

# Speaking Out on Matters of Public Concern: The Precarious Nature of School Administrator Speech

This manuscript has been peer-reviewed, accepted, and endorsed by the National Council of Professors of Educational Administration as a significant contribution to the scholarship and practice of school administration and K-12 education.



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*The purpose of this paper is to highlight current U.S. Supreme Court precedents regarding public employee speech on matters of public concern, and how those precedents are being applied by lower federal courts to public school administrators. Surveying the current legal landscape reveals a heightened vulnerability for school administrators engaging in speech on matters of public importance. Due to the complexity of the school administrator's job, the vast scope of their responsibilities, and the uniqueness of their position (which often entails being a spokesperson of sort for the school district), the speech of public school administrators, even on matters of public concern, often lacks the legal protection many assume exists for such speech. This paper is intended to raise awareness for both practitioners and those who train them with the hope that a better understanding of recent litigation in this area will help inform one's practice and preparation.*

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## Introduction

In *Pickering v. Board of Education* (1968) the United States Supreme Court held that public employers violate the First Amendment rights of their employees when employers retaliate for speech made while the employee is speaking as a private citizen on a matter of public concern, provided the speech does not substantially disrupt organizational efficiency (Pickering, 1968). This is often referred to as the *Pickering* two-part test. Over the years, subsequent court opinions frequently focused on whether the speech at issue regarded a matter of public concern and/or whether there was an adverse effect on the employer-employee relationship. Little attention was given to the role of the speaker or their particular job responsibilities at the time the speech was made. Almost forty years after *Pickering*, the Supreme Court once again addressed the parameters of public employee speech in the seminal case of *Garcetti v. Ceballos* (2006). In *Garcetti* the Court clarified that statements made pursuant to a public employee's official duties do not qualify as private citizen speech. As a result, *Garcetti* fundamentally altered the analysis courts engage in when deliberating employee speech cases in public school settings.

In recent years several federal circuit courts have applied *Garcetti* (2006) to cases involving public school employees (see *Casey*, 2007; *Brammer-Hoelter*, 2007; *D'Angelo*, 2007; *Mayer*, 2007; *Williams*, 2007; *Almontaser*, 2008; *Samuelson*, 2008; *Posey*, 2008; *Weintraub*, 2010; *Reinhardt*, 2010; *Fox*, 2010; *Evans-Marshall*, 2010; *Decotiis*, 2011; *Johnson*, 2011; *Ross*, 2012; *McArdle*, 2013; *Dougherty*, 2014; *Hubbard*, 2014; *Mpoy*, 2014). Many of these appellate cases have been decided in favor of the employer/school district as the courts determined the speech at issue was speech engaged in as an employee and because the speech in question fell within the parameters of the employees' job responsibilities. Some have argued that "the circuits have impermissibly broadened the *Garcetti* threshold exemption far beyond its intended scope" (Bauries & Schach, 2011, p. 383). Regardless, it is safe to say that *Garcetti* has profoundly impacted free speech retaliation claims brought by public school employees. Bowman (2013) observed that "*Garcetti* in particular limits public employees' speech rights to a point where they have almost wasted away" (p. 254). Many times cases that would have been previously analyzed under the two-part test in *Pickering* are now disposed of rather efficiently after an initial analysis applying the *Garcetti* test of whether the speech at issue was made pursuant to one's official job duties. In this regard, public school administrators appear to be a *particularly* vulnerable group because their job responsibilities are often quite broad and elastic.

This paper highlights a growing number of federal appellate cases (*Casey*, 2007; *Williams*, 2007; *D'Angelo*, 2007; *Almontaser*, 2008; *McArdle*, 2013) where school administrators are discovering the harsh application of the Supreme Court's decision in *Garcetti* (2006) to expression that most would deem ethically mandated and/or job-required. Furthermore, recent cases from the Sixth and Eleventh Circuits are presented that should give policy-making, school administrators pause as they consider the potentially vulnerable nature of expression directly related to the policy positions of their public employers. While most school administrators may not consider themselves "policy makers" as that phrase is commonly understood in the field of education, this paper will describe how the courts define "policy-making" or "confidential" public employees for purposes of free speech analysis. Finally, this paper not only serves to inform current school administrators about the challenges they face in light of *Garcetti* and recent holdings by various federal circuits, but it also encourages those who prepare future administrators and those who counsel current administrators to consider the implications for practice.

## Framework of a First Amendment Retaliation Claim

The cases cited herein typically involve public school administrators who assert they were adversely affected by their public employers for exercising rights guaranteed to be protected under the First Amendment. To support a retaliation claim, specific legal elements must be present. There is variation among the federal circuits as to how they articulate these elements (see *Fox*, 2010, p. 348), but the factors they hold in common include proving that 1) the public employee engaged in a constitutionally protected activity (e.g., speech or petition), 2) the employer took an adverse employment action against the employee, and 3) the employee's constitutionally protected activity was a substantial or motivating factor for the employer's adverse action. Even if a plaintiff proves the aforementioned elements, a public employer may still overcome liability by demonstrating they would have taken the same adverse action against the plaintiff even if there had been no protected expression because of legitimate reasons quite separate from the expression at issue (see *Mt. Healthy*, 1977, p. 283).

### The *Garcetti* Effect

Thirty-eight years after the Supreme Court's *Pickering* (1968) ruling, the Court handed down the *Garcetti v. Ceballos* (2006) decision. "The Supreme Court ... in *Garcetti* did revisit *Pickering's* first prong ... and added some clarity to the question when a public employee speaks as a citizen rather than as an employee" (*Casey*, 2007, p. 1328). In *Garcetti* the Court ruled that the First Amendment does not protect a public employee from discipline for speech made pursuant to the employee's official duties. *Garcetti* clarified that there is a threshold determination to be made prior to (and quite separately from) an analysis of whether the content of the employee's speech was on a matter of public concern. In order for the employee's speech to be protected, the content of the speech may *not* be "pursuant to" the employee's job duties and responsibilities. Therefore, the employee must truly be speaking as a "citizen" rather than an "employee." Bowman (2013) explains that "because the government effectively hires 'official duty' speech, it is the government's speech to control" (p. 254).

In the few short years since the Court's *Garcetti* decision was issued, the federal appellate courts already have had numerous opportunities to apply its holding to retaliation claims brought by public employees in K-12 settings (see *Casey*, 2007; *Brammer-Hoelter*, 2007; *D'Angelo*, 2007; *Mayer*, 2007; *Williams*, 2007; *Almontaser*, 2008; *Samuelson*, 2008; *Posey*, 2008; *Weintraub*, 2010; *Reinhardt*, 2010; *Fox*, 2010; *Evans-Marshall*, 2010; *Decotiis*, 2011; *Johnson*, 2011; *Ross*, 2012; *McArdle*, 2013; *Dougherty*, 2014; *Hubbard*, 2014; *Mpoy*, 2014). Five of these appellate cases are highlighted below. They were selected as a sub-set for review because they all involve public school *administrators* who alleged they suffered adverse employment actions for engaging in expression that should have been protected by the First Amendment, and in each case the courts ruled (at least in part) against their claims. Each case highlighted below demonstrates a new reality under *Garcetti*; namely, that simply engaging in speech that encompasses a public concern is not sufficient to secure First Amendment protection.

## Post *Garcetti* Federal Appellate Cases Pertinent to School Administrator Speech

### Casey v. West Las Vegas Independent School District

A newly appointed superintendent discovered that her school district was not in compliance with the requirements of the federal Head Start program, the district was in violation of the New Mexico Open Meetings Act, and the district was engaged in other miscellaneous “violations of state or federal law (e.g., hiring employees without advertising vacancies or conducting a review process, and improperly handling claims of misconduct by teachers and principals)” (*Casey*, 2007, p. 1329). During her brief tenure, the superintendent addressed all of these issues in one way or another. When the superintendent was subsequently fired she filed a retaliation claim asserting the school district had terminated her over expression that constituted protected speech. The Tenth Circuit Court of Appeals entertained this appeal shortly after *Garcetti* (2006) was handed down by the United States Supreme Court. In light of the Court’s *Garcetti* holding, the Tenth Circuit observed that the “question for us on *Pickering’s* first prong is thus significantly modified...” (*Casey*, 2007, p. 1328). No longer would the courts simply decide whether the speech touched on a matter of public concern, but they would now analyze whether the public employee speaking on a matter of public concern did so as a private citizen or as part of their employment responsibilities as a public employee.

*Casey* (2007) presented the Tenth Circuit with several instances of public expression that had to be analyzed according to what was expected of a school superintendent in the normal course of one’s duties. With regard to the miscellaneous violations of state and federal law, the superintendent admitted that statements she made to the School Board concerning these violations “fell within the scope of her duties as Superintendent because they were aimed ‘solely to the School Board’ to which she reported and her job admittedly included ‘advis[ing] Defendants about the lawful and proper way to conduct school business’” (*Casey*, 2007, p. 1328). Hence, under *Garcetti* (2006) such expression was not protected by the First Amendment. As to the district’s Head Start violations, the superintendent both reported these violations to the School Board and directed a subordinate to contact federal authorities to discuss the district’s non-compliance with federal regulations. Still, the Tenth Circuit held that such expression was a function of the superintendent’s position and was therefore not protected speech.

We simply hold that Ms. Casey’s speech, such as it was, is more akin to that of a senior executive acting pursuant to official duties than to that of an ordinary citizen speaking on his or her own time; accordingly, Ms. Casey cannot meet her burden here and avoid the heavy barrier erected by the Supreme Court in *Garcetti* to the satisfaction of *Pickering’s* first prong. (*Casey*, 2007, p. 1331)

The final act of “expression” at issue in this case involved the superintendent’s statements to the School Board that they were violating the state’s Open Meetings Act, and her subsequent statements to the state Attorney General regarding the same issue. While the Tenth Circuit held that the statements made to the School Board did not survive the *Garcetti* test, the statements made to the Attorney General were quite a different matter: “...we conclude that 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*” (*Casey*, 2007, pp. 1332-33). Thus, we see in the *Casey* decision one of the first examples of going outside the chain of command and, as a result,

preserving the First Amendment protection of such speech. Notably, however, we also see in the *Casey* decision just how pervasive *Garcetti's* (2006) reach is, especially when it involves the all-encompassing job responsibilities of a school superintendent.

### **Williams v. Dallas Independent School District**

The plaintiff in the *Williams* (2007) case was a high school athletic director and head football coach who became increasingly concerned about the lack of appropriate operating procedures employed by his school in relation to how the school was handling gate receipts for football games. Williams attempted to address this issue with the school business manager, and ultimately brought the high school principal into the discussion. Four days after Williams submitted a memo to the high school principal regarding the lack of appropriate operating procedures, his position as athletic director was terminated and his football coaching contract was not renewed. Thereafter, Williams filed a retaliation lawsuit alleging the school district took inappropriate action regarding the memo which constituted protected speech. The Fifth Circuit Court of Appeals concluded that even though the memo was not a requirement of the athletic director's position, the content of the memo was directly tied to his position and did not constitute protected speech. Applying *Garcetti* (2006), the Fifth Circuit explained that "even if the speech is of great social importance, it is not protected by the First Amendment so long as it was made pursuant to the worker's official duties" (*Williams*, 2007, p. 692). It is interesting to note that shortly after Williams was terminated, the business manager and high school principal were dismissed for financial improprieties, the very conduct Williams sought to address. The *Williams* (2007) case demonstrates that those who have the courage and opportunity to address financial malfeasance may nonetheless lack First Amendment protection for such speech in light of the *Garcetti* affect.

### **D'Angelo v. School Board of Polk County, Florida**

In the *D'Angelo* (2007) case, the principal of a public school attempted to convert his school to a charter school. His initiative did not receive sufficient faculty support and, as a result, the effort to convert failed. The principal was then terminated for what he deemed to be protected speech in relation to his advocacy for conversion to a charter. Analyzing the principal's retaliation claim, the Eleventh Circuit Court of Appeals recognized that even though the speech took place on school property and the administrator had used school resources to communicate with staff members, those factors alone did not automatically exempt his speech from being that of a private citizen. However, since the principal asserted it was his duty to pursue the conversion to charter school status, the court determined his speech was rooted in his responsibilities as the school's administrator and therefore under *Garcetti* (2006) his speech was not protected. In *D'Angelo* (2007) the principal's own testimony was detrimental to his case because he characterized the speech at issue as part of what his duty entailed as principal of the school. In relation to the *D'Angelo* case Bauries & Schach (2011) observed that "the court's election to sweep discretionary administrative speech 'rallying the troops' within *Garcetti's* categorical threshold exclusion presents an example of the troubling nationwide trend to expand the *Garcetti* exclusion, and thereby to narrow individual speech rights" (p. 379).

### **Almontaser v. New York City Department of Education**

The *Almontaser* (2008) case involved an interim school principal (Almontaser) who was passed over for a permanent administrative position in her district. During her stint as an interim principal, the school district required Almontaser to meet with the press and discuss a sensitive local issue. While the interview went quite well and Almontaser apparently did a good job, the subsequent newspaper contained exaggerations and untruths which led to community unrest. Through no fault of Almontaser, the newspaper article created a public relations nightmare for the district. Sometime later, Almontaser applied for a principal position within the school district but her application was removed from the applicant pool due to the controversy over the interview.

Claiming the interview with the press was protected speech and the sole reason her application was removed from consideration, Almontaser filed a Section 1983 retaliation claim. Analyzing the circumstances that gave rise to Almontaser's claim, the Eighth Circuit Court of Appeals determined that since the press had asked her to do the interview in the first place due to the fact that she was an interim principal at the time, the speech had a direct link to her job duties and was therefore, according to *Garcetti* (2006), not protected speech. The *Almontaser* (2008) case demonstrates how a school administrator could be asked to engage in particular speech, do so admirably, yet suffer an adverse employment action for circumstance beyond the administrator's control. Those who are most often called upon to speak out publicly because of the nature of their job as a school administrator may find such speech the legal basis of an adverse employment action. Under *Garcetti*, there is simply no First Amendment protection for speech that owes its very existence to the job responsibilities required of the school administrator.

### **McArdle v. Peoria School District No. 150**

The *McArdle* (2013) case involved a middle school principal who confronted a superior about financial improprieties and found herself the target of alleged employment retaliation soon thereafter. McArdle, the middle school principal, called out her superior (who was also her immediate predecessor as middle school principal) for "use of school funds and a school credit card for personal purposes; ... direction of payment to a student teacher in violation of district policy against such payments; and ... circumvention of rules regarding admission procedures for nonresident students" (*McArdle*, 2013, p. 752). Soon after McArdle discovered these financial improprieties and brought them to the attention of her superiors, her two-year contract was terminated early. Applying *Garcetti* (2006) to McArdle's complaint, the Seventh Circuit Court of Appeals summarily dismissed the case in favor of the school district because it attributed the expression that formed the basis of the complaint to be expression that owed its very existence to McArdle's job duties as a principal (*McArdle* at 754). Most people reading the case in the light most favorable to the plaintiff would find her to be in an impossible situation: either turn a blind eye to financial impropriety (potentially implicating an ethical responsibility, though in this case not a legal responsibility) or speak out and risk falling out of favor with one's superiors and ultimately the loss of one's livelihood. Hence is the Hobson's choice some public school employees are finding themselves in as a result of *Garcetti's* pervasive application.

The practical effect of the Court's *Garcetti* (2006) application to retaliation claims by public employees in K-12 settings is that those who are most likely to be in a position to observe malfeasance in a public school system and have the ethical fortitude to confront it (*i.e.*, school

administrators) will seldom find such expression protected by the First Amendment primarily because of the expansive scope of a school administrator's job responsibilities. School administrators may have to rely on alternative legal protections that may or may not be available depending on the state in which a school administrator works. For example, in the *McArdle* (2013) case several alternative state claims were presented but were also dismissed by the court. As the next section demonstrates, there is no solid safety net either in federal law or state law that would protect all instances of whistleblower expression by public school employees.

### **A “Patchwork of Protection” for Public School Employee Whistleblowers**

Strasser (2013) rightly points out that, in light of the *Garcetti* (2006) decision, public employees who “wish to expose official corruption are afforded no First Amendment protection if those messages are communicated as part of an individual's job” (p. 997). Knowing this would be a concern, the Court in *Garcetti* pointed to alternative protections for such speech, namely “the powerful network of legislative enactments-such as whistle-blower protection laws and labor codes-available to those who seek to expose wrongdoing” (p. 1962); however, Justice Souter's dissenting opinion in *Garcetti* criticized the majority's reliance on this “powerful network,” likening it instead to a “patchwork” of whistleblower laws. Indeed, a thorough review of state whistleblowing statutes demonstrates the merit of Justice Souter's concerns that the current patchwork of law in place is rather inadequate to protect public employees who blow the whistle on misconduct in public employment settings (*see* Kallio & Geisel, 2011). An analysis of state whistleblower statutes revealed that Justice Souter's concerns are well founded as the parameters various states have established for protected whistle blowing span a wide spectrum of guidelines and limitations (Kallio & Geisel, 2011, p. 526). For example, while Alaska has no statute of limitations, most states have a window between one and five years to file a state whistle blowing claim before such a claim is barred. In a few states, the statute of limitations for filing whistleblower claims is extremely short (e.g., 10 days in Colorado and 90 days in Michigan).

An examination of state whistle blowing statutes also showed that “chain of command” may play an important role in whether a public employee has any recourse under a whistleblower statute (Kallio & Geisel, 2011). Several state statutes require the aggrieved party to notify the employer prior to making the information available outside the chain of command (e.g. Colorado, Kansas, Wyoming, and Alaska). On the other hand, Oregon specifically forbids the creation of any policy or law that requires employees to discuss alleged violations with employers prior to reporting the information outside the chain of command. The majority of state whistleblower statutes appear to be silent on the matter which could create an ambiguity about the necessity of following the chain of command in order to bring a successful claim (Kallio & Geisel, 2011, p. 525).

This matter of “chain of command” has proved to be an important factor in several cases analyzing whether a public employee's speech was pursuant to their job responsibilities (and thus unprotected under *Garcetti*) or whether the speech was transformed into citizen speech precisely because the public employee exited the chain of command. For example, in *Fox v. Traverse City Area Public School Board of Education* (2010) the Sixth Circuit Court of Appeals specifically noted that the plaintiff did not exit the chain of command when complaining about her allegedly illegal caseload of special education students. To the court, staying within the chain of command about a matter related to one's job responsibilities only underscored that the plaintiff engaged in speech pursuant to those job responsibilities and therefore the court easily concluded that her speech was not protected by the First Amendment. Consistently, in *Davis v.*

*McKinney* (2008), the Fifth Circuit Court of Appeals stated that “when a public employee raises complaints or concerns up the chain of command at his workplace about his job duties, that speech is undertaken in the course of performing his job” (p. 313). Accordingly, such speech is not protected under *Garcetti* (2006).

By contrast, cases where the public employee has been able to demonstrate that they went outside the chain of command to address a matter of public importance reveal that such speech is largely protected by the First Amendment (assuming the speech survives the *Pickering* balancing test). For example, in *Dougherty v. School District of Philadelphia* (2014) a school business officer (“plaintiff”) was terminated after he leaked information to the newspaper about an illegal no-bid contract the superintendent awarded to a non-approved firm. While the school district argued that the plaintiff had engaged in speech pursuant to his job responsibilities (and therefore such speech would not be protected), the Third Circuit Court of Appeals found just the opposite, noting that the plaintiff had exited the chain of command when he went to the local newspaper. The court explained that nothing in the plaintiff’s job duties required him to report the information he had obtained to the school district, the newspaper, or any other source. And in spite of an ethics code that the school district used to argue that the plaintiff improperly went outside the chain of command, the court found that the plaintiff’s speech to the newspaper “was made as a citizen for First Amendment purposes and should not be foreclosed from constitutional protection” (*Dougherty*, 2014, p. 988). Furthermore, the court also found that the plaintiff’s speech survived the *Pickering* balance test. On this note, the court concluded that “some disruption is almost certainly inevitable; the point is that *Pickering* is truly a balancing test” (*Dougherty*, 2014, p. 993). Finding that the disruption came primarily from those trying to suppress the plaintiff’s speech rather than from the plaintiff’s speech itself, the court ruled in favor of giving First Amendment protection to the plaintiff’s speech. The *Dougherty* case exemplifies how going *outside* of the chain of command may make it more apparent that certain speech is citizen speech rather than speech pursuant to one’s job responsibilities. Still, public employees considering such an exit from the chain of command will necessarily need to contemplate whether their speech will survive the *Pickering* balance even if they have met the *Garcetti* threshold for protected speech.

Whether one views the alternative speech protections as a “powerful network” (as the majority opinion in *Garcetti* did) or regards them more as a “patchwork” (as Justice Souter did in his dissenting opinion), it should be noted that an additional source of protection for whistleblowing speech may be found in federal civil rights legislation where applicable. For example, in *Reinhardt v. Albuquerque Public School Board of Education* (2010) a speech and language pathologist (“plaintiff”) complained that her hours at work were reduced because of her persistent advocacy for students with disabilities in the district. The plaintiff brought a First Amendment claim, but also brought alternative claims of engaging in “protected activity” under Section 504 of the Rehabilitation Act of 1973 and the American with Disabilities Act of 1990. The Tenth Circuit Court of Appeals affirmed that “attempting to protect the rights of special education students constitutes protected activity under the Rehabilitation Act” (*Reinhardt*, 2010, p. 1132). As DePietro & Zirkel (2010) point out, “the first element of a retaliation claim brought under Section 504 and/or the ADA is whether the employee has engaged in protected activity, and advocacy on behalf of students with disabilities is generally recognized by courts as a protected activity” (p. 837). DePietro & Zirkel also note that “it is much easier for public school employees to satisfy the first element of a Section 504 or ADA retaliation claim in the context of special education advocacy” (p. 837) than it is to secure First Amendment protection post-



*Garcetti*. DePietro & Zirkel explain why this is so: “Following *Garcetti* ... the majority of advocacy cases were dismissed because the employee's speech was determined to be within the scope of the employee's employment” (p. 837). While not widely applicable, it is important for those engaging in advocacy on behalf of students with disabilities to know that this alternative protection for whistleblowing speech is available.

Justice Souter's concerns regarding the Court's reliance on whistleblower laws as an adequate safeguard for public employee speech that addresses governmental misconduct were well-founded as few situations meet all the criteria of a successful whistle blowing action (e.g., must be reporting on a violation of federal or state law, meet the statute of limitations for filing, and follow the state statute's chain of command requirements for a state claim). Strasser (2013) concludes that post-*Garcetti* “numerous individuals have suffered adverse employment actions when seeking to expose the kinds of practices that whistleblower protections are designed to bring to light” (p. 993). With *Garcetti* (2006) rendering public employee speech that is pursuant to one's job responsibilities unprotected by the First Amendment and the significant variance of state requirements for a successful whistle blower action being what they are, it becomes quite apparent that public school administrators are a particularly vulnerable class of public employees when it comes to their job-related expressions.

### **Special Scrutiny of “Policy-Making” Public Employees Renders Protection for High-Level School Administrator Speech Even More Tenuous**

There is yet another basis upon which some federal circuit courts have denied speech-based retaliation claims that public school employees should be aware of, especially those who serve in administrative roles. Many of these cases still implicate the *Pickering* balance test but carve out additional vulnerabilities for high level public employees such as school superintendents and other central office administrators with “policy-making” roles. To fully appreciate the significance of these cases one must understand how courts determine whether a public employee is a “policy-maker.” While the Sixth Circuit Court of Appeals in *Dixon v. University of Toledo* (2012) acknowledged that “there is no clear line drawn between policymaking and non-policymaking positions” (p. 275) (in other words, a simple job description or title will be insufficient to determine whether a position is a policymaking position), it did refer back to its earlier case in *Rose v. Stephens* (2002) to explain that policy-making positions would certainly include those where policy-making authority was expressly authorized by law or such authority was delegated (or could be delegated) by those so authorized (e.g., a school board). In some federal circuits the very nature of one's position as a “policymaking” or “confidential” employee (courts appear to use these terms interchangeably to describe a type of employee whose position necessarily requires a degree of policy/political loyalty to their public employer) may render their speech (i.e., speech related to their employer's policies or policy positions) unprotected by the First Amendment (see Haas, 2004). For example, in *Leslie v. Hancock County Board of Education* (2013), the Eleventh Circuit Court of Appeals considered whether a policymaking or confidential employee “has a right not to be retaliated against for speech about policy” (p. 1348).

In *Leslie* (2013) a Superintendent was fired and the Assistant Superintendent was demoted after they had spoken out publicly about local tax policy. Specifically, the school administrators (plaintiffs) drew attention to the Tax Commissioner's deficient collection of taxes because it was having an adverse effect on the local school district. However, after the next round of school board elections resulted in the Tax Commissioner's sister being elected as the

School Board President, the Superintendent was terminated without explanation and the Assistant Superintendent was demoted. Consequently, the plaintiffs brought a Section 1983 retaliation case against the school district for violating their freedom of speech. Rather than applying *Garcetti* (2006) to the plaintiffs' claims, the Eleventh Circuit focused on the nature of the plaintiffs' positions as policymaking or confidential employees and the effect that has on the *Pickering* balance (*Leslie*, 2013 at p. 1347). Under *Pickering* (1968), if the government's interests outweigh a public employee's First Amendment right to speak out on matters of public concern, then the balance tips in favor of the government and essentially renders the speech unprotected by the First Amendment.

After first acknowledging that among the federal circuits there is no uniform approach to this question (*i.e.*, whether policy making employees have a right not to be penalized for speaking out on matters of policy), the Eleventh Circuit held that "no clearly established law bars the termination of a policymaking or confidential employee for speaking about policy" (*Leslie*, 2013, p. 1349). In fact, the court noted that the First, Sixth, and Seventh Circuits take the position that "where an employee is in a policymaking or confidential position and is terminated for speech related to political or policy views, the *Pickering* balance favors the government as a matter of law" (*Rose*, 2002, p. 922). In other words, "the employer's interest in effective governance outweighs the employee's interest in speaking when an employee in a policymaking position expresses political or policy views" (*Leslie*, 2013, p. 1348). In the end, the defendants in *Leslie* (*i.e.*, the board of education) prevailed on their qualified immunity defense because there is no law preventing the firing or demotion of a policymaking public employee for speaking out on matters of policy related to the employer's interests.

Another aspect of *Leslie* that is noteworthy is the finding that the Superintendent and the Assistant Superintendent were "policymaking" employees. While not surprising, it may nonetheless be sobering for school administrators (and those who train them) to know just how tenuous a school administrator's employment may be. According to the court, the Superintendent "was the executive officer on whom the Board relied for the enforcement of its policies. Georgia law makes a local school superintendent the alter ego of the local school board" (*Leslie*, 2013, p. 1351). It is likely that most jurisdictions would find high level school administrators to be "policymaking" employees. And for those policymaking/confidential employees in the Sixth Circuit, the next case demonstrates that even "*citizen*" speech on policy matters may jeopardize one's public employment.

In *Dixon v. University of Toledo* (2012), the Sixth Circuit denied a university administrator's retaliation claim that was based on *citizen* speech on a matter of public concern. Crystal Dixon, an African-American female, was an interim Associate Vice President for Human Resources at the University of Toledo when she wrote an op-ed article for the Toledo Free Press in which she criticized a comparison the paper made between the gay rights movement and the civil rights movement. Shortly after the paper ran her article, Dixon was fired. Dixon never identified herself as an employee of the University, and it was undisputed that she wrote her letter as a private citizen and was dismissed precisely because of this expression. Subsequently, Dixon brought a Section 1983 case against the University of Toledo for retaliating against her for exercising her freedom of speech. The Sixth Circuit articulated the issue before it as a question of "whether the speech of a high-level Human Resources official who writes publicly against the very policies that her government employer charges her with creating, promoting, and enforcing is protected" (*Dixon*, 2012, p. 271).

While Dixon expressed her position solely as a citizen, her position on the issue was nevertheless at odds with the university's public position on the matter, and formed the basis of her dismissal. In a letter to Dixon terminating her employment, the President of the University articulated the incongruity between Dixon's public expression as a citizen and the official position of the University as follows:

The public position you have taken in the Toledo Free Press is in direct contradiction to University policies and procedures as well as the Core Values of the Strategic Plan which is mission critical. Your position also calls into question your continued ability to lead a critical function within the Administration as personnel actions or decisions taken in your capacity as Associate Vice President for Human Resources could be challenged or placed at risk. The result is a loss of confidence in you as an administrator. (*Dixon*, 2012, p. 273)

Once the Sixth Circuit established that Dixon had engaged in expression on a matter of public concern, it immediately turned its attention to the nature of her position as a policymaking or confidential employee.

If one is a policymaking or confidential employee in the Sixth Circuit, then there is a legal presumption (known as the "Rose Presumption") that the *Pickering* balance favors the public employer as a matter of law (see *Dixon*, 2012 at p. 275). In order for the presumption to apply, one must "(1) hold a confidential or policymaking position, and (2) have spoken on a matter related to political or policy views" (*Dixon*, p. 275). According to the Sixth Circuit: "An application of this presumption 'renders the fact-intensive inquiry normally required by *Pickering* unnecessary because under these circumstances it is appropriate to presume that the government's interest in efficiency will predominate'" (*Dixon*, p. 275). Having found that Dixon was a policymaking employee by analyzing her job description and duties, and having concluded that Dixon spoke out about a policy matter related directly to her position within the University, the Sixth Circuit held that the University's interest outweighed Dixon's interest as a matter of law. Underscoring the significance of the "Rose Presumption," the Sixth Circuit made the following statement: "Because the Rose presumption is dispositive, it is unnecessary for us to consider the district court's *Pickering* and *Garcetti* analyses" (*Dixon*, p. 277).

The *Leslie* (2013) and *Dixon* (2012) cases demonstrate that whether one's speech is *employee speech* focused on a policy matter related to one's employment or whether the speech is *citizen speech* on a policy matter that is at odds with the official position of one's employer, the "confidential" or "policymaking" public employee may have little First Amendment protection when engaging in such speech. While not all federal circuits would necessarily go as far as the Sixth and Eleventh Circuits, the *Leslie* and *Dixon* cases serve as a reminder that policy-making school administrators are a particularly vulnerable sub-set of public employees when it comes to both their employee-based and citizen-based expressions on matters of policy related to their public employment. Ominously, Gibson (2003) correctly observes that "permitting terminations for any policy-related speech creates a nearly endless range of dischargeable speech." (p. 781).

### **Implications for Practice**

The *Garcetti effect* has several implications for practice, including the following: 1) public school employees need to understand that speech on a matter of public concern does not automatically equate to speech protected by the First Amendment, 2) public school employees

need to understand “chain of command,” when it is critical to follow, when it may be necessary to go outside of it, and what the potential implications may be, 3) public school employees need to develop and operate from an ethical framework that informs their practice with an understanding that doing what is ethical may not always be protected by law, 4) public school employees should have a basic awareness of the *Garcetti effect*, their state’s whistleblower law, and the nature of “protected activity” under various federal civil rights laws (e.g., Section 504, ADA, etc.), and how these areas may or may not overlap, 5) school administrators should carefully consider issues appealed up the chain of command by public employees lest the school administrator’s unresponsiveness encourage an exit from the chain of command, potentially making a bad situation worse and giving First Amendment protection to the speech as it may no longer be considered employee based speech under *Garcetti* (2006), and 6) school administrators should understand and be aware of their particular vulnerability as public school employees because of the often broad and elastic nature of their job duties, especially those high level school administrators in policy-making or confidential roles.

### Conclusion

In the area of speech and expression, *Garcetti* (2006) makes it clear that speech that owes its very existence to one’s employment duties will not be protected by the First Amendment regardless of the speaker’s motivation or the public concern implicated. The past several years have given ample opportunity to see how the federal circuits are applying *Garcetti* to retaliation claims in K-12 settings. For many courts, *Garcetti* requires a “threshold” determination of whether the speech owes its existence to one’s employment in order to know whether one is speaking as a citizen or an employee. Increasingly, courts are looking at factors such as “chain of command,” specified and implied job duties, location of the speech, etc. to determine when a public employee is wearing their citizen hat versus their employee hat. To be sure, the application of *Garcetti* to some public school employee cases has resulted in rather harsh outcomes where, at best, the employee is left to find alternative statutory protections. Whether those statutory protections even exist or the employee is favorably situated to avail themselves of such protections is often an open question subject to a rather porous “patchwork” of whistleblower protection.

Additionally, recent cases in the federal circuits such as *Leslie* (2013) and *Dixon* (2012) remind us that the body of law related to public employee speech is still evolving and presents a minefield through which public employees must navigate. It is likely that many public school employees have a limited understanding of just how tenuous their freedom of speech is in the workplace (and perhaps even beyond the workplace for the policy-making, public employee). Furthermore, school administrators (as a particular class of public school employees) may be uniquely vulnerable based upon the very nature of their positions because their job descriptions are fairly elastic and often involve policymaking roles.

The implications for those in the trenches of educational leadership and those tasked with preparing future educational leaders is profound. At a minimum, public school employees need to recognize that speech on a matter of public concern does not inevitably equate to speech protected by the First Amendment. Speech that owes its very existence to one’s job duties and categorized as “employee speech” will not be protected speech even if it is on a matter of public concern. Additionally, if public employee speech is on a matter of public concern and engaged in as a citizen, but fails the *Pickering* balance, then that speech will also be unprotected. Finally, school administrators (particularly high ranking central office type administrators) should be

aware that their classification as a policymaking employee could (in some jurisdictions) automatically render citizen speech on a matter of public concern unprotected if it is at odds with the policy position of one's public employer. The need for continuous professional development in this area has never been greater.

## References

- Almontaser v. New York City Dept. of Educ.*, 519 F.3d 505 (2<sup>nd</sup> Cir. 2008).
- Americans with Disabilities Act of 1990, 42 U.S.C.A. § 12101 *et seq.* (1991).
- Bauries, S.R., & Schach, P. (2011). Coloring outside the lines: *Garcetti v. Ceballos* in the federal appellate courts. 262 *Ed. Law Rep.* 357.
- Bowman, K.L. (2013). The government speech doctrine and speech in schools. 48 *Wake Forest L. Rev.* 211.
- Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192 (10<sup>th</sup> Cir. 2007).
- Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323 (10<sup>th</sup> Cir. 2007).
- D'Angelo v. Sch. Bd. of Polk County, Fla.*, 497 F.3d 1203 (11<sup>th</sup> Cir. 2007).
- Davis v. McKinney*, 518 F.3d 304 (5<sup>th</sup> Cir. 2008).
- DePietro, G.K., & Zirkel, P.A. (2010). Employee special education advocacy: Retaliation claims under the First Amendment, Section 504 and the ADA. 257 *Ed. Law Rep.* 823.
- Decotiis v. Whittemore*, 635 F.3d 22 (1<sup>st</sup> Cir. 2011).
- Dixon v. Univ. of Toledo*, 702 F.3d 269 (6<sup>th</sup> Cir. 2012).
- Dougherty v. Sch. Dist. of Philadelphia*, 772 F.3d 979 (3<sup>rd</sup> Cir. 2014).
- Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Village Sch. Dist.*, 624 F. 3d 332 (6<sup>th</sup> Cir. 2010).
- Fox v. Traverse City Area Pub. Sch. Bd. of Educ.*, 605 F.3d 345 (6<sup>th</sup> Cir. 2010).
- Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006).
- Gibson, W.C. (2003). Rethinking the Sixth Circuit's erosion of First Amendment rights in *Rose v. Stephens*. 72 *U. Cin. L. Rev.* 767.
- Haas, T.O. (2004). Constitutional law -- First Amendment -- A policy-making or confidential public employee can be discharged based only on his speech without violating his First Amendment rights because the Pickering balancing test favors the government as a matter of law. *Rose v. Stephens*, 291 f.3d 917 (6th cir. 2002). 81 *U. Det. Mercy L. Rev.* 245.
- Hubbard v. Clayton County Sch. Dist.*, 756 F.3d 1264 (11<sup>th</sup> Cir. 2014).
- Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954 (9<sup>th</sup> Cir. 2011).
- Kallio, B.R., & Geisel, R.T. (2011). To speak or not to speak: Applying *Garcetti* and whistleblower laws to public school employee speech. *West's Education Law Reporter*, 264(2), 517-540.
- Leslie v. Hancock County Bd. of Educ.*, 720 F.3d 1338 (11<sup>th</sup> Cir. 2013).
- Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477 (7<sup>th</sup> Cir. 2007) *cert. denied*, 552 U.S. 823 (2007).
- McArdle v. Peoria Sch. Dist. No. 150*, 705 F.3d 751 (7<sup>th</sup> Cir. 2013).
- Mpoy v. Rhee*, 758 F.3d 285 (D.C. Cir. 2014).
- Mt. Healthy City Sch. Dist. v. Doyle*, 429 U.S. 274 (1977).
- Pickering v. Bd. of Educ.*, 88 S.Ct. 1731 (1968).
- Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121 (9<sup>th</sup> Cir. 2008).
- Reinhardt v. Albuquerque Pub. Sch. Bd. of Educ.*, 595 F.3d 1126 (10<sup>th</sup> Cir. 2010).
- Rose v. Stephens*, 291 F.3d 917 (6<sup>th</sup> Cir. 2002).
- Ross v. Breslin*, 693 F.3d 300 (2<sup>nd</sup> Cir. 2012).
- Samuelson v. LaPorte Cmty. Sch. Corp.*, 526 F.3d 1046 (7<sup>th</sup> Cir. 2008).
- Section 504 of the Rehabilitation Act, 29 U.S.C. § 701 *et seq.* (1973).

Strasser, M. (2013). Whistleblowing, public employees, and the First Amendment. *60 Clev. St. L. Rev.* 975.

*Weintraub v. Bd. of Educ. of City Sch. Dist. of City of New York*, 593 F.3d 196 (2<sup>nd</sup> Cir. 2010), *cert. denied* 131 S.Ct. 444 (2010).

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