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NINTH CIRCUIT TRIMS EMPLOYEE FREE SPEECH RIGHTS

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Several years ago, the United States Supreme Court dealt a crippling blow to public employee free speech protection in *Garcetti v. Ceballos* (2006) 547 U.S. 410, by ruling that public employers are free to retaliate with adverse actions against employees for speech made pursuant to the employee's official duties.

Before the *Garcetti* decision, a public employer was subject to federal civil rights liability for imposing adverse employment action in retaliation for an employee's exercise of free speech on a matter of public concern. *Pickering v. Board of Education* (1968) 391 U.S. 563, 569-570. As explained below, exactly how far the *Garcetti* decision would go in shielding government officials from whistleblowers depended on how the courts interpreted the phrase "pursuant to ... official duties."

In *Pickering*, the Supreme Court had recognized that the issue whether the First Amendment protected employees from retaliation for whistle blowing activity must be resolved by balancing the competing interests of free speech and efficient governmental operation. The Court articulated the concept of a balancing test in terms of the employee's interest "as a citizen, in commenting upon matters of public concern...." *Pickering*, 391 U.S. at 568. Subsequent cases had then simply applied a threshold test of whether the employee's speech touched on a matter of public concern.

But then the Supreme Court majority in *Garcetti*, seeking to abolish this constitutional protection for most employee speech, seized on the isolated phrase used purely in passing in the *Pickering* opinion, "as a citizen," Suddenly giving independent

significance to that phrase, the Supreme Court ruled that the fact Ceballos made his statements "pursuant to his duties as a calendar deputy" meant that he did *not* make his statements *as a citizen*. 415 U.S. at 421. The fact that Ceballos "spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case," removed the constitutional protection against resulting discipline that would otherwise exist. *Id*. at 421.

Accordingly, 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." *Id*. In other words, if the employee is speaking "pursuant to" official duties, the employee is not speaking as a "citizen," and therefore, the statement does not receive any constitutional protection. The Court stated, "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created." *Id*. at 421-422.

While Ceballos' communication in the *Garcetti* case "owed its existence" to the fact that he was assigned to evaluate cases for prosecution, if the criterion "pursuant to ... official duties" were applied to a law enforcement officer, it could theoretically encompass everything the officer says, at the station, in the field, at home, anywhere, because most police department manuals require officers to speak the truth at all times, to not withhold or conceal information about violations of law, and to affirmatively report observed misconduct. Given that a law enforcement officer's job duties require the officer to affirmatively tell the truth in all situations and under all conditions, everything an officer says is, arguably, pursuant to official duty.

Consequently, at least for law enforcement officers, a broad interpretation of the phrase "pursuant to ... official duties" would completely eliminate First Amendment whistleblower protection. And, if a law enforcement officer has no civil rights remedy for adverse actions taken in retaliation for complaints of official corruption or mismanagement, a corrupt police supervisor could dictate a code of silence to protect the corrupt activity, under penalty of insubordination and termination for any subordinate who speaks out.

Another perverse consequence of the *Garcetti* decision is that while internal complaints and reports can quite easily be defined as pursuant to official duty, complaints to the media or elected officials more readily fall outside official duties. Accordingly, the *Garcetti* decision indirectly encourages public employees with complaints of supervisorial corruption or mismanagement to take their complaints directly to the media or elected officials, rather than air them internally where they could be addressed short of public scandal.

We do not know if the majority faction of Supreme Court collectively wanted to bring about these perverse results, or made this holding oblivious of its real world consequences. But because the *Garcetti* decision appeared to impose severe consequences for law enforcement officers, we promised to keep track of how courts in subsequent cases would interpret the phrase "pursuant to ... official duty."

In analyzing and tracking the new constitutional rule, we noted that the *Garcetti* holding had been presaged by a few lower federal court opinions that in the process of applying the *Pickering* balancing test, had attributed significance to the distinction between voluntary communication and communications made in the course of official performance. Perhaps the earliest trace of the isolated application of the "speaking as a citizen" language from *Pickering* appears in *Thomson v. Scheid*, 977 F.2d 1017 (6th Cir. 1992), where a fraud investigator developed a suspicion of Medicaid fraud by a county commissioner's aunt, and alleged he was constructively discharged after his attempt to pursue the investigation was frustrated by supervisors. *Id*. at 1019.

Affirming summary judgment on the investigator's First Amendment retaliation claim, the court in *Thomson* held, "Because plaintiff's contact with the OIG was approved by his supervisors, we believe that plaintiff was acting in the course of his employment in his conversations with the OIG. He therefore was not speaking out as a citizen with regard to his investigation, and his conversations with the OIG are not protected by the First Amendment. Because plaintiff did not speak out on a matter of public concern, his statements are not protected by the First Amendment...." *Id*. at 1021. In other words, the fact the investigator acted "in the course of his employment" meant he "did not speak out on a matter of public concern...." This is almost the same analysis as in *Ceballos*, but the First Amendment analysis in *Thomson* is overshadowed by numerous other claims the plaintiff made in the case.

The case that more likely may have provided the original philosophical inspiration for *Ceballos* is *Gonzalez v. City of Chicago*, 129 F.3d 939 (7th Cir. 2001). The *Gonzalez* opinion addressed a question that could readily be anticipated from the *Ceballos* case, the question of how broadly the phrase "pursuant to ... official duties" will be construed.

The Seventh Circuit in *Gonzalez* ruled that an employee who claimed he had been punished for previously publishing a police brutality report in the course of the official duties of prior civilian employment had no constitutional claim because his statement was required as part of his job. 129 F.3d at 941. The Court observed that if the employee had been ordered to suppress parts of his report, and refused to do so, the employee would have acted outside of his official duties and his refusal to alter his report would be entitled to constitutional protection. *Id.*

In the Court's suggested hypothetical, speech is not "pursuant to ... official duty" if it is insubordinate. If the rule in *Garcetti* is eventually interpreted according to the reasoning in *Gonzalez*, Ceballos himself would be in a position to portray at least some of his speech as insubordinate, since he testified favorably for the defense *after* a heated discussion in which a lieutenant "sharply" criticized his handling of the case. 547 U.S. at 414. In any event, after *Garcetti*, it was predictable that future cases would need to determine whether insubordination takes a statement out of official duty and into constitutional protection!

At first, the Ninth Circuit showed an inclination to interpret the new *Garcetti* exception narrowly to apply to only speech that truly owed its existence to the performance of an official duty. In *Freitag v. Ayers* (9th Cir. 2006) 468 F.3d 528, a correctional deputy alleged retaliation for complaints of sexual harassment made to supervisors, a state senator, and the Office of Inspector General. The Court held that the complaints to the state senator and Inspector General remained under First Amendment protection, but denied First Amendment protection for the internal complaints, finding them made pursuant to official duty. *Id*. at 544-545. In *Marable v. Nichtman* (9th Cir. 2007) 511 F.3d 924, the Court ruled that an engineer's report of corruption was not made pursuant to official duty, despite broad duties in his job description. *Id*. at 932-933. In *Eng v. Cooley* (9th Cir. 2009) 552 F.3d 1062, 1073-1074, the fact that the plaintiff's speech was "inextricably related" to his work as a deputy district attorney was not necessarily enough to make it pursuant to official duty. *Id*. at 1073-1074.

But in its first encounter with the official duties of a city police officer, the Ninth Circuit has now issued a new decision, *Huppert v. City of Pittsburg*, 2009 WL 2151344 (9th Cir. July 21, 2009), that is difficult to reconcile with *Marable* and *Eng*, and appears to take the *Garcetti* holding to its furthest extreme, at which all constitutional whistleblower protection for at least police officers, if not all government employees, would be abolished. *Huppert* also indirectly addresses the paradox inferred from the reasoning in *Gonzalez* and *Garcetti*, whereby workplace speech would receive constitutional protection if and only if it is insubordinate.

Essentially, *Huppert* holds that a law enforcement officer who is subpoenaed to testify before a grand jury is *per se* speaking pursuant to official duty, simply because of the requirements of law and the department manual that a law enforcement officer must enforce the law and tell the truth. Under the new *Huppert* holding, if a law enforcement officer has information that a superior official has committed a crime, and is subpoenaed to testify before a grand jury, the officer can go to prison for covering up the crime, but can freely be fired for telling the truth and disclosing it. The *Garcetti* exception thus gives a superior officer a powerful tool to recruit accomplices for a corrupt scheme by threatening to terminate anyone who speaks out.

Huppert is a split decision along partisan lines. Judge William A. Fletcher, who wrote the dissent, accuses the majority of selectively stating the facts and presents his own factual summary. As shown in Fletcher's comprehensive factual summary, Huppert and co-plaintiff Javier Salgado were police officers in Pittsburg, California. In 1991, Huppert was assigned to a 24-hour shift covering a seafood festival. He requested modification of his shift to permit breaks. His request was denied and a supervisor, Lieutenant Baker, was unhappy about the complaint. Slip opn. at 14, Fletcher, J., dissenting.

In 1996, after being promoted to Inspector, Huppert reported that one of his supervisors, a sergeant who was a personal friend of Baker, drove unsafely and used racial epithets in a pursuit following a carjacking, in which the suspect fatally struck a bystander. Baker, who was now a Commander, charged Huppert with misconduct for not making his report more promptly, and because he concluded the report of racial epithets was unfounded despite corroborating evidence. *Id.*

In 1997 and 1998, Huppert was selected by the district attorney to assist in investigating corruption in the public works yard. Huppert claimed he was

scorned and treated as an outcast from that time on. He took the sergeant's exam and received the highest score, but Commander Baker told him he was passed over for the promotion because he had a goatee. *Id.*

Later, Huppert began cooperating with the FBI investigating corruption in the department. Baker was promoted to Chief in 1998. Baker learned of Huppert's cooperation with the FBI, and transferred Baker from Investigations to Code Enforcement, a unit known as the "Penal Colony" because "disaffected and/or disfavored officers were assigned there." *Id.* Huppert's commander in that assignment told him Chief Baker had instructed him to get Huppert terminated. *Id.*

In September 2001, Huppert and Salgado were assigned to investigate gambling and other corruption at the city golf course. Chief Baker ordered them not to tell their immediate superior, Commander Hendricks, about the investigation. After two interviews revealed gambling, accepting free golf, and possible drug activity, Baker ordered the officers to stop the investigation. Hendricks, however, relayed the officers' information to the FBI, told Chief Baker that he had done so, and told Baker that he "may be violating the law by trying to bury the investigation...." *Id.* at 15. Baker threatened Hendricks' career if Hendricks continue to pursue the investigation. *Id.*

Huppert and Salgado continued the investigation with the knowledge and encouragement of Commander Hendricks. Baker ordered the officers to not write a report, but Huppert prepared a memorandum of his findings, accusing officers of accepting gratuitities and illegal perks. Huppert and Salgado reported only to Baker and the City Manager, but another officer who was friends with the corruption suspect then threatened Huppert and Salgado. *Id.*

In December 2002, Commander Hendricks was "forced out." *Id.* at 16. In January 2003, Hendricks' replacement accused Huppert and Salgado of engaging in an improper pursuit. When they denied involvement in the alleged pursuit, the accusing supervisor first claimed that the complaint about the pursuit was received from an anonymous concerned citizen, then later admitted he had made it up. *Id.*

In March 2004, Huppert was subpoenaed to testify before a civil grand jury investigating corruption in the department. On his own time, Huppert met with district attorney's investigators and an FBI agent. *Id.* The service of the grand jury subpoena was recorded in a log posted in the department break room. After Huppert testified, he was informed that his position was being eliminated, and was given a less desirable

assignment, where his work was severely nitpicked. *Id*. at 16-17.

In late 2003 and early 2004, Salgado refused a request by a supervisor to lie in an internal investigation against another officer. In May 2004, Salgado was placed on administrative leave and charged with falsifying reports. *Id*. at 17. Although Salgado had a strong defense that his preparation of the reports followed an accepted practice within the department and that the reports had been approved by his supervisors, he was terminated, charged with five felony counts, and pled no contest. *Id*. at 18.

In April 2005, Huppert retired on disability from a knee injury, admitting that he could have had elective surgery to possibly return to work, but chose not to because of "the persistent and pervasive discrimination and harassment" he had suffered, because Salgado had been terminated, and because of "other means by which the defendants ... sought to destroy my career and the careers of other good officers...." *Id*. at 17.

Under these facts, Huppert and Salgado filed a federal civil rights action alleging retaliation for their exercise of free speech. The trial court granted summary judgment based on *Garcetti*, finding that none of the alleged protected communications was "made as a private citizen." 2009 WL 2151344, slip opn. at 4. The case raised an interesting set of issues for applying the *Garcetti* exception because of the wide variety of alleged protected activities. Huppert alleged four protected activities: (1) the participation in the district attorney's investigation of corruption in the department; (2) the report and memo from the golf course corruption investigation; (3) the cooperation with the FBI; (4) the
grand jury testimony. Salgado was involved in only the second of these four activities. *Id*. at 6.

The Ninth Circuit affirmed the ruling that all four of these activities were pursuant to official duty. No other issue clouded the holding, as the public concern element was easily met by allegations of governmental corruption, and the finding of official duty made it unnecessary to evaluate whether the causation element could be proven.

On the first of the four activities, cooperating in the district attorney's investigation of the public works yard, the only way Huppert could allege speaking outside official duty was to claim that at the time, he was working for the district attorney, not the police department. But after the district attorney had asked him to assist, the police department had assigned him to do so, and the work was consequently "at the direction of his superiors...." *Id*. at 8.

The second activity, investigation of corruption at the city golf course, raised the intriguing issue foreshadowed by the *Gonzalez* decision discussed above, whether the rationale of *Garcetti* offers exceptional constitutional protection for insubordinate speech. Huppert and Salgado argued that since Chief Baker had ordered them to stop the investigation, and they continued in it with only the approval of their immediate superior, Commander Hendricks, their investigative report was insubordinate and therefore not pursuant to their official duties. In an astonishingly result-oriented approach, the Ninth Circuit majority reasoned, "This is one of the clearest examples of speech pursuant to one's job duties." *Id*. at 9.

What made it clear? The Ninth Circuit found that although the investigation was "in direct contravention to Baker's demand that they cease, Hendricks ordered them to continue." *Id*. And, because Hendricks told Baker they would be continuing, therefore, paraphrasing from *Garcetti*, the Court found "When they went to work and performed the tasks they were paid to perform, Huppert and Salgado acted as government employees." *Id*., internal punctuation omitted.

In its treatment of this issue, the Ninth Circuit essentially ducked the question whether insubordination takes speech out of official duty for purposes of First Amendment whistleblower liability. But the Court certainly seems inclined to agree with that proposition, however, as it found it necessary to circumvent, rather than confront, the argument that Chief Baker's order made the speech insubordinate. Judge Fletcher's dissent properly recognizes that if Chief Baker ordered the investigation stopped, then Hendricks' order to Huppert and Salgado to continue the investigation was itself insubordinate to Baker, so that Huppert and Salgado were merely joining Hendricks in his insubordination, and could not properly be found to be acting pursuant to an official duty that had been essentially been condemned by the Chief. *Id*. at 22-23, Fletcher, J., dissenting. As stated by Judge Fletcher, "a direct order from the Chief of Police is a more authoritative source for determining the scope of a police officer's official duties than the encouragement of a lower-ranking officer in the department to disobey that order." *Id*. at 23, Fletcher, J., dissenting.

The Ninth Circuit in *Huppert* found it relatively easy to dispose of the third and fourth assertedly protected activities, cooperating with the FBI and responding to the grand jury subpoena, by means of the type of reasoning that we predicted in the wake of the *Garcetti* decision, whereby a police officer's duty to

affirmatively tell the truth could bring everything the officer says on or off duty within the "official duty" exclusion from First Amendment protection. The Court cited *Christal v. Police Commission* (1939) 33 Cal. App. 2d 564 for the proposition that the official duties of police officers include "preventing the commission of crime" and "disclosing all information known to them which may lead to the apprehension and punishment of those who have transgressed our laws." The Court noted that "When police officers acquire knowledge of facts which will tend to incriminate any person, it is their duty to disclose such facts to their superiors and to testify freely concerning such facts when called upon to do so before any duly constituted court or grand jury." *Slip opn.* at 9-10.

Therefore, despite Huppert's claim that he went to the FBI on his own time and "was repeatedly informed by the FBI that his investigatory work was outside his duties as a police officer," the Court held, "this is not enough to overcome California's jurisprudence defining such duties." *Id*. at 10. Under *Christal*, Huppert's "official duties include investigating corruption, so as to prevent the commission of crime and assist in its detection." *Id*. at 10, internal punctuation omitted. Huppert's conversations with the FBI "would have been to disclose all information known to Huppert regarding the alleged acts of corruption within the" department. *Id*., internal punctuation omitted. To the Ninth Circuit majority, Huppert's voluntary, off-duty cooperation with the FBI "obviously encompasses his duty to uphold the law specifically entrusted to California's peace officers." *Id*.

Similarly, the court held, "Testifying before a grand jury charged with investigating corruption is one part of an officer's job." *Id*. The court perceived that within the meaning of *Garcetti*, such testimony does owe its existence to the officer's professional responsibilities. *Id*. The court then renounced any implication "that a police officer might never be protected if he speaks on issues such as corruption." *Id*. at 12. The Court explained that going to the news media or elected officials remains protected. *Id*. We must wonder how this can be. Even if an officer goes to the media or an elected official about alleged corruption, the officer remains subject to the general duties quoted from *Christal*, to prevent the commission of crime and to disclose "all information known to them which may lead to the apprehension and punishment of those who have transgressed our laws." If *Christal* indeed defines an officer's official duties for purposes of *Garcetti* analysis, perhaps nothing an officer says about corruption or criminal activity, to any person, any time, can ever be protected by the First Amendment.

Even the Supreme Court majority that decided *Garcetti* warned against the type of reasoning seen in *Huppert*. The Court held that the fact that the memo written by Ceballos "concerned the subject matter of" his employment was not dispositive. 547 U.S. at 420. It was only speech that "owes its existence to his professional responsibilities...." *Id*. at 421-422. And the Court cautioned against deriving an officer's official duties from overexpansive job descriptions and work rules, as it suggested that a finding of official duty for First Amendment purposes should be confined to those duties that the officer "actually is expected to perform." *Id*. at 424-425.

The rationale of *Garcetti* also calls for more careful analysis of the scope of a government employee's official job duties. The Supreme Court stated that in withholding First Amendment protection from official duty speech, its intention was to avoid a rule that would prohibit supervisors from evaluating the communicative work product of an officer. 547 U.S. at 422. As illustrated by the facts of *Garcetti*, it is the communications on which the employer would normally base its official actions that the employer has a legitimate interest in evaluating.

On Huppert's claim of assisting the district attorney, his work product could conceivably have been of a nature that the police department would have an interest in evaluating, because it was apparently at least commissioned by the police department. But Huppert's reports to the FBI or testimony to the grand jury, far from being his commissioned work product on which his supervisors in the department would take official action, was the work product of an agency that was investigating the department. These were not communications the supervisor would use to take official action, they were communications that would be used by outside investigators to take action *against* Huppert's supervisors in the Department, if warranted. Huppert's supervisors in the department would have absolutely no legitimate interest in scrutinizing the product of those efforts. That work product was not prepared for Huppert's superiors, but for those who were investigating Huppert's superiors. To withhold First Amendment protection for those activities goes beyond even the *Garcetti* decision in protecting government officials from the consequences of their own corruption and malfeasance.

Judge Fletcher's dissent recognizes many of the concerns we have expressed from the beginning about this new concept of constitutional jurisprudence reflected in *Garcetti*. In general, we continue to believe that (1) the Supreme Court in

Pickering used the phrase "as a citizen" only in passing, and the only substantive limitation on First Amendment protection it intended to impose was that the subject matter be of public concern, rather than a mere private workplace grievance; (2) the *Pickering* public concern test gives the courts all they truly need to weed out unworthy claims of First Amendment protection; (3) the inimical tendency of the *Garcetti* exception to facilitate concealment of governmental corruption and mismanagement far outweighs any utility it might have in weeding out unworthy claims; and (4) the reasoning in *Garcetti* that a government employee's official speech is merely speech of the government itself in which the employee can have no legitimate interest is a cynical fiction having no basis in reality when an officer comes into possession of information that is unwelcome to superiors.

The *Huppert* decision threatens to stand constitutional law on its head. If it is not overturned by an en banc reconsideration or Supreme Court review, both of which appear exceedingly unlikely, it will mean not only that a government whistleblower has no constitutional protection for retaliation for internal complaints, but perhaps no protection for media and other external complaints as well.

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