F.3d 45, 46 (D.C. Cir. 2011).
\(^{489}\) *Id.*
\(^{490}\) *Id.* at 4.
\(^{491}\) *Id.*
\(^{492}\) *Id.* at 5.
termination suit against the OIG. As a result of his actions, Bowie was terminated. In response to his termination, Bowie filed suit in the U.S. District Court for the District of Columbia alleging he was retaliated against in violation of his First Amendment rights. The district court ruled against Bowie finding his speech was made, “pursuant to his official duties” and therefore unprotected by the First Amendment. Bowie appealed the district court’s ruling to the United States Court of Appeals for the District of Columbia Circuit.

In his appeal, Bowie argued his speech was protected by the First Amendment because, it [was] analogous to the speech of private citizens who submit testimony... The circuit court disagreed. The D.C. Circuit acknowledged, “Bowie’s argument… finds support” in the Second Circuit’s opinion in Jackler. In Jackler, the Second Circuit, “concluded Jackler’s refusal to obey [his employer’s] instructions… is not beyond the scope of the First Amendment.” Because a citizen analogue existed, the Second Circuit concluded Jackler’s speech was protected by the First Amendment even though he spoke pursuant to his official duties. However, the D.C. Circuit concluded, the Second Circuit had misinterpreted Garcetti in Jackler. The D.C. Circuit reasoned, “A 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.” The court said, “All official speech, viewed at a

494 Bowie v. Maddox, 653 F.3d 45, 46 (D.C. Cir. 2011).
495 Id.
496 Id. at 47.
497 Id.
498 Id.
499 Caroline A. Flynn, supra note 215, at 775.
500 Bowie v. Maddox, 653 F.3d 45, 48 (D.C. Cir. 2011).
sufficient level of abstraction, has a civilian analogue.”

The court ruled, “An utterance made ‘pursuant to employment responsibilities’ is unprotected even if the same utterance would be protected were the employee to communicate it ‘as a citizen.’”

Because Bowie spoke pursuant to his official duties, regardless of the potential existence of a civilian analogue, the D.C. Circuit concluded his speech was unprotected by the First Amendment.

2012

In Massaro v. Dep’t of Educ. of N.Y., the Second Circuit ruled a teacher’s complaints about alleged unsanitary conditions in her classroom were not protected by the First Amendment. Yvonne Massaro was employed as a public school teacher with the New York City Department of Education (“DOE”). Massaro claimed to school administrators she had contracted scabies from what she alleged to be unsanitary conditions in her classroom. Massaro filed a Comprehensive Injury Report, claiming she had been bitten by mites in her classroom. Massaro also filed an Accident Report, in which she described her classroom as an “unclean working environment,” and sought reimbursement expenses related to her scabies infection. During this time, Massaro also complained verbally to school administrators about these issues. In response to her complaints, Massaro alleged school administrators retaliated against her by rescheduling her classes so she had to walk up more stairs than before, placed large

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501 Id.
504 Id. at 654.
505 Id.
506 Id.
507 Id.
numbers of special education students in one of her classes, either failed to provide adequate supplies or delayed the receipt of adequate supplies for her classes, and subjected her to increased scrutiny by her peers as to whether she was present in her classroom on time.\textsuperscript{508} Massaro brought suit in the United States District Court for the Southern District of New York alleging in part school administrators retaliated against her in violation of her First Amendment rights. The district court found in favor of the DOE ruling, “Massaro’s complaints regarding her health issues and the allegedly unsanitary conditions in her classroom did not constitute constitutionally protected speech because Massaro spoke as an employee rather than a private citizen.”\textsuperscript{509} Massaro appealed to the Second Circuit.

It its opinion, the Second Circuit stated the question before the court was whether Massaro spoke as an employee pursuant to her official duties or as a private citizen on a matter of public concern.\textsuperscript{510} Citing its earlier decision in Weintraub, the court concluded employee speech may be considered to be unprotected if made pursuant to a public employee’s official duties and if it was “part-and-parcel” of the employee’s “ability to properly execute [their] duties.”\textsuperscript{511} The court also acknowledged, “The ‘lack of a citizen analogue’ to the form of [an employee’s] speech also ‘bear[s] on… whether the public employee is speaking as a citizen.’”\textsuperscript{512}

Turning to the facts of the case, the court concluded Massaro’s complaints, “concerned her ability ‘to properly execute [her] duties’ as a public school teacher because they were aimed at resolving her health issues so that she could continue to teach, and ensuring she had a safe and

\textsuperscript{509} Massaro v. Dep’t of Educ. of N.Y., 481 Fed. Appx. 653, 645 (2012).
\textsuperscript{510} Id.
\textsuperscript{511} Id. Citing Weintraub v. Bd. of Educ., 593 F. 3\textsuperscript{rd} 196, 203 (2d Cir. 2010).
\textsuperscript{512} Id. Citing Weintraub v. Bd. of Educ., 593 F. 3\textsuperscript{rd} 196, 204 (2d Cir. 2010).
clean environment in which to work and that her use of sick days [were] properly credited.”

The court also found, “Massaro spoke as an employee rather than a private citizen… [because] she aired her complaints only to several school administrators rather than to the public, and that most of those complaints were made in the context of internal safety and medical absence-related forms (as least one of which was marked “confidential”), for which there was no relevant citizen analogue. Because Massaro’s complaints were “part-and-parcel” of her “ability to properly execute her duties” and her complaints were logged in such a manner as precluding civilian analogue, the Second Circuit ruled her speech was unprotected by the First Amendment.

In *Ross v. Breslin*, the Second Circuit held a school district payroll employee’s report of alleged financial malfeasance was not protected by the First Amendment. Risa Ross was employed as a payroll clerk typist for the Katonah-Lewisboro Union Free School District (the “District”). Over a period of three years, Ross informed District Superintendent Robert Lichtenfeld of several alleged improprieties, including forgery, unauthorized bonuses and improper payments. Ross also brought her allegations to Renee Gargano, an outside consultant brought in by the District. Gargano was also serving as Deputy Superintendent at a neighboring school district at that same time. Gargano informed Lichtenfeld that Ross had previously worked and been terminated from employment in Gargano’s school district and that Ross had failed to record her employment at the neighboring school district on her employment

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514 *Id.*
515 *Id.* Citing *Weintraub v. Bd. of Educ.*, 593 F. 3rd 196, 203 (2d Cir. 2010).
517 *Id.* at 303.
518 *Id.*
application with Katonah-Lewisboro. 519 Thereafter, Lichtenfeld suspended Ross with pay. 520 During her suspension, Ross wrote a letter on her personal stationary to each of the board members outlining the concerns she shared with Lichtenfeld and expressing her “complete frustration with the District’s administration.” 521 After receiving a copy of the letter, Lichtenfeld recommended and the Board agreed to terminate Ross. 522 Ross filed suit in the United States District Court for the Southern District of New York alleging in part her termination was a violation of her First Amendment right to free speech. 523 The district court ruled in Ross’s favor finding Ross presented sufficient evidence Lichtenfeld violated her First Amendment rights. 524 The district court found Ross’s statements to Gargano about improper payments and promotions were not protected by the First Amendment because they were “in the nature of an employee grievance,” but her statements to Lichtenfeld and her letter to the Board were protected by the First Amendment because, “she was speaking on a matter of public concern, she went outside the chain of command, and her complaints were not in the nature of an employee grievance.” 525 Lichtenfeld appealed the case to the Second Circuit. The question before the Second Circuit was whether Ross’s speech was made pursuant to her official duties as the school district’s payroll clerk typist. 526

519 Id.
520 Id.
521 Id.
522 Id. at 304. Ross was afforded a pre-termination hearing before a hearing officer. The hearing officer found Ross knowingly made false statements on her application and recommended she be terminated. The Board voted unanimously to terminate Ross.
523 Id.
524 Id.
525 Id. at 306.
526 Id. at 304.
The Second Circuit stated observed, “The inquiry into whether an employee’s speech was made pursuant to her official duties is not susceptible to a bright-line rule.” Citing Weintraub, the court went on to clarify, “courts must examine the nature of the plaintiff’s job responsibilities, the nature of the speech, and the relationship between the two.” The court reasoned, “Other contextual factors, such as whether the complaint was also conveyed to the public, may properly influence a court’s decision.” Examining Ross’s testimony to the district court, the Sixth Circuit found Ross, “admitted that her responsibilities included reporting mistakes to supervisors,” and, “[Ross] acquired all of the information she relayed to Lichtenfeld in the ordinary course of performing her work.” According to the court, Ross’s reports to Lichtenfeld were, “part and parcel of her official responsibilities.” In response to the district court’s finding that Ross went outside the chain of command to express her concerns to Lichtenfeld and the Board, the Sixth Circuit concluded Ross brought her concerns to Lichtenfeld because she felt her concerns were not being addressed by her immediate supervisor. When Ross felt Lichtenfeld was not addressing her concerns, she brought them to the Board. The court reasoned, “Taking a complaint up the chain of command to find someone who will take it seriously ‘does not, without more, transform [her] speech into protected speech made as a private citizen.’” Because Ross’s speech, “owed its existence to her job duties” and her concerns

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527 Id. at 306.
528 Id. Citing Weintraub v. Bd. of Educ., 593 F. 3rd 196 (2d Cir. 2010).
530 Id.
531 Id.
532 Id.
were expressed up the chain of command within the school district, the Sixth Circuit ruled her speech was unprotected by the First Amendment.\footnote{Id. at 308.}

\textbf{2013}

In \textit{Lane v. Franks}, the Eleventh Circuit ruled the First Amendment did not protect a community college administrator’s subpoenaed testimony about possible fraud involving an elected official.\footnote{Lane v. Franks, 523 Fed. Appx. 709 (11th Cir. 2013).} Edward Lane was employed in a probationary position as Director of Central Alabama Community College’s (“CACC”) Intensive Training for Youth Program (“CITY”).\footnote{Id. at 710.} As director, Lane performed a financial audit of CITY and discovered then-state representative Suzanne Schmitz was on CITY’s payroll but was, “not reporting for work and had not otherwise performed any tangible work for the program.”\footnote{Id.} Despite warnings from CACC’s president, Dave Franks and lawyer, Lane terminated Schmitz’s employment with CITY.\footnote{Id.} Soon after Schmitz’s termination, the FBI began investigating the representative. Schmitz was accused of mail fraud and fraud involving a program receiving federal funds. Lane testified before a grand jury and pursuant to a subpoena in federal court that Schmitz had not reported to work or submitted time sheets for work, refused to report to work at CITY’s offices as instructed by Lane, and confessed to Lane that she had gotten her job through connections with the Executive

\footnote{Id.} CACC’s president and lawyer informed Lane terminating Schmitz’s employment “could have negative repercussions for both Lane and CACC.
Secretary of the Alabama Education Association. Later that same year, Franks sent Lane and 29 other CITY employees with less than 3 years of service a termination letter citing budget cuts as the reason. A few days later after allegedly discovering most of the employees receiving the letters were not actually probationary employees; Franks rescinded all but two termination letters. Lane’s termination letter was not rescinded. In response to his termination, Lane filed suit in the United States District Court for the Northern District of Alabama alleging Franks terminated Lane in retaliation for testifying against Schmitz, in violation of his First Amendment rights. The district court ruled Lane’s speech was made pursuant to his official duties as CITY’s Director and not as a citizen on a matter of public concern. Lane appealed to the Eleventh Circuit.

Citing its previous decision in Abdur-Rahman v. Walker, the Eleventh Circuit stated, “In determining whether a government employee’s statement is protected by the First Amendment, ‘we look to the content, form, and context of a given statement, as revealed by the whole record.’” Stating Lane’s comments in question were made in the context of subpoenaed testimony, the Eleventh Circuit acknowledged its earlier decision in Morris v. Crow was controlling precedent. In Morris, the court held a police officer’s speech consisting of a written accident report and his subpoenaed testimony regarding the accident report were not

538 Id.
539 Id.
540 Id.
541 Id.
542 Id. at 711.
543 Id. Citing Abdur-Rahman v. Walker, 567 F.3d 1278 (11th Cir. 2009).
protected by the First Amendment. In *Morris*, the court stated, “The mere fact that Morris’s statements were made in the context of a civil deposition cannot transform them into constitutionally protected speech.” Turning to the facts of the case before them, the court found no one disputed Lane was acting pursuant to his official duties when he investigated Schmitz’s work activities, spoke with Schmitz and other CACC officials about her employment, and ultimately fired her. The court reasoned, “Lane testified about his official activities pursuant to a subpoena and in the litigation context, in and of itself, [did] not bring Lane’s speech within the protection of the First Amendment.” The court ruled, “Nothing evidences that Lane testified at Schmitz’s trial ‘primarily in [his] role as citizen’ or that his testimony was an attempt to comment publicly on CITY’s internal operations.” Because Lane was speaking pursuant to his official duties as director of CITY when giving testimony about Schmitz, the court ruled his speech was unprotected by the First Amendment.

In *Lane*, the Eleventh Circuit acknowledged a split among the circuit courts existed in adjudicating public employee speech cases involving subpoenaed testimony. The Eleventh Circuit cited the Seventh Circuit’s decision in *Morales v. Jones*, where the Seventh Circuit found a public employee’s subpoenaed deposition testimony about speech was made pursuant to his official duties and protected by the First Amendment. The Eleventh Circuit also cited the Third Circuit’s decision in *Reilly v. City of Atlantic City*, where the court ruled, “a police officer’s

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545 *Lane v. Franks*, 523 Fed. Appx. 709, 711 (11th Cir. 2013).
546 *Id.* at 712.
547 *Id.*
548 *Id.*
549 *Id.*
550 *Id.*
trial testimony was protected by the First Amendment because, although the testimony stemmed from the officer’s official duties, the officer had an independent obligation as a citizen to testify truthfully.“Thereafter, the Supreme Court agreed to hear an appeal from Lane.

In granting certiorari, the Supreme Court noted the review was being conducted, “to resolve discord among the Courts of Appeals as to whether public employees may be fired—or suffer other adverse employment consequences—for providing truthful testimony outside the course of their ordinary job responsibilities. In Lane, the question before the Court was, “whether the First Amendment protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities. The Court examined Lane’s testimony at Schmitz’s trials. The Court held, “Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes… even when the testimony relates to his public employment or concerns information learned during that employment.” The Court went on to clarify, “Sworn testimony in judicial proceedings is a quintessential example of speech as a citizen for a simple reason: Anyone who testifies in court bears an obligation, to the court and society at large, to tell

552 Id. See also Reilly v. City of Atlantic City, 532 F.3d 216 (3d Cir. 2008).
553 Lane v. Franks, 134 S. Ct. 2369, 2378 (2014).
554 Id.
555 Id. at 2379.
the truth.” The Court noted public employees have an “obligation as a citizen to speak the truth.”

In examining the Lane decision, the Court concluded the appeals court “read Garcetti too broadly.” In clarifying their earlier decision, the Supreme Court stated, “Garcetti said nothing about speech that simply relates to public employment or concerns information learned in the course of public employment.” In Lane, the Eleventh Circuit had reasoned Lane’s testimony was employee speech because the subject matter of his testimony was learned in the course of his employment. The Supreme Court disagreed with the Eleventh Circuit’s reasoning. The Court stated, “The mere fact that a citizen’s speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech.” The Court clarified that the “critical question under Garcetti is whether the speech at issue is itself ordinarily within the scope of an employee’s duties, not whether it merely concerns those duties.” To support this conclusion, the Court cited its previous decisions in public employee speech cases stating “precedents dating back to Pickering have recognized that speech by public employees on subject matter related to their employment holds special value precisely because those employees gain knowledge of matters of public concern through their employment.” The Court also pointed out public employee speech is “especially evident in

556 Id.
557 Id.
558 Id.
559 Id.
560 Id.
561 Id.
562 Id.
563 Id.
the context” of Lane because the case dealt with public corruption.\textsuperscript{564} The Court reasoned if the Eleventh Circuit’s opinion was allowed to stand, “Such a rule would place public employees who witness corruption in an impossible position, torn between the obligation to testify truthfully and the desire to avoid retaliation and keep their jobs.”\textsuperscript{565} For these reasons, the Court ruled Lane’s sworn testimony was citizen speech and therefore protected under the First Amendment.

In a concurring opinion, Justice Thomas alluded to a possible distinction between employees who testify as citizens and employees who testify for employers as employees. Thomas reasoned, “For some employees—such as police officers, crime scene technicians, and laboratory analysts—testifying is a routine and critical part of their employment duties.”\textsuperscript{566} He also pointed out, “Others may be called to testify in the context of particular litigation as the designated representatives of their employers.”\textsuperscript{567} Stopping short of making a judgment as to whether this distinction was valid, Thomas stated, “the Court properly leaves the constitutional questions raised by these scenarios for another day.”\textsuperscript{568}

\textsuperscript{564} Id.
\textsuperscript{565} Id. at 2383.
\textsuperscript{566} Id. at 2384.
\textsuperscript{567} Id.
\textsuperscript{568} Id.
CHAPTER THREE
ANALYSIS OF DATA

This study analyzed public employee First Amendment speech cases decided by the Supreme Court and federal Circuit Courts of Appeal in an effort to identify decisional trends, specific language employed by the courts and methodological approaches utilized by the courts in formulating opinions. It is anticipated this exploration will assist public school administrators in better understanding the complex legal issues surrounding public employee First Amendment speech rights and the conflicting decisions of the lower federal courts in First Amendment speech cases. This study was also crafted to provide school leaders a basis for developing a framework for addressing employee speech issues within the public school setting.

Decisional Trends

In 1968, *Pickering v. Board of Educ.* rejected Justice Holmes’ view of public employment as privilege thereby expanding the previously denied free speech rights for public employees.\(^{569}\) Prior to *Pickering*, public employers had the ability to place conditions on the terms of public employment absent constitutional constraints.\(^{570}\) In *Pickering* the Court, “made clear that government employees do not give up their First Amendment freedom of speech by


virtue of their status as public employees."§571 Pickering created a judicial test to be used in striking a, “balance between the interests of the [public 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.”§572 From 1968 to 1983, public employees enjoyed enlarged free speech rights than had existed prior to Pickering. §573 However, since 1983 the High Court’s decisions have resulted in a retrenchment of those rights by creating a dual threshold requirement in Connick v. Meyers and Garcetti v. Ceballos. As explained below, this dual threshold requirement has made it more difficult for public employees to prevail in free speech cases. §574

The Dual Threshold Inquiry

In Connick v. Meyers, the Supreme Court modified the Pickering balancing test by requiring courts to first determine as a threshold requirement whether an employee’s speech addresses a matter of public concern before applying the Pickering balancing test. §575 This test was commonly referred to as the Pickering/Connick balancing test. In Connick the court stated, “When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First

Amendment.” In *Connick*, the Court narrowed the definition of “matters of public concern” by eliminating the need for courts to consider matters related to internal office procedures or policies that arguably can be considered of public interest. However, Justice Brennan’s dissent noted, “in concluding that the effect of [government’s] personnel policies on employee morale and the work performance of the [government office] is not a matter of public concern, the Court impermissibly narrows the class of subjects on which public employees may speak out without fear of retaliatory dismissal.” By establishing the public concern threshold and narrowing the definition of matters of public concern, the Court created greater opportunity for public employers to prevail in public employee free speech cases.

In *Connick*, the Court further concluded speech of “limited First Amendment interest” did not require government employers to “tolerate action which [the government employer] believed would disrupt the office, undermine [its] authority, and destroy close working relationships.” The *Connick* majority explicitly stated public employers do not have to establish an employee’s speech actually resulted in disruption of the government’s operations before taking an adverse employment action against the employee. The Court held, “we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.” Prior to *Connick*, if the employer failed to show the employee’s speech disrupted the workings of government, the speech would be protected. After *Connick*, public employers simply needed

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576 *Id.* at 146.
577 *Id.* at 158.
578 *Id.* at 154.
579 *Id.* at 152.
to establish they legitimately believed an employee’s speech would result in disruption before taking action. In *Connick*, the Court expanded the rights of public employers, “by withdrawing protection from all [employee] speech not deemed of public concern,” and allowing employers to take action against public employees not only for speech actually resulted in disruption but speech the employer merely believed could result in disruption.

In 2006, the Court modified the *Pickering/Connick* balancing test by establishing a new threshold inquiry for courts in deciding public employee speech cases. In *Garcetti v. Ceballos*, the Court stated, “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.”581 The Court further concluded, “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.”582 Prior to *Garcetti*, courts first applied *Connick*’s public interest inquiry to determine if the public employee’s speech touched on a matter of public concern before applying *Pickering*’s balancing test. If the speech in question was found not to touch upon a matter of public concern, application of the *Pickering* balancing test was unnecessary. As a result of *Garcetti*, courts had to first determine if a public employee spoke as a private citizen or as a public employee pursuant to their official duties. For almost forty years, courts had paid little attention to whether the employee spoke as a citizen.583 Under the *Garcetti* analysis, if a court finds a public employee spoke not as a private citizen but as a public employee pursuant to their official duties, the employee’s speech is not entitled to First Amendment protections. As a result, the Court

582 *Id.*
583 Christine Elzer, *supra* note 211.
established a bright line rule, something it had explicitly refused to do in prior public employee speech cases. Thus *Garcetti*, “shaped the law such that an employee speaking within the scope of his employ on matters of public concern is, per se, not speaking as a citizen” and thus not protected by the First Amendment. 584

**Impact of the Dual Threshold Inquiry**

Each federal Circuit Court of Appeals has developed its own public employee free speech jurisprudence in response to the dual threshold requirement of the *Pickering/Connick/Garcetti* test and the test’s vague language contained therein. An analysis of the federal Circuit Courts of Appeal cases discussed in Chapter Two demonstrates the difficulty public employees face prevailing in free speech cases at the federal appellate level. Of the twenty five public employee speech cases discussed in Chapter Two, the courts found in twenty of those cases the public employee failed to meet *Garcetti*’s threshold inquiry. Of the five cases where public employees met the *Garcetti*’s threshold, only portions of their speech was deemed protected. In *Jackler v. Byrne*, the Second Circuit found the entirety of the public employee’s speech was protected. That *Jackler* decision, however, has been roundly criticized by the other federal circuit courts. 585

The D.C. Circuit Court of Appeals went so far as to say the *Jackler* test was “as useful as a mosquito net made of chicken wire.” 586 As a result of the Court’s failure to clearly define the phrase “pursuant to their official duties,” the ability of a public employee to prevail in a free

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speech case at the federal appellate level is contingent upon each Circuit Court’s interpretation of the vague language of the *Pickering/Connick/Garcetti* test.

Table 1 - *Garcetti* Threshold

<table>
<thead>
<tr>
<th>Year</th>
<th>Circuit</th>
<th>Case</th>
<th><em>Garcetti</em> Threshold</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>7</td>
<td><em>Mills v. City of Evansville</em></td>
<td>Failed</td>
</tr>
<tr>
<td>2006</td>
<td>11</td>
<td><em>Battle v. Bd. of Regents</em></td>
<td>Failed</td>
</tr>
<tr>
<td>2007</td>
<td>1</td>
<td><em>Curran v. Cousins</em></td>
<td>In part</td>
</tr>
<tr>
<td>2007</td>
<td>3</td>
<td><em>Foraker v. Chaffinch</em></td>
<td>Failed</td>
</tr>
<tr>
<td>2007</td>
<td>3</td>
<td><em>Williams v. Dallas Indep. Sch. Dist.</em></td>
<td>Failed</td>
</tr>
<tr>
<td>2007</td>
<td>6</td>
<td><em>Haynes v. City of Circleville</em></td>
<td>Failed</td>
</tr>
<tr>
<td>2007</td>
<td>6</td>
<td><em>Weisbarth v. Geauga Park District</em></td>
<td>Failed</td>
</tr>
<tr>
<td>2007</td>
<td>7</td>
<td><em>Rose v. Kliment</em></td>
<td>Failed</td>
</tr>
<tr>
<td>2007</td>
<td>11</td>
<td><em>D'Angelo v. Sch. Bd.</em></td>
<td>Failed</td>
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<tr>
<td>2007</td>
<td>10</td>
<td><em>Khan v. Rundle</em></td>
<td>Failed</td>
</tr>
<tr>
<td>2007</td>
<td>10</td>
<td><em>Casey v. W. Las Vegas Indep. Sch. Dist.</em></td>
<td>In part</td>
</tr>
<tr>
<td>2007</td>
<td>10</td>
<td><em>Brammer-Hoelter v. Twins Peaks Charter Academy</em></td>
<td>In part</td>
</tr>
<tr>
<td>2008</td>
<td>7</td>
<td><em>Davis v. Cook County</em></td>
<td>Failed</td>
</tr>
<tr>
<td>2008</td>
<td>9</td>
<td><em>Freitag v. Ayers</em></td>
<td>In part</td>
</tr>
<tr>
<td>2008</td>
<td>2</td>
<td><em>Weintraub v. Bd. of Educ.</em></td>
<td>Failed</td>
</tr>
<tr>
<td>2008</td>
<td>6</td>
<td><em>Fox v. Traverse City Sch. Bd.</em></td>
<td>Failed</td>
</tr>
<tr>
<td>2008</td>
<td>2</td>
<td><em>Jackler v. Byrne</em></td>
<td>Passed</td>
</tr>
<tr>
<td>2011</td>
<td>D.C.</td>
<td><em>Bowie v. Maddox</em></td>
<td>Failed</td>
</tr>
<tr>
<td>2012</td>
<td>2</td>
<td><em>Massaro v. Dep't of Educ. Of N.Y.</em></td>
<td>Failed</td>
</tr>
<tr>
<td>2012</td>
<td>2</td>
<td><em>Ross v. Reslin</em></td>
<td>Failed</td>
</tr>
</tbody>
</table>

Table 1 illustrates the difficulty with which public employees have in meeting *Garcetti’s* threshold inquiry.

As illustrated in Table 2 below, in four of the five cases where the *Garcetti* threshold was met, the courts found the speech in question also met *Connick’s* public interest inquiry and thus satisfied the dual threshold requirement.
In only four of the twenty-one cases discussed in Chapter Two did the public employee meet the dual threshold requirement of the Pickering/Connick/Garcetti test. Eighty-one percent of the time, the public employer successfully demonstrated the public employee either spoke pursuant to their official duties or the public employee didn’t speak on a matter of public concern.
Language Employed by the Supreme Court

*Pickering*, *Connick* and *Garcetti* combined to establish the current legal test used by the courts in deciding public employee speech cases. However, the tests contain vague language lower courts must interpret in rendering their decisions. As a result, different courts examining similar fact patterns often craft contradictory decisions based on their individual interpretation of the test’s language. The vague language contained in the *Pickering/Connick/Garcetti* test has resulted in the federal appellate courts developing their own methodological approaches to deciding public employee speech cases.

In *Pickering*, the Court created the balancing test to determine whether the interests of the public employee in exercising freedom of speech on matters of public concern outweighed the interest of the employer in maintaining the efficient provision of public services. The Court’s intent was to provide a broad framework for deciding cases in which public employees claimed infringement of their free speech rights. In writing for the Court, Justice Marshall acknowledged, “because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed, to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.”

Because the Court expressly refused to “lay down a general standard,” lower courts were left to consider a number of factors suggested by the Court in *Pickering* including, the proximity of the relationship between the employee and the employer; the extent to which the employer had been harmed or was unable to continue to carry out its function and; the degree to

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which the ideas expressed by a public employee constituted a matter of public concern. In its
decision, the Court did not provide guidance on the weight to be accorded each of these factors
but instead left the door open to the possibility the lower court’s might examine additional
factors not expressly mentioned in *Pickering*.

In *Connick*, the Court introduced the public concern threshold placing an emphasis on
*Pickering’s* vague phrase “matters of public concern.” The *Pickering* Court described a
teacher’s speech critical of his employer’s management of public funds as “a matter of public
concern,” an “issue of general public interest” and an issue “currently the subject of public
attention.” The Court failed, however, to clearly define these general phrases. The Court
attempted to provide clarification in *Connick* by defining, “‘public concern’ as ‘any matter of
political, social or other concern to the community’ in light of ‘the content, form, and context of
a given statement, as revealed by the whole record.’” However, this attempt at clarification
resulted in additional confusion among the lower courts and the development of their own
“public concern” jurisprudence.

In *Garcetti*, the Court continued to the muddy the waters for lower courts tasked with
interpreting and applying the *Pickering/Connick/Garcetti* test. The *Garcetti* Court held, “when
employees make statements pursuant to their official duties, the employees are not speaking as
citizens for First Amendment purposes.” The Court failed, however, to define what
constituted “pursuant to their official duties.” In *Garcetti*, “while the majority… made clear that
a government employee acting within the scope of his employ is not acting ‘as a citizen,’ the

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588 *Id.* at 563.
590 *Id.* at 259.
majority failed to define the framework for determining what constitutes ‘scope of employment.’” 592 The Court’s failure to clearly articulate what constitutes “pursuant to their official duties” has led to much confusion among the lower courts leaving each to develop their own “pursuant to their official duties” jurisprudence.

Methodological Approaches

Post Garcetti, the federal appellate courts have been left to decide what constitutes speech pursuant to a public employee’s official duties. 593 As a result, the courts have relied upon a variety of factors for determining if an employee’s speech is made pursuant to their official duties. 594 These factors are not mutually exclusive and are at times considered in tandem by courts in determining whether the employee speech is protected. This section identifies and discusses four main factors recurrent in the cases discussed in Chapter Two – context; audience; citizen analogue and; informal job duties.

Context

Context is one main factor the federal appellate courts have considered when deciding public employee free speech cases. The courts routinely have examined the time, place and manner in which public employee statements were made to determine whether or not the

593 Caroline A. Flynn, supra note 215, at 771.
594 Sarah R. Kaplan, supra note 216, at 468.
employee was speaking pursuant to their official duties. In *Mills v. City of Evansville*, the Seventh Circuit relied upon context in ruling a police sergeant spoke pursuant to her official duties because at the time the sergeant made her comments she was on duty, in her police uniform and speaking to her superiors within the police department.\(^{595}\) The First Circuit similarly found in *Curran v. Cousins* a police officer’s statements were not protected by the First Amendment because the officer made threatening comments to his superiors on the job during a discussion of “official Department policy.”\(^{596}\) The Sixth Circuit relied upon context when considering two cases, *Hayes v. City of Circleville* and *Weisbarth v. Geauga Park District*.\(^{597}\) In *Hayes*, the court examined the manner in which a police officer wrote a memo to his superiors regarding the department’s recent cutbacks to the canine program.\(^{598}\) Because the officer was the author of the program’s standard operating procedures and considered the de facto administrator of the program, the court concluded the manner in which the officer wrote the memo confirmed the officer was acting pursuant to his official duties as the de facto administrator in complaining about the cutbacks to the canine program rather than a private citizen concerned about public safety.\(^{599}\) In *Weisbarth*, the Sixth Circuit again examined the context in which a public employee’s comments were made.\(^{600}\) In this case, the court found comments made by a park ranger to a paid consultant hired to examine department morale and performance problems were made by the ranger during her work shift while riding in her work vehicle and were therefore made pursuant to her official duties. In *Fox v. Traverse City Sch. Bd.*, the Sixth Circuit reiterated,

\(^{595}\) *Mills v. City of Evansville*, 452 F.3d 647, 648 (7th Cir. 2006).

\(^{596}\) *Curran v. Cousins*, 509 F.3d 36, 44 (1st Cir. 2007).

\(^{597}\) *Hayes v. City of Circleville*, 474 F.3d 357 (6th Cir. 2007); *Weisbarth v. Geauga Park District*, 499 F.3d 538 (6th Cir. 2007).

\(^{598}\) *Hayes v. City of Circleville*, 474 F.3d 357 (6th Cir. 2007).

\(^{599}\) *Id.* at 364.

\(^{600}\) *Weisbarth v. Geauga Park District*, 499 F.3d 538 (6th Cir. 2007).
“in reviewing a public employee’s statements under Garcetti, [courts] must consider both [the speech’s] content and context” to determine if it is protected under the First Amendment.\textsuperscript{601}

In \textit{D’Angelo v. Sch. Bd.}, the Eleventh Circuit ruled a principal’s speech regarding the possibility of converting his public school to a charter school was unprotected speech due to the context in which the statements were made.\textsuperscript{602} Examining the Florida statute controlling the charter conversion process, the court observed applications for charter conversation had to be made by specific groups enumerated in the law - the district school board, the principal, teachers, parents, and/or the school advisory council.\textsuperscript{603} Since the principal was not acting as a board or school advisory council member, teacher, or parent, the court concluded the manner in which the principal made his comments must have been pursuant to his official duties as the school principal. In these five cases, the context of the employee’s speech was a major controlling factor in the courts’ decisions.

\textbf{Audience}

Many of the federal appellate courts have also considered to whom a public employee made statements in determining whether the speech merited constitutional protection. If an employee made comments “up the chain of command” to superiors within their respective agencies, the courts have routinely found such speech unprotected by the First Amendment. In \textit{Foraker v. Chaffinch}, the Third Circuit concluded two Delaware State Troopers’ concerns regarding the safety and operation of a department firing range were unprotected because the

\begin{itemize}
  \item \textsuperscript{601} Fox v. Traverse City Sch. Bd., 605 F.3d 345, 348 (6th Cir. 2010).
  \item \textsuperscript{602} D’Angelo v. Sch. Bd., 2007 U.S. App. LEXIS 18235 (11th Cir. 2007).
  \item \textsuperscript{603} Id. at 13.
\end{itemize}
troopers “were expected, pursuant to their job duties, to report problems concerning the operations at the range up the chain of command.”\footnote{Foraker v. Chaffinch, 504 F.3d 231, 241 (3rd Cir. 2007).} Because the troopers reported their concerns to their superiors, their speech was deemed unprotected. In \textit{Weintraub v. Bd. Of Educ.}, the Second Circuit ruled a teacher’s complaints regarding how he was treated by his superiors was unprotected because the teacher complained to his employer, the Board of Education.\footnote{Weintraub v. Bd. Of Educ., 593 F.3d 196 (2d. Cir. 2010).} In \textit{Weintraub}, the court ruled when an employee expresses complaints and concerns to supervisors, “up the chain of command of command at his workplace,” the employee’s speech is unprotected by the First Amendment because it is made pursuant to the employee’s official duties.\footnote{Id.} In \textit{Ross v. Breslin}, the Second Circuit relied on its previous \textit{Wintraub} decision in ruling a payroll clerk’s reporting of alleged improprieties at the school district were unprotected by the First Amendment.\footnote{Ross v. Breslin, 693 F.3d 300 (2nd Cir. 2012).} The district court had previously ruled in favor of the clerk finding she had gone outside the chain of command to report the improprieties to the Board of Education when she felt the school district’s superintendent was not responding appropriately to her allegations. Reversing the district court’s finding, the Second Circuit ruled, “taking a complaint up the chain of command to find someone who will take it seriously ‘does not, without more, transform [her] speech into protected speech made as a private citizen.’”\footnote{Id. at 306.}

In \textit{Freitag v. Ayers}, the Ninth Circuit expressly distinguished the difference between concerns raised up the chain of command to superiors within a government agency from concerns raised by the same employee regarding the same subject matter to someone outside the

\footnotesize\textbf{\footnotemark}
In Freitag, the Ninth Circuit ruled a prison guards internal memos regarding inmate sexual misconduct were unprotected by the First Amendment because they were made to her superiors within the prison system. However, the same concerns raised by the prison guard to a state senator outside the prison system were protected.

The Sixth Circuit acknowledged the importance of audience in Fox v. Traverse City Sch. Bd. In Fox, the Sixth Circuit ruled a special education teacher’s complaints about class size were unprotected by the First Amendment because in part the comments were made up the chain of command to her supervisor. In its decision, the court pointed out the need to consider “to whom the statement was made” in determining whether speech is protected. The court found the teacher’s comments “were directed solely to her supervisor, not to the general public.” Consideration of this factor, in part, led the court to find the speech unprotected by the First Amendment.

Citizen Analogue

Garcetti stated, “When a public employee speaks pursuant to employment responsibilities… there is no relevant analogue to speech by citizens who are not government employees.” Some of the federal appellate courts, particularly the Second Circuit, have analyzed case fact patterns to see if a relevant citizen analogue existed. In doing so, these courts have considered whether a public employee expressed themselves in a manner available to private citizens. The Second Circuit laid out its citizen analogue analysis in Weintraub v. Bd. of

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609 Freitag v. Ayers, 468 F.3d 528 (9th Cir. 2009).
610 Fox v. Traverse City Sch. Bd., 605 F.3d 345 (6th Cir. 2010).
611 Id.
612 Id.
Educ.\textsuperscript{614} As discussed above, in Weintraub a teacher complained about his treatment to his supervisors up the chain of command. The teacher’s initial complaint was in the form of a union grievance. In its decision, the Second Circuit ruled, “the lodging of a union grievance is not a form or channel of discourse available to non-employee citizens.”\textsuperscript{615} Because private citizens lack access to the formal grievance process afforded the teacher, the Second Circuit ruled no citizen analogue existed and the teacher was speaking as a public employee rather than a private citizen. Relying on its previous Weintraub decision, the Second Circuit in Massaro v. Dep’t of Educ. of N.Y. ruled a teacher’s complaints regarding classroom conditions and other job related concerns were unprotected by the First Amendment in the absence of a relevant citizen analogue.\textsuperscript{616} In Massaro, the Second Circuit found the teacher “spoke as an employee rather than a private citizen… [because] she aired her complaints only to several school administrators rather than to the public, and most of those complaints were made in the context of internal safety and medical absence-related forms (as least one of which was marked “confidential”), for which there was no relevant citizen analogue."\textsuperscript{617} Again relying on its citizen analogue analysis, in Jackler v. Byrne the Second Circuit found a police officer’s refusal to obey his superiors insistence he change a written report regarding another officer’s alleged misconduct was protected by the First Amendment even though the officer was speaking pursuant to his official duties.\textsuperscript{618} In its decision the court ruled, “a citizen has a First Amendment right to decide what to say and what not to say, and, accordingly, the right to reject governmental efforts to require him

\textsuperscript{614} Weintraub v. Bd. Of Educ., 593 F.3d 196 (2d. Cir. 2010).
\textsuperscript{615} Id. at 204.
\textsuperscript{616} Massaro v. Dep’t of Educ. of N.Y., 481 Fed. Appx. 653, 645 (2012).
\textsuperscript{617} Id.
\textsuperscript{618} Jackler v. Byrne, 658 F.3d 225 (2d Cir. 2011).
to make statements he believes are false.”\textsuperscript{619} The court further concluded, “[the officer’s] refusal to comply with orders to retract his truthful Report and file one that was false was a clear civilian analogue and that [the officer] was not simply doing his job in refusing to obey those orders.”\textsuperscript{620}

**Informal Job Duties**

In *Garcetti*, the Supreme Court held, “Formal job descriptions 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.”\textsuperscript{621} Many of the federal appellate courts have formulated decisions based on duties an employee can reasonably be expected to perform even if those duties are not expressly written in formal job descriptions. In *McGee v. Pub. Water Supply*, a supervisor at a water treatment plant argued his criticism of repairs being made at the plant were protected by the First Amendment because he had been removed from supervising the repair projects and was told not to concern himself with the repairs.\textsuperscript{622} The Eight Circuit rejected his argument ruling his general supervisory duties included repairs at the plant and his duty to advise the Water Supply Board regarding regulatory and legal requirements.\textsuperscript{623} The court concluded the supervisor’s comments were related to duties the supervisor would, “actually be expected to perform.”\textsuperscript{624} In

\textsuperscript{619} Id. at 241.
\textsuperscript{620} Id.
\textsuperscript{622} *McGee v. Pub. Water Supply*, 471 F.3d 918, 921 (8th Cir. 2006).
\textsuperscript{623} Id.
\textsuperscript{624} Id.
Foraker v. Chaffinch, two Delaware State Troopers argued statements they made regarding safety concerns at a department firing range were protected by the First Amendment because their formal job duties entailed instructing students on how to fire weapons and not speaking out about health and safety concerns at the firing range.\footnote{Foraker v. Chaffinch, 504 F.3d 231, 238 (3rd Cir. 2007).} The Third Circuit disagreed ruling it was within the troopers’ job functions to report problems at the firing range to their supervisors even if such a duty to report was not expressly written in their formal job descriptions. In Williams v. Indep. Sch. Dist., a high school athletic director argued concerns he raised over an athletic department account were protected speech because he was not required to raise such concerns as athletic director.\footnote{Williams v. Indep. Sch. Dist., 480 F.3d 689, 692 (5th Cir. 2007).} The school board conceded it was not within the athletic directors formal responsibilities. The Fifth Circuit ruled the concerns raised by the athletic director pertained to his “daily operations” as athletic director and the athletic account in question was necessary for the operation of the athletic department.\footnote{Id. at 693.} Therefore the court reasoned the comments regarding the athletic account were made pursuant to the athletic director’s official duties even though the school board conceded it was not within the athletic director’s formal job responsibilities to raise such concerns.

The Seventh Circuit has ruled a public employee’s “more general responsibilities” must be considered when determining whether or not a public employee’s speech was made pursuant to his official duties.\footnote{Vose v. Kliment, 506 F.3d 565, 566 (7th Cir. 2007).} In Vose v. Kliment, a police department’s narcotics unit supervisor argued concerns he raised about misconduct of officers in the department’s major case unit were protected by the First Amendment because conducting an independent investigation of the major...
crime unit and reporting suspected misconduct was not within his formal job responsibilities. The narcotics supervisor believed detectives in the major case unit were using alleged drug investigations to obtain search warrants contrary to department procedures and the law. The Seventh Circuit stated, “A public employee’s more general responsibilities are not beyond the scope of the official duties for First Amendment purposes.” The court reasoned after Garcetti, “th[e] focus on ‘core’ job functions [was] to narrow.” The court ruled, “while [the supervisor] may have gone above his ordinary daily job duties in reporting the suspected misconduct outside his unit, it was not beyond his official duty as a sergeant of the narcotics unit to ensure the security and propriety of the narcotics unit’s operations.” Because the supervisor’s reporting of alleged misconduct fell within his “more general responsibilities” as defined by the Seventh Circuit, the panel concluded the supervisor’s speech was not protected by the First Amendment.

The Eleventh Circuit has defined informal job duties as those that “owe their existence” to a person’s employment as a government agent. In Khan v. Rundle, an assistant state’s attorney argued comments he made in court were protected by the First Amendment because he refused to follow the directives issued by his supervisors lie to judges. The assistant state’s attorney pointed out the supervisory expectation for him to lie in court was part of his official duties. Therefore, when he testified truthfully he was speaking as a citizen and not as a government employee. The Eleventh Circuit ruled the assistant state’s attorney’s statements in court owed their existence to his role as a government lawyer while representing the state of

629 Id. at 571.
630 Id. at 570.
631 Id. at 571.
632 Id.
Florida in open court. The Eleventh Circuit expanded on its definition of duties owing their existence to an employee’s role as a government agent in *Brammer-Hoelter v. Twin Peaks Charter Academy.* In *Brammer-Hoelter*, the court reasoned, “if an employee engages in speech during the course of performing an official duty and the speech reasonably contributes to or facilitates the employee’s performance of the official duty, the speech is made pursuant to the employee’s official duties.” The court stated, “speech may be made pursuant to an employee’s official duties even if it deals with activities that the employee is not expressly required to perform.” Similar to the Eleventh Circuit’s rulings in *Khan* and *Brammer-Hoelter*, the Sixth Circuit has also stated comments owing their existence to a person’s government employment are unprotected by the First Amendment. In *Fox v. Traverse City Sch. Bd.*, the Sixth Circuit stated, “speech 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.’”

**Lane v. Franks – A Potential Turning Point**

Post *Garcetti*, the federal appellate courts have been left to decide what constitutes speech pursuant to a public employee’s official duties. But are the federal appellate courts’ interpretations of what constitutes speech pursuant to a public employee’s official duties too

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634 *Id.* at 52.
635 *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192 (10th Cir. 2007)
636 *Id.* at 1203.
637 *Id.*
638 *Fox v. Traverse City Sch. Bd.*, 605 F.3d 345 (6th Cir. 2010).
expansive thereby unduly restricting public employee speech rights? The Supreme Court’s recent *Lane v. Franks* decision may help to answer that question and possibly portend a reversal in the restrictive trend in public employee speech rights discussed above.\(^{640}\)

In *Lane*, the director of a community college program, Edward Lane, sued his former employer alleging his First Amendment rights were violated when he was fired after investigating potential fraud in the program involving a state legislator and subsequently testifying as a subpoenaed witness in two prosecutions initiated against the state legislator.\(^ {641}\) The question before the Court was, “whether the First Amendment protects a public employee who provides truthful sworn testimony, compelled by subpoena, outside the scope of his ordinary job responsibilities.”\(^ {642}\) The Eleventh Circuit ruled it was not protected speech. The appellate panel, relying on its previously established “pursuant to official duties” jurisprudence reasoned, “Lane testified about his official activities pursuant to a subpoena and in the litigation context, in and of itself, [did] not bring Lane’s speech within the protection of the First Amendment.”\(^ {643}\) The court ruled, “Nothing evidences that Lane testified at [the state representative’s] trial ‘primarily in [his] role as citizen’ or that his testimony was an attempt to comment publicly on CITY’s internal operations.”\(^ {644}\) The Supreme Court, however, concluded the Eleventh Circuit had, “read *Garcetti* far too broadly” and pointed out, “*Garcetti* said nothing about speech that simply relates to public employment or concerns information learned in the course of public employment.”\(^ {645}\) Further clarifying its *Garcetti* decision, the Court stated, “the

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\(^{641}\) *Id.* at 2376.

\(^{642}\) *Id.* at 2378.

\(^{643}\) *Lane v. Franks*, 523 Fed. Appx. 709, 712 (11\(^{th}\) Cir. 2013).

\(^{644}\) *Id.*

\(^{645}\) *Lane v. Franks*, 134 S. Ct. 2369, 2378 (2014).
mere fact that a citizen’s speech concerns information acquired by virtue of his public employment does not transform that speech into employee – rather than citizen – speech.”\textsuperscript{646} The Court concluded, “The critical question under \textit{Garcetti} is whether the speech at issue is itself ordinarily within the scope of an employee’s duties, not whether it merely concerns those duties.”\textsuperscript{647}

The High Court’s \textit{Lane} decision may have signaled a reversal in the restrictive trend in public employee speech rights by cautioning the federal appellate courts their interpretations of what constitutes speech pursuant to an employee’s official duties may be too broad. Although \textit{Lane} dealt specifically with truthful sworn subpoenaed testimony, this may be the first case in a string of new Supreme Court cases that attempt to clarify \textit{Garcetti}’s vague language and, “resolve discord among the Courts of Appeals” in deciding public employee speech cases.\textsuperscript{648}

\begin{footnotesize}
\begin{enumerate}
\item Id. at 2379.
\item Id.
\item Id. at 2377.
\end{enumerate}
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CHAPTER FOUR
CONCLUSION

For young teachers, social media websites such as Facebook are part of their daily lives. They grew up posting messages, “liking” other people’s comments and sharing personal information with people they’ve “friended.” For many of these young teachers, social media may be their primary vehicle for communicating with family, friends, colleagues and acquaintances. According to the National Education Association (NEA), some young teachers “seem oblivious to the devastating consequences of posting really stupid things in cyberspace.”\(^{649}\) As a result school administrators find themselves dealing with a growing number of concerns over teacher cyber speech. As young teachers continue to incorporate social media into every aspect of their lives, it is important for school administrators to understand how to deal with the inevitable situation involving a school community member reporting alleged inappropriate comments made by a teacher via a social media or another type of Internet website.

*Pickering/Connick/Garcetti Test*

The appropriate legal test to apply to teacher cyber speech cases is the *Pickering/Connick/Garcetti* test. Since the Supreme Court’s 2006 *Garcetti* decision, the courts

\(^{649}\) Mike Simpson, *supra* note 11.
have consistently applied this test to public employee speech cases.\textsuperscript{650} It’s likely the vast majority of school administrators has never heard of the Pickering/Connick/Garcetti test nor confronted a teacher cyber speech issue. School administrators are more likely to have faced cyber speech issues with students. Most school administrators have probably heard of the Tinker test routinely applied to student speech cases and most probably understand Tinker’s material and substantial disruption requirements.\textsuperscript{651} However, without knowledge of the Pickering/Connick/Garcetti test, school administrators may rely on their understanding of Tinker to address a complaint or concern regarding a teacher’s cyber speech. As the probability school administrators will have to address employee cyber speech issues rises, it is important school administrators be aware of the correct legal test employed by courts in public employee speech cases so they can properly investigate and appropriately react to teacher cyber speech issues.

\textbf{Investigating Teacher Cyber Speech}

The legal issues surrounding public employee speech are complex as demonstrated by the divergent public employee speech jurisprudence among the federal appellate courts. The Pickering/Connick/Garcetti test can provide school administrators with guidance on what questions to ask and what information to collect during employee cyber speech investigations. According to the Pickering/Connick/Garcetti test, the first question a school administrator should ask in response to a complaint regarding a teacher’s cyber speech is: Was the teacher speaking as

\textsuperscript{650} The balancing of interests between the employer and employee in public employee speech cases has an even longer history of consistent judicial application, first employed by the Supreme Court in Pickering \textit{v. Board of Educ.}, 391 U.S. 563, 570 (1968).

\textsuperscript{651} \textit{Tinker v. Des Moines School Dist.}, 393 U.S. 503 (1969).
a private citizen or as a public employee pursuant to their official duties? Contrary to first blush appearance, this is not an easy question to answer. However, the federal appellate courts have provided a number of factors for school administrators should consider when attempting to answer this question.

**Context**

The first factor school administrators should consider is context. They should pay particular attention to the time, place and manner in which the teacher made the comments. The school administrator needs to know whether or not the teacher made the comments during work hours within the school building utilizing district owned technology. The school administrator also needs to know how the speech was communicated. The school administrator should consider whether the comments were posted to a private social media account, like Facebook, or a more public online venue such as a public discussion blog. If the school administrator finds the teacher made the comments while on duty using district-owned technology, it is more likely the courts will find the teacher acted pursuant to her official duties. The teacher also most likely violated the school board’s policy governing appropriate use of district-owned technology equipment. If the teacher made the comments after hours using a privately owned personal technology device, the school administrator should consider additional factors in determining whether the teacher spoke pursuant to her official duties.
Audience

The school administrator also needs to identify to whom the teacher made the allegedly inappropriate comments. Because the comments were made by the teacher online, this may also be a difficult question to answer. The school administrator should determine whether the comments were expressly directed to a specific person or group, such as a parent, student or colleague or at a specific entity, such as the school district or the school board. If the teacher’s comments were directed at either school administrators or the board of education, the courts may find the comments were made up the chain of command within the school district. The federal appellate courts have routinely ruled comments made up the chain of command were unprotected by the First Amendment. If the teacher’s comments were not directed to a specific individual or entity, the school administrator should attempt to determine who had the ability to view the teacher’s comments. If the comments were made on a teacher’s personal social media webpage, it would be helpful to determine the webpage’s privacy settings. Determining who had the ability to view the teacher’s comments may be helpful in establishing the intended audience.

Citizen Analogue

The school administrator should analyze whether the teacher’s expression was accessible to a private citizen. School administrators should determine whether a private citizen had the ability to post comments on the same webpage utilized by the teacher. If the general public has the ability to post comments to the same webpage the teacher used in making the allegedly inappropriate comments, it’s possible the courts will find a citizen analogue existed. Where a
citizen analogue exists, the courts are more likely to rule the public employee was not speaking pursuant to their official duties because private citizens can avail themselves to the same method of communication as the public employee used.

**Informal Job Duties**

_Garcetti_ stated, “Formal job descriptions 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.”

In analyzing the teacher’s comments, school administrators should determine if the teacher’s comments could be reasonably linked to the job they were expected to perform. For example, if a general education teacher made comments online critical of individual education plans for special education students assigned to her classroom, the courts may find the teacher made comments pursuant to her official duties because a school district may reasonably expect a teacher to bring those concerns to school officials even if a duty to report isn’t expressly listed in the teacher’s job description. The Seventh Circuit has stated, “A public employee’s more general responsibilities are not beyond the scope of the official duties for First Amendment purposes.”

The Sixth Circuit has ruled comments owing their existence to a person’s government employment are unprotected by the First Amendment.

If the school administrator can link the teacher’s comments to the teacher’s general responsibilities or establish the teacher’s

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653 _Vose v. Kliment_, 506 F.3d 565, 571 (7th Cir. 2007).
654 _Fox v. Traverse City Sch. Bd._, 605 F.3d 345 (6th Cir. 2010).
comments owed their existence to the teacher’s employment with the school district, the courts may find the teacher spoke pursuant to her official duties when making the allegedly inappropriate comments online.

**Speech As A Matter of Public Concern**

If a school administrator can establish the teacher’s allegedly inappropriate online comments were made pursuant to the teacher’s official duties, they can move to the second part of the balancing test to determine if the comments addressed a matter of public concern. In *Connick* the court stated, “When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.”\(^{655}\) If the teacher’s comments were related to internal school procedures or policies, courts will most likely find the teacher’s comments were not on a matter of public concern and thus not protected by the First Amendment. Frequent media coverage regarding inappropriate teacher comments posted online discusses teacher rants aimed at students and their parents. Analyzing the federal appellate case law, courts will most likely consider these rants merely inappropriate comments made by a disgruntled employee and not speech on a matter of public concern. In 2011, a first grade teacher was fired for posting, “I’m a warden for future criminals!” The firing was upheld by an administrative law judge who stated, “the district’s need to operate efficiently trumped any free speech rights because

‘thoughtless words can destroy the partnership between home and school that is essential to the mission of the schools.’ General comments regarding public education, major education initiatives and the state of parenting, however, may be deemed of interest to the general public and thus most likely protected by the First Amendment. School administrators must carefully consider the content of the online comments and their appeal to the general public before taking action against the teacher – even if the comments are controversial. The Supreme Court has recognized government employees have specific knowledge of the workings of their government agencies and can heighten public discourse on important matters of public concern. The Court has held “free and open debate is vital to informed decision-making by the electorate,” and, “teachers are, as a class, the members of a community most likely to have informed and definite opinions” regarding school matters and should be “able to speak out freely on such questions without fear of retaliatory dismissal.” Thus, school administrators should tread carefully when considering if the teacher’s comments were on a matter of public concern and protected by the First Amendment.

School administrators don’t have to wait for an actual disruption of school operations before taking action. The Connick Court stated, “we do not see the necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.” School administrators simply need to establish they legitimately believed a teacher’s online comments would result in disruption before taking action. If school administrators can

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656 Michael Stafford, supra note 9.
argue the teacher’s online comments were not related to any matter of political, social, or other concern to the community, they can take action against the teacher without having to wait until an actual disruption of the school environment occurs.

**Interests of the Teacher vs. Interests of the School District**

If school administrators can establish the teacher’s alleged controversial comments were made pursuant to their official duties and on a matter of public concern, the final part of the *Pickering/Connick/Garcetti* test requires school administrators to weight the teacher’s interest in exercising their freedom of speech against the school official’s interest in maintaining the efficient provision of public educational services. In balancing the teacher’s interests against the school district’s interests, school administrators need to consider several factors outlined by the Supreme Court in *Pickering*. First, school administrators should consider whether the teacher’s comments jeopardized her relationships with her immediate supervisors or harmony with co-workers. Comments directed at parents may not result in discord between the teacher and her supervisors and coworkers whereas comments about a teaching colleague or the school principal may lead to discord. Second, the school administrator should determine if the comments would impede the teacher from performing her teaching duties. Rants toward students are more likely to impede the teacher’s ability to perform her job functions in contrast to comments directed at a new instructional initiative. Lastly, school administrators need to consider whether the teacher’s comments have or will cause disruption to the efficient operation of the school. Inappropriate comments that
create a public uproar and distract the school from focusing on the mission of educating public school children can and most likely will negatively impact the efficient operation of the school. If the teacher’s comments negatively impact her working relationships, impede her ability to discharge her duties as a teacher and/or negatively impact the efficient operation of the schools, the courts will most likely tip the balance in favor of school officials and thus afford the teacher’s comments no First Amendment protections.

Involving the Board Attorney

There are many factors school administrators should consider when confronted with alleged inappropriate online comments by public school teachers. This chapter and the flow charts below are designed to assist school administrators in investigating allegations of inappropriate online teacher comments and collecting pertinent information that may be used to take action against the teacher. However, case law on teacher cyber speech is continuing to evolve and public employee cyber speech jurisprudence is scant. Because this is far from a settled area of law, school administrators may use this study to help guide their investigations but should ultimately turn their findings over to their school board attorney prior to taking any action against a teacher for their online speech. School board attorneys will have knowledge of the most recent, if any, public employee speech cases progressing through the courts and an accompanying understanding of public employee speech decisions in the school district’s federal appellate court jurisdiction. Involving the school board attorney will serve school administrators well when dealing with the thorny legal issues involved in these types of cases.
Recommendations for Further Study

This study analyzed public employee First Amendment speech cases decided by the Supreme Court and federal Circuit Courts of Appeal in an effort to identify decisional trends, specific language employed by the courts and methodological approaches utilized by the courts in formulating opinions.

This study focused specifically on Supreme Court and federal appellate court decisions in cases involving public employee speech rights. Expanding the study to include lower court decisions and cases brought before administrative law judges or state labor relations boards may assist in predicting how the courts would deal with specific fact patterns relating to public employee cyber speech.

Disciplining public school teachers, including termination, can be a lengthy and costly process for school districts. Many school districts may favor entering into separation agreements with public school teachers accused of posting inappropriate comments online. Using freedom of information laws to obtain, if possible, separation agreements entered into because of cyber speech issues may also shed some light on the complicated issues surrounding employee cyber speech cases. Additionally, interviewing school administrators who have dealt with teacher cyber speech issues could provide valuable information that can be used to further tailor the recommendations on how school administrators should effectively respond to complaints of inappropriate cyber speech by teachers.

Lastly, public employee cyber speech is an area of emerging law. As more case law emerges, it would be helpful to review the specific findings of the court to analyze
how federal appellate courts and/or the Supreme Court apply current public employee speech jurisprudence specifically to public employee cyber speech cases.
APPENDIX A

ADMINISTRATIVE GUIDE TO CYBER SPEECH INVESTIGATIONS
Administrative Guide to Cyber Speech Investigations

The intent of this guide is to assist administrators in the collection of pertinent information during investigations of alleged inappropriate employee cyber speech. In certain circumstances, employee cyber speech may be protected by the First Amendment. Administrators should use this guide to collect evidence and work with their school board attorney’s to determine if the speech is constitutionally protected and what, if any, disciplinary actions can be taken if the employee cyber speech is found to be inappropriate by the administrator.

Part I - Investigate whether the teacher spoke as a private citizen or public employee pursuant to their official duties.

1. Consider the context (time, place and manner):
   a. Did the speech occur during the workday?
   b. Did the teacher use district owned equipment when making the comments?

2. Consider the intended audience:
   a. Were the comments expressly directed at a specific person or group (parent, student, colleague, supervisor, school district, school board)?
   b. Who viewed the teacher’s comments?
   c. If the teacher was using a private social media account, can you determine the privacy settings on the account?

3. Consider the comments in relation to the teacher’s formal and informal job duties:
   a. Were the comments specifically linked to one or more of the teacher’s official duties (caseloads, schedule, assigned curriculum, etc.)?
   b. Were the comments specifically linked to one or more duties the teacher could responsibility be expected to perform (general supervision of students, implementing school district policies or curriculum, maintaining appropriate professional relationships with colleagues)?

4. Consider whether a citizen analogue existed:
   a. Could a private citizen have posted comments to the same webpage the teacher used in making the allegedly inappropriate comments?

Part II – Investigate whether the speech touched on a matter of public concern.
1. Did the speech relate to a political, social or other concern the school community would find of interest?

2. Could the speech be characterized as an emotional rant?

3. Did the comments heighten public discourse about a matter relating to the school or school district?

4. Did you reasonably believe the comments would lead to a general disruption of the school environment?

**Part III – Investigate the impact the speech had on the general school environment.**

1. Did the speech cause an actual disruption to the school environment? If so:
   
   a. Did the speech negatively impact the teacher’s ability to work with colleagues, parents or immediate supervisor(s)?
   
   b. Did the speech negatively impact the teacher’s ability to deliver classroom instruction?
   
   c. Did the comments result in general discord within the school or larger school community?

**Part IV – If you found the comments to be inappropriate in your professional opinion, discuss your findings with the school board attorney before you consider disciplining the
APPENDIX B

INVESTIGATIVE GUIDE VISUALS
The visual below illustrates the three essential questions school administrators should ask themselves when investigating alleged inappropriate teacher cyber speech.

Is the teacher’s cyber speech protected by the First Amendment?

- Was the teacher speaking as a private citizen or pursuant to their official duties?
- Were the teacher’s comments on a matter of public concern?
- Does the school’s interest in maintaining its efficient operation outweigh the teacher’s interest in exercising their freedom of speech?
The visual below illustrates the factors to be considered when attempting to determine whether a teacher spoke pursuant to their official duties.
The visual below illustrates the factors to be considered when attempting to determine whether a teacher’s comments were on a matter of public concern.
The visual below illustrates the factors to be considered when balancing the interests of the teacher to freely express themselves and the interests of the school in maintaining efficient operations.