CHAPTER XV

FREE SPEECH RIGHTS OF PUBLIC EMPLOYEES

The First Amendment provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The courts have interpreted the First Amendment as prohibiting government from censoring or prohibiting speech or expressive conduct because of the content of the ideas expressed.[1]

The Supreme Court held that there are certain well defined and narrowly limited classes of speech which do not enjoy constitutional protection. These types of speech include the lewd, obscene and profane, the libelous and insulting or fighting words. Fighting words are those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[2] The Court further stated:

> "It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument."[3]

In Texas v. Johnson,[4] the Supreme Court held that a Texas statute that prohibited the burning of the American flag was unconstitutional. The Court held that the defendant's act of burning the American flag during a protest rally was expressive conduct within the protection of the First Amendment.[5]

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[1] Cantwell v. Connecticut, 310 U.S. 296, 309-311, 60 S.Ct. 900, 905-906 (1940); Texas v. Johnson, 491 U.S. 397, 406, 109 S.Ct. 2533, 2540 (1989). See, Rodney A. Smolla, "Rethinking First Amendment Assumptions About Racist and Sexist Speech," 47 Wash & Lee L Rev 171 (1990); William W. Van Alstyne, "Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review," 43 Law and Contemporary Problems 79 (1990); Martha McCarthy, "Student Expression That Collides with the Rights of Others: Should the Second Prong of Tinker Stand Alone?" 240 Ed.Law Rep. 1 (2009).
[2] Id. at 769.
[3] Id. at 769.
[4] 491 U.S. 397, 109 S.Ct. 2533 (1989).
[5] Ibid.

In R.A.V. v. City of St. Paul,[6] the Supreme Court held that a city ordinance that prohibited certain speech based on its viewpoint was unconstitutional. The city ordinance prohibited the display of a symbol which one knows or has reason to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender. The defendant had burned a cross on an African American family's lawn and had been charged with violation of the ordinance. The Supreme Court concluded that the ordinance was facially unconstitutional because it imposes special prohibitions on those speakers who express views on the disfavored subjects of race, color, creed, religion or gender, but allows such displays if they are not addressed for those topics.

In the school context, in Tinker v. Des Moines Independent Community School District, the United States Supreme Court held that students or teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[7] The Supreme Court held that students had a First Amendment right to freedom of speech in the school setting, so long as the speech did not disrupt the educational process or invade the rights of others.

U.S. SUPREME COURT DECISIONS

A. Right to Speak Out on Issues of Public Importance

The right of free speech is one of our most cherished freedoms and public employees do not lose their right to free speech when they begin working for a public agency. However, as a public employee, an individual does not have an unfettered right to criticize his or her employer. In balancing the employee's free speech rights and the employer's interest in an orderly work environment, the United States Supreme Court in Pickering v. Board of Education,[8] held that freedom of speech, while not absolute in all circumstances, is sufficiently strong to require states to show a compelling state interest in order to overcome an employee's right to speak out on issues of public importance. The Court held that a teacher's comments in a local newspaper were matters of public concern and articulated a four part test:

1. Whether the speech would interfere with the employee's performance;

2. Whether the speech would create disharmony among co-workers;

3. Whether the speech would undercut an immediate supervisor's authority over the employee;

4. Whether the speech would destroy the relationship of loyalty and trust required of confidential employees.[9]

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[6] 505 U.S. 377, 112 S.Ct. 2538 (1992).
[7] 393 U.S. 503, 89 S.Ct. 733, 736 (1969). See, Ronald D. Wenkart, "Disruptive Student Speech and the First Amendment: How Disruptive Does It Have to Be?" 236 Ed.Law Rep. 551 (2008).
[8] Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731 (1968).
[9] Id.

In Mt. Healthy City School Board of Education v. Doyle,[10] the United States Supreme Court established a test for determining whether an employee had been dismissed for exercising free speech rights under the First Amendment. Under the test, the courts attempted to answer three questions:

1. Is the speech protected under the First Amendment?

2. If so, was it a motivating factor in the disciplinary decision?

3. If so, would the school district have nonetheless made the same disciplinary decision?[11]

If the speech is not protected by the First Amendment (i.e. speech related to private matters), the employee may be dismissed without violating the First Amendment. If the speech is protected by the First Amendment but was not a motivating factor in the dismissal decision, then there is no constitutional violation and the employee may be dismissed. If the school district would have dismissed the employee despite the protected First Amendment speech due to other grounds for dismissal, then there is no constitutional violation and the employee may be dismissed.[12]

B. When Speech is a Matter of Public Concern

In Connick v. Myers,[13] the United States Supreme Court clarified what is speech related to private matters. The court stated:

> "We hold that when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of the personnel decision taken by a public agency allegedly in reaction to the employee's behavior."[14]

The Court went on to note that whether an employee's speech is a matter of public concern must be determined by the content, form and context of the speech. In Connick, the employee had circulated a questionnaire to her fellow employees soliciting their views on the office transfer policy, office morale, the need for a grievance committee, the level of confidence employees had in their supervisors, and whether employees felt pressured to work in political campaigns. The Court concluded that the questionnaire, as a whole, did not involve issues of public concern and, therefore, was not protected speech under the First Amendment. The Court

[10] Mt. Healthy City School Board of Education v. Doyle, 429 U.S. 274 (1977).
[11] Id. at 285.
[12] In Givhan v. Western Line Consolidated School District, 439 U.S. 410, 99 S.Ct. 693 (1979), the United States Supreme Court applied its holdings in Pickering and Mt. Healthy to employees who make private statements to their supervisors.
[13] Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684 (1983).
[14] Id. at 1690.

held that the state showed that the questionnaire substantially interfered with the operations of the District Attorney's office and upheld the employee's termination.[15]

In Connick, the United States Supreme Court reviewed its prior decisions and noted that the Pickering decision was rooted in precedents that invalidated statutes and policies that sought to suppress the right of public employees to participate in public affairs. These cases involved statutes and policies that prohibited government employees from joining political parties, certain associations and groups that others might believe to be subversive.[16]

The Court in Connick noted that the First Amendment was fashioned to assure unfettered interchange of ideas for bringing about political and social changes desired by the people and that speech concerning public affairs is more than self expression, it is the essence of self government. Accordingly, the Supreme Court has frequently reaffirmed that speech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection.[17]

Justice White, in the Connick majority opinion, noted that Pickering followed these precedents and held that the dismissal of a high school teacher for openly criticizing the Board of Education on its allocation of school funds was a matter of legitimate public concern upon which free and open debate is vital to informed decision-making by the electorate.[18] In contrast, the Court noted that when employee expression is not related to a matter of political, social or other concern to the community, government officials should enjoy wide latitude in managing their offices without intrusive oversight by the judiciary in the name of the First Amendment. The Court stated: "Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable."[19]

The Court ruled that working for the government does not give a government employee a grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for government. Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement as revealed by the whole record. In Connick, the Court found that the questions posed by Myers to her coworkers in the employee survey do not fall under the rubric of matters of public concern with one exception. Because one of the questions in the survey touched upon a matter of public concern and contributed to the employee's discharge, the Court determined that it must determine whether the employer was justified in discharging Myers. The Court held:

> "The Pickering balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public. . .

[15] Id. at 1693-1694.
[16] Id. at 1689.
[17] Id. at 1689.
[18] Id. at 1689.
[19] Id. at 1690.

> To this end, the government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the workplace, foster disharmony, and ultimately impair the efficiency of an office or agency."[20]

The Court went on to find that the facts and circumstances in Connick indicated that close working relationships were disrupted and that deference should be given to the employer's judgment in this regard. The Court also noted that there was no necessity for an employer to allow events to unfold to the extent the disruption of the office and the disruption of working relationships is manifest before taking action. The Court stated:

> "The limited First Amendment interest involved here does not require that Connick tolerate action which he reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships. Myers' discharge, therefore, did not offend the First Amendment. . . .
>
> Our holding today is grounded in our longstanding recognition that the First Amendment's primary aim is the full protection of speech upon issues of public concern, as well as the practical realities involved in the administration of a government office. Although today the balance is struck for the government, this is no defeat for the First Amendment. For it would indeed be a Pyrrhic victory for the great principles of free expression if the Amendment's safeguarding of a public employee's right, as a citizen, to participate in discussions concerning public affairs were confused with the attempt to constitutionalize the employee grievance that we see presented here."[21]

In Waters v. Churchill,[22] the Supreme Court summed up the First Amendment analysis of public employee decisions as follows:

> "The key to First Amendment analysis of government employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing

[20] Id. at 1692.
[21] Id. at 1694-1695.
[22] Waters v. Churchill, 511 U.S. 661, 114 S.Ct. 1878 (1994).

someone for the very purpose of effectively achieving it goals, such restrictions may well be appropriate."[23]

C. Statements Made Pursuant to an Employee's Official Duties

In Garcetti v. Ceballos,[24] the United States Supreme Court held that when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes and the Constitution does not insulate their communications from employer discipline. In Garcetti, Richard Ceballos had been employed since 1989 as a deputy district attorney for the Los Angeles County District Attorney's Office. Ceballos was a calendar deputy in the Pomona branch, and in that capacity he exercised certain supervisory responsibilities over other lawyers. In February 2000, a defense attorney contacted Ceballos about a pending criminal case. The defense attorney claimed there were inaccuracies in an affidavit used to obtain a search warrant.

After examining the affidavit and visiting the location it described, Ceballos determined that the affidavit contained inaccuracies and misrepresentations. Ceballos spoke on the telephone to the Deputy Sheriff about the misrepresentations, but did not receive a satisfactory explanation for the perceived inaccuracies. Ceballos informed his supervisors and followed up by preparing a disposition memorandum. The memo explained Ceballos' concerns and recommended dismissal of the case. On March 2, 2000, Ceballos submitted the memo to his supervisor for review.

Based on Ceballos' statements, a meeting was held to discuss the affidavit. In attendance were Ceballos, his supervisors, as well as representatives of the Sheriff's Department. Despite Ceballos' concerns, the supervisors decided to proceed with the prosecution pending disposition of the defendant's motion to dismiss the search warrant. The trial court held a hearing on the motion. Ceballos was called by the defense and Ceballos testified about his reservations about the affidavit but the trial court rejected the challenge to the warrant. Ceballos claims that in the aftermath of these events he was retaliated against by being reassigned to a trial deputy position, transferred to another courthouse and denied a promotion.

The United States Supreme Court indicated that the question presented by the case was whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties. The Supreme Court reviewed its prior cases and noted that the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern. However, the court found that the controlling factor in Ceballos' case was that his expressions were made pursuant to his duties as a calendar deputy and as a prosecutor, and that Ceballos was fulfilling his responsibilities to advise his supervisors about how best to proceed with the pending case when he wrote the memorandum. The Supreme Court stated: "We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First

[23] Id. at 675.
[24] Garcetti v. Ceballos, 126 S.Ct. 1951(2006).

Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[25]

The Court noted that Ceballos wrote his disposition memo because it was part of his duties and that restricting speech that owes its existence to a public employee's job responsibilities does not infringe upon any liberties the employee might have enjoyed as a private citizen. The Court held that the restriction of official speech or work related speech simply reflects the exercise of employer control over speech the employer itself has commissioned or created. The Court held that Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as writing a memo that addressed the proper disposition of a pending criminal case. The Court held that refusing to recognize First Amendment claims based on a government employee's work product does not prevent the public employee from participating in public debate. The employee retained the prospect of constitutional protection for his or her contributions to the civic discourse. However, the prospect of protection, "…does not invest them with a right to perform their jobs however they see fit."[26]

The Court reasoned that employers have a heightened interest in controlling speech made by an employee in the employee's professional capacity and that official communications have official consequences that create a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment and promote the employer's mission. The Court indicated that Ceballos' memo illustrated this concern and that if Ceballos' supervisors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action.[27]

In response to Justice Souter's dissent, the Court indicated that it would not decide whether the decision in Garcetti applies to speech relating to higher education scholarship or teaching.[28] In dissent, Justice Souter expressed concern that the court's decision would impair all First Amendment protection of academic freedom in public colleges and universities, whose professors and instructors necessarily speak and write pursuant to their official duties. In response, the court stated:

> "…Justice Souter suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value. …There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employer-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis

[25] Id. at 1960.
[26] Id. at 1960.
[27] Id. at 1961. See, Zachary Martin, "Public School Teachers' First Amendment Rights: In Danger in the Wake of 'Bong Hits for Jesus,'" 57 Cath.U.L.Rev. 1183 (2008); Emily White Kirsch, "First Amendment Protection of Teachers' Instructional Speech: Extending Rust v. Sullivan to Ensure that Teachers Do Not Distort the Government Message," 58 Clev.St.L.Rev. 185 (2010).
[28] Id. at 1962.

> we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."[29]

The language in Garcetti raises the issue of whether issues involving the K-12 school curriculum are issues of public concern or private matters which school boards and school administrators may regulate.

D. Protected Speech

In Heffernan v. City of Paterson, New Jersey,[30] the United States Supreme Court held that the First Amendment prohibits government officials from dismissing or demoting an employee because of the employee's engagement in constitutionally protected political activity.[31]

In Heffernan, a government official demoted an employee because the official believed incorrectly that the employee had supported a particular candidate for mayor. The issue before the U.S. Supreme Court is whether the public official's factual mistake makes a critical legal difference. The issue was even though the employee did not engage in protected political activity, did his demotion deprive him of a right secured by the Constitution of the United States?[32] The Supreme Court held that even though the employee had not in fact engaged in protected political activity, he was deprived of a right secured by the United States Constitution when he was demoted.

In 2005, Jeffrey Heffernan was a police officer in Paterson, New Jersey. He worked in the office of the chief of police, James Wittig. At that time, the mayor of Paterson, Jose Torres, was running for re-election against Lawrence Spagnola. Torres had appointed to their current positions both Chief Wittig and a subordinate who directly supervised Heffernan. Heffernan was a good friend of Spagnola's.

During the campaign for mayor, Heffernan's mother, who was bedridden, asked Heffernan to drive downtown and pick up a large Spagnola sign. Heffernan's mother wanted to replace a smaller Spagnola sign, which had been stolen from her front yard. Heffernan went to a Spagnola distribution point and picked up the sign. While there, he spoke for a time to Spagnola's campaign manager and staff. Other members of the police force saw him, sign in hand, talking to campaign workers. Word quickly spread throughout the police force.

The next day, Heffernan's supervisors demoted Heffernan from detective to patrol officer and assigned him to a "walking post." In this way, they punished Heffernan for what they thought was his overt involvement in Spagnola's campaign. In fact, Heffernan was not involved with the campaign but had picked up the sign simply to help his mother.
Heffernan's supervisors had made a factual mistake.

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[29] Id. at 1962.
[30] ___ S.Ct. ____ (2016).
[31] See, Elrod v. Burns, 427 U.S. 347 (1976); Branti v. Finkel, 445 U.S. 507 (1980).
[32] See, 42 U.S.C. § 1983.

Heffernan subsequently filed a lawsuit in federal court. He claimed that Chief Wittig and the other respondents had demoted him because he had engaged in conduct that (based on their mistaken view of the facts) constituted protected speech. The city therefore deprived him of the right secured by the United States Constitution.

The U.S. District Court found that Heffernan had not engaged in any First Amendment conduct and for that reason he had not been deprived of any constitutionally protected right. The Court of Appeals for the Third Circuit affirmed. The Third Circuit Court of Appeals held that a free speech retaliation claim is actionable under section 1983 only where the adverse action at issue was prompted by an employee's actual, rather than perceived, exercise of constitutional rights.

The U.S. Supreme Court, for purposes of the appeal, assumed that the policy that Heffernan's employers implemented violated the Constitution because Heffernan's employers may have dismissed him for participating in Spagnola's campaign. However, the Court held that if Heffernan's employers dismissed him pursuant to a neutral policy prohibiting police officers from overt involvement in any political campaign, that issue should be determined by the lower courts and the Supreme Court remanded the matter back to the lower courts for further proceedings.

LOWER COURT DECISIONS

A. Introduction

In light of the Supreme Court decision in Garcetti, how have the lower courts determined when public employee speech is protected by the First Amendment?

In Garcetti, the Supreme Court declined to articulate a formula for determining when a government employee acted pursuant to his official duties but the court in Garcetti made clear that speech relating to tasks within an employee's uncontested employment responsibilities is not protected from regulation. In essence, speech is made pursuant to official duties if it is generally consistent with the type of activities the employee was paid to do.[33]

The Court of Appeals held that an employee's official job description is not dispositive because speech may be made pursuant to an employee's official duties even if it deals with activities that the employee is not expressly required to perform. The ultimate question is whether the employee speaks as a citizen or instead as a government employee acting in his or her professional capacity.[34]

Consequently, if an employee engages in speech during the course of performing an official duty and the speech reasonably contributes to or facilitates the employee's performance

[33] See, Brammer-Hoelter v. Twin Peaks Charter Academy, 492 F.3d 1192, 1203, 222 Ed.Law.Rep. 596 (10th Cir. 2007).
[34] Id. at 1203.

of the official duty, the speech is made pursuant to the employee's official duties. At the same time, not all speech that occurs at work is made pursuant to the employee's official duties.[35]

A good example of a court decision finding that an employee's speech was made outside of the employee's official duties is Reinhardt v. Albuquerque Public Schools.[36]

B. Protected Speech – Speech Made Outside the Scope of Employee's Official Duties

In Reinhardt v. Albuquerque Public Schools Board of Education,[37] the Tenth Circuit Court of Appeals held that an employee's filing of a complaint with a state agency is protected speech.

Reinhardt was employed as a speech language pathologist (SLP) by the Albuquerque Public Schools Board of Education since 1986. She worked full-time at Rio Grande High School. SLPs with a full-time caseload receive a 1.0 contract or standard contract. The school district grants a 0.2 contract increase if an SLP's caseload supports such an increase or an extended contract.[38]

Starting in 1998, Ms. Reinhardt regularly complained to school district administrators that she was not receiving active and timely caseload lists of students. She believed the inaccurate lists were leading to qualified special education students not receiving speech and language services. Inaccurate lists also had the potential to affect a SLP's contract status and salary. Since Ms. Reinhardt was not able to get a response to her complaints, Ms. Reinhardt consulted an attorney and filed an Individuals with Disabilities Education Act (IDEA) complaint with the New Mexico Public Education Department against the school district on October 3, 2005. The state conducted an investigation and ordered the school district to take corrective action.[39]

Before the 2004-2005 school year, Reinhardt previously had received extended contracts. On September 28, 2004, the school district reduced her to a standard contract because her caseload did not support an extended contract. Reinhardt requested a contract increase based on her caseload on January 18, 2006, and was denied.

In June 2007, Reinhardt filed suit alleging First Amendment retaliation in violation of Section 504 of the Rehabilitation Act. The district court granted the school district's motion for summary judgment on Reinhardt's First Amendment retaliation claim, holding that the Plaintiff's communications were made pursuant to her official duties and were, therefore, not protected by the First Amendment.[40]

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[35] Id. at 1203-1204.
[36] Reinhardt v. Albuquerque Public Schools Board of Education, 595 F.3d 1126, 253 Ed.Law.Rep.567 (10th Cir. 2010).
[37] Id.
[38] Id. at 1130.
[39] Id.
[40] Id.

The Court of Appeals reversed and held that Reinhardt was speaking as a private citizen rather than pursuant to her job responsibilities since her job responsibilities did not include reporting wrongdoing and Reinhardt went outside the chain of command when reporting the wrongdoing. Reinhardt's filing of a state complaint satisfied both of these factors.

The Court of Appeals noted that Reinhardt was not hired to ensure the IDEA compliance of the school district. She was hired to provide speech and language services to special education students. The court held that Reinhardt's consulting an attorney and filing a state complaint went well beyond her official responsibilities.[41]

The case of Casey v. West Las Vegas Independent School District[42] is an example of both protected and unprotected speech in which the Court of Appeals found that some of the speech made by the employee was protected and some was not.

In Casey v. West Las Vegas Independent School District,[43] the Tenth Circuit Court of Appeals reviewed the case of a district superintendent, Barbara Casey, who alleged that she had been demoted and eventually fired in retaliation for exercising her First Amendment rights.

As district superintendent, Casey was responsible for serving as the chief executive officer of the district's Head Start program, a federally funded program to provide educational opportunities, meals, and health services to low income children between the ages of three and five. Casey was informed by her staff that as many as fifty percent of the families enrolled in the district's Head Start program appeared to have incomes that were too high for them to qualify for participation in the program. Casey reported her concerns to the board president and then to the entire board. She was told to leave the issue alone. Casey then instructed her staff to report her concerns to the U.S. Department of Health and Human Services (HHS). HHS found violations and ordered the school district to repay $500,000 in federal funds.[44]

During the 2002-2003 school year, Casey also informed the school board that it was violating the New Mexico Open Meeting Act. The board ignored her warning and Casey filed a complaint with the New Mexico Attorney General's Office. On March 25, 2003, the Attorney General's office wrote the Board President outlining the complaint, enclosed the copy of the complaint and requested a response. After receiving the board's response and completing its review of the matter, the Attorney General's office determined that the Board had in fact violated the Open Meetings Act and ordered corrective action.[45]

On April 10, 2003, the Board demoted Casey to Assistant Superintendent. Casey was then terminated at the end of the 2002-2003 school year. Following her termination Casey filed a lawsuit against the school district alleging she was terminated in retaliation for exercising her First Amendment rights.[46]

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[41] Id. at 1137.
[42] Casey v. West Las Vegas Independent School District, 473 F.3d 1323, 215 Ed.Law.Rep. 604 (10th Cir. 2007).
[43] Id.
[44] Id. at 1326.
[45] Id.
[46] Id. at 1327.

The Court of Appeals reviewed Casey's statements regarding the Head Start Program and held that Casey's comments about the legality of the district's operation of the Head Start Program was part of her duties as district superintendent. Therefore, the court held that Casey had made statements regarding the Head Start Program pursuant to her official duties. The Court of Appeals held that as district superintendent and executive director of the Head Start Program, Casey had a duty to report the district's noncompliance to federal authorities because she would be held legally responsible for having knowledge that something was wrong and not reporting it. The Court of Appeals recognized that irregularities in the Head Start Program was a matter of public concern but Casey's speech was made pursuant to her official duties and therefore her Head Start speech was not protected by the First Amendment.[47]

The Court of Appeals noted that with respect to the Open Meetings Act violations, Casey's statements to the Board about violations were part of her duty to provide candid advice and counsel to the Board as its chief executive officer. Therefore, the court held that these statements were not protected by the First Amendment. However, the court concluded that Casey did not have a similar duty to report Open Meeting Act violations to the New Mexico Attorney General. The Court of Appeals found that the duty to comply with the New Mexico Open Meetings law was the responsibility of the board members alone. Therefore, Casey's statements to the Attorney General were outside the scope of her office and they were protected by the First Amendment. The court held that Casey was speaking as a public citizen on matters of public concerns when she reported the violations of the Open Meetings Law to the New Mexico Attorney General.[48]

C. Determining Whether Speech is Made Pursuant to Official Duties

Determining whether an employee is speaking pursuant to his or her official duties can be difficult. While at least one circuit court has ruled that the determination can be a mixed question of fact and law that must be determined by the trier of fact[49] another circuit has treated the determination solely as a question of law.[50]

In Posey v. Lake Pend Oreille School District,[51] the Ninth Circuit Court of Appeals held that following Garcetti, the inquiry into whether a public employee's speech is protected by the First Amendment is no longer purely legal and presents a mixed question of fact and law. Therefore, the Court of Appeals held that summary judgment was inappropriate where the Plaintiff has spoken on a matter of public concern, the state lacks an adequate justification for treating the employee differently from any other member of the general public and there was a genuine and material dispute as to the scope and content of Plaintiff's employment duties. Accordingly, the Court of Appeals reversed the district court's grant of summary judgment in favor of the school district.[52]

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[47] Id. at 1327-31.
[48] Id. at 1332-34.
[49] See, Posey v. Lake Pend Oreille School District, 546 F.3d 1121, 238 Ed.Law.Rep.537 (9th Cir. 2008).
[50] Brammer-Hoelter v. Twin Peaks Charter Academy, 492 F.3d 1192, 222 Ed.Law.Rep. 596 (10th Cir. 2007).
[51] 546 F.3d 1121, 238 Ed.Law Rep. 537 (9th Cir. 2008).
[52] Id. at 1123

Posey, as an employee of the school district, was assigned as a security specialist to Sandpoint High School. Posey believed that the school district's safety and emergency policies were inadequate. In November 2002, Posey met with the principal to express his concerns about the student discipline and safety issues, including ongoing drug and weapons violations, and Posey's feelings that his hands were tied in enforcing school policies. The principal did not respond directly to Posey's expression of concern and Posey became increasingly uneasy about security and safety issues.[53]

In October 2003, Posey sent a lengthy letter to the school district's chief administrative officer and the superintendent complaining about both personal grievances and what Posey perceived to be inadequate safety and security policies at the high school. The letter specifically detailed the following:

1. The school administration's general unresponsiveness to safety problems.

2. Inadequate staff and faculty training.

3. Concealment and insufficient documentation of safety violations.

4. Ineffective enforcement of truancy policies.

5. Ineffective enforcement of sexual harassment policies.

6. Inadequate fire safety and school evacuation planning.[54]

In addition, Posey gave examples of students bringing weapons to school, student intoxication, sexual harassment and possible rape among school staff, persistent student truancy, and failure to evacuate the building when there had been smoke in the hallways and the fire alarm had gone off. Posey wrote the letter at home, with his own resources, on his own time, and on his own initiative. The parties dispute whether Posey wrote the letter as part of his official employment responsibilities. The parties also disputed the scope of Posey's duties.[55]

The Court of Appeals noted that in Garcetti, the Supreme Court added a third stage to the first element of the First Amendment retaliation test, requiring a determination of whether the plaintiff spoke as a public employee or instead a private citizen. In Garcetti, there was no dispute that Ceballos' internal memorandum had been written in execution of Ceballos' official employment responsibilities. In Posey, the court noted there was room for debate as to whether Posey wrote and delivered his letter in execution of his official employment duties.[56]

The Court of Appeals held that given the factual disputes presented in the record, whether an employee is speaking pursuant to his official duties is a mixed question of fact and law. The

[53] Id. at 1123-24.
[54] Id. at 1124.
[55] Id. at 1124-26.
[56] Id. at 1126-27.

court held that if the statements were made in the speaker's capacity as a citizen and the speaker had no official duty to make the questioned statements, or if the speech was not the product of performing the tasks the employee was paid to perform, then they were not made pursuant to the employee's official duties.[57]

The Court of Appeals noted that circuits are split over whether the determination as to whether an employee's speech is made pursuant to the employee's official duties is a question of law or a mixed question of fact and law. The court held that the scope and content of the Plaintiff's job responsibilities can and should be determined by a trier of fact because the task of determining the scope of the Plaintiff's job responsibilities is concrete and practical, rather than abstract and formal, and therefore, the court ruled that a factual determination of a Plaintiff's job responsibilities is appropriate.[58]

The Court of Appeals concluded that the pleadings and evidence in the case presented genuine disputes of material facts regarding the scope and content of Posey's job responsibilities. The Court of Appeals held that the district court should determine first whether the discussions in question were made by the teacher upon matters of public concern, and second, whether the state lacked adequate justification for treating the employee differently from any other member of the general public. If the answer to both questions is yes, then the possibility of a First Amendment claim arises. After having answered these questions in the affirmative, only then should the court consider whether the plaintiff spoke as a private citizen or a public employee. Where there are genuine and material disputes as to the scope and content of the plaintiff's job responsibilities, the court must reserve judgment on this third prong of the protected status inquiry until after the fact-finding process.[59] The Court of Appeals stated:

> Here, Posey spoke on matters of public concern, and the school district lacked adequate justification to treat him differently from other citizens. Because there are genuine disputes of material fact regarding his job responsibilities, we REVERSE the grant of summary judgment and REMAND the case to the district court for further proceedings consistent with this opinion.[60]

The case of Brammer-Hoelter v. Twin Peaks Charter Academy[61] illustrates when speech is made pursuant to official duties and when it is not and illustrates when speech is a matter of public concern. The Court of Appeals in Brammer-Hoelter held that determining whether speech is made pursuant to an employee's official duties is a question of law.

In Brammer-Hoelter v. Twin Peaks Charter Academy, the Tenth Circuit Court of Appeals reviewed a case in which former teachers of the Twin Peaks Charter Academy alleged that the

[57] Id. at 1127-30.
[58] Id. at 1128.
[59] Id. at 1129-31.
[60] Id. at 1131.
[61] Brammer-Hoelter v. Twin Peaks Charter Academy, 492 F.3d 1192, 222 Ed.Law Rep. 596 (10th Cir. 2007).

school district and charter school violated their First Amendment rights by retaliating against them for exercising their freedom of speech and freedom of association rights.[62]

The Twin Peaks Charter Academy ("Academy") in Longmont, Colorado was chartered by, and operates within the boundaries of, the St. Vrain Valley School District. The Academy first opened its doors in the fall of 1997. Plaintiffs were employed as teachers pursuant to written contracts with the Academy.[63]

The plaintiffs alleged that they were told that the Academy was founded upon the principles of open discussion and communication among teachers and parents regarding school activities and functions. The plaintiffs further alleged that they were told that the Academy welcomed constructive criticism and input motivated by a sincere desire to enhance the Academy's education program, improve its working conditions and provide additional opportunity for parental involvement.[64]

The plaintiffs received satisfactory performance reviews in their 1997-98 school year evaluation and each accepted a renewed contract for the 1998-99 school year. By the Fall 1998, plaintiffs developed a number of concerns and grievances about the operation, management, and mission of the Academy. They began to meet off campus and after hours at restaurants and at each other's homes to discuss their concerns. In response, the principal issued a series of directives indicating plaintiffs were not to discuss Academy matters outside of work with any persons, including each other. One such order was made during a mandatory faculty meeting. The principal also told plaintiffs that she would prefer they not even associate with each other outside of school.[65]

Nevertheless, the plaintiffs continued to meet off campus for the purpose of discussing various Academy matters. Some meetings were attended by parents and other members of the public. There were approximately 20 to 25 meetings in all. All of the plaintiffs made their concerns and grievances known to the Twin Peaks Academy Board of Directors after the board invited them to communicate without fear of retaliation. Plaintiffs contended their grievances were ignored.[66]

The plaintiffs contended that the principal retaliated against them by giving them less favorable performance reviews and ignoring them when she passed them in the hallway. Plaintiffs testified the principal also slammed doors in their presence, behaved in a hostile manner towards them and that this caused them various forms of severe distress. Plaintiffs each drafted resignation letters which were dated either February 28 or March 1, 1999, indicating that their last day of work would be March 12, 1999. Their resignations were accepted by the board.[67]

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[62] Id. at 1198.
[63] Id. at 1198.
[64] Id. at 1198-99.
[65] Id. at 1199.
[66] Id. at 1199.
[67] Id. at 1199-1200.

The Court of Appeals noted that when a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom. However, the First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacity as private citizens. Consequently, when government employees speak on matters of public concern, they must face only those speech restrictions that are necessary for their employees to operate efficiently and effectively.[68] The Court of Appeals adopted a six part test under Garcetti and Pickering:

1. The court must determine whether the employee's speech was made pursuant to the employee's official duties.

2. If an employee did not speak pursuant to his official duties, but instead spoke as a citizen, the court must determine whether the subject of the speech was a matter of public concern.

3. If the speech is not a matter of public concern then the speech is unprotected and the inquiry ends.

4. If the employee speaks as a citizen on a matter of public concern, the court must determine whether the employee's interest in commenting on the issue outweighed the interest of the state as an employer.

5. Assuming the employee's interest outweighed that of the employer the employee must show that their speech was a substantial factor or a motivating factor in a detrimental employment decision.

6. If the employee established that the employee's speech was a substantial or motivating factor, the employer may demonstrate that it would have taken the same action against the employee even in the absence of the protected speech.[69]

The Court of Appeals noted that the first three steps were to be resolved by the district court, while the last three were ordinarily resolved by the trier of fact. The Court of Appeals held that speech is made pursuant to official duties if it is generally consistent with the type of activities the employee was paid to do. The Court of Appeals held that the key is whether the employee speaks as a citizen or instead as a government employee acting in his or her professional capacity. If an employee engages in speech that reasonably contributes to or facilitates the employee's performance of an official duty, the speech is made pursuant to the employee's official duties. However, not all speech that occurs at work is made pursuant to the employee's official duties.[70]

[68] Id. at 1202.
[69] Id. at 1203-1208.
[70] Id. at 1203-1204.

The Plaintiffs, pursuant to their contracts, were all hired as school teachers. By entering into the contracts, Plaintiffs agreed to support the philosophy and curriculum of the Academy without reservation. Plaintiffs also agreed their duties and responsibilities would be consistent with the charter contract and the charter application as approved by the district board of education. The Court of Appeals noted that nearly all of the matters Plaintiffs claim they discussed were made pursuant to their duties as teachers. For example, the Plaintiffs alleged they discussed the Academy's expectations regarding student behavior. The court noted that Plaintiffs were expected to regulate the behavior of their students. Plaintiffs also discussed the curriculum and the financial priorities of the academy. The court held that these complaints were made pursuant to plaintiffs' inherent duties as teachers to ensure they had adequate materials to educate their students. Consequently, statements regarding all of these and similar matters were made pursuant to plaintiffs' official duties and could be freely regulated by the Academy.[71]

The Court of Appeals held that some of plaintiffs' speech was not made pursuant to their official duties. The court listed twelve issues that plaintiffs discussed that were not pursuant to their official duties.[72]

The Court of Appeals held that the discussion of these matters occurred after hours and outside of the academy and included ordinary citizens and parents who are not employed by the Academy. Consequently, the court held that these twelve matters were not made pursuant to official duties.[73]

The Court of Appeals then turned to whether these issues were a matter of public concern (i.e., of interest to the community whether for social, political, or other reasons). In determining whether speech pertains to a matter of public concern, the court may consider the motive of the speaker and whether the speech is calculated to disclose misconduct or merely deals with personal disputes and grievances unrelated to the public's interest. Statements revealing official impropriety usually involve matters of public concern. Conversely, speech that simply airs grievances of a purely personal nature typically does not involve matters of public concern. In deciding what is a matter of public concern the court must consider the content, form and context of a given statement as revealed by the whole record.[74]

The Court of Appeals held that eight of the twelve matters were not matters of public concern. The Court of Appeals held that these issues were personal matters, rather than public concern. The Court of Appeals held that the four remaining matters discussed by plaintiffs were matters of public concern. These matters were:

1. Whether the Academy's code of conduct could restrict Plaintiffs' freedom of speech.

2. The principal's restriction on speech and association.

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[71] Id. at 1204.
[72] Id. at 1204-05.
[73] Id. at 1205.
[74] Id. at 1205-06.

3. Whether the Academy charter would be renewed.

4. The upcoming board elections.[75]

The Court of Appeals then went on to balance the interest of the employees against the interests of the employer in an efficient and disciplined work environment. Generally, the only public employer interest that can outweigh a public employee's recognized speech rights is an interest in avoiding direct disruption, by the speech itself, of the public employer's internal operations and employment relationship. The employer bears the burden of justifying its regulation of the employee's speech. The court noted that the Defendants made no argument regarding their interest as employers either in their motion for summary judgment or in their appellate brief. Accordingly, the Court of Appeals held that it could not affirm summary judgment on this basis and must assume that plaintiffs' interest in speaking on the four remaining matters outweighs the defendants' interest in managing the work environment.[76]

The Plaintiffs bear the burden of showing that their speech on the four remaining matters was a motivating factor in an adverse employment action. The Court of Appeals held that there was sufficient evidence to show adverse employment action (i.e., the poor performance evaluations). The court held that poor performance ratings, especially for non-tenured teachers could deter a reasonable person from exercising their First Amendment rights. The court held that there was enough evidence to create a genuine dispute about whether these adverse actions occurred and whether they were motivated by the Plaintiffs' speech and association and held that summary judgment for Defendants on this ground was improper.[77]

The Court of Appeals held that if Plaintiffs establish their protected speech was a motivating factor in an adverse employment action, the Defendants may demonstrate it would have taken the same action against the employee even in the absence of protected speech. Since Defendants have not proffered any evidence in this regard, the court held that this depth of analysis was not a proper basis for summary judgment in favor of the Defendants. The Court of Appeals reversed in part the district court's grant of summary judgment on the freedom of speech and freedom of association retaliation claims and remanded the matter to the district court for further proceedings consistent with the Court of Appeals opinion.[78]

D. Unprotected Speech – Pursuant to Official Duties in the Classroom

As the following cases illustrate, when teachers make statements, advocate particular points of view, choose specific books and curriculum materials or post specific items on classroom bulletin boards, the courts have held that the teachers are acting pursuant to their official duties and their speech is not protected under the First Amendment.

[75] Id. at 1206.
[76] Id. at 1207.
[77] Id. at 1207-08.
[78] Id. at 1212.

In Mayer v. Monroe County Community School Corporation,[79] the Seventh Circuit Court of Appeals held that the First Amendment did not entitle a teacher to advocate her viewpoint on an anti-war demonstration during a classroom session.

Deborah Mayer worked for one year as a probationary elementary school teacher in Monroe County, Indiana. When the school district did not renew her contract for a second year, Mayer filed suit maintaining that the school district violated the First Amendment when it failed to renew her contract because she took a political stance during a current events session in her class. The district court granted summary judgment to the school district and on appeal, the Court of Appeals reviewed the matter, accepting Mayer's version of the facts, and affirmed the lower court decision.[80]

Mayer told her class in response to a pupil's question that when she passed a demonstration against U.S. military operations in Iraq, she honked her car's horn to show support for the demonstrators. Some parents complained and the school principal told all teachers not to take sides in any political controversy. Mayer was told she could teach about the controversy and allow arguments from different perspectives so long as she kept her personal opinions to herself. Mayer believes that this incident led the school district to dismiss her.[81]

The Court of Appeals noted that 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. Mayer conceded that the current events session, conducted during class hours, was part of her official duties. Mayer acknowledged that if Garcetti applies, then the school district would prevail. However, Mayer argued that the principles of academic freedom supersede Garcetti.[82]

The Court of Appeals held that those authorities (e.g. the school board and administrators) charged by state law with curriculum development may require employees, including teachers, to follow that curriculum.[83] The court noted that school districts do more than regulate teachers' speech; they "hire that speech," (i.e. school districts hire a teacher to speak for the school district and to advance its goals). Expression is a teacher's stock in trade which the teacher sells to the school district in exchange for a salary.[84] The Court of Appeals explained:

> "A teacher hired to lead a social-studies class can't use it as a platform for a revisionist perspective that Benedict Arnold wasn't really a traitor, when the approved program calls him one; a high school teacher hired to explicate Moby Dick in a literature class can't use Cry, The Beloved Country instead, even if Paton's

[79] Mayer v. Monroe County Community School Corporation, 474 F.3d 477, 215 Ed.Law.Rep. 626 (7th Cir. 2007).
[80] Id. at 478.
[81] Id.
[82] Id. at 478-479.
[83] Id. at 479; citing Webster v. New Lenox School District, 917 F.2d 1004 (7th Cir. 1990); Palmer v. Board of Education, 603 F.2d 1271 (7th Cir. 1979); Boring v. Buncomb County Board of Education, 136 F.3d 364 (4th Cir. 1998).
[84] Id. at 479.

> book better suits the instructor's style and point of view; a math teacher can't decide that calculus is more important than trigonometry and decide to let Hipparchus and Ptolemy slide in favor of Newton and Leibniz."[85]

The Court of Appeals noted that students are a captive audience and that education is compulsory in elementary and secondary grades. Children must attend public schools unless their parents are willing to incur the costs of private education or the considerable time commitment of home schooling. The court noted that the power to decide the curriculum should reside with people who can be voted out of office rather than tenured teachers. The Board of Education's views can be debated openly and people may, for example, choose to elect persons committed to neutrality on contentious issues.[86]

The Court of Appeals concluded:

> "The Constitution does not entitle teachers to present personal views to captive audiences against the instructions of elected officials….It is enough to hold that the First Amendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system."[87]

In Evans-Marshall v. Board of Education,[88] the Sixth Circuit held that a high school teacher does not have a First Amendment right to select books and the method of instruction to use in the classroom. The Court of Appeals held that the right to free speech protected by the First Amendment does not extend to the in-class curricular speech of teachers in primary and secondary schools made pursuant to their official duties.

In 2010, the Tipp City Board of Education hired Evans-Marshall to teach English and to supervise their high school's literary magazine for the 2000-2001 school year. The board renewed her contract for the 2001-2002 school year, when Evans-Marshall taught English to ninth and eleventh grade students and a creative writing course to eleventh and twelfth grade students. At the beginning of the fall semester, Evans-Marshall assigned Ray Bradbury's Fahrenheit 451 to a ninth grade class. The class explored the book's theme of government censorship and Evans-Marshall distributed a list compiled by the American Library Association of the 100 most frequently challenged books. Evans-Marshall asked each group of students to pick a book from the list to investigate the reasons why the book was challenged and to lead an in-class debate about the book. Two groups chose Heather Has Two Mommies by Leslea Newman.[89]

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[85] Id. at 479.
[86] Id. at 479-480.
[87] Id. at 480.
[88] Evans-Marshall v. Board of Education, 624 F.3d 332 (6th Cir. 2010).
[89] Id. at 335-336.

A parent complained about Heather Has Two Mommies, and the principal asked Evans-Marshall to tell the students to choose a different book. She complied and explained to the class that they were in a unique position to use this experience as source material for the debate because they were in the position of having actually experienced censorship in preparing to debate censorship. After the class concluded the Fahrenheit 451 unit, Evans-Marshall assigned Siddhartha, by Hermann Hesse and used it as a basis for in-class discussion about spirituality, Buddhism, romantic relationships, personal growth, and familial relationships.[90]

At the October 1, 2001 meeting of the school board, approximately 25 parents complained about the curricular choices in the school, including Siddhartha, and the book censorship assignment. The next day, the principal called a meeting of the English department and told Evans-Marshall that she was on the "hot seat." Nearly 100 parents, as well as the local media, attended the board's November 2001 meeting. The parents expressed concerns about the books in the curriculum and in the school library. While the parents mentioned many books, they raised particular objection to the materials in Evans-Marshall's classroom and her teaching methods.[91]

In teaching creative writing, Evans-Marshall maintained a file of student writing samples that she shared with students who asked for additional guidance on assignments. She sent three of the samples to support staff to be copied. A member of the copy room staff showed the writing samples to the principal. After reading the papers, the principal called Evans-Marshall to his office. One of the writing samples was a first-hand account of a rape and the other was a story about a young boy who murdered a priest and desecrated a church. Evans-Marshall explained that the writing samples were not intended for in-class distribution and that she would refrain from sharing the papers if he wanted. The principal told her he did not like the materials she was using in her classroom or her in-class discussions.[92]

Evans-Marshall complained about the principal to the superintendent. The superintendent advised Evans-Marshall to meet with the principal and work it out. The principal and Evans-Marshall talked but could not reach agreement. The principal's evaluations criticized Evans-Marshall's attitude and demeanor as well as her use of material that is pushing the limits of community standards. Evans-Marshall filed written objections to the principal's evaluations and a grievance with the superintendent.[93]

At its March 2002 meeting, the school board voted unanimously not to renew Evans-Marshall's contract. On April 9, 2002, the school board sent Evans-Marshall a letter stating that her non-renewal was due to problems with communications and team work. At Evans-Marshall's request, the board held a formal hearing about the employment decision. The principal, superintendent, and Evans-Marshall all testified and the board again voted unanimously not to renew her contract.[94]

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[90] Id. at 336.
[91] Id. at 336.
[92] Id. at 336-337.
[93] Id. at 337.
[94] Id. at 337.

In March 2003, Evans-Marshall filed an action against the school board alleging that the school board and other defendants retaliated against her curricular and pedagogical choices infringing her First Amendment rights to select books and methods of instruction for use in the classroom without interference from public officials.[95]

The Court of Appeals held that Evans-Marshall's curricular choices were a matter of public concern and her interest as a citizen in commenting upon matters of public concern through her in-class speech outweighed the school board's interest as an employer in promoting the efficiency of the public service it performs. However, the Court of Appeals held that Evans-Marshall cannot overcome Garcetti. When government employees speak pursuant to their official duties, the court noted that Garcetti indicates that they are not speaking as citizens for First Amendment purposes. The court observed that when a teacher teaches, the school system does not regulate that speech as much as it hires that speech.[96] The court stated:

> "Expression is the teacher's stock in trade, the commodity she sells to her employer in exchange for her salary, …and if it is the school board that hires that speech, it can surely regulate the content of what is or is not expressed... Only the school board has the ultimate responsibility for what goes on in the classroom, legitimately giving it a say over what teachers may or may not teach in the classroom."[97]

The Court of Appeals noted that teachers are not everyday citizens. Evans-Marshall contended that she had the right to select books and methods of instruction for use in the classroom without interference from public officials, but Ohio law provides that the board of education shall prescribe the curriculum. Thus, state law gives elected officials, not teachers, responsibility over the curriculum. The court noted that this is an accountability measure that ensures that the citizens of a community have a say over a matter of considerable importance to many of them, their children's education, by giving them control over membership on the school board.[98]

The Court of Appeals noted that if one teacher, Evans-Marshall, had a First Amendment right to select books and methods of instruction for use in the classroom, so presumably would other teachers. The result would be chaos. Each teacher would be teaching a different curriculum.[99]

The Court of Appeals reasoned that since every child in Ohio must attend school, providing public school teachers with a captive audience for their in-class speech, putting curricular choices in the hands of someone the community can vote out of office, or who is otherwise democratically accountable, is a reasonable legislative choice.[100] The Court of

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[95] Id. at 337-338.
[96] Id. at 339-340.
[97] Id. at 340.
[98] Id. at 341.
[99] Id. at 341.
[100] Id. at 342.

Appeals stated: "In concluding that the First Amendment does not protect primary and secondary school teachers' in-class curricular speech, we have considerable company. The Seventh Circuit invoked Garcetti in concluding that the curricular and pedagogical choices of primary and secondary school teachers exceed the reach of the First Amendment."[101]

The Court of Appeals noted that although a teacher has the right to advocate outside of the classroom for the use of certain curricular materials, the teacher does not have the right to use those materials in the classroom. The court noted that the common thread through all of the cases involving curricular speech is that when it comes to in-class curricular speech at the primary or secondary school level, no other appellate court has held that such speech is protected by the First Amendment.[102]

In Lee v. York County School Division,[103] the Fourth Circuit Court of Appeals affirmed the district court's award of summary judgment for the school district finding that the teacher's First Amendment rights were not violated.

William Lee, a high school teacher in York County, filed a lawsuit against the York County School Division alleging that the school district violated his rights under the First Amendment by removing materials he had posted on the bulletin board in his classroom. The district court rejected Lee's claim, concluding his postings were curricular in nature and thus did not constitute speech on a matter of public concern. The Court of Appeals affirmed the lower court's decision.[104]

In 2001, Lee began teaching Spanish at Tabb High School in Yorktown, Virginia. In October, 2004, an employee of the school board received a complaint from a private citizen who expressed concern over certain material posted on the bulletin boards within Lee's classroom. The citizen's complaint alleged that some of Lee's postings were overly religious in nature. The principal of Tabb High School investigated the matter and removed the following five items from Lee's bulletin boards:

1. A 2001 National Day of Prayer Poster showing George Washington kneeling in prayer.

2. A May 15, 2004 Daily Press news article entitled, "The God Gap" outlining religious and philosophical differences between President Bush and his challenger John Kerry.

3. An October 14, 2002, USA Today news article entitled, "White House Staffers Gather for Bible Study," describing how former Attorney General John Ashcroft lead staffers in voluntary bible study sessions.

[101] Id. at 342; citing, Mayer v. Monroe County Community School Corporation, 474 F.3d 477, 480, 215 Ed.Law.Rep. 626 (7th Cir. 2007).
[102] Id. at 342-344.
[103] Lee v. York County School Division, 484 F.3d 687, 219 Ed.Law.Rep. 413 (4th Cir. 2007).
[104] Id. at 689.

4. A November 1, 2001 Daily Press news article detailing the missionary activities of a former Virginia High School student, Veronica Bowers, who had been killed when her plane was shot down in South America.

5. A June 2001 Peninsula Rescue Mission newsletter highlighting the missionary work of Bowers.[105]

The school district conceded that it did not have any written policies on what teachers may properly post on classroom walls or bulletin boards. The school board gave principals broad discretion to evaluate and decide which postings were appropriate for a particular classroom setting. Under the unwritten policy, inappropriate postings included items that violated the First Amendment, that were offensive, that used profanity or that were otherwise unrelated to curricular objectives. The principal removed the items from Lee's classroom because he saw them as overly religious and in violation of the Establishment Clause of the First Amendment.[106]

On appeal, Lee argued that he possessed a First Amendment right to post the materials that were removed on the school board's classroom bulletin boards. The Court of Appeals recognized that the state has an interest as an employer in regulating the speech of its employees that differs significantly from those that the government possesses in connection with the regulation of the speech of citizens in general.[107]

The Court of Appeals noted that in previous cases the court held that if contested speech is curricular in nature, it does not constitute speech on a matter of public concern. The court concluded that disputes over curriculum constitute ordinary employment disputes and do not implicate speech on matters of public concern. Therefore, when a First Amendment free speech dispute involves a teacher-employee who is speaking within the classroom, the determination of whether the teacher's speech involves a matter of public concern is dependent on whether or not the speech is curricular.[108]

In applying this standard, the court found that Lee's postings plainly constituted school sponsored speech having the imprimatur of the school and was part of the school's curriculum. The removed items were not posted on a private bulletin board owned by Lee but on a school-owned bulletin board in his classroom. The teacher argued that he sought to impart values to his students in order to expose his students to social and moral values deemed beneficial to their emotional growth. However, the court found that it is the school board that is responsible for the well-being of its students and it is the school board that must make the determination as to what is appropriate to impart to students. The court found that it is far better public policy to entrust the makeup of the curriculum to local school board members and administrators who are responsible to the electorate. The Court of Appeals concluded that the posted items did not

[105] Id. at 689-90.
[106] Id. at 690-91.
[107] Id. at 693.
[108] Id. at 693-94.

constitute speech on a matter of public concern and, therefore, are not protected by the First Amendment.[109]

In Johnson v. Poway Unified School District,[110] the Ninth Circuit Court of Appeals held that the Poway Unified School District did not violate the rights of a high school math teacher when it ordered the teacher to remove large banners (seven feet wide and two feet tall) from the wall of his classroom which contained messages which promoted a religious viewpoint. This decision should be helpful to school districts with respect to regulating the banners and posters placed on classroom walls.

Bradley Johnson has taught math to students in the Poway Unified School District for more than forty years. In August 2003, he moved to the newly opened Westview High School to teach calculus and algebra. He presently teaches there and is the faculty sponsor of the school's Student Christian Club.[111]

In late 2006, a fellow teacher at Westview advised the principal about two large banners prominently displayed in Johnson's classroom. The principal went to the classroom to see the banners. In Johnson's classroom, there were two large banners, each about seven feet wide and two feet tall, hung on the wall. One had red, white and blue stripes and stated in large block type: "IN GOD WE TRUST"; "ONE NATION UNDER GOD"; "GOD BLESS AMERICA"; and "GOD SHED HIS GRACE ON THEE." The other banner stated: "All men are created equal, they are endowed by their CREATOR." On the second banner, the word "CREATOR" occupied its own line, and each letter of "CREATOR" was capitalized and nearly double the size of the other text.[112]

The principal recalled being overwhelmed by the size of the banners when she walked into the classroom. The principal was concerned that since it was a math class, the phrases appeared to be taken out of context, very large and seemed to be the promotion of a particular religious viewpoint that might make students that did not share that viewpoint uncomfortable. The common thread in all of these banners were the word "God" and "Creator".[113]

The principal consulted with the district assistant superintendents and superintendent. District staff consulted with legal counsel while the principal discussed modifying the banners to put them into context. For example, the principal suggested making the banners smaller or displaying the phrase "In God we Trust," on a coin. The teacher rejected these suggestions.[114]

Later, the school board approved the decision to order the teacher to remove the banners. On January 19, 2007, an assistant superintendent phoned the teacher and told him he would need to remove the banners. Four days later, the assistant superintendent sent a letter directing Johnson to review the school district's administrative procedures on "The Teaching of

[109] Id. at 695-700.
[110] 658 F.3d 954 (9th Cir. 2011). 273 Ed. Law Rep. 110.
[111] Id. at 958.
[112] Ibid.
[113] Ibid.
[114] Ibid.

Controversial Issues" as well as Education Code section 51511.[115] Education Code section 51511 states:

> "Nothing in this code shall be construed to prevent, or exclude from the public schools, references to religion or references to or the use of religious literature, dance, music, theatre, and visual arts or other things having a religious significance when such references or uses do not constitute instruction in religious principles or aid to any religious sect, church, creed, or sectarian purpose and when such references or uses are incidental to or illustrative of matters properly included in the course of study."

The assistant superintendent advised the teacher to refrain from advocating or using his influence to promote partisan or sectarian viewpoints. The letter stated that the prominent display of brief and narrow selections of text from documents and songs without the benefit of any context, all of which include the word "God" or "Creator" had the effect of promoting the teacher's viewpoints to advocate a sectarian viewpoint and provided aid to a particular religious sect, creed or sectarian purpose that was not incidental or illustrative of matters properly included in the course of study as a teacher of mathematics.[116]

The teacher complied with the district's order and removed the banners. Shortly thereafter, the teacher filed suit in federal court. The district court granted summary judgment to the teacher and the school district appealed. The Court of Appeals reversed.[117]

The Ninth Circuit Court of Appeals adopted a sequential five step test based on Pickering.[118] The Court of Appeals held that where the government acts as both sovereign and employer, the Pickering analysis applies. The Pickering analysis requires the courts to balance interests of the public employee as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. The Court of Appeal outlined the five steps as follows:

1. Whether the plaintiff spoke on a matter of public concern;

2. Whether the plaintiff spoke as a private citizen or public employee;

3. Whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action;

4. Whether the state had an adequate justification for treating the employee differently from other members of the general public;

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[115] Id. at 959.
[116] Ibid.
[117] Ibid.
[118] Id. at 961-62. See, Eng v. Cooley, 552 F.3d 1062, 1070-72 (9th Cir. 2009).

5. Whether the state would have taken the adverse employment action even absent the protected speech.[119]

If the plaintiff fails to satisfy any of the five steps, the court concludes its inquiry and rules against the plaintiff.[120] The Court of Appeals stated that when a citizen enters government service, the citizen by necessity must accept certain limitations on his or her freedom, or else there would be little chance for the efficient provision of public services.[121] The Court of Appeals noted that other circuits have applied Pickering to teacher speech that takes place in school.[122]

The Court of Appeals then reviewed the first step of the inquiry. The Court of Appeals concluded that these banners represented speech of a religious nature and as such concerned matters of public concern. The Court of Appeals then went to the second step of the inquiry to determine whether the teacher spoke as a private citizen or as a public employee.[123]

The Court of Appeals determined that the teacher's speech owed its existence to his position as a teacher and, therefore, the teacher spoke as a public employee. The speech occurred in the teacher's classroom and only the teacher may post banners in the classroom. A member of the public, a private citizen, would not have the authority to place banners on a public school classroom. The Court of Appeal stated, "Certainly, Johnson did not act as a citizen when he went to school and taught class, took attendance, supervised students, or regulated their comings-and-goings; he acted as a teacher – a government employee."[124]

The Court of Appeals held that the teacher held a position of trust and authority and interacted with students with impressionable young minds. The Court of Appeals stated, "An ordinary citizen could not have walked into Johnson's classroom and decorated the walls as he or she saw fit, any more than an ordinary citizen could demand that students remain in their seats and listen to whatever idiosyncratic perspective or sectarian viewpoint he or she wish to share…Johnson took advantage of his position to press his particular views upon the impressionable and 'captive' minds before him…."[125]

Because the teacher spoke as an employee rather than a private citizen, the Court of Appeals held that the teacher's free speech rights were not violated and the second step of the inquiry was not satisfied. The Court of Appeals also held that the school district acted consistently with the Establishment Clause of the First Amendment by maintaining governmental neutrality between religion and nonreligion. The Court of Appeals held that

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[119] Ibid.
[120] Id. at 961-62. See, also, Huppert v. City of Pittsburg, 574 F.3d 696, 703 (9th Cir. 2009).
[121] Id. at 963. See, also, Garcetti v. Ceballos, 547 U.S.410, 418 (2006).
[122] Ibid. See, Evans-Marshall v. Board of Education, 624 F.3d 332, 340 (6th Cir. 2010); Borden v. School District of East Brunswick, 523 F.3d 153, 171 (3rd Cir. 2008); Lee v. York County School Division, 487 F.3d 687, 700 (4th Cir. 2007); Grammer-Hoelter v. Twin Peaks Travel Academy, 492 F.3d 1192, 1204 (10th Cir. 2007); Williams v. Dallas Independent School District, 480 F.3d 689, 694 (5th Cir. 2007); Mayer v. Monroe County Community School Corporation, 474 F.3d 477, 479-80 (7th Cir. 2007).
[123] Id. at 964-65.
[124] Id. at 967.
[125] Id. at 968.

government may take action to avoid a violation of the Establishment Clause and, when doing so, it does not run afoul of the Constitution.[126] The Court of Appeals stated:

> "We would not be the first to recognize the difficult position government offices often find themselves in when trying to 'run the gauntlet' between not being sued under the Establishment Clause for speaking in a manner some might perceive as unconstitutionally 'pro-religious' and not being sued under the very same clause for ceasing that speech – and action that, as this case demonstrates, may be equally offensive to others….As our precedent demonstrates, government action – especially the curtailment of its own speech – taken on account of an honest interest in ensuring neutrality generally passes constitutional muster…."[127]

In Coomes v. Edmonds School District, the Ninth Circuit Court of Appeals held that a teacher's communications with administrators about failure of the school district to implement a student's IEP and its mismanagement of the program for emotionally disturbed students program was not made in her capacity as a private citizen, and thus her discharge for doing so was not protected by the First Amendment. The Court stated:

> "Even when construing the evidence in the light most favorable to Coomes, her speech to her supervisors and district administrators is unprotected 'up-the-chain-of-command' complaints, and her speech to parents regarding their students' educational program was, by her own admission, part of her job as head of the EBD program. We therefore conclude that Coomes failed to meet her burden to show that the relevant speech was made in her capacity as a private citizen, and that the district court's judgment with respect to Coomes' First Amendment claim was proper."

E. Unprotected Speech – Pursuant to Official Duties as a Coach

As the following cases show, coaches, like teachers, act pursuant to their official duties when a coach participates in prayers with his football team or seeks financial information about the school's athletic program and their speech is not protected by the First Amendment.

In Borden v. School District of the Township of East Brunswick,[128] the Third Circuit Court of Appeals held that a school district did not violate a coach's free speech rights under the First Amendment and prohibited the coach from participating in prayers with his football team.

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[126] Id. at 970-73.
[127] Id. at 973, n. 24.
[128] Borden v. School District of the Township of East Brunswick, 52 F.3d 153, 231 Ed.Law.Rep. 583 (3rd Cir. 2008).

Marcus Borden was the head football coach at East Brunswick High School. During his tenure at East Brunswick High School, Borden engaged in two pre-game prayer activities. The team participated in this tradition for twenty three seasons until September 26, 2005, when the superintendent of the school district received a complaint from a parent. On October 6, 2005, the school district's legal counsel advised the superintendent and the school board that a coach for the school could not lead students in prayer or participate in student prayers. The superintendent met with Borden the next day, October 7, 2005, and told him that all prayer needed to be student initiated, including the selection of which student would recite the prayer.[129]

Later that day, the superintendent sent Borden a memorandum and attached the guidelines provided by legal counsel. That same evening, Borden resigned, effective immediately, and he did not attend the football game scheduled for that evening. However, on October 17, 2005, Borden withdrew his resignation and agreed to abide by the school district's policy for the remainder of the 2005 season.[130]

The Court of Appeals found that Borden's speech was not a matter of public concern since the employee's speech related to his personal interests. The court found that the form and context of Borden's speech was non-public in nature because it does not occur in any type of official proceeding or public forum. Borden's speech was meant for the football team only. Therefore, the court held that Borden's expressive conduct of bowing his head and taking a knee were not matters of public concern triggering the protection of his right, as a public employee, to freedom of speech. In addition, Borden's speech would not be protected under Garcetti because it was made pursuant to his official duties as a coach of the East Brunswick High School football team and not as an ordinary citizen.[131]

In Williams v. Dallas Independent School District,[132] the Fifth Circuit Court of Appeals held that a coach's speech was made in the course of performing his duties rather than as a citizen and thus was not protected by the First Amendment.

Gregory Williams was employed as an athletic director and football coach at Pinkston High School in the Dallas Independent School District. Williams repeatedly asked the school's office manager for information concerning the funds appropriated for athletic activities. Despite numerous requests, the school's office manager did not give information on the athletic account. In September, 2003, Williams wrote a memorandum to the school office manager, with a copy to the school principal, in which he objected to the manager's failure to provide him with any information pertaining to the athletic account. Williams questioned the negative balance on the account and the accounting of gate receipts.[133]

Four days after receiving the memorandum, the principal removed Williams as athletic director. In March 2003, the school district decided not to renew Williams' contract. Later that

[129] Id. at 159.
[130] Id. at 160-61.
[131] Id. at 169-71.
[132] Williams v. Dallas Independent School District, 480 F.3d 689, 217 Ed.Law.Rep. 802 (5th Cir. 2007).
[133] Id. at 690.

month, the school district placed the principal and the office manager on administrative leave pending an investigation of matters including financial accountability.

Williams brought a lawsuit against the school district in the United States District Court. The district court granted summary judgment in favor of the school district, holding that Williams' memorandum to the principal did not address a matter of public concern and therefore, was not protected by the First Amendment.[134]

The Court of Appeals held that under Garcetti, the court must shift its focus from the content of the speech to the role of the speaker when the speech was made. If the employee was acting in his or her role as an employee, the First Amendment does not protect speech made pursuant to the employee's official duties. The Court of Appeals noted, "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."[135]

The Court of Appeals held that activities undertaken in the course of performing one's job are activities pursuant to official duties and that other circuits have drawn similar conclusions.[136] The Court of Appeals went on to state that Williams needed information regarding the athletic account so that he could operate the athletic department based on standard operating procedures. When Williams wrote the memorandum he accused the office manager of impairing his ability to provide students athletes with critical items of materials necessary for competition. Williams was responsible for buying sports equipment and for arranging and paying tournament fees. Because the office manager and principal were responsible for monitoring the athletic accounts in order for Williams to enter in competitions he needed to consult with the principal about his budget. Therefore, the Court of Appeals found that Williams' speech was made in the course of performing his employment.[137]

The Court of Appeals found that Williams wrote the memorandum because he needed the information so that he could properly execute his duties as an athletic director. These duties included taking the students to tournaments and paying their tournament fees.

Williams did not write the memo from the perspective of a citizen since Williams had special knowledge that two hundred dollars was raised at a basketball tournament, he was experienced with standard operating procedures with athletic departments and he accused the principal with engaging and enforcing unwritten rules. Therefore, the Court of Appeals concluded that Williams' memorandum to the office manager and principal were written in the course of performing his job as athletic director and not protected by the First Amendment.[138]

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[134] Id. at 691.
[135] Id. at 692.
[136] Id. at 693; citing, Fritag v. Ayres, 468 F.3d 528 (9th Cir. 2006); Battle v. Board of Regents, 468 F. 3d 755, 761 (11th Cir. 2006); Mills v. City of Evansville, 452, F.3d 646, 648 (7th Cir. 2006).
[137] Id. at 694.
[138] Id. at 694.

F. Unprotected Speech – Pursuant to Official Duties Filing a Complaint

As the following cases illustrate, when teachers file grievances under their collective bargaining agreement or make informal complaints to their supervisors regarding their working conditions, they are acting pursuant to their official duties and their speech is not protected by the First Amendment.

In Weintraub v. Board of Education,[139] the Second Circuit Court of Appeals held that a teacher's filing of a grievance was made pursuant to his official duties as a teacher and, thus, not protected by the First Amendment.

Weintraub alleged that defendants violated his First Amendment rights by retaliating against him for filing a formal grievance with his union to challenge a school assistant principal's decision not to discipline a student who had thrown books at Weintraub during class. The district court dismissed Weintraub's claim in light of Garcetti v. Ceballos which held that the First Amendment does not protect speech made pursuant to a public employee's official duties. Weintraub appealed.[140]

The Court of Appeals found that Weintraub's filing of the grievance was in furtherance of one of his core duties as a public school teacher, maintaining class discipline, and had no relevant analogue to citizen speech. As a result, the Court of Appeals found that the grievance was filed pursuant to Weintraub's official duties. Therefore, the grievance was not protected speech and the Court of Appeals affirmed the district court's dismissal of the plaintiff's retaliation claim.[141]

The Court of Appeals held that under the First Amendment, speech can be made pursuant to a public employee's official job duties even though it is not required by, or included in, the employee's job description or in response to a request by the employer. The Court of Appeals held that Weintraub's grievance was filed pursuant to his official duties because it involved his ability to properly execute his duties as a public school teacher (i.e., to maintain classroom discipline, which is an indispensible prerequisite to effective teaching and classroom learning).[142]

In Fox v. Traverse City Area Public Schools Board of Education,[143] the Sixth Circuit Court of Appeals held that a teacher did not speak as a citizen when she made complaints to her immediate supervisors about the size of her teaching caseload.

Susan Fox was employed as a special education teacher by the school district. The district court granted summary judgment to the school district on the Plaintiff's First Amendment retaliation action, holding that under Garcetti, the Plaintiff's complaints to her supervisors about

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[139] Weintraub v. Board of Education, 593 F.3d 196, 253 Ed.Law.Rep. 17 (2nd Cir. 2010).
[140] Id. at 198.
[141] Id. at 198.
[142] Id. at 203.
[143] Fox v. Traverse City Area Public Schools Board of Education, 605 F.3d 345, 257 Ed.Law.Rep. 23 (6th Cir. 2010).

the size of her teaching caseload were not protected by the First Amendment. The Court of Appeals affirmed the decision of the district court.[144]

The Court of Appeals noted that for a public employee's statements to receive First Amendment protection, the public employee must speak as a citizen and address matters of public concern. When public employees make statements pursuant to their official duties, employees are not speaking as citizens for First Amendment purposes.[145] Fox's complaints were directed solely to her supervisors, not to the general public.[146] The Court of Appeals noted that the circuits are split as to whether it is a question of law or a question of fact and law as to whether an employee is speaking pursuant to their official duties. However, the court held that even if the question was purely a question of fact, the district court properly granted summary judgment because the factual record presented no genuine issue of trial.[147]

G. Unprotected Speech – Pursuant to Official Duties as a Principal

Principals in the same manner as teachers, act pursuant to their official duties, when seeking to convert their school to a charter school. As the case below illustrates, such speech is not protected by the First Amendment.

In D'Angelo v. School Board of Polk County,[148] the Court of Appeals was required to decide whether a school district violated the First Amendment rights of a high school principal when the board terminated him in retaliation for his efforts to convert his school to a charter school.

D'Angelo alleged that when he served as principal of Kathleen High School in Polk County, Florida, he was terminated due to his efforts to convert his school to a charter school. D'Angelo met with teachers, consulted with principals of other local high schools, and held two faculty votes regarding the conversion of the school to charter status. The district court held that D'Angelo's efforts to convert Kathleen High School to charter status were part of his official duties and were not undertaken as a citizen. Therefore, D'Angelo's speech was not protected by the First Amendment. The district court granted summary judgment in favor of the school board. The Court of Appeals affirmed.[149]

The Court of Appeals concluded that under Garcetti, D'Angelo was not engaged in protected speech. The Court of Appeals noted that in Garcetti the Supreme Court emphasized that a public employee must speak both on a matter of public concern and as a citizen to be protected under the First Amendment.[150]

The Court of Appeals noted that D'Angelo undertook his efforts to convert Kathleen High School to charter status in his capacity as the principal and not as a citizen. D'Angelo

[144] Id. at 346-347.
[145] Id. at 348.
[146] Id. at 349.
[147] Id. at 350-351.
[148] D'Angelo v. School Board of Polk County, 497 F.3d 1203, 223 Ed.Law.Rep. 598 (11th Cir. 2007).
[149] Id. at 1206.
[150] Id. at 1210-13.

admitted that his efforts to convert his school to charter status would fulfill his professional duties. D'Angelo was not expressly assigned the duties to pursue charter conversion but D'Angelo admitted that he pursued charter conversion to explore any and all means to improve the quality of education of his school which was one of his listed duties and which D'Angelo described as his number one priority in his job as principal. Therefore, the Court of Appeals held that D'Angelo's speech was not protected and affirmed the decision of the district court to grant the summary judgment in favor of the school district.[151]

H. Unprotected Speech – Criticism of Supervisor

In Desrochers v. City of San Bernardino,[152] the Court of Appeals held that police officers' complaints about their supervisor was not a matter of public concern and, therefore, was not subject to First Amendment protection.

In Desrochers, two police officers filed an internal grievance against their supervisor, alleging that his management style was autocratic, controlling and critical. The grievance alleged that he frequently embarrassed employees and gave the San Bernardino Police Department a bad name with other police departments.[153]

After their formal grievance had been denied, the police officers filed a complaint with the city's human resources department. Neither the grievance nor the formal complaint with the city's human resources department was made public. After their complaint was denied by the human resources department, the police officers filed a complaint in U.S. District Court under 42 U.S.C. Section 1983.[154]

The district court held that the grievance did not touch on matters of public concern and dismissed their complaint. The police officers appealed.[155]

The Ninth Circuit Court noted that in First Amendment retaliation claims against a government employee, there is a five-step series of questions:

1. Whether the plaintiff spoke on a matter of public concern;

2. Whether the plaintiff spoke as a private citizen or public employee;

3. Whether the plaintiff's protected speech was a substantial and motivating factor in the adverse employment action;

4. Whether the state had an adequate justification for treating the employee differently from other members of the general public; and

[151] Id.
[152] 572 F.3d. 703 (9th Cir. 2009).
[153] Id. at 705.
[154] Id. at 706.
[155] Id. at 708.

5. Whether the state would have taken the adverse employment action even absent the protected speech.[156]

The Court of Appeals held that since the matter was not a matter of public concern, there was no First Amendment violation. The Court of Appeals held that based on the content of the speech and the allegation that it pertained to the morale of the police department in its operation with efficiency and effectiveness, the court held that the content was insufficient to support a First Amendment claim. The Court of Appeals held that to address a matter of public concern, the content of the speech must involve issues about which information is needed or appropriate to enable the members of the public to make informed decisions about the operation of their government. Speech that deals with individual personnel disputes and grievances and that would be of no relevance to the public's evaluation of the performance of governmental agencies is generally not a public concern.[157]

The Court of Appeals also noted that the speech was in the form of an internal employee grievance, which means that the public was never made aware of the officers' concerns. The court noted that a limited audience weighs against the claim of protected speech.[158]

The Court of Appeals held that plaintiffs failed to meet their burden to demonstrate that their speech can fairly be considered as relating to a matter of political, social or other concern to the community. The court held that while the working environment might have been unpleasant, the speech at issue involved nothing more than an internal dispute. For these reasons, the Court of Appeals held that the plaintiffs could not meet the threshold requirement to state a First Amendment retaliation claim under Section 1983 that the speech be a matter of public concern, and the Court of Appeals affirmed the district court's grant of summary judgment.[159]

In Kaye v. Board of Trustees of the San Diego County Public Law Library,[160] the Court of Appeal held that a former law librarian whose employer discharged him after he sent a scathing e-mail criticizing his superiors did not have his First Amendment rights violated, and the Court of Appeal affirmed the lower court's granting of summary adjudication regarding the wrongful termination action.

In February 2006, the plaintiff, Michael Kaye, a reference librarian who taught the library's public course for self-represented litigants participated in a program sponsored by the administrative offices of the courts. Kaye's supervisor inquired as to why the invitation went to Kaye rather than her. As a result, Kaye rescinded his acceptance to participate in the panel discussion at the conference.[161]

On March 5, 2006, Kaye sent his supervisor a lengthy e-mail which he copied to his coworkers. Rather than discuss project prioritization as the supervisor requested, Kaye opted to

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[156] Id. at 708-09.
[157] Id. at 710. See, Coszalter v. City of Salem, 320 F.3d 968, 973 (9th Cir. 2003); McKinley v. City of Eloy, 705 F.2d 1110, 1113 (9th Cir. 1983).
[158] Id. at 715, 717.
[159] Id. at 719.
[160] 179 Cal.App.4th 48, 101 Cal.Rptr. 3d 456 (2009).
[161] Id. at 52.

discuss governments of the reference department and his perceptions that the library's management regards the full-time reference librarians as "fungible and disposable peons who are not genuinely valued." Kaye criticized his supervisor's management style as autocratic and questioned many of their management decisions.[162]

Kaye's supervisor then sent him a letter notifying him that she was proposing to discharge him for insubordination and serious misconduct. A pre-termination administrative hearing was held and the prehearing concluded that Kaye's conduct constituted serious misconduct and justified termination. Kaye then appealed.[163]

The Court of Appeal reviewed the matter and concluded that Kaye cannot establish his discharge violated the California Constitution's Free Speech clause. The Court of Appeal applied the U.S. Supreme Court's decision in Garcetti v. Ceballos[164] and held that there is no language in the California Constitution that would indicate a different result than the U.S. Supreme Court found in Garcetti. The Court of Appeal concluded, "We have not located any California authorities affording public employees greater protection in this area."[165]

In addition, the Court of Appeal held that Kaye cannot establish his discharge violated the state whistleblower protections. The Court of Appeal applied federal law deciding under a similar federal statute.[166] The Court of Appeal held that an employee's conduct must be in furtherance of a false claims action.[167] The Court of Appeal held that a disgruntled employee's expression of dissatisfaction with his treatment on the job is not protected activity under the state whistleblower statute.[168]

In addition, the Court of Appeal held that the law library board's use of the same attorney that advocated against the employee for advice in closed session did not violate the Brown Act. The court held that Kaye was an at-will employee and, therefore, the due process concerns do not apply.[169]

In Hunt v. County of Orange,[170] the Ninth Circuit Court of Appeals held that a lieutenant in the Orange County Sheriff's Department who was the Chief of Police Services for the City of San Clemente, which contracted with the Orange County Sheriff's Department for police services, was not a policymaker. The district court concluded that Hunt's campaign speech was not protected by the First Amendment when he ran against the incumbent sheriff, Michael Carona. However, the Ninth Circuit Court of Appeals reversed, Hunt's speech was protected by the First Amendment and found that Hunt was not a policymaker for the following reasons:

1. Hunt did not have policymaking authority over any area of policy.

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[162] Id. at 53.
[163] Ibid.
[164] Id. at 566-57; see, also, 547 U.S. 410 (2006).
[165] Id. at 59.
[166] 31 U.S.C. Section 3729, et seq.
[167] U.S. v. Anton, 91 F.3d 1261, 1269 (9th Cir. 1996).
[168] U.S. v. Howard University, 153 F.3d 731, 740 (D.C. Cir. 1998).
[169] See, Howitt v. Superior Court, 3 Cal.App.4th 1575 (1992).
[170] 672 F.3d 606 (9th Cir. 2012).

2. Hunt did not formulate, substantially influence or substantially influence modifications to any department-wide policy.

3. Hunt did not formulate, or substantially influence plans to implement the broad goals of the Orange County Sheriff's Department departmentwide.

4. Hunt did not formulate policy that affected San Clemente.

5. Hunt did not exercise discretion in setting policy for the Orange County Sheriff's Department in San Clemente.

6. Hunt did not directly and regularly communicate with Orange County Sheriff Michael Carona.

7. Hunt did not usually speak with Carona, as Hunt generally approached his supervisor or other department officials when confronted with policy related decisions.

8. Hunt did not act as an advisor to Carona or the assistant sheriffs.

9. Hunt did not have authority to speak to the media without prior approval of higher ranking officials.

10. Hunt did not have a vaguely worded job description.

11. Neither Carona, the captains, or the assistant sheriffs' trust and confidence was necessary for Hunt to adequately perform his duties.[171]

The Court of Appeals founds that the nine factors set forth in Fazio v. City and County of San Francisco[172] were not present to show that Hunt was a policymaker. However, the Court of Appeals held that former sheriff Michael Carona was entitled to qualified immunity because a government official in his position reasonably but mistakenly could have believed that political loyalty was required by someone with Hunt's job responsibilities at the time he ran against Carona.[173]

SUMMARY

The post-Garcetti case law indicates a trend toward limiting the free speech rights of public employees to matters of public concern when the public employee is speaking in his or her role as a citizen and not as a public employee carrying out his or her official duties. When school employees seek to advocate their own personal point of view in the classroom,[174] seek

[171] Id. at 611-16.
[172] 125 F.3d 1328, 1334 Note 5 (9th Cir. 1997).
[173] Id. at 616.
[136] Mayer v. Monroe County Community School Corp., 474 F.3d 477, 215 Ed.Law.Rep. 626 (7th Cir. 2007).

information from their superiors to assist them with their duties,[175] post items of a religious nature on school bulletin boards,[176] seek to convert their school to a charter school,[177] attempt to lead students in prayer,[178] file a grievance due to the failure of a school administrator to discipline a student,[179] complain to supervisors about their own caseload,[180] or attempt to select books and the method of instruction for use in their classroom over the objections of the school board,[181] the courts have held that the public employees involved were acting or making statements pursuant to their official duties and not speaking as citizens for First Amendment purposes.

When a district superintendent reported violations of the Open Meeting Act to the State Attorney General, the Court of Appeals held that the statements were not made pursuant to the district superintendent's duties since this was the sole responsibility of the board of education and the speech was protected by the First Amendment.[182] When teachers were speaking out against a principal's restrictions on their free speech rights, the Court of Appeals held that this speech was protected.[183] Where a teacher's job duties were unclear, the courts have held that whether particular statements were made pursuant to the employee's official duties presented mixed questions of fact and law that must be determined by the trier of fact.[184] When a teacher filed a complaint under the Individuals with Disabilities Education Act (IDEA) with the state educational agency and the employee's job responsibilities do not include IDEA compliance, but rather the provision of speech therapy services to special education students, the employee was not acting pursuant to the employee's duties and the employee's speech was protected by the First Amendment.[185]

Based on the above cases, when the public employee is speaking in his or her role as a citizen and not as a public employee carrying out his or her official duties, the public employee's speech is protected by the First Amendment. Teachers and other school employees will need to be more cautious when speaking out on issues that may be within the scope of their official duties on matters that are not of public concern, as this type of speech is not protected by the First Amendment and the employee could be subject to normal disciplinary proceedings. Disputes will likely arise as to the scope of the employee's official duties. The courts are split as to whether the scope of an employee's duties is a question of law or a mixed question of fact and law.

Ultimately, the Supreme Court will have to decide this issue. In the future, employees seeking protection under the First Amendment will have the burden of proving that their speech

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[175] Williams v. Dallas Independent School District, 480 F.3d 689, 217 Ed.Law.Rep. 802 (5th Cir. 2007).
[176] Lee v. York County School Division, 484 F.3d 687, 219 Ed.Law.Rep. 413 (4th Cir. 2007).
[177] D'Angelo v. School Board of Polk County, 497 F.3d 1203, 223 Ed.Law.Rep. 598 (11th Cir. 2007).
[178] Borden v. School District of the Township of East Brunswick, 52 F.3d 153, 231 Ed.Law.Rep. 583 (3rd Cir. 2008).
[179] Weintraub v. Board of Education, 593 F.3d 196, 253 Ed.Law.Rep. 17 (2nd Cir. 2010).
[180] Fox v. Traverse City Area Public Schools Board of Education, 605 F.3d 345, 257 Ed.Law.Rep. 23 (6th Cir. 2010).
[181] Evans-Marshall v. Board of Education, 624 F.3d 332 (6th Cir. 2010).
[182] Casey v. West Las Vegas Independent School District, 473 F.3d 1323, 215 Ed.Law.Rep. 604 (10th Cir. 2007).
[183] Brammer-Hoelter v. Twin Peaks Charter Academy, 492 F.3d 1192, 222 Ed.Law.Rep. 596 (10th Cir. 2007).
[184] Posey v. Lake Pend Oreille School District, 546 F.3d 1121, 238 Ed.Law.Rep. 537 (9th Cir. 2008).
[185] Reinhardt v. Albuquerque Public Schools, 595 F.3d 1126 263 Ed.Law Rep. 567 (10th Cir. 2010).

was not part of their official job duties and that they were speaking in their role as a citizen if they wish to protect their free speech rights under the First Amendment.