
**SPEAK NO EVIL? GOVERNMENT EMPLOYEE
SPEECH RIGHTS IN THE SEVENTH CIRCUIT IN
LIGHT OF *GARCETTI V. CEBALLOS***

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INTRODUCTION

A government employer, unlike its private-sector counterpart, must operate within the confines of the First and Fourteenth Amendments.¹ While a private-sector employer can typically discipline or discharge an employee as determined by its business judgment,² Title 42 § 1983 of the United States Code³ imposes liability

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¹ U.S. CONST. amend. I; U.S. CONST. amend. XIV, § 1.

² See RESTATEMENT (SECOND) AGENCY § 442 (1958) (“Unless otherwise agreed, mutual promises by principal and agent to employ and serve create obligations to employ and serve which are terminable by either party”); see generally Deborah A. Ballam, *Employment-at-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 687 (2000).

³ 42 U.S.C. § 1983 (2000); see also Rankin v. McPherson, 483 U.S. 378, 383-84 (1987) (internal citation omitted) (even if a government employee is “merely a probationary employee, and even if [the employee] could have been discharged for any reason, or for no reason at all, [the employee] may nonetheless be entitled to reinstatement if she was discharged for exercising her constitutional right to freedom of expression”).

on any government actor that disciplines or discharges a government employee in violation of the employee's protected right to speech and association.⁴ This creates a unique tension in the government employment context between an employee's right as a citizen to be free from governmental intrusion on personal liberties, and the government's legitimate interest as an employer in limiting disruptive speech.⁵

More than thirty-five years ago, the Supreme Court rejected the idea that citizens working for government agencies forfeit the ability to publicly criticize their employers.⁶ Therefore, if a public employee is speaking as a citizen and on a matter of public concern, a government employer may only restrict the speech as necessary to pursue its legitimate interest in operational efficiency.⁷ The Supreme

⁴ The essential elements of a § 1983 claim are: 1) deprivation of a right secured by the constitution or laws of the United States 2) caused by an action taken under color of state law. *Hernandez v. City of Goshen, Indiana*, 324 F.3d 535, 537 (7th Cir. 2003) (citing *Baker v. McCollan*, 443 U.S. 137, 140 (1979)).

Government actors may be sued in their individual, as well as their official capacities under § 1983. *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985).

⁵ See *Rankin*, 483 U.S. at 384 (noting the "dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment"); *Garcetti v. Ceballos*, 126 S.Ct. 1951, 1966 (2006) (Souter, J. dissenting) (noting "the tension between individual and public interests in the speech, on the one hand, and the government's interest in operating efficiently without distraction or embarrassment by talkative or headline-grabbing employees").

⁶ *Pickering v. Bd. of Educ. of Twp. High School Dist. 205, Will County, Ill.*, 391 U.S. 563, 568 (1968) (quoting *Keyishian v. Bd. of Regents of State of N.Y.*, 385 U.S. 589, 606 (1967)) ("[T]he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected").

⁷ *Garcetti*, 126 S.Ct. at 1958 ("So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively"). Because these are *post hoc* employment decisions, and not content-based restrictions on a specific category of speech, they are not subject to strict scrutiny. See *United States v. Nat'l Treasury Employees Union*, 513 U.S. 454, 466-67 (1995). Rather, a court need only determine whether the employer had a legitimate reason to discipline or discharge the employee based on the speech. *Garcetti*, 126 S. Ct. at 1958.

Court recently refined this standard in *Garcetti v. Ceballos*,⁸ holding that a government employee speaking pursuant to an official duty is precluded from claiming First Amendment protection for speech “as a citizen.”⁹

Although the Seventh Circuit was the first United States Court of Appeals to apply this distinction, Judge Easterbrook, joined by Judges Williams and Rovner seemingly ignored the analytical guidelines expressed in *Garcetti*,¹⁰ as well as decades of Supreme Court precedent,¹¹ and applied a truncated analysis to determine whether an employee was speaking “pursuant to [her] official duties”¹² in *Mills v. City of Evansville*.¹³ If *Mills* is interpreted broadly, its holding unduly limits the circumstances under which a government employee can claim protection for speech propounded at the workplace and creates a disincentive for employee’s to report internal wrongdoing through the chain of command.

This Comment will contend that the Seventh Circuit’s opinion in *Mills* suggests an overly broad application of the standard announced in *Garcetti v. Ceballos*. Section I will recount Supreme Court precedent relating to the speech rights of government employees, including its recent decision in *Garcetti*. Section II will discuss the Seventh Circuit’s application of *Garcetti* in *Mills*. Section III will contrast the Seventh Circuit’s analysis with the application of *Garcetti* by other United States Courts of Appeals. Section IV will explore the repercussions of the Seventh Circuit’s decision in *Mills* for government employers and employees in the Seventh Circuit.

⁸ 126 S.Ct. 1951 (2006).

⁹ *Id.* at 1955.

¹⁰ *Id.* at 1959-61.

¹¹ See *Pickering v. Bd. of Educ. of Twp. High School Dist. 205, Will County, Ill.*, 391 U.S. 563, 568 (1968); *Connick v. Myers*, 461 U.S. 138 (1983); *Rankin v. McPherson*, 483 U.S. 378 (1987).

¹² *Mills v. City of Evansville, Ind. (“Mills II”)*, 452 F.3d 646, 647 (7th Cir. 2006).

¹³ *Id.* at 646-48.

I. THE EVOLUTION OF GOVERNMENT EMPLOYEE SPEECH JURISPRUDENCE

Prior to 1967, the “unchallenged dogma”¹⁴ was that a government employer could condition employment on whatever terms it saw fit, including those that limited an employee’s freedom of speech and association, without fear of being held to have violated the Constitution.¹⁵ Although this line of reasoning was eventually rejected,¹⁶ First Amendment protection for statements by government employees has emerged slowly, and protection for statements in the government employment context has been the exception, not the rule.

A. *Emergence from At-Will Employment Doctrine*

In the absence of an employment contract to the contrary, employment relationships in the United States are presumed to be at-will.¹⁷ Under this doctrine, either the employer or employee may terminate the employment relationship at any time, for any reason, or

¹⁴ *Connick*, 461 U.S. at 143-44 (quoting Justice Holmes in *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (1892)) (“[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman”). (internal citations omitted).

¹⁵ See *Adler v. Bd. of Educ. of City of N.Y.*, 342 U.S. 485 (1952), *overruled by* 385 U.S. 589, 606 (1967); *Garner v. Bd. of Pub. Works*, 341 U.S. 716 (1951); *United Pub. Works v. Mitchell*, 330 U.S. 75 (1947); *U.S. v. Wurzbach* 289 U.S. 396 (1930); *Ex parte Curtis*, 106 U.S. 371 (1882).

¹⁶ *Keyishian v. Bd. of Regents of State of N.Y.*, 385 U.S. 589, 605 (1967).

¹⁷ See generally James A. Sonne, *Firing Thoreau: Conscience and At-will Employment*, 9 U. PA. J. LAB. & EMP. LAW 235, 235 n.2 (citing Peter O. Hughes, *Employment at Will*, 10-259 LAB. AND EMP. LAW (Matther Bender) § 259.04 n.5 (2007), available at LEXIS 10-259 Lab. and Emp. Law § 259.04). (“[e]mployment is presumed to be at will in . . . every state” except Montana).

for no reason at all.¹⁸ Although courts and legislatures have created exceptions to the at-will presumption,¹⁹ it nonetheless gives employers in the private-sector broad discretion to terminate their employees for any reason, including their speech,²⁰ so long as the termination is not in violation of a contract or statute.²¹ While the at-will employment doctrine creates the illusion of equivalence, it has been criticized for creating a “vast disparity in power between employers and their

¹⁸ See RESTATEMENT (SECOND) AGENCY § 442 (1958); see generally Deborah A. Ballam, *Employment-at-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 687 (2000).

¹⁹ Courts have applied implied covenants of good faith and fair dealing, implied contracts of continued employment. In addition, public policy exceptions prevent an employer from terminating an employee for certain protected activities, which have included: whistleblowing, exercising a statutory or constitutional right, refusing to commit an illegal act, and performance of a statutory duty. See generally Amy M. Carlson, *States Are Eroding the At-Will Employment Doctrines: Will Pennsylvania Join the Crowd?*, 42 DUQ. L. REV., 511, 513 (Spring 2004); Deborah A. Ballam, *Employment-at-Will: The Impending Death of a Doctrine*, 37 AM. BUS. L.J. 653, 687 (Summer 2000); Stephen D. Lichtenstein and Jonathan J. Darrow, *Employment Termination For Employee Blogging: Number One Tech Trend for 2005 and Beyond, or A Recipe For Getting Dooced?*, 2006 UCLA J.L. & TECH. 4, *7 (Fall 2006).

For statutory exceptions including state and federal whistleblower statutes see generally Peter O. Hughes, *Employment at Will*, 10-259 LAB. AND EMP. L. (Matthew Bender) § 259.04 n.5 (2007), available at LEXIS 10-259 Lab. and Emp. Law § 259.04.

For whistleblower statutes in states in the Seventh Circuit see 20 ILL. COMP. STAT. 415/19 c.1 (West 2007); IND. CODE 36-1-8-8 (West 2007); WIS. STAT. § 230.80 (West 2007).

²⁰ See Chris Oakes, *23 Fired for Email Violations*, WIRED MAGAZINE, December 1, 1999, available at <http://www.wired.com/politics/law/news/1999/12/32820> (last visited May 2, 2007); *Fired for Sending E-mail: More Employers are Reading E-mails, to Employees Surprise*, CBS Early Show (2004) <http://www.cbsnews.com/stories/2004/08/17/earlyshow/living/caught/main636589.shtml> (last visited May 2, 2007).

²¹ See generally Peter O. Hughes, *Employment at Will*, 10-259 LAB. AND EMP. L. (Matthew Bender) § 259.04 (2007), available at LEXIS 10-259 Lab. and Emp. Law § 259.04.

employees”²² by giving employers the ability to leverage the employment relationship to pressure employees to act or refrain from acting in ways frowned upon by the employer.²³

Prior to the Supreme Court’s decision in *Keyishian v. Board of Regents of the State of New York*²⁴ in 1967, courts justified a variety of restrictions on speech and association in the employment context by borrowing from the underlying theory of at-will employment doctrine—that an employee has no legally cognizable right to be employed.²⁵ Accordingly, a public employer could terminate an employee for “the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act,”²⁶ for belonging to a group deemed “subversive,”²⁷ or for simply “advocat[ing]” subversive ideas.²⁸ Courts reasoned that such restrictions on government employment did not chill freedom of speech or association because employees maintained the option of “retain[ing] their beliefs and associations and go[ing] elsewhere.”²⁹ Therefore, the personal liberties of an employee forced to choose between government employment and his personal beliefs were limited only “in the remote sense that limitation is inherent in every choice.”³⁰

²² Amy M. Carlson, *States Are Eroding the At-Will Employment Doctrines: Will Pennsylvania Join the Crowd?*, 42 DUQ. L. REV., 511, 513 (Spring 2004). See also Stephen D. Lichtenstein and Jonathan J. Darrow, *Employment Termination For Employee Blogging: Number One Tech Trend for 2005 and Beyond, or A Recipe For Getting Dooced?*, 2006 UCLA J.L. & TECH. 4, *7 (Fall 2006).

²³ Amy M. Carlson, *States Are Eroding the At-Will Employment Doctrines: Will Pennsylvania Join the Crowd?*, 42 DUQ. L. REV., 511, 513 (2004).

²⁴ 385 U.S. 589 (1967)

²⁵ *Connick v. Myers*, 461 U.S. 138, 143-44 (1983) (quoting Justice Holmes in *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517, 517 (1892)) (“[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman”). (internal citations omitted).

²⁶ *Adler*, 342 U.S. at 489 n.5.

²⁷ *Id.* at 489 n.4.

²⁸ *Id.* at 489 nn.3, 4.

²⁹ *Id.* at 492.

³⁰ *Keyishian v. Bd. of Regents of State of N.Y.*, 385 U.S. 589, 605 (1967).

*B. Keyishian v. Board of Regents of the State of New York:
The Supreme Court Recognizes the Rights of Government Employees
as Citizens*

By 1967, the courts of the nation had “uniformly rejected” the premise that personal liberties were not infringed by denying or placing conditions on government employment.³¹ Accordingly, the Supreme Court announced a new standard, holding that a government employer cannot “condition[] employment upon the surrender of constitutional rights which could not be abridged by direct government action.”³²

In *Keyishian*, the Court invalidated as unconstitutional a New York statute that refused employment to applicants associated with organizations deemed “subversive.”³³ And, although the facts of that case arose in the refusal-to-hire context, the Court strongly suggested that it would also recognize First Amendment violations for wrongful terminations.³⁴ A year later, the Court confirmed that notion in *Pickering v. Board of Education of Township High School District 205, Will County, Illinois*.³⁵

*C. Pickering and its Progeny:
Balancing the Interests of Government Employer and Employee*

In a holding that changed the legal landscape for both government employers and employees, the Supreme Court recognized “it is essential that [public employees] be able to speak out freely on [matters of public concern] without fear of retaliatory dismissal.”³⁶

³¹ *Id.*

³² *Id.*

³³ *Id.* at 605-10.

³⁴ *Id.* at 607, n.11 (“there can be no doubt that the repressive impact of discharge will be no less direct or substantial”).

³⁵ 391 U.S. 563, 572 (1968).

³⁶ *Id.*

Keyishian held that a government employer cannot refuse employment on a basis that infringes a citizen's freedom of speech or association.³⁷ The *Pickering* majority took that reasoning one step further by holding that a citizen who has entered into an employment relationship with the government does not relinquish his First Amendment rights as a condition of employment.³⁸ Therefore, government employees cannot constitutionally be discharged for publicly criticizing their employers.³⁹

Pickering recognized a retaliatory discharge claim by a public high school teacher who alleged he was terminated for writing a letter to the local newspaper that criticized a tax-increase proposal supported by the Board and the Superintendent of Schools.⁴⁰ In his letter, Marvin L. Pickering accused the Board of channeling taxpayer funds towards athletics rather than to the programs and improvements that the Board had previously promised⁴¹ and accused the Superintendent of attempting to curb employee speech on the issue by threatening to impose discipline on teachers that openly opposed the new proposal.⁴²

The reasoning in *Pickering* was twofold. In addition to vindicating the First Amendment rights of public employees as citizens, the *Pickering* majority also recognized the value of employee speech to the "free marketplace of ideas"⁴³ protected by First Amendment jurisprudence, noting that government employees are often in a unique position to comment upon the efficient operation of their employers, and therefore, have valuable insight that should be made available to the community.⁴⁴ As a result, allowing government employers to

³⁷ *Id.* at 568.

³⁸ *Id.*

³⁹ *See id.* at 574 ("a[n] [employee's] exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment").

⁴⁰ *Id.* at 565-66.

⁴¹ *Id.* at 575-78 app. A.

⁴² *Id.* at 576 app. A.

⁴³ *See generally* *Smith v. United States*, 431 U.S. 291, 321 (1977); *Keyishian v. Bd. of Regents of State of N.Y.*, 385 U.S. 589, 603 (1967).

⁴⁴ *Pickering*, 391 U.S. at 571-72.

punish any employee speech that is critical or deemed “detrimental to the best interests” of the employer could have the effect of depriving the public of information needed to make well-informed decisions.⁴⁵

At the same time, however, the Court acknowledged the competing interest of “the State . . . as an employer in regulating [the] speech [of its employees].”⁴⁶ Therefore, *Pickering* holds that courts are charged with the responsibility of determining “a balance between the interests of the [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.”⁴⁷

Under *Pickering*, the initial stage of analysis requires a court to determine whether the employee’s statements were made “as a citizen . . . upon matters of public concern.”⁴⁸ If they were, then the statements are protected.⁴⁹ Nonetheless a government employer may constitutionally discipline or discharge an employee even for protected statements if it can show its interests as an employer “in promoting the efficiency of the public services it performs” outweigh “the interests of the [employee], as a citizen, in [making the statements]” under the second, balancing stage of *Pickering* analysis.⁵⁰

While the Supreme Court recognized the “enormous variety of fact situations” that may lead to First Amendment claims under *Pickering* and declined to lay down a bright-line rule for determining legitimate government interests in regulating employee speech,⁵¹ it suggested that relevant considerations under the second-stage of analysis include: whether the statement interferes with the employer’s ability to maintain discipline or harmony among its workers, whether it has a detrimental impact on close working relationships for which

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 568.

⁴⁸ See *Garcetti v. Ceballos*, 126 S.Ct. 1951, 1958 (2006).

⁴⁹ *Pickering*, 391 U.S. at 568.

⁵⁰ *Id.*

⁵¹ *Id.* at 569

“personal loyalty and confidence” are reasonably required, or whether the statement impedes the performance of the employee’s daily duties or interferes with the regular operation of the employer.⁵² The Court further suggested that the government may have greater, even absolute, ability to control the speech of high-level employees, depending on the nature of their position.⁵³

Pickering was a victory for government employees wishing to engage in civic discussion publicly. Yet even though the holding clearly protected speech propounded to the public, the opinion left open the issue of what types of statements could form the basis for viable First Amendment retaliation claims beyond those made in a public forum.

Ten years later, the Supreme Court resolved any doubts regarding whether First Amendment protection for government employees extended only to statements made to the public.⁵⁴ In *Givhan v. Western Line Consolidated School District*, the Court held that First Amendment protection extends both to statements made to the public as well as to statements at the workplace.⁵⁵ As such, a school teacher’s private complaints to the school principal about what she perceived to be discriminatory employment practices were held to constitute protected speech.⁵⁶

⁵² *Id.* at 570-73 (1968); *see also* *Connick v. Myers*, 461 U.S. 138, 151-52 (1983); *Rankin v. McPherson*, 483 U.S. 378, 388 (1987).

⁵³ *Pickering*, 391 U.S. at 570 n.3; *see also Connick*, 461 U.S. at 151-52 (1983) (again noting, “when close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer’s judgment is appropriate”).

⁵⁴ *Givhan v. W. Line Consol. Sch. Dist.*, 439 U.S. 410, 415 (1979).

⁵⁵ *Id.*

⁵⁶ *Id.* at 414; *see also Rankin*, 483 U.S. at 386-88 (holding First Amendment protection extended to private statements made by an employee to a co-worker regarding the attempted assassination of then President, Ronald Reagan. Therefore, the plaintiff-employee’s statement could not form the basis for discharge absent a showing that the statement interfered with the “efficient functioning of the office”).

*D. The Modern Standard:
Striking the Balance in Favor of the Employer*

Despite the protection offered to public employees by *Pickering* and *Givhan*, the Supreme Court has recognized that not all employee speech relating to the internal operations of a government employer is protected by the First Amendment as a “matter of public concern.”⁵⁷ Although “speech on public issues occupies the ‘highest rung of the hierarchy of First Amendment values,’ and is entitled to special protection,”⁵⁸ Supreme Court precedent makes clear that a government employer is, nonetheless, an employer, and as such retains broad discretion to discipline an employee where the employee is not speaking as a citizen on a matter of public concern.⁵⁹

1. *Connick v. Myers*

By 1983, it was well-established that the rights of government employees could not be abridged as a condition of employment.⁶⁰ But, the Supreme Court also recognized that “government offices could not function if every employment decision became a constitutional matter.”⁶¹ Therefore, the Supreme Court in *Connick* held:

⁵⁷ *Connick v. Myers*, 461 U.S. 138, 148-49 (1983).

⁵⁸ *Id.* at 145 (quoting *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)).

⁵⁹ *Connick*, 461 U.S. at 146 (when employee expression “cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices”); *Rankin*, 483 U.S. at 384 (“public employers are *employers*, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions”).

⁶⁰ *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Pickering v. Bd. of Educ. of Twp. High School Dist. 205, Will County, Ill.*, 391 U.S. 563, 568 (1968); *Keyishian v. Bd. of Regents of State of N.Y.*, 385 U.S. 589, 605-06 (1967).

⁶¹ *Connick*, 461 U.S. at 143.

[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.⁶²

Connick excludes statements that are essentially an employee's personal grievances from protection as "matters of public concern."⁶³ By doing so, the Court maintained protection of employee speech on matters of value to the public while at the same time protecting the government from employees seeking to "constitutionalize the employee grievance" by turning any adverse employment decision into a constitutional claim by asserting that their grievances address matters of public concern.⁶⁴

Sheila Myers, the plaintiff in *Connick*, was an Assistant District Attorney who vocally opposed her proposed transfer to another department.⁶⁵ She was discharged after distributing a questionnaire to her co-workers that created what was described by Myers' supervisor as, a "mini-insurrection" within the office.⁶⁶ Among other things, the questionnaire asked co-workers whether they believed the office procedure regarding transfers was fair, whether they thought there was an active "rumor mill" in the office, and whether they had confidence in and would rely on the work of five individually named supervisors.⁶⁷

Myers argued that the questionnaire was protected under the First Amendment because it addressed matters of public concern.⁶⁸

⁶² *Id.* at 147 (citing *Bishop v. Wood*, 426 U.S. 341, 349-50 (1976)).

⁶³ *Connick*, 461 U.S. at 141.

⁶⁴ *Id.* at 154.

⁶⁵ *Id.* at 140-41.

⁶⁶ *Id.* at 140.

⁶⁷ *Id.* at 257 app. A.

⁶⁸ *Id.* at 141.

However, the Supreme Court rejected the idea that any matter relating to the internal operations of a government employer—down to office procedure regarding transfers, and whether individual employees have confidence in their supervisors—is a matter of public concern simply because it may tangentially relate to governmental efficiency.⁶⁹

The Court held whether an employee’s speech addresses a matter of public concern is a fact-intensive inquiry to be determined by the “content, form and context” of the statement “as revealed by the whole record.”⁷⁰ And, an issue such as employee confidence in supervisors, that is “not otherwise of public concern” does not rise to that level simply because “its subject matter . . . might be of general interest” if communicated to the public.⁷¹

In addition to limiting what constitutes a matter of public concern *Connick* gave further judicial deference to the business judgment of government employers by suggesting that the government has broad discretion to discipline its employees contemporaneously based on the predicted results of the speech.⁷² Moreover, the Court rejected Myers’ assertion that the government was required to justify her termination by showing that the questionnaire “substantially interfered” with the operations of the office.⁷³ Rather, the state’s burden in justifying a

⁶⁹ *Id.* at 149 (“To presume that all matters which transpire within a government office are of public concern would mean that virtually every remark—and certainly every criticism directed at a public official—would plant the seed of a constitutional case”).

⁷⁰ *Id.* at 147-48.

⁷¹ *Id.* at 148 n.8. However, the Court ultimately held that Myers’ question regarding whether employees felt pressured to work on political campaigns was a matter of public concern; therefore, *Pickering* balancing was required. *Id.* at 149.

⁷² *Id.* (a government employer is not required to “allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action”). But, importantly, the Court cautioned that a “stronger showing” of disruption or potential disruption may be required where the employee’s speech “more substantially involved matters of public concern [than Myers’ questionnaire].” *Id.*

⁷³ *Id.* at 149.

particular discharge will vary depending on the nature of the employee's expression.⁷⁴

2. Post-*Connick* decisions

After *Connick*, the United States Courts of Appeals applied various methods of analysis to determine whether a government employee was speaking “as a citizen upon matters of public concern [or] instead as an employee upon matters of personal interest.”⁷⁵ Many circuits held that whether an employee was speaking as a citizen on a matter of public concern was intent-based.⁷⁶ In those circuits, the question was: Was the employee speaking primarily as a concerned citizen, or as an employee merely interested in internal procedure?⁷⁷ Under this method of analysis, if an employee was motivated by a personal grievance, the speech was precluded from protection as a matter of public concern.⁷⁸

The Seventh Circuit held that intent was a factor, but not the most important factor.⁷⁹ In the Seventh Circuit, whether the speech constituted a matter of public concern was determined by the “content, form, and context” of the given statement, with content being the most important factor.⁸⁰ Therefore, the Seventh Circuit rejected the idea that speech on a matter of public concern lost its protected status if it was expounded only for personal reasons, rather than a desire to “air the

⁷⁴ *Id.* at 150.

⁷⁵ *Id.* at 147.

⁷⁶ See *Saulpaugh v. Monroe Cmty. Hosp.*, 4 F.3d 134, 143 (2d Cir. 1993); *David v. City of Denver*, 101 F.3d 1344, 1356 (10th Cir. 1996); *Morgan v. Ford*, 6 F.3d 750, 755 (11th Cir. 1993).

⁷⁷ See *Morgan*, 6 F.3d at 754.

⁷⁸ See *Saulpaugh*, 4 F.3d 134 at 143; *David*, 101 F.3d at 1356; *Morgan*, 6 F.3d at 755.

⁷⁹ *Wright v. Ill. Dep't of Children and Family Servs.*, 40 F.3d 1492 (7th Cir. 1994).

⁸⁰ *Id.*

merits of the issue.”⁸¹ Accordingly, if the content of the speech addressed a matter of public concern, the speech was protected, irrespective of the employee’s motive for engaging in the speech.⁸²

3. *Garcetti v. Ceballos*

In 2006, the Supreme Court clarified the *Pickering/Connick* test but imposed an additional hurdle upon government employees by bifurcating the initial stage of analysis.⁸³ Under *Garcetti*, an employee must be speaking both as a citizen and on a matter of public concern before reaching the balancing stage of *Pickering*.⁸⁴ Therefore, if a public employee cannot establish that he was speaking as a citizen, and not as an employee “pursuant to . . . official duties”⁸⁵ the government is free to punish the speech at its discretion, and courts will not examine the government interest in regulating the speech, even if the speech addresses a matter of public concern.⁸⁶

Richard Ceballos, the plaintiff in *Garcetti*, was an Assistant District Attorney who claimed his First Amendment rights were violated when he suffered a series of allegedly adverse employment actions stemming from a disposition memorandum he wrote to his supervisor detailing what he believed were serious misrepresentations

⁸¹ *Wainscott v. Henry*, 315 F.3d 844, 850 (7th Cir. 2003) (“Animosity in a supervisor-subordinate relationship cannot be the sole basis for characterizing an unflattering statement as a personal grievance” and thereby excluding the statement from protection); *Smith v. Fruin*, 28 F.3d 646, 652 (7th Cir. 1994) (“the content of some remarks may lift the speech to the level of public concern even if the employee’s reasons for speaking out are entirely self-interested”).

⁸² *Wainscott*, 315 F.3d at 850; *Smith*, 28 F.3d at 652.

⁸³ *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1958 (2006).

⁸⁴ *Id.* at 1961 (“When an employee speaks as a citizen addressing a matter of public concern, they First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences. When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny”).

⁸⁵ *Id.* at 1960.

⁸⁶ *Id.* at 1961.

in an affidavit used to obtain a search warrant in a pending case.⁸⁷ Ceballos was alerted to the potential inaccuracies in early 2000 by a defense lawyer.⁸⁸ Based on a personal investigation, Ceballos believed that the warrant affiant, a deputy sheriff, “at least grossly misrepresented the facts.”⁸⁹

Following a meeting with his immediate supervisor and the Head Deputy District Attorney regarding the inaccuracies, Ceballos completed a disposition memo in which he detailed the inconsistencies and recommended that the pending case be dismissed.⁹⁰ Ceballos’ supervisor directed him to revise the memo to make it “less accusatory” of the warrant affiant.⁹¹ After Ceballos wrote a second disposition memo again recommending that the case be dismissed, he was “sharply criticiz[ed]” for his handling of the case during a meeting with his superiors.⁹² Following his supervisor’s decision to proceed with the case, Ceballos alleged that he was subject to a series of retaliatory employment actions including reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion.⁹³ The Supreme Court held that the First Amendment did not protect Ceballos from discipline for his statements in the disposition because those statements were made “pursuant to [his] official duties” and, therefore, could be controlled at his employer’s discretion.

Garcetti holds that speech espoused by a public employee pursuant to an employment duty is precluded from protection as speech “as a citizen,” even if the employee was motivated by his

⁸⁷ *Id.* at 1955-56.

⁸⁸ *Ceballos v. Garcetti*, 361 F.3d 1168, 1170 (9th Cir. 2004), *overruled by* 126 S. Ct. at 1960.

⁸⁹ *Ceballos*, 361 F.3d at 1171.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Garcetti*, 126 S.Ct. at 1956.

⁹³ *Id.*

concerns as a citizen.⁹⁴ Where an employee is speaking pursuant to his official duties, he is not speaking as a citizen, and his speech does not rise to that level by virtue of its subject matter, or his intent in forwarding the statement.⁹⁵

In justifying this limit, the Court reasoned that “[r]estricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. Rather, it simply reflects the exercise of employer control over what the employer has itself commissioned or created.”⁹⁶

Garcetti made clear that statements by government employees are not automatically precluded from First Amendment protection simply because they are made at the workplace, or because they concern the subject-matter of employment.⁹⁷ The Supreme Court also rejected the idea “that employers can restrict employees’ rights by creating excessively broad job descriptions.”⁹⁸ But outside of these very general guidelines, the Supreme Court did not specify a method of analysis for determining when statements are made “pursuant to [an employee’s] official duties” other than holding that the “proper inquiry is a practical one” into the “scope of the employee’s professional duties.”⁹⁹ Nonetheless, the Seventh Circuit seems to have ignored even these limited guidelines in *Mills v. City of Evansville*.¹⁰⁰

⁹⁴ *See id.* at 126 S.Ct. at 1960 (“Ceballos wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do. It is immaterial whether he experienced some personal gratification from writing the memo; his First Amendment rights do not depend on his job satisfaction”).

⁹⁵ *See id.* at 126 S.Ct. at 1956-57 (In holding that an employee must be speaking both as a citizen, and on a matter of public concern, the Supreme Court rejected the Ninth Circuit’s reasoning that because the content of the disposition memo, was “inherently . . . of public concern” and not of personal interest, Ceballos’ memo was protectable as speech “as a citizen”).

⁹⁶ *Id.* at 1960.

⁹⁷ *Id.* at 1959.

⁹⁸ *Id.* at 1961.

⁹⁹ *Id.* at 1962.

¹⁰⁰ (“*Mills II*”), 452 F.3d 646, 646-48 (7th Cir. 2006).

II. *MILLS V. CITY OF EVANSVILLE*

Mills was decided approximately three weeks after *Garcetti* issued,¹⁰¹ making the Seventh Circuit the first United States Court of Appeals to apply the Supreme Court decision to determine when an employee's statements are made "pursuant to [an] official duty." But rather than defining a method of analysis, Judges Easterbrook, Williams, and Rovner ignored *Garcetti*'s guidelines by failing to address the scope of Mills' job responsibilities and instead summarily held that the Brenda Mills' statements were precluded from First Amendment protection without articulating a reasoned basis for their decision.¹⁰²

The Seventh Circuit's truncated analysis is flawed for three reasons. First, the Seventh Circuit unnecessarily extended *Garcetti* beyond the internal document scenario addressed in that case. Second, even assuming the Seventh Circuit was justified in extending *Garcetti*, the Court ignored the analytical guidelines articulated by the Supreme Court and failed to provide a reasoned basis for that extension. Third, by extending *Garcetti* without identifying the facts on which it based its decision, the Seventh Circuit suggested a confusingly broad rule that is unduly restrictive and benefits neither government employees nor their employers.

A. *Facts of the Case*

Brenda Mills worked as a police officer for the City of Evansville, Indiana for twenty-seven years.¹⁰³ For the last six years of her employment, her duties included supervising the "Crime Prevention

¹⁰¹ *Id.* at 646.

¹⁰² *See id.* at 648 (Judge Easterbrook dedicates only one paragraph of a one and a half page opinion to the issue of whether Brenda Mills was speaking pursuant to her official duties).

¹⁰³ *Mills v. City of Evansville, Ind.* ("*Mills I*"), No. 3:03CV00183-JDT-WGH, 2005 WL 1939917, at *1 (S.D. Ind. June 28, 2005), *overruled by* 452 F.3d 646, 646-48 (7th Cir. 2006).

Officers” assigned throughout the City’s West Sector.¹⁰⁴ In Mills’ words, these officers were: “part of the patrol division . . . assigned throughout the city to, in part, interact with neighborhood associations in an effort to reduce the incidence of crime, foster good community relationships and deal with quality of life issues.”¹⁰⁵

Sometime prior to January 2002, the Evansville Chief of Police proposed a re-structuring plan aimed at dealing with a manpower shortage within the city’s Police Department that would reduce the number of Crime Prevention Officers on Mills’ shift by one.¹⁰⁶ The Chief formally announced his plan at a meeting of upper level staff members on January 18, 2002, which Mills attended in lieu of her supervisor.¹⁰⁷ The meeting was on departmental premises, and Mills was on-duty and in uniform both during and after the meeting.¹⁰⁸

After the meeting ended, the Chief approached Mills and initiated a conversation in the public lobby of the Police Station.¹⁰⁹ The Chief informed Mills that he was concerned because he had heard that some of the Crime Prevention Officers had attended a neighborhood meeting where they informed neighborhood association members that they could contact the Mayor in order to prevent the removal of the Crime Prevention Officer on Mills’ shift.¹¹⁰ Other of Mills’ superiors were present during the conversation, although whether the conversation could be overheard by others passing through the lobby area was disputed.¹¹¹ During the conversation, Mills expressed her opinion to

¹⁰⁴ *Mills I*, 2005 WL 1939917, at *1.

¹⁰⁵ *Id.*; *Mills v. City of Evansville, Ind.* (“*Mills II*”), 452 F.3d 646, 647 (7th Cir. 2006).

¹⁰⁶ *Mills II*, 452 F.3d at 647.

¹⁰⁷ *Mills I*, 2005 WL 1939917, at *1.

¹⁰⁸ *Mills II*, 452 F.3d at 647.

¹⁰⁹ *Mills I*, 2005 WL 1939917, at *1. According to Mills, the Chief approached her and said, “If the [Crime Prevention Officers] want a problem, they can have it.” Br. of Pl.-Appellant at *5, *Mills v. City of Evansville, Ind.*, No. 05-3207 (7th Cir. Oct. 31, 2005).

¹¹⁰ *Mills II* at *1.

¹¹¹ Br. of Pl.-Appellant at *7, *Mills v. City of Evansville, Ind.*, No. 05-3207 (7th Cir. Oct. 31, 2005).

the Chief and the other superior officers present “that the plan would not work, that community organizations would not let the change happen, and that sooner or later [the Chief] would have to restore the old personnel assignment policies.”¹¹²

Twelve days after Mills made the statements in the lobby, Captain Brad Hill, who had joined the January 18th conversation between Mills and her superiors at some point in the middle, put a “Summary of Counseling” in Mills’ file that “disapproved [of] her attitude at the meeting, her choice of time and place for presenting her views, and her failure to work through the chain of command.”¹¹³ Mills agreed in her response to the Summary that the time and place were inappropriate, but indicated she felt she was left “with no recourse except to respond” because the Chief continued to press her to state her opinion.¹¹⁴

Shortly over a month after the “Summary of Counseling” was put in Mills’ file, Mills was removed from her supervisory position on the first shift and transferred to patrol duties on the West Sector third shift.¹¹⁵ About six weeks later, on April 24, 2002, Mills was informed that she was going to be transferred again—this time, to patrol duties on the South Sector.¹¹⁶ After Mills objected to the re-assignment, she was transferred to the Record Room.¹¹⁷

Mills subsequently sued under 42 U.S.C. § 1983, claiming that the City of Evansville and certain officers in their individual capacities violated the United States Constitution by unlawfully retaliating against her because of her speech.¹¹⁸ The Southern District of Indiana granted summary judgment for Defendants, holding that although Mills’ statements after the meeting were protected, the police department’s “interest in efficient management of its operations”

¹¹² *Mills II*, 452 F.3d at 647.

¹¹³ *Id.*; *Mills I*, 2005 WL 1939917, at *2.

¹¹⁴ *Mills I*, 2005 WL 1939917, at *2.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Mills II*, 452 F.3d at 647.

outweighed her First Amendment interests in the speech.¹¹⁹ Mills then appealed to the United States Court of Appeals for the Seventh Circuit.

In a one paragraph rationale, the Seventh Circuit reversed the district court, holding that Mills' statements were not protected under *Garcetti* because:

Mills was on duty, in uniform, and engaged in discussion with her superiors, all of whom had just emerged from [the] Chief[']s briefing. She spoke in her capacity as a public employee contributing to the formation and execution of official policy. Under *Garcetti* her employer could draw inferences from her statements about whether she would not zealously implement the Chief's plans or try to undermine them; when the department drew the latter inference it was free to act accordingly.¹²⁰

B. Mills unnecessarily extends Garcetti.

Although the Seventh Circuit likely reached the right result, it seemingly did so for the wrong reasons. *Mills* improperly implies that all job-related statements are precluded from First Amendment protection under *Garcetti*. But, *Garcetti*'s holding is not so broad. Specifically, insofar as *Mills* implies that Brenda Mills was speaking pursuant to her official duties because her speech was propounded at the workplace and pertains to the subject matter of her employment: that reasoning was specifically rejected by *Garcetti*.¹²¹ Moreover, the Seventh Circuit could have reached the same result by either articulating a factual basis for holding that Mills was speaking pursuant to an employment duty, or by holding that her employer's interest in maintaining the chain of command outweighed her First

¹¹⁹ *Id.*

¹²⁰ *Id.* at 648.

¹²¹ *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1959 (2006).

Amendment interest in forwarding statements that were critical of the Chief of Police.

1. *Garcetti* should be limited to internal communications that can be properly characterized as the employer's speech.

The facts and reasoning of the *Garcetti* opinion support a narrow reading that limits its holding to internal documents and other speech compelled by an employment duty. Underlying the *Garcetti* opinion is deference to the idea that government employers, "like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services."¹²² But although the Supreme Court clearly intended to preclude government employees from stating First Amendment retaliation claims for statements properly encompassed within their official duties, the Court nonetheless implied limits on its holding.

First, *Garcetti* was a fact-specific case that dealt with a disposition memo Ceballos was unquestionably required to write. In determining that Ceballos' disposition memo was written "pursuant to [his] employment duties,"¹²³ the Supreme Court repeatedly stressed that Ceballos had an employment duty to write the memo. The Court explained that he was speaking "as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case";¹²⁴ that "[he] wrote his disposition memo because that is part of what he, as a calendar deputy was employed to do";¹²⁵ that the memo "owe[d] its existence" to his "professional responsibilities";¹²⁶ and Ceballos was "simply performing his . . . job

¹²² *Id.* at 1958. Moreover, the Court's reasoning continues to support the idea that "managerial discretion" should not be "displace[d] . . . by judicial supervision." *Id.* at 1961.

¹²³ *Id.* at 1957.

¹²⁴ *Id.* at 1959.

¹²⁵ *Id.* at 1960.

¹²⁶ *Id.*

duties.”¹²⁷ The Court also referred to the disposition memo as “work product.”¹²⁸ Thus:

Ceballos did not act as a citizen when he went about conducting his *daily professional activities*, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. When *he went to work and performed the tasks he was paid to perform*, Ceballos acted as a government employee.¹²⁹

In contrast, Mills’ statements are not as clearly encompassed in her job responsibilities as the disposition memo in *Garcetti*. Mills made statements after the meeting she was required to attend had ended.¹³⁰ And although the Seventh Circuit noted that she was “on duty, in uniform, and engaged in discussion with her superiors,”¹³¹ Judge Easterbrook’s opinion fails to indicate why these facts establish, as a matter of law, that Mills was speaking pursuant to her official duties.

Second, the reasoning of *Garcetti* does not support a broad application. *Garcetti* reflects the ability of the government employer to control speech, like Ceballos’ disposition memo, that is cloaked as the speech of the employer.¹³² Such restrictions on documents “under the control, and vested with the authority, of [the] employer”¹³³ do not

¹²⁷ *Id.* at 1961.

¹²⁸ *Id.* at 1960.

¹²⁹ *Id.*

¹³⁰ *Mills v. City of Evansville, Ind. (“Mills II”),* 452 F.3d 646, 647 (7th Cir. 2006).

¹³¹ *Id.* at 648.

¹³² *See Garcetti*, 126 S.Ct at 1960 (“Restricting speech that owes its existence to a public employee’s professional responsibilities” simply reflects the ability of the employer to “control . . . what the employer has itself commissioned or created”).

¹³³ *Rice-Lamar v. City of Fort Lauderdale, Fla.,* 232 F.3d 836, 842 (11th Cir. 2000)

violate the First Amendment because this type of speech is not properly categorized as employee speech at all.¹³⁴ Accordingly, there is no “relevant analogue”¹³⁵ to speech by citizens who are not government employees, and a government employer may limit and control such statements at its discretion.¹³⁶

And, on an intuitive level, this type of limited application of *Garcetti* does not elicit the same kind of negative gut-reaction as a broader application because it makes sense that the government should be given discretion to control its own speech. Indeed, the Seventh Circuit has employed similar reasoning in justifying limits on public school teachers’ speech in the classroom because “the school system does not ‘regulate’ teachers’ speech as much as it *hires* that speech.”¹³⁷

Moreover, while *Garcetti* recognizes the broad discretion of the government employer to control its “official communications,”¹³⁸ nothing in *Garcetti* suggests that the Supreme Court intended to overrule *Givhan* by applying an overly broad interpretation of “official duties.” Indeed, *Garcetti* cites *Givhan* as good law.¹³⁹

Lastly, it should be noted that the Court never questioned the ability of *Pickering* balancing to protect a government employer’s legitimate interest in disciplining and discharging employees for speech that interferes with the efficiency of governmental operations.¹⁴⁰ Because the second stage of *Pickering* analysis already

¹³⁴ *Id.*

¹³⁵ *Garcetti*, 126 S.Ct. at 1961.

¹³⁶ *Id.*

¹³⁷ *Mayer v. Monroe County Cmty. Sch. Corp.*, 474 F.3d 477, 479 (7th Cir. 2007). For a comprehensive discussion of the speech rights of public school teachers in light of *Mayer v. Monroe* see Justin Nemunaitis, *Mayer v. Monroe: The Seventh Circuit Sheds Freedom of Speech at the Classroom Door*, 2 SEVENTH CIRCUIT REV. 762 (2007), at <http://www.kentlaw.edu/7cr/v2-2/nemunaitis.pdf>.

¹³⁸ *Garcetti*, 126 S.Ct. at 1960.

¹³⁹ *Id.* at 1959.

¹⁴⁰ This is particularly true in the Seventh Circuit, which already interprets an “adverse employment action” narrowly for purposes of First Amendment retaliation claims. See *Mills v. City of Evansville, Ind.* (“*Mills II*”), 452 F.3d 646, 647-48 (7th Cir. 2006).

adequately protects a government employer's ability to limit speech that jeopardizes operational efficiency, there is no reason to apply a broad interpretation of *Garcetti* that precludes all job-related statements from protection. In addition, allowing protection for statements under the first stage of *Pickering* while recognizing greater latitude for government employee discipline under the second stage would comport more with First Amendment jurisprudence, which recognizes that personal liberties should be narrowly proscribed.¹⁴¹

2. Limiting *Garcetti* comports with Seventh Circuit precedent.

The Seventh Circuit has addressed First Amendment retaliation claims by employees for statements made pursuant to employment responsibilities prior to the Supreme Court's decision in *Garcetti*.¹⁴² In *Gonzalez v. City of Chicago*, a Chicago police officer claimed he was retaliated against by the City of Chicago, its Chief of Police, and two supervisors in the city's 18th District for investigative reports he completed on at least nine 18th District Officers during his previous employment as a civilian employee of the Chicago Police Department's Office of Professional Standards.¹⁴³

The Seventh Circuit affirmed summary judgment for the defendants holding that Gonzalez could not, as a matter of law, establish he was speaking "as a citizen" under *Connick* inasmuch as his statements were "written statements for internal use in the Department,"¹⁴⁴ "required by his employer,"¹⁴⁵ and the statements

¹⁴¹ See *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) ("even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved"); *N.A.A.C.P. v. Button*, 371 U.S. 415, 432-33 (1963) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity").

¹⁴² *Gonzalez v. City of Chicago*, 239 F.3d 939, 939-43 (7th Cir. 2001).

¹⁴³ *Id.* at 940.

¹⁴⁴ *Id.* at 941.

¹⁴⁵ *Id.*

were “created in the scope of [his] ordinary job responsibilities.”¹⁴⁶ Judges Ripple, Manion, and Kanne reasoned that although the investigations of police misconduct addressed a matter of public concern, Gonzalez was precluded from claiming First Amendment protection because the investigative reports were a “routine requirement of the job” and, as such, Gonzalez was “clearly acting entirely in an employment capacity [and not as a citizen] when he made those reports.”¹⁴⁷ The judges further noted that the written reports were “mandated”¹⁴⁸ by Gonzalez’s employment responsibilities, and failure to write the reports would be a “dereliction of employment duties” for which Gonzalez could have been fired.¹⁴⁹

In 2002, the Seventh Circuit reinforced the distinction between routine and discretionary duties for purposes of determining whether an employee is speaking as a citizen in *Delgado v. Jones*.¹⁵⁰ That case involved a 15-year veteran of the Milwaukee Police Department who claimed he was retaliated against after reporting to his supervising lieutenant that he may have information about public school employees buying and selling drugs, and that he had an informant who claimed that a close relative of a public official had been frequenting a drug house.¹⁵¹ Judges Cudahy, Rovner, and Wood held that the officer’s statements were not per se precluded from protection under *Gonzalez*, distinguishing between “routine” statements of the type made in *Gonzalez* and “discretionary” statements, which maintain some prospect of protection.¹⁵² The panel reasoned that although “divulging [the] information to his superiors may have been consistent with his obligations as a police officer in seeking an independent and objective investigation,” the officer nonetheless maintained “considerable discretion about how he communicated the information

¹⁴⁶ *Id.* (internal citation omitted).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 942.

¹⁵⁰ *Delgado v. Jones*, 282 F.3d 511 (7th Cir. 2002).

¹⁵¹ *Id.* at 514.

¹⁵² *Id.*

up the chain of command,” such that the statements “went beyond some rote, routine discharge of an assigned duty as in *Gonzalez*.”¹⁵³

While the Seventh Circuit’s recent decision in *Spiegla v. Hull* seemingly dispenses with the routine/discretionary distinction, at least in the context of internal whistleblowing within a chain of command,¹⁵⁴ the reasoning of *Spiegla* case is not inconsistent with a limited application of *Garcetti* to speech compelled or “mandated” by an employment duty as in *Gonzalez*.

In *Spiegla*, the “speech” at issue included Spiegla’s entries in her employer’s log book, and her internal reports to supervisors within her chain of command regarding the suspicious activities of two co-workers.¹⁵⁵ Those entries and reports were made after Spiegla observed the suspicious activities of two fellow prison guards in the course of her assignment to monitor the front door of the prison where she was employed.¹⁵⁶ Accordingly, *Spiegla* is distinguishable from *Mills* because even if internal whistleblowing was not encompassed within Spiegla’s “core duties,” she nonetheless had an affirmative employment duty to report the alleged infractions, and the speech at issue—particularly her entries in the log book—could properly be characterized as the employer’s speech.

3. The Seventh Circuit Could Have Reached the Same Result Without Stripping Mills’ Speech of First Amendment Protection.

The Seventh Circuit could have relied on the second stage of *Pickering* analysis to justify the City of Evansville’s employment decisions. The court could have held, as the district court did, that the speech at issue was protected, but that the Evansville Police Department’s interest in promoting official policy and preventing

¹⁵³ *Id.* at 519.

¹⁵⁴ *Spiegla v. Hull*, No. 05-3722, 2007 WL 937081, at *5 (7th Cir. Mar. 30, 2007) (holding that “[the] focus on ‘core’ job functions is too narrow after *Garcetti*”).

¹⁵⁵ *Id.* at *2.

¹⁵⁶ *Id.* at *1.

disruption outweighed her interest in the speech. Because of the time and place in which Mills forwarded her speech, and because Mills voiced her opinion to superior officers out of her chain of command, *Pickering* balancing would favor the City of Evansville and, therefore, the court could have reached the same result without stripping Mills' statements of First Amendment protection.

Alternately, given that Judge Easterbrook devotes the majority of the opinion to a discussion of why Mills' "lateral transfer" was not an adverse employment action for purposes of a First Amendment retaliation claim,¹⁵⁷ the three-judge panel could have employed the same reasoning to hold that Mills' statements were protected, but that Mills failed to state a retaliation claim because she had not established that she suffered an adverse employment action.

C. The Seventh Circuit improperly ignored the Supreme Court's analytical guidelines.

The *Garcetti* majority defined the "pursuant to official duty" inquiry as a "practical" inquiry into the scope of the employee's professional duties.¹⁵⁸ And, the Court specifically rejected the suggestion that "employers can restrict employees' rights by creating excessively broad job descriptions."¹⁵⁹ However, the Seventh Circuit never considered what Mills' job responsibilities actually consisted of, or whether attending the Chief's meeting and supporting the Chief's re-structuring proposal were a legitimate part of her job responsibilities such that she was speaking "pursuant to official duty"

¹⁵⁷ The Seventh Circuit employs a three-stage burden-shifting analysis for First Amendment retaliation claims under § 1983: 1) the employee must establish that he engaged in constitutionally protected speech 2) the speech was a substantial or motivating factor in an adverse employment action taken against the employee 3) once the employee establishes the first two prongs, the burden shifts to the government defendant to prove by a preponderance of the evidence that the same action would have been taken irrespective of the protected speech. *Kuchenreuther v. City of Milwaukee*, 221 F.3d 967, 973 (7th Cir. 2000).

¹⁵⁸ *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1961 (2006).

¹⁵⁹ *Id.*

when she commented on the Chief’s proposal after the meeting.¹⁶⁰ Moreover, the court did not address whether Mills was the type of high-ranking employee such that “political loyalty [is considered] a valid qualification” and the employee can be disciplined for failure to promote official policy.¹⁶¹ Instead, the Seventh Circuit merely concluded without explanation that Mills was speaking pursuant to her official duties because she was “speaking in her capacity as a public employee contributing to the formation and execution of official policy.”¹⁶²

Because the Seventh Circuit never examined what Mills’ job description actually entailed, its reasoning could be interpreted broadly as holding that any employee statement that tangentially relates to the internal operations of a government employer is subsumed within an employee’s “official duties” under *Garcetti*.¹⁶³ The related

¹⁶⁰ Rankin v. McPherson, 483 U.S. 378, 390 (1987). (In the context of “weighing the state’s interest in discharging an employee based on any claim that the content of the statement somehow undermines the mission of the public employer, some attention must be paid to the responsibilities of the employee within the agency. The burden of caution employees bear with respect to the words they speak will vary with the extent of authority and public accountability the employee’s role entails”).

¹⁶¹ Fuerst v. Clarke, 454 F.3d 770, 772 (7th Cir. 2006).

¹⁶² Mills v. City of Evansville, Ind. (“*Mills II*”), 452 F.3d 646, 648 (7th Cir. 2006).

¹⁶³

It could be persuasively argued that the Seventh Circuit’s definition goes beyond the bounds envisioned by the [Supreme] Court. It could be argued that if the standards upon which the Seventh Circuit based their decision had been used to assess Ardith McPherson or Bessie Givhan’s claims, the Supreme Court would have granted summary judgment and dismissed their claims. This [*sic*] Seventh Circuit’s definition of within the “scope of employ” is so broad that it effectively excludes the entire public employee labor force from First Amendment protection sans a few lone instances where some lucky soul may find safe harbor.

Kathryn v. Cooper, *Garcetti v. Ceballos: The Dual Threshold Requirement Challenging Public Employee Free Speech*, 8 LOY. J. PUB. INT. L. 73, 93 (Fall 2006).

presumption—that “all matters which transpire within a government office are of public concern”¹⁶⁴—was expressly rejected in *Connick*, and such a sweeping generalization without further analysis should be similarly rejected in determining whether a government employee is speaking “as a citizen.”

Even if Mills had a duty to respond to the Chief’s question, her statements should not be precluded from First Amendment protection simply because they are job-related. If the Chief was unhappy with the content of Mills’ response, he was free to discipline her for insubordination, or (as he did) for the time and manner in which she voiced her opinions.

In addition, the three-judge panel never addressed, nor did it even mention in its summary of facts, that the Chief of Police initiated his conversation with Mills specifically because he had heard that several of the Crime Prevention Officers were contacting neighborhood groups and asking them to directly contact the mayor to criticize his proposal.¹⁶⁵ Therefore, there is a justifiable inference that the purpose of the Chief’s conversation with Mills was to enlist Mills to stifle the protected speech of her subordinate officers.¹⁶⁶ Arguably, such tasks were not a part of Mills’ official responsibilities, and Mills maintained the prospect of First Amendment protection in responding to such a suggestion.

But perhaps of the greatest concern is the fact that had the three-judge panel examined Mills’ job responsibilities, it likely could have found a justified basis for holding that Mills was speaking “pursuant to [her] official duties.” Under *Garcetti*, the Seventh Circuit could have reasoned that Mills was speaking pursuant to an official duty because

¹⁶⁴ *Connick v. Myers*, 461 U.S. 138, 149 (1983).

¹⁶⁵ *Mills v. City of Evansville, Ind.* (“*Mills I*”), No. 3:03CV00183-JDT-WGH, 2005 WL 1939917, at *1 (S.D. Ind. June 28, 2005), *overruled by* 452 F.3d 646, 646-48 (7th Cir. 2006).

¹⁶⁶ *Garcetti* leaves unquestioned that public employees retain First Amendment protection for statements on matters of public concern made publicly and not in the course of their official duties. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006).. As such, Crime Prevention Officers were free to enlist neighborhood organizations to oppose the Chief’s re-organization plan.

Mills was required to attend the Chief's meeting in lieu of her supervisor. Yet, Judge Easterbrook curiously omitted this point from his summary of facts.¹⁶⁷ Had the opinion relied on this fact in its reasoning, *Mills* could be justified under *Garcetti* on the basis that Mills' spoke pursuant to her official duties her attendance at the meeting was a required job responsibility.

Alternately, the three-judge panel could have considered whether Mills was the type of high-ranking official whose employment duties include promoting official policy.¹⁶⁸ If so, Mills' job responsibilities may have legitimately encompassed her statements after the Chief's meeting such that those statements were precluded from protection under *Garcetti*.¹⁶⁹

III. OTHER CIRCUITS' INTERPRETATIONS

Although *Garcetti* is a relatively recent opinion, the majority of circuits have applied its holding to determine whether a government employee spoke "pursuant to [] official duties."¹⁷⁰ Although many of these circuits have cited *Mills* for the proposition that government employees are not insulated from discipline for statements made pursuant to an employment duty¹⁷¹ the majority of circuits have, to

¹⁶⁷ *Mills I*, 2005 WL 1939917, at *1.

¹⁶⁸ See *Fuerst v. Clarke*, 454 F.3d 770, 772 (7th Cir. 2006).

¹⁶⁹ *Id.*

¹⁷⁰ As of May 2, 2007, every circuit but the First Circuit has applied *Garcetti*. See *Skehan v. Vill. of Mamaroneck*, 465 F.3d 96 (2d Cir. 2006); *Hill v. Borough of Kutztown*, 455 F.3d 225,242 (3d Cir. 2006); *Campbell v. Galloway*, No. 06-1038, 2007 WL 1166101 (4th Cir. Apr. 20, 2007); *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 692-93 (5th Cir. 2007); *Haynes v. City of Circleville, Ohio*, 474 F.3d 357, (6th Cir. 2007); *Mills v. City of Evansville, Ind.*, 452 F.3d 646, 647 (7th Cir. 2006); *McGee v. Pub. Water Supply, Dist. #2 of Jefferson County, Mo.*, 471 F.3d 918, 920 (8th Cir. 2006); *Freitag v. Ayers*, 468 F.3d 528, 543 (9th Cir. 2006); *Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323, 1329-30 (10th Cir. 2007); *Battle v. Bd. of Regents for the State of Ga.*, 468 F.3d 755, 760 (11th Cir. 2006); *Wilburn v. Robinson*, 480 F.3d 1140,1149-50 (D.C. Cir. 2007).

¹⁷¹ See *Williams*, 480 F.3d at 694; *Green v. Bd. of County Comm'rs*, 472 F.3d 794, 799 (10th Cir. 2007); *Wilburn*, 480 F.3d at 1149.

date, limited their application of *Garcetti* to required job duties, including duties to report wrongdoing.¹⁷²

For example, the Fifth Circuit has held that an athletic director employed by a public school was speaking pursuant to his official duties when he wrote two separate memoranda¹⁷³ complaining about the office manager's failure to provide him with information relating to the athletic account.¹⁷⁴ Interpreting *Garcetti*, the court emphasized that the plaintiff there was "performing activities *required* to fulfill his duties as a prosecutor and calendar deputy"¹⁷⁵ and therefore reasoned that "job-required speech is not protected."¹⁷⁶ Applying that reasoning, the court held that the subject matter and context of the memoranda supported a holding that the athletic director was speaking pursuant to his official duties.¹⁷⁷ The court reasoned that, although the writing the memo may not have been "demanded of him" in the same way as the memo in *Garcetti*, it was nonetheless created in the course of doing his job.¹⁷⁸ Specifically, the court reasoned that the subject matter of the memoranda focused on the athletic director's "daily operations" and that he needed the account information in order to do his job.¹⁷⁹

Similarly, the D.C. Circuit has held that the Director of the District's Office of Human Rights was speaking pursuant to an official duty where she complained that the District Office of Personnel's salary decisions for two job applicants was discriminatory.¹⁸⁰ In *Wilburn v. Robinson*, the court held that government employee speech

¹⁷² *Hill*, 455 F.3d at 230, 242; *Green*, 472 F.3d at 800-01; *Williams*, 480 F.3d at 690-91; *McGee*, 471 F.3d at 921; *Freitag*, 468 F.3d at 546; *Battle*, 468 F.3d at 761; *Wilburn*, 480 F.3d at 1142, 1150.

¹⁷³ The first memorandum was sent to the school's office manager and the second to the school's principal. *Williams*, 480 F.3d at 690-91.

¹⁷⁴ *Id.* at 690-91, 694.

¹⁷⁵ *Id.* at 693.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 694.

¹⁷⁸ *Id.*

¹⁷⁹ *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689, 693 (5th Cir. 2007).

¹⁸⁰ *Wilburn v. Robinson*, 480 F.3d 1140, 1142, 1150 (D.C. Cir. 2007)

(emphasis added).

is precluded from First Amendment protection where the contested speech “falls within the scope of the employee’s *uncontested job responsibilities*.”¹⁸¹ Thus, the Director was speaking pursuant to an official duty because her employment duties “easily” encompassed “identify[ing] and eliminat[ing] discriminatory practices in employment . . . in the District of Columbia.”¹⁸²

As *Wilburn* illustrates, several circuits have applied *Garcetti* to internal whistle-blowers who report wrongdoing up the chain of command.¹⁸³ For instance, the Eleventh Circuit has held that an employee of a state university’s Office of Financial Aid and Veterans Affairs was speaking pursuant to her official duties when she reported concerns about fraudulent financial aid claims.¹⁸⁴ Likewise, the Third Circuit has held that the Borough Manager of the Borough of Kutztown was speaking pursuant to an official duty when he reported complaints of harassment to the Borough Council.¹⁸⁵ And, the Eighth Circuit held that a public employee was speaking pursuant to his official duties when he reported a concern about sewage leakage.¹⁸⁶

¹⁸¹ *Id.* at 1150; *but see* *Battle v. Bd. of Regents of Ga.*, 468 F.3d 755, 761 (11th Cir. 2006) (specifically rejecting the idea that *Garcetti* applies only to an “employee’s everyday job functions”).

¹⁸² *Id.* at 1150-51 (alteration in original).

¹⁸³ *Hill v. Borough of Kutztown*, 455 F.3d 225, 230, 242 (3d Cir. 2006); *McGee v. Pub. Water Supply, Dist. #2 of Jefferson County, Mo.*, 471 F.3d 918, 921 (8th Cir. 2006); *Freitag v. Ayers*, 468 F.3d 528, 546 (9th Cir. 2006); *Casey v. W. Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323, 1325 (10th Cir. 2007); *Battle v. Bd. of Regents of Ga.*, 468 F.3d 755, 761-62 (11th Cir. 2006).

¹⁸⁴ *Battle*, 468 F.3d at 761-62.

¹⁸⁵ *Hill*, 455 F.3d at 230, 242.

¹⁸⁶ *McGee*, 471 F.3d at 921; *but see* *Bradley v. James*, 479 F.3d 536, 538 (8th Cir. 2007) (holding that the plaintiff’s allegations that a superior officer was intoxicated were precluded from protection, not because the plaintiff had a duty-to-report, but because the statements were made during the course of the investigation and were, thus, made pursuant to his official duties); *Haynes v. City of Circleville, Ohio*, 474 F.3d 357, 360, 364 (6th Cir. 2007) (holding that a Police Officer’s memo to his supervisor complaining about training cutbacks was speaking pursuant to an official duty).

The Ninth, Tenth, Second, and Fourth Circuits suggest that a distinction between required and discretionary reporting¹⁸⁷ is still viable. In *Freitag v. Ayers*, the Ninth Circuit held that a female prison guard was speaking pursuant to her official duties when she filed internal complaints of sexual harassment by inmates, but she spoke as a citizen when she reported the same concerns outside of the Department of Corrections to her state senator and the California Inspector General.¹⁸⁸ The court further held there was a factual issue as to whether she was speaking as a citizen when contravened the chain of command and complained to the Director of the Department of Corrections and Rehabilitation in the state capitol.¹⁸⁹ Similarly, in *Casey v. West Las Vegas Independent School Board*, the Tenth Circuit held that a school superintendent, who was also the CEO of the school's Head Start program,¹⁹⁰ was speaking pursuant to an official duty when she voiced concerns about the program's compliance with federal regulations to the School Board,¹⁹¹ but spoke as a citizen when she voiced those concerns to the state's Attorney General.¹⁹² And, in *Skehan v. Village of Mamaroneck*, the Second Circuit refused to decide on summary judgment whether a Police Officer's complaints to the state's Attorney General regarding racial decision-making in the Department were encompassed in his employment duties.¹⁹³

Along the same lines, the Fourth Circuit has suggested that employee complaints about co-workers that address personal slights, as opposed to misconduct that affects the public, are not encompassed

¹⁸⁷ *Delgado v. Jones*, 282 F.3d 511, 514 (7th Cir. 2002); *Gonzalez v. City of Chicago*, 239 F.3d 939, 941 (7th Cir. 2001). However, other circuits reject this distinction. *Cf. Battle*, 468 F.3d at 761 (specifically rejecting the idea that *Garcetti* applies only to an "employee's everyday job functions").

¹⁸⁸ 468 F.3d 528, 546 (9th Cir. 2006).

¹⁸⁹ *Id.*

¹⁹⁰ 473 F.3d 1323, 1325 (10th Cir. 2007).

¹⁹¹ *Id.* at 1330.

¹⁹² *Id.* at 1332-33.

¹⁹³ 465 F.3d 96, 102, 106 (4th Cir. 2006).

in the duty-to-report.¹⁹⁴ That circuit has remanded a case for further fact-finding to determine whether a female police officer was speaking pursuant to her official duties when she submitted a memo to the town attorney detailing “perceived slights” and potentially harassing conduct by other officers.¹⁹⁵

Other circuits’ interpretations of *Garcetti* demonstrate why an overly broad reading of *Mills*, which encompasses all job-related statements, is inappropriate. The majority of these circuits have only read *Garcetti*’s bar to apply in one or a combination of two circumstances: 1) where the speech is compelled or required by an employment duty, and 2) usually where the speech is forwarded using a medium controlled by the employer; whether it be a log book, an internal grievance procedure, or a reporting dichotomy. In light of these decisions, a broad application of *Mills* likely misapplies the Supreme’s Court decision and creates bad precedent and as such, the Seventh Circuit should re-visit and clarify its holding in *Mills*.

IV. IMPLICATIONS FOR GOVERNMENT EMPLOYEES AND EMPLOYERS IN THE SEVENTH CIRCUIT

A. Implications for government employees

Because the *Mills* opinion did not expressly hold that Sergeant Mills was speaking pursuant to an official duty solely because she was on duty and in uniform, government employees in the Seventh Circuit may argue that *Mills* should be limited to its facts, and that *Mills* can only be supported on two logical bases: 1) because Mills was required to attend the Chief’s meeting, or 2) because Mills was the type of high-ranking official whose employment responsibilities include supporting, without questioning, the official stance of her employer. Public employees may further argue that a broader reading of *Mills* is

¹⁹⁴ Campbell v. Galloway, No. 06-1038, 2007 WL 1166101 (4th Cir. Apr. 20, 2007).

¹⁹⁵ *Id.* at *1.

inconsistent with the facts and reasoning of *Garcetti*, and with the history of Supreme Court jurisprudence leading to *Garcetti*.

But even in light of the broad application that *Mills* suggests, the Seventh Circuits decision, arguably, will not greatly affect lower level whistleblowers whose job descriptions do not include a duty-to-report. In addition, employees would seem to maintain protection from retaliation for statements made at the workplace which are not part of a delegated task and do not pertain to the subject matter of employment—for example, an employee’s expression of unpopular political ideas in the lunchroom.¹⁹⁶ It should also be remembered that, even in light of *Garcetti*, government employees are still protected for whistleblowing under Title VII,¹⁹⁷ state whistleblower statutes,¹⁹⁸ and other federal statutes.¹⁹⁹

B. Implications for government employers

Although *Mills* assists government employers by allowing them to dispose of a large variety of claims at the summary judgment stage, its broad holding can nonetheless work against a government employer who does not employ sufficient internal mechanisms against retaliation. As Section III demonstrates, *Garcetti* has been held to protect an employee’s complaints outside of the chain of command. Thus, an employer that does not internally safeguard employees from retaliatory employment actions creates an incentive for employees to

¹⁹⁶ Compare *Trejo v. Shoben*, 319 F.3d 878, 887 (7th Cir. 2003) (quoting *Swank v. Smart*, 898 F.2d 1247, 1250-51 (7th Cir. 1990)) (“Casual chit-chat between two persons or otherwise confined to a small group . . . is not protected”) (alteration in original), with *Rankin v. McPherson*, 483 U.S. 378, 386-88 (1987) (holding First Amendment protection extended to private statements made by an employee to a co-worker regarding the attempted assassination of then President, Ronald Reagan).

¹⁹⁷ 42 U.S.C. § 2000 e-3 (West 2007).

¹⁹⁸ See 20 ILL. COMP. STAT. 415/19 c.1 (West 2007); IND. CODE 36-1-8-8 (West 2007); WIS. STAT. § 230.80 (West 2007).

¹⁹⁹ See generally Peter O. Hughes, *Employment at Will*, 10-259 LAB. AND EMP. L. (Matther Bender) § 259.04 n.5 (2007), available at LEXIS 10-259 Lab. and Emp. Law § 259.04.

bypass the employer's internal mechanisms, and to report their concerns outside of the office, or directly to the public.

Government employers should also employ internal review processes prior to disciplining or discharging employees in connection with statements made at the workplace to ensure that they are not left open to liability under *Garcetti*. In addition, these employers would be wise to base their internal procedures on a narrower reading of *Mills* in the case that decision is clarified or overruled.

CONCLUSION

The Supreme Court's decision in *Garcetti v. Ceballos* will likely continue to spawn debate over what types of employee speech are encompassed within a government employee's official duties. Although the First Circuit has not yet addressed this issue, *Garcetti* should be limited to speech required by an employment duty, or forwarded using a medium controlled by the employer. In addition, other circuits that have addressed the issue should continue to limit their holdings to these scenarios, leaving the second stage of *Pickering* balancing to protect government employer's legitimate interest in limiting disruptive speech. Because other circuits have so limited their application of *Garcetti*, the Seventh Circuit should clarify its holding in *Mills* and define a method for analysis for determining when statements are made pursuant to an official duty to provide certainty for both government employees and employers in the Seventh Circuit.