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NEW NINTH CIRCUIT DECISION PROTECTS EMPLOYEE FREE SPEECH RIGHTS IMPERILED BY SUPREME COURT'S GARCETTI DECISION

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The United States Supreme Court in *Garcetti v. Ceballos,* 126 S.Ct. 1951 (2006), drastically narrowed the so-called "whistleblower" protections for public employees by holding that constitutional freedom of speech offers no protection for employee statements made in the course of performing official duties. Shortly after *Garcetti*, the Ninth Circuit in *Freitag v. Ayers* 468 F.3d 528 (9th Cir. 2006) held that the Constitution no longer protected a correctional officer's internal misconduct complaints, but still protected the officer's public complaints to an elected official.

Last month, the Ninth Circuit ruled that despite *Garcetti*, the Constitution still prohibits retaliation against a government engineer for reporting financial misconduct by supervisors. *Marable v. Nitchman* (December 26, 2007) 2007 DJDAR 18922. If the Supreme Court lets it stand, *Marable* will allow the local federal courts enough flexibility to avoid the worst fears engendered by *Garcetti*. But the *Freitag* and *Marable* decisions show that the type of supervisorial mischief that we predicted in the wake of the *Garcetti* decision has indeed come to fruition, to the detriment of the law enforcement profession and the public.

The impact of the Supreme Court's *Garcetti v. Ceballos* decision

The *Garcetti* decision was supposedly intended to avoid making a federal case out of a routine employee grievance. When it was announced, we pointed out that it would create more problems than it would solve, because it would give public officials the power to intimidate subordinates into cooperating in covering up corruption and misconduct, and would encourage employees who become aware of corruption to take their complaints to the press rather than seeking to rectify the problem internally.

The Supreme Court implicitly conceded that its *Garcetti* decision would spawn a new round of First Amendment litigation. This has turned out to be an understatement, as *Garcetti* has already been cited in almost 1500 cases around the country.

In the *Garcetti* case, plaintiff Richard Ceballos was a Calendar Deputy in the Los Angeles County District Attorney's office. His assignment included evaluating and investigating pending cases. Ceballos became aware of alleged misrepresentations in a search warrant affidavit in

a pending case, and recommended that the case be dismissed. But the District Attorney pressed forward with the prosecution, and Ceballos soon found himself reassigned, transferred, and denied a promotion. Ceballos brought a civil rights action alleging retaliation for his exercise of constitutionally-protected free speech.

Traditionally, a claim of retaliation for exercise of First Amendment rights is adjudicated by applying a balancing test that weighs the importance of the free speech right asserted by the employee, against any legitimate government interest in restricting the speech. The first step in this balancing process inquires into the degree of constitutional protection the statement should receive. The core value protected by the First Amendment is the right to criticize the government. Therefore, speech that pertains to matters of important public concern receives the highest degree of constitutional protection, compared to speech relating to subjects such as internal employment matters, employee grievances, personal matters, or commercial transactions, which receives little or none.

See, e.g.: *Pickering v. Board of Education* (1968) 391 U.S. 563.

Under former law, the statements made by Ceballos, that misrepresentations were made in a search warrant affidavit, would easily be found a matter of public concern meriting the highest degree of constitutional protection. Ceballos would have prevailed in a civil rights action based on the First Amendment if the jury believed the adverse actions against him were taken in retaliation for his disclosures about the search warrant.

But the Supreme Court seized on a factual distinction that had barely been noticed in prior cases, observing that the disclosure made by Ceballos was part of his regular job assignment to evaluate pending cases. The Court first recognized that public employees, like all citizens, are free to speak their minds without fear of employment retaliation. Thus, when a public employee contacts a local newspaper about corruption in the government workplace, the Constitution should provide maximum protection against retaliation. But the Court determined that where the employee speaks out in the course of performing official duties, the employee is not simply doing what any citizen is free to do, instead the employee is performing a function of government activity that the government as employer has a right to control. Accordingly, the Court opted to remove all Constitutional protection from such speech, and leave supervisory officials with unbridled discretion to retaliate against an employee who in the course of official performance makes statements contrary to their subjective preferences.

The Supreme Court in *Garcetti v. Ceballos* took its cue from a dissenting opinion below by Ninth Circuit Judge Diarmuid O'Scannlain, who perceived a need to distinguish between public employees speaking as employees, as contrasted with speaking as "citizens." The Court quoted with approval Judge O'Scannlain's premise that "when 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." 126 S.Ct. at 1957, quoting from *Ceballos v. Garcetti* 361 F.3d at 1168, 1189 (9th Cir. 2004) O'Scannlain, Judge, dissenting.

Turning to the issue whether Ceballos' statements were entitled to First Amendment protection, the Court observed that he expressed his views internally rather than publicly, and that the statements concerned the subject matter of his employment, but the truly decisive factor was "that his expressions were made pursuant to his duties as a calendar deputy." *Id.* at 1959. 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 1960. 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 a dissenting opinion, Justice Souter observed that the Court was drawing a fictional line between public employees "speaking in the course of official duties" on one hand, and as "citizens" on the other; a line-drawing exercise the Court implicitly conceded would engender a new round of litigation. *Id.* at 1965. Justice Souter perceived that the Court was swayed by the increasingly

popular notion among strict constructionists that the speech of government employees is legally the government's own speech. *Id.* at 1968-1969. Justice Souter's dissent pointed out that the Court's formulation was broad enough to remove constitutional protection from a public auditor's discovery of embezzlement, a building inspector's report of an attempted bribe, or a law enforcement officer's refusal to obey an order to violate someone's Constitutional rights, *id.* at 1966-1967, and noted that professors at public universities necessarily speak and write "'pursuant to official duties.'" *Id.* at 1969-1970.

When *Garcetti* was announced, we predicted that it would (1) encourage employees to make their reports to the press instead of the employer; (2) encourage employers to adopt expansive job descriptions to bring more employee speech into the now-unprotected scope of official duty; (3) spawn litigation over the validity of the newly-adopted employee duties in these job descriptions; (4) discourage reporting of governmental corruption, fraud, incompetence and mismanagement; and (5) in turn, lead to an increase in the frequency and severity of governmental misconduct, malfeasance and corruption.

The Ninth Circuit's application of *Garcetti* in *Marable v. Nitchman*

Plaintiff in *Marable v. Nitchman* was an engineer for a state agency known as the Washington State Ferries, who alleged he was suspended and denied a promotion in retaliation for internal and external reporting that management officials claimed inappropriate overtime and contrived special projects to pad their pay. Marable filed a federal civil rights action under the First Amendment. 2007 DJDAR at 18922-18923. The district court granted summary judgment in favor of the employer, primarily on the ground that Marable's internal reports "constituted on the job speech rather than speech as a citizen...." The district court also found Marable's external report to the State Executive Ethics Board "fell within Marable's job duties...." *Id.* at 18923.

The Ninth Circuit reversed the summary judgment and remanded the First Amendment claim for trial. The Ninth Circuit's analysis began by surveying the state of First Amendment protection of public employee speech after *Garcetti* and *Freitag*. In *Freitag*, a correctional officer suffered adverse employment actions after submitting numerous internal inmate discipline forms complaining of exhibitionist behavior by inmates, then writing letters to the warden complaining that her disciplinary forms were being thrown away, thus undermining her authority and subjecting her to a hostile work environment. 468 F.3d at 533. Freitag also complained to a state senator, who reported the complaint to the Inspector General. The Ninth Circuit held that Freitag's internal complaints were part of her job, thus unprotected, but that Freitag had acted as a citizen, and was thus entitled to constitutional protection, for her complaints to an elected official and an independent state agency. 468 F.3d at 545-546.

The *Freitag* decision thus vindicated our prediction that *Garcetti v. Ceballos* would give employees greater protection for public reports than for internal complaints, and would encourage employees to go to the press without first trying to address the problem with their supervisors. In finding Freitag's internal reports of inmate misconduct constitutionally unprotected, the Ninth Circuit followed closely the reasoning of *Garcetti* and concluded that the critical factor was that as a correctional officer, Freitag "was required as a part of her official duties to report inmate misconduct and to pursue appropriate discipline." Freitag's internal complaints that her reports were being thrown away, meaning "her supervisors' actions were preventing her from effectively doing her job," were found "directly related to her job duties." 468 F.3d at 533-534.

Contrasting *Freitag*, the court in *Marable* found the engineer's complaints of improper overtime and pay padding "were not in any way a part of his official job duties." *Marable*, 2007 DJDAR at 18925. The duty to point to supervisors' actions of abusing the public trust and converting public funds to their own use was not among Marable's assigned tasks as an engineer. *Id.* at 12923 and 18925.

Marable's written job description was considered "informative," albeit not dispositive, as the court found that for purposes of assessing First amendment protection, *Garcetti* requires a "practical" inquiry into an employee's job duties, in which the listing of a given task in the written job description "is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties...." *Id.*, quoting

Garcetti, 126 S.Ct. at 1962. The court concluded that Marable's "official duties all related to ensuring that all machinery aboard his vessel, both mechanical and electrical, was properly maintained and serviced," and Marable "was not responsible for attempting to ensure that his superiors abstained from allegedly corrupt financial schemes." *Id.* (some internal punctuation omitted).

In a footnote, the Ninth Circuit observed that the employer had argued that the reporting of corruption was within Marable's official job duties because of provisions in the training manual requiring engineers to "know and enforce all applicable federal and state rules and regulations." *Id.* at 18926, fn. 13. The Ninth Circuit pointed to language in *Garcetti* where the Supreme Court rejected "the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions." *Id.*, quoting *Garcetti* at 1961-1962. Instead, the practical inquiry should focus on "the duties an employee actually is expected to perform." *Id.*

What the new *Marable* decision means for you

The *Marable* decision reaches an appropriate conclusion on an issue we anticipated when *Garcetti* was first announced. We predicted that an employer could limit the First Amendment protection for internal complaints by drafting job descriptions so broadly as to encompass all conceivable reports and complaints an employee might make. *Marable* now confirms that an employer will not be successful in this effort unless the duty is one that the employee is actually expected to perform.

But variants of this issue still lurk in the internal rules and performance manuals of most law enforcement agencies. Unlike the duties of the engineer in *Marable*, all law enforcement officers are subject to a strict duty of honesty, which usually includes an affirmative duty to report observed misconduct. For example, the Riverside County Sheriff's Department manual imposes a duty to speak the truth at all times. The duties of all sworn peace officers also include to some extent the same directive to which Marable was subject, to "know and enforce all applicable federal and state rules and regulations." Beyond that general charge, the official duties of honesty, affirmative disclosures, and enforcement of laws and regulations that are imposed on peace officers are generally far broader than any job requirement found in *Marable*, *Freitag,* or *Garcetti*.

In addition to imposing an extremely broad official duty of honesty, this duty is arguably one that many law enforcement agencies "actually" call on employees to perform, within the meaning of the *Marable* opinion. The interpretations of the honesty rules given in most department manuals, and the actual practices of most agencies, certainly permit an employee to be disciplined for dishonesty for withholding or concealing relevant information about observed misconduct, and for telling half truths that omit material facts. Beyond the internal rules imposing an affirmative duty of honesty, this affirmatively duty has been recognized as a matter of law and public policy in cases such as *Titus v. Civil Service Commission* (1982) 130 Cal. App. 3d 357, 364. Indeed, recent disciplinary appeals we have handled indicate that the some departments consider this duty applicable even to the employee's private life.

In one recent case, a law enforcement officer creatively sought to bring his report of observed misconduct under constitutional protection by disputing that the duty of honesty is one he was "actually" called on to perform, and arguing that his"actual" duty was to obey an unwritten "code of silence" under which the "actual" duty is to cover up misconduct. A district court accepted this argument in *Batt v. City of Oakland* (N.D.Cal. 2006) 2006 WL 1980401, but this trial court ruling has no precedential force. A similar argument will undoubtedly reach the appellate courts in due course, but the need to assert such nonsensical arguments for the sake of restoring a First Amendment protection that should never have been taken away is a lamentable reflection on the state to which constitutional law has been reduced by this presently sitting majority.

Within most law enforcement agencies, it is clear that any employee who learns of misconduct by supervisors and fails to report it can himself be disciplined for dishonesty. Yet, under the precedents that stem from the Supreme Court's *Garcetti* decision, the employee who truthfully does report misconduct by supervisors can be disciplined for embarrassing the department, and would find no refuge in the constitutional freedom of speech.

The Ninth Circuit has laudably come to the rescue of the two employees who have thus far been caught in this trap. But the *Garcetti* decision and its progeny still stand for the proposition that the employee who learns of official

corruption and seeks to rectify it within the workplace would be constitutionally better off going straight to the press. This is unfortunate for employees, for supervisors, and for the public, but it is what the Supreme Court has decreed.

STAY SAFE

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