The Limits of Public Employee Free Speech Both Inside and Outside of the Schoolhouse Gate

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Submitted in advance to the Education Law Association for presentation on November 9, 2017 at the Educational Law Association’s 2017 annual conference in San Diego, CA.

Introduction

K-12 settings often present the perfect conditions for the collision of competing interests, such as the free speech of public employees on the one hand and the interests of the public employer on the other. The precise parameters of protected public employee speech is an increasingly nettlesome area of law and practice for school officials with the current uptick in political rancor, the presence and proliferation of social media, and the blurred lines of when personal expression impacts one’s professional responsibilities. This paper endeavors to briefly present the basic legal framework of public employee speech as it has been constructed over the last fifty years by the U.S. Supreme Court. Additionally, the paper gives an overview of litigation at the federal appellate level that involves public employees in K-12 schools and highlights the most recent activity. Finally, this paper attempts to give a practical perspective from the field where school law attorneys and school administrators are often on the front lines of these legal skirmishes and are called upon to navigate the shoals of public employee free speech law in real time.

The Ever-Evolving Legal Framework of Public Employee Free Speech Claims

Pickering’s Two-Pronged Analysis

Almost fifty years ago the United States Supreme Court was asked to decide whether a public school teacher had a First Amendment right to publicly criticize (via a letter to the editor of the local newspaper) the way his school district allocated money.\(^1\) Mr. Pickering opposed his employer’s bond proposal in a very public way and lost his teaching job as a result. However, the Court held that it was illegal for public employers to retaliate against public employees for their speech if the employee was speaking as a private citizen on a matter of public concern and the speech did not disrupt organizational efficiency.\(^2\) Mr. Pickering was ultimately reinstated to his teaching position as the Court found that his letter addressed a matter of public concern and his expression did not impede the “proper performance of his daily duties in the classroom or

\(^2\) Id. at 572-574.
…[interfere] with the regular operation of the schools generally.”\(^3\) The Pickering decision has remained the bedrock of public employee expression law for five decades. Over the years, subsequent court opinions frequently focused on whether the speech at issue was a matter of public concern (Pickering’s first prong) or whether there was an adverse effect on the employer-employee relationship (Pickering’s second prong).\(^4\) Rarely were these cases focused on the question of whether the speech at issue was citizen speech. It often appeared that courts assumed speech was citizen speech if the court found it to be on a matter of public concern. It would be nearly four decades before the question of whether someone was speaking as a citizen or a public employee (regardless of whether the speech touched on matters of public concern) became a significant part of the Court’s legal framework for analyzing whether, as an initial matter, public employee speech was protected by the First Amendment. Prior to that, however, the Court was compelled to resolve some other questions about public employee speech.

**Pickering’s Progeny: Mt. Healthy, Givhan, and Connick**

Subsequent to Pickering the U.S. Supreme Court was compelled to address whether a public school district could refuse to rehire a non-tenured public school teacher when legitimate reasons for termination existed alongside, but apart from, speech that was protected by the First Amendment. In Mt. Healthy City School District v. Doyle\(^5\) a teacher alleged that he was being dismissed for exercising his freedom of speech after calling into a local radio program to discuss a school dress code policy he disagreed with. However, this same teacher had a track record of unprofessional conduct that included making obscene gestures to female students, arguing with a cafeteria worker over the amount of food he was served, swearing at a student, and an altercation with a fellow teacher. The school board subsequently decided not to renew the teacher’s contract citing “a notable lack of tact in handling professional matters….”\(^6\) The Court ruled in favor of the public school employer holding that when there is both First Amendment activity at play as well as legitimate reasons for discipline, the public employer may proceed to discipline its

\(^3\) Id. at 573 (citation omitted).
\(^4\) Pickering’s second prong is often referred to as the Pickering balancing test because the Court framed the necessary inquiry as follows: “The problem in any case is to arrive at a balance between the interests of the teacher, 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.” Id. at 568.
\(^6\) Id. at 283.
employee. Consequently, when there is justification to discipline an employee apart from their constitutionally protected expression, the employer may proceed with the adverse employment action even though the employee is sure to argue retaliation for the exercise of constitutionally protected expression.

Just a couple of years after Mt. Healthy the U.S. Supreme Court was asked to consider whether speech loses its First Amendment protection when it is communicated privately rather than publicly. In Givhan v. Western Line Consolidated School District a terminated teacher (Givhan) argued that she lost her job after she complained about the district’s alleged discriminatory hiring practices during a private meeting with her school principal. Givhan spoke with her principal on multiple occasions about her belief that the district’s decision regarding her teaching assignment was racially motivated and her belief that the district used discriminatory hiring practices. Givhan was ultimately terminated and filed suit. At the lower level, the Fifth Circuit Court of Appeals “concluded that because petitioner had privately expressed her complaints and opinions to the principal, her expression was not protected under the First Amendment.” However, the U.S. Supreme Court rejected this view. Adding another layer to its public employee speech framework (and in this case scoring a win for the teacher), the Court held that a public employee’s speech does not lose First Amendment protection just because the speech is communicated privately with one’s employer rather than broadcasted publicly. In the words of the Court, “Neither the Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public.” On a side note, the converse of this holding is worth noting as well; namely, a “private grievance” does not somehow gain First Amendment protection just because it is broadcast publicly rather than privately.

While Givhan focused on the target audience of one’s speech, the Court’s next addition to the public employee speech framework focused on the nature of the speech itself; specifically, the Court gave guidance on how to determine if speech truly addresses a matter of public concern or merely reflects a private grievance. In Connick v. Meyers the U.S. Supreme Court found itself weighing the free speech rights of the employee (Meyers) against the potential of the

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8 Id. at 413.
9 Id. at 415-416.
speech to damage the organization. Following notification of a pending transfer, Meyers asked fellow employees to complete a questionnaire that, among other things, addressed workplace satisfaction. Meyers was subsequently terminated. In Connick the Court ruled that before an employee’s speech can be considered protected it must be determined “whether the employee’s speech addresses a matter of public concern as determined by the content, form, and context of a given statement, as revealed by the whole record.” Here, the Court found that Meyers’ lawsuit was simply an attempt to constitutionalize an employee grievance, and therefore her speech was deemed not protected by the First Amendment. Tipping in favor of the public employer in light of the specific context of Connick, the Court noted that “[w]hen employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office.” While the cases of Mt. Healthy, Givhan, and Connick built upon the foundation established in Pickering, the framework for analyzing First Amendment retaliation claims brought by public employees was significantly impacted, if not altered, by the Court’s holding in Garcetti v. Ceballos in 2006.

**Garcetti: The Threshold Consideration of Speaking as a Citizen**

Almost forty years after Pickering, the U.S. Supreme Court heard the seminal case of Garcetti v. Ceballos where Ceballos, a deputy district attorney, claimed his public employer had retaliated against him for circulating a memo regarding what he believed to be a flawed search warrant. In a fractured five to four decision, the U.S. Supreme Court ruled 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 communication from employer discipline.” The Court explained that limiting speech which owes its very existence “to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise

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11 Id. at 147-48. This is often referred to as the “Connick principle.”
12 Id. at 153.
14 Id.
15 Id. at 421.
of employer control over what the employer itself has commissioned or created.”\textsuperscript{16} It is important to note, however, that the Court contrasted \textit{Garcetti}’s speech to \textit{Pickering}’s speech,\textsuperscript{17} and by implication recognized that just because certain speech generally relates to the public employee’s employment context does not somehow render it non-citizen speech.

In \textit{Garcetti} the Court ruled that the First Amendment does not protect a public employee from discipline for speech made pursuant to their official duties. Based on \textit{Garcetti}, it is no longer sufficient that the content of the employee’s speech be on a matter of public concern to satisfy \textit{Pickering}’s first prong. \textit{Garcetti} served to highlight the fact that speaking on a matter of public concern is not synonymous with speaking as a citizen. Both requirements have always been imbedded in \textit{Pickering}’s first prong, but for almost four decades few courts had ever distinguished between the two. Now, in order for a public employee’s speech to be protected, the very first question to be resolved for most federal courts is whether the public employee spoke as a citizen. To pass the \textit{Garcetti} test, the content of one’s speech may not specifically pertain to their official (or in fact) public employee job duties. Therefore, the employee must truly be speaking as a “citizen” rather than an “employee” before meeting the initial requirements for protected speech.

\textit{Garcetti} has had a profound impact on free speech retaliation claims brought by public school employees. Many times cases that would have been previously analyzed under the two-part test in \textit{Pickering} are now disposed of rather summarily after an initial analysis applying the \textit{Garcetti} test of whether the speech at issue was made pursuant to one’s official job duties.\textsuperscript{18} Some have even argued that the lower federal courts have applied \textit{Garcetti} too broadly.\textsuperscript{19} Not coincidentally, one of the most recent cases in the U.S. Supreme Court’s legal framework for analyzing public employee free speech claims addressed an overzealous application of \textit{Garcetti} by some of the federal circuits.

\textit{Lane v. Franks}: Narrowing \textit{Garcetti}’s Application or Simply Carving out a Limited Exception?

\textsuperscript{16} \textit{Id.} at 421-22.
\textsuperscript{17} \textit{Id.} at 422.
Seizing an opportunity to resolve a discrepancy between the federal circuits “as to whether public employees may be fired—or suffer other adverse employment consequences—for providing truthful subpoenaed testimony outside the course of their ordinary job responsibilities,” the U.S. Supreme Court issued a unanimous opinion in 2014 in *Lane v. Franks* which rendered clarification on the issue of what exactly constitutes “employee speech” for purposes of a *Garcetti* analysis. In *Lane* the plaintiff brought a Section 1983 retaliation claim against his public employer (defendant) after he was fired for allegedly giving truthful subpoenaed testimony in a corruption scandal that involved another of the defendant’s employees. The plaintiff had been involved with investigating the corruption, confronting it, and ultimately firing the employee who was essentially collecting money for a job she never showed up to. As a result, the plaintiff was called upon to testify at two different trials involving the matter. Both the trial court and the Eleventh Circuit Court of Appeals ruled against the plaintiff’s retaliation claim on the basis that he was asked to testify about matters he had come to be involved in through the course of his employment duties, and was therefore speaking as an employee rather than a citizen when testifying on the matter.

Recognizing that the plaintiff’s “ordinary job responsibilities did not include testifying in court proceedings,” the U.S. Supreme Court concluded that “the Eleventh Circuit read *Garcetti* far too broadly” when it found that the plaintiff’s testimony was employee speech rather than citizen speech. “The critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties.” Hence, ruling in favor of the plaintiff, the Court’s holding was clear: “Truthful testimony under oath by a public employee outside the scope of his ordinary job duties is speech as a citizen for First Amendment purposes.” Once the Court established that the plaintiff had

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21 Id. at 2376-77.
22 Id. at footnote 4; Shortly after the *Lane* decision was issued the D.C. Circuit Court of Appeals observed that the Court’s “use of the adjective ‘ordinary’ -- which the court repeated nine times -- could signal a narrowing of the realm of employee speech left unprotected by *Garcetti*. Neither *Garcetti* nor any other previous Supreme Court case had added ‘ordinary’ as a qualifier.” *Mpoy v. Rhee*, 758 F.3d 285, 295 (D.C. Cir. 2014).
23 *Lane*, 134 S.Ct. at 2379.
24 Id.; See also *Dougherty v. Sch. Dist. of Philadelphia*, 772 F.3d 979, 990 (3rd Cir. 2014) where the Third Circuit Court of Appeals concluded “that *Lane* reinforces *Garcetti*’s holding that a public employee may speak as a citizen even if his speech involves the subject matter of his employment.”
25 Id. at 2378.
engaged in citizen speech on a matter of public concern (applying the *Connick* test), it turned its attention to whether the plaintiff’s speech could survive the *Pickering* balance test. The Court noted:

A public employee’s sworn testimony is not categorically entitled to First Amendment protection simply because it is speech as a citizen on a matter of public concern. Under *Pickering*, if an employee speaks as a citizen on a matter of public concern, the next question is whether the government had “an adequate justification for treating the employee differently from any other member of the public” based on the government’s needs as an employer. *Garcetti*, 547 U.S., at 418, 126 S.Ct. 1951.

On this point the Court found that the defendant’s side of the scale was void of anything that would tip it in favor of the public employer. Consequently, the Court held that the plaintiff’s speech was protected by the First Amendment.

The *Lane* case serves as an important bright line ruling in an area where some circuits may tend to apply *Garcetti* more broadly than the Court intended. Also noteworthy was the Court’s straightforward analysis of a public employee retaliation case based upon speech allegedly protected by the First Amendment. The Court systematically engaged in (1) analysis of employee speech versus citizen speech, (2) analysis of the content, form, and context of speech in order to determine if the speech was on a matter of public concern, and (3) analysis of the *Pickering* Balancing Test to conclude whether the government’s interests as a public employer outweighed the public employee’s freedom of speech.

**Retaliation Based on the Perception of Engaging in Expressive Activity**

Reality versus perception is a distinction without a difference according to the U.S. Supreme Court’s recent opinion in *Heffernan v. City of Paterson, N.J.* In the current political environment, public school employees may be heartened to know that the U.S. Supreme Court recently held that a public employer’s retaliation for constitutionally protected expression it

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27 *Lane* at 2380.

wrongly perceived its employee engaging in was a violation of the First Amendment even though the employee never actually exercised the expression. In *Hefferman*, “a government official demoted an employee because the official believed, but incorrectly believed, that the employee had supported a particular candidate for mayor.”29 The issue squarely before the Court was whether the employer’s motive for making an adverse employment decision could form the basis of an illegal deprivation of First Amendment rights in the absence of the public employee actually engaging in the expressive activity. Put another way, could a public employer who punishes a public employee for what it wrongly perceived as the exercise of constitutionally protected expression be just as illegal as the public employer who takes an adverse action against a public employee for actual exercise of a constitutionally protected right under the First Amendment? The Court concluded as follows:

When an employer demotes an employee out of a desire to prevent the employee from engaging in political activity that the First Amendment protects, the employee is entitled to challenge that unlawful action under the First Amendment and 42 U.S.C. § 1983—even if, as here, the employer makes a factual mistake about the employee’s behavior.30

The Court’s rationale for concluding that a right was violated even when there was no actual exercise of the right rested on the view “that a discharge or demotion based upon an employer’s belief that the employee has engaged in protected activity can cause the same kind, and degree, of constitutional harm whether that belief does or does not rest upon a factual mistake.”31

The legal framework for analyzing public employee retaliation claims based on the First Amendment’s guarantee of free speech and expression will continue to evolve. Indeed, it appears the next related issue the U.S. Supreme Court has agreed to consider in the Court’s 2017-2018 term involves the issue of compelled speech; namely, whether state laws requiring public employees to pay their “fair share” to their union “violates the First Amendment by compelling employees who disapprove of the union to contribute money to it.”32 It would appear that the

29 Id. at 1416.
30 Id. at 1418.
31 Id. at 1419.
potential issues to be resolved on the matter of public employee expression, in light of the related nuances of each case, are nearly endless. The next section of this paper (and its related appendices) provides an overview of the scope and frequency of some of these cases in K-12 settings as reflected by the published cases in the federal appellate courts.

**Appellate Activity Involving Public Employee Speech Cases in K-12 Settings Post-Garcetti**

In the eleven years since the *Garcetti* decision was issued, the federal courts have had numerous opportunities to apply its holding to retaliation claims brought by public employees in K-12 settings. Appendix A of this paper provides a citation list of published federal appellate court cases that have applied the *Garcetti* test to retaliation claims involving speech/expression exercised by K-12 public employees. Of the 23 cases listed 16 (70%) were decisively found in favor of the school district after the *Garcetti* test was applied; 2 (9%) were a mixed back where most of the speech was rendered unprotected employee speech, but at least one expression survived the *Garcetti* test; 1 (4%) was inconclusive being sent back to the lower court to look further into the precise nature of the employee’s job responsibilities because what was on record was insufficient to make a determination with; and only 4 (17%) decisively survived the *Garcetti* test as protected citizen speech. To read a synopsis of each of the 23 “*Garcetti* cases” see Appendix B.

With the *Garcetti* test being a threshold inquiry for most of the federal circuits, it is plain to see that *Garcetti* has had a profound impact on public employee speech litigation in K-12 settings. Still, there are a handful of public employee speech cases where the outcome is solely dependent on an application of *Pickering*’s public concern test (a/k/a the *Connick* principle) or the *Pickering* balance test, but rare is the case that runs the gauntlet of all three tests where the K-12 public employee is the prevailing party. With so many legal landmines in the area of public employee speech in K-12 settings, it is imperative that school administrators have a general

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33 See, e.g., *Nagle v. Marron*, 663 F. 3d 100 (2nd Cir. 2011); *Borden v. Sch. Dist. of Twp. of East Brunswick*, 523 F.3d 153 (3rd Cir. 2008); *Lee v. York*, 484 F.3d 687 (4th Cir. 2007).


35 But see *Dougherty v. Sch. Dist. of Philadelphia*, 772 F.3d 979 (3rd Cir. 2014); *Decotiis v. Whittemore*, 635 F.3d 22 (1st Cir. 2011); *Casey v. West Las Vegas Indep. Sch. Dist.*, 473 F.3d 1323 (10th Cir. 2007); *Brammer-Hoelter v. Twin Peaks Charter Academy*, 492 F.3d 1192 (10th Cir. 2007).
understanding of the legal landscape and receive good counsel for how to proceed when they encounter employee speech issues that have the potential to evolve into full-blown legal cases. Sometimes those cases involve their subordinates and sometimes those cases hit even closer to home as evidenced by how many of the cases discussed above involved school administrators as the aggrieved party. With this in mind, the next section provides practical input for those in K-12 settings faced with potential expression-based employee issues that may result in a subsequent adverse employment action.

**Perspectives from Legal Counsel**

Because legal counsel has the requisite legal training, experience in handling similar cases for other public school clients, and emotional separation from the personalities involved in a particular case, legal counsel can provide sound advice on whether, and to what extent, school officials should consider disciplining an employee for engaging in expressive activities.

**Determining Employee Status**

Before contacting legal counsel, school officials should determine whether the employee who engaged in the alleged misconduct is considered a professional employee (e.g., teacher, administrator) or staff member (e.g., administrative assistant, custodial, food service, transportation). There are three primary reasons why this distinction is important.

First, different board policies and collective bargaining agreements will apply to different categories of employees. Many public school districts have separate board policies for professional staff than for other employees. It is important to review the relevant board policies and collective bargaining agreement that apply to the particular employee involved. The district may have board policies or collective bargaining provisions that address the following:

- acceptable use of technology and social media;
- free speech and expression rights of employees;
- handling and investigating complaints against employees; and
- disciplining employees.

Failure to follow the appropriate board policies and collective bargaining agreement could result in not only a grievance under the applicable contract, but also a claim that the school district failed
to provide due process of law. Public employees who may only be disciplined or discharged “for just cause” have a property right in their continued employment, which limits the public employer’s discretion to discipline or discharge.\textsuperscript{36} While it is generally easier to discipline and discharge an at-will employee, it is still imperative to follow board policies and collective bargaining provisions when doing so.

Second, professional employees may have additional tenure protection in their employment, requiring school officials to follow certain procedures before issuing discipline that constitutes a demotion or discharge.\textsuperscript{37} It is generally easier to discipline, demote, or discharge an employee who is not tenured, though, as noted above, it is essential to follow the procedures set forth in any applicable collective bargaining agreement or board policy pertaining to employee discipline, even for non-tenured employees. If the professional employee has tenure, legal counsel can assist school officials in preparing the tenure charges to be considered by the school board before demoting or discharging a tenured employee.

It is also generally easier to discipline, demote, or discharge an employee who is still in a probationary period and has not yet obtained tenure. In some situations, school officials may decide to simply not renew a probationary teacher’s contract for the following school year. In some states, all that is required to effectuate the non-renewal of a probationary teacher’s contract is to provide timely notice that the school district will not renew the probationary employee’s contract for the following school year. Legal counsel can help explain the various options available under the law.

Third, different standards or expectations of professional conduct may apply to different categories of employees. Professional employees, such as teachers and administrators, are typically considered to be role models for students and are therefore held to a higher standard of personal and professional conduct. The Supreme Court has stated that a “teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and

\textsuperscript{36} See Board of Regents of State College v. Roth, 408 U.S. 564, 578 (1972); Gilber v. Homar, 520 U.S. 924, 929 (1997).

\textsuperscript{37} In Michigan, teachers who have successfully served a probationary period (generally five years) will obtain tenure, and may only be demoted or discharged for a reason that is not considered arbitrary or capricious. See the Michigan Teachers’ Tenure Act, Act 4 of 1937 (Ex. Sess.), as amended; Mich. Comp. Laws § 38.71, et seq. Prior to the amendments to the Michigan Teachers’ Tenure Act, administrators could also obtain tenure in their administrative positions, and the standard for demotion or termination for both teachers and administrators was “just cause.” Legal counsel and school administrators should review state statutes to determine the appropriate standard for discipline and discharge in their respective jurisdiction.
values.”38 Non-professional staff, such as custodial, food service, or transportation employees may not be held to as high of a standard with respect to their conduct. It may therefore be easier to demonstrate how offensive or inappropriate speech by professional employees impedes their ability to properly perform their duties, or otherwise interferes with the regular operation of the school. Legal counsel can assist school officials in articulating how the employee’s speech had or would likely have such a disruptive impact.

**Identifying Violations and Defining the Disruption to the District**

Use of social media and text messaging can be a double-edged sword. While the technology is neutral in itself, and can be used for good or for bad, too often employees are engaging in the inappropriate use of social media or text messaging. Often, school officials explain the employee’s inappropriate speech the way Justice Potter Stewart explained obscenity: “I know it when I see it.”39 Legal counsel can assist school officials in analyzing the situation and explaining why the expressive activity was inappropriate by identifying any board polices or employment expectations that were violated, and articulating how the employee’s speech disrupted the educational environment.

School boards, with input from their administrators and their constituents, decide by policy what will be considered appropriate use of social media. Some school districts, as a matter of policy, will require all communication between employees and students to be conducted through official channels, such as the school district’s email servers, web pages, classroom pages, etc.

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38 *Amback v. Norwick*, 441 U.S. 68, 78-79 (1979). In *Ambach* the Supreme Court described the special role teachers play in the public school system as follows:

> Within the public school system, teachers play a critical part in developing students' attitude toward government and understanding of the role of citizens in our society. Alone among employees of the system, teachers are in direct, day-to-day contact with students both in the classrooms and in the other varied activities of a modern school. In shaping the students' experience to achieve educational goals, teachers, by necessity, have wide discretion over the way the course material is communicated to students. They are responsible for presenting and explaining the subject matter in a way that is both comprehensible and inspiring. No amount of standardization of teaching materials or lesson plans can eliminate the personal qualities a teacher brings to bear in achieving these goals. Further, a teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy.

*Id.* (footnotes omitted).

These types of acceptable use and social media policies prohibit employees from interacting with students on the employee’s private email, internet, and social media accounts. Other school districts may discourage, but not outright prohibit, such communication between employees and students.\(^{40}\) Still other districts may not even address the issue in their board policies. Legal counsel may review such policies and give advice as to the constitutionality of their enforcement, but the policy decision remains with the school board.

\(^{40}\)For an example of such a board policy, see Grand Rapids Public Schools Board Policy 5202, which states in relevant part as follows:

It is the policy of the Grand Rapids Public Schools (“GRPS”) that employee use of social media, even while off duty and off-site, must not interfere with the educational purpose and mission of the district. This policy applies to all GRPS employees, vendors, and consultants.

Social media is a powerful tool that can enhance student and staff learning and communication. General rules for behavior, ethics, and communications apply when using social media.

Employees will be held accountable for creating, copying, or publishing inappropriate content on social media. For the purpose of this Policy, “inappropriate content” includes but is not limited to: confidential information about other employees, such as addresses, phone numbers, social security numbers, and medical information; confidential, personally identifiable, or sensitive information about students, guests, or vendors; slanderous, libelous, or discriminatory statements and images; disparaging or derisive comments about students or their parents/guardians even if the comments are not personally identifiable; infringed upon intellectual property; content that distracts from or disrupts the educational process such as sexually provocative images or sexually explicit messages; illegal items and activities; and content that violates any school district policy or code of conduct, such as bullying, harassment, or making threats. Notwithstanding the preceding guidelines, certain social media content may be protected under applicable labor laws or collective bargaining agreements. GRPS does not prohibit employees from posting social media content regarding protected or concerted union activity.

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Employees shall use social media in a way which represents them and GRPS in a professional manner. Employees shall exercise caution and sound judgment when using social media sites. An employee’s online activities, even while off-duty or off-site, has the potential to result in disruption to the educational environment or workplace. Such disruption may be a violation of GRPS policies or the law.

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Employees are encouraged to not communicate, network, “friend”, or otherwise connect with students using personal social media or personal e-mail accounts. All allegations of inappropriate conduct or content will be thoroughly investigated.

Employees are encouraged to use appropriate privacy settings to control access to their social media sites. However, be aware that there are limitations to privacy settings. If a student, parent, other GRPS employee, the public, or news media obtain access to inappropriate content posted by a GRPS employee, such employee’s actions will be investigated. Employees should presume that their social media postings and communications will last indefinitely and can be seen by anyone. Employees should not rely on the “private” nature of any content on social media platforms.

As noted above, school officials and legal counsel must review the applicable board policies when deciding whether to discipline or discharge the employee who is alleged to have engaged in misconduct. It is helpful to identify how the employee’s actions and expressive activities violated the board policies and employee expectations. Granted, some employee misconduct clearly violates appropriate behavior (e.g., an employee who solicits or distributes sexually explicit photos with a student); other times, it may be helpful for legal counsel to assist school officials in articulating why the speech was inappropriate and how it violated board policies, employment expectations, or, in some cases, the law.

A common example of employee misconduct is when an employee shares or posts something inappropriate on social media. The particular content could involve any (or a combination of) the following subjects: students, parents, other school employees, other third parties, and/or other topics. An unfortunately common act of misconduct occurs when a teacher shares or posts information about students publicly, even if access to the post is limited to the teacher’s “friends” or “followers” on social media. Occasionally, a teacher may include personally identifiable information that is contained in a student’s education records, such as a student’s academic or disciplinary record, which is a violation of federal law.\textsuperscript{41} School officials can easily show that this violation of federal law, the penalty for which could be the loss of federal funding to the public school, impedes the operation of the school district. In such situations, legal counsel for the teacher may argue that the U.S. Department of Education’s Family Policy Compliance Office has never imposed such a penalty, and therefore there was no actual disruption to the school. Legal counsel for the school district can counter that the action in violating the confidentiality and privacy of the student involved leads to a lack of trust between the student, the parents, and the teacher, and therefore regardless of any financial penalty, the teacher’s ability to do their job is impeded.

It is more common for a teacher to post inappropriate derogatory remarks about students generally, without identifying a particular student. Teachers have referred to their students as “stupid,” “retarded,” “monkeys,” “future criminals,” “ghetto youth,” or other similar derogatory terms. When a parent discovers that their child’s teacher has referred to their child in such derogatory terms, the building administrator, superintendent, and board president often get a call with a complaint and a request to change teachers. Legal counsel can explain to the school officials

\textsuperscript{41}See Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g; See also regulations at 34 CFR Part 99.
how such communication, even on a private social media account, could be considered to create a hostile environment in violation of federal law. Derogatory comments that could be construed to disparage students on the basis of disability could violate Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act. Derogatory comments that could be construed to disparage students on account of race or national origin could violate Title VI of the Civil Rights Act of 1964. Derogatory comments that could be constructed to disparage students on the basis of gender or sex could violate Title IX.

Employee misconduct may also occur when a school employee texts or engages in instant messaging with students. Where a staff member exchanges sexually explicit materials with a student, especially a minor, or solicits a minor to produce and distribute sexually explicit materials with the employee, there is a violation of state and federal law. But other types of messaging can also be considered inappropriate. In one case, a teacher sent messages to a high school student (Student 1) asking about another student’s (Student 2) romantic relationships, and who the other girl was dating. The teacher texted: “Is she a slut? LOL I didn’t peg her for that. [Student 3’s name] definitely. LOL not [Student 2’s name] tho.” The school officials successfully defended tenure charges against this teacher, with the Administrative Law Judge finding that such text messaging with his students was “beyond inappropriate.”

According to the Administrative Law Judge, “Such a comment being made by a teacher to a student is simply repugnant and should never be tolerated nor should any comments made by a teacher to a student which contain such sexual undertones.”

Even when the content of the messages themselves are benign, the act of engaging in the text or instant message exchanges with a student can be inappropriate based on the context of the

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42 29 U.S.C. § 701, et seq. 34 C.F.R. Part 104.4
43 42 U.S.C § 12131, et seq. 28 C.F.R. Part 35
45 20 U.S.C § 1681, et seq. 34 C.F.R. Part 106.
46 Federal law prohibits the production (punishable by 15 to 30 years / $250,000 fine), distribution (punishable by 5 to 20 years / $250,000 fine), and possession (punishable by up to 10 years / $250,000 fine) of child pornography. See 18 USC 2251/2252. Legal counsel should also review applicable state law. For example, Michigan law prohibits the creation (punishable by 20 years / $100,000 fine), distribution (punishable by up to 7 years/ $50,000 fine), and possession (punishable by up to 4 years / $10,000 fine) of child pornography. See MCL 750.145c.
48 *Id.* The ALJ found that the text messages “included cursing frequently, making disparaging comments about other students, inquiring about the sexual proclivities of other students” among other inappropriate things. The ALJ held that the teacher’s dismissal for engaging in such inappropriate conduct was not arbitrary or capricious.
49 *Id.*
situation. In one situation, a teacher began anonymously instant messaging a high school student at 11:30 p.m. When the student asked who was messaging her, the teacher asked the student to guess. Over an hour later, the student finally figured out who was messaging her – after 12:30 a.m. The content of the late-night messages themselves may not have been considered inappropriate, but the fact that the teacher sent the messages and played a guessing game from 11:30 p.m. to 12:32 a.m. was.

It is becoming more common for school employees to seek to defend engaging in such communications with students (e.g., text messages using curse words, referring to other students, sent outside of school hours, unrelated to school activities) on the grounds that they are trying to relate to or identify with the students. While that may be an admirable goal, as a role model to students, teachers must maintain an appropriate boundary in their relationship to students. In one such case, an Administrative Law Judge responded to the teacher’s argument as follows:

Attempting to relate to one’s students is an admirable notion, and one that could potentially help students in the academic environment. However, there is a difference between attempting to relate to a student and acting like one in a social context. Above all, the teacher is still a teacher and the students are the pupils thereof. There is a line that must be acknowledged, respected, and abided by at all times. Petitioner/Appellant’s actions simply shattered that line.\textsuperscript{50}

Teachers must understand at all times they are the students’ teacher, not the students’ friend. Behavior, including expressive activities, on the part of school employees that is overly friendly or crosses the professional boundary need not be tolerated by schools.

**Level of Discipline Imposed**

Once school officials determine that there was a violation of board policy or employment expectations that disrupted the educational environment, they need to determine the appropriate level of discipline for the employee. There is a range of disciplinary options available to school officials when responding to such misconduct. On the lenient side, school officials could issue a verbal or written reprimand to the employee. This would be suggested in less egregious situations where there was no violation of the law. In the middle, school officials could issue time off without pay to the employee. In some states, if the employee has tenure, there may be a limitation on how

\textsuperscript{50} Id.
many days without pay an employee can be suspended before the suspension constitutes a
demotion, which triggers tenure protections. On the more strict and stringent side, school
officials could seek to discharge the employee. Situations where school employees have violated
the law by engaging in inappropriate communications of a sexual nature with students should call
for the most stringent discipline. As noted above, school officials must consider applicable
collective bargaining agreement provisions and the tenure status of an employee before deciding
on the appropriate discipline of the employee.

Often, when the school officials present the evidence of misconduct to an employee, the
employee may offer to resign in lieu of discharge. Sometimes the employee may want a settlement
payment in exchange for a release and covenant not to sue the school district or its officials. Legal
counsel can provide valuable insight on whether school officials should consider permitting the
resignation in lieu of discharge and making any settlement payment for a release. This can include
discussion about the time, expense, and stress of going through a tenure hearing or potential
lawsuit, along with the likelihood of success on the merits of any such litigation. The decision to
offer or accept any such settlement is ultimately up to the school officials and the board. Some
school officials refuse to consider such an offer in egregious situations.

**Mandatory Reporting Obligations Emanating from Certain Speech and Expressive Conduct**

School officials generally have a legal obligation to report certain types of employee
misconduct to appropriate law enforcement agencies. Most, if not all, states have a statute that
specifies “mandatory reporters” of child abuse, and require certain school officials (such as
teachers, building administrators, school counselors) to report suspected child abuse. The
circumstances that create the legal obligation to report suspected abuse vary among the state
statutes. Legal counsel can assist school officials in ensuring that they do not fail to meet this legal
obligation.

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51 In Michigan, a demotion occurs when a school district suspends the tenured employee without pay for 15 or more
consecutive days, or reduces the employee’s compensation for a particular school year by more than an amount
equivalent to 30 days’ compensation, or transfers the employee to a position carrying a lower salary. Mich. Comp.
Laws § 38.74 (1937).

52 For an overview of the state statutes pertaining to mandatory reporters, current through August 2015, please see
*Mandatory Reporters of Child Abuse and Neglect*, published by the Child Welfare Information Gateway, available
online at www.childwelfare.gov/pubPDFs/manda.pdf.
A common example of employee speech that creates a reasonable suspicion of child abuse includes email or texting messages between an employee and a minor that include sexual images or content (e.g., sexually abusive activity, child pornography). When an employee engages in this type of activity, and the school officials confront the employee with evidence of such misconduct, the employee is often willing to resign rather than fight a discharge. School officials must ensure that they do not ignore their legal obligations as a mandatory reporter when agreeing to accept an employee’s resignation.

For example, a one-time well-respected football coach in a small Michigan community resigned when confronted with allegations that he shared pornography and sex toys with some of his athletes. The school officials not only accepted the coach’s resignation, they also followed the law, reported the suspected abuse, and the coach was charged and ultimately convicted of his crimes.

**Conclusion**

The right of public school employees to engage in free speech and expressive activities under the First Amendment to the United States Constitution is far from absolute. The United States Supreme Court has created a legal framework to analyze whether the expressive activities of public employees are entitled to constitutional protection. Broadly speaking, there are three key components to that framework that must be considered: 1) the nature of the speech as citizen speech or speech that owes its very existence to the ordinary job responsibilities of the school employee; 2) the nature of the speech as regarding a public concern versus the trivial, personal or private grievance; and 3) the actual or imminent disruptive effect that the employee’s speech has on the regular operation of the school as weighed by balancing the expressive rights of the public employee against the needs of the school to conduct its business effectively.

When school officials are confronted with an employee’s speech that appears to be inappropriate, school officials should consider contacting their legal counsel, who understand this legal framework, and can assist school officials in identifying how (or if) the speech violates board

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polices and employment expectations, as well as how (or if) the speech impedes the employee’s proper performance of his or her daily duties, or otherwise interferes with the regular operation of the school.
## Appendix A

A Citation Overview (by Year and Circuit) of Federal Appellate Cases Involving Public Employees in K-12 Schools Where a *Garcetti* Analysis Was Applied

<table>
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<th>Case Name</th>
<th>Citation</th>
<th>Circuit</th>
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<td>Kennedy v. Bremerton Sch. Dist.</td>
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<td>Coomes v. Edmonds Sch. Dist. No. 15</td>
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<td>Johnson v. Poway Unified School District</td>
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<td>9th Cir.</td>
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*The Third Circuit engaged in a *Garcetti* analysis, but employed *Pickering* to decide the case based on its conclusion that the expression involved was not a matter of public concern.


Appendix B

A Synopsis of Federal Appellate Cases Involving Public Employees in K-12 Schools Where a Garcetti Analysis Was Applied

Kennedy v. Bremerton Sch. Dist., 2017 WL 3613343 (9th Cir. 2017). A football coach (Kennedy) filed suit against his school district to request a preliminary injunction requiring the district to allow him to kneel and pray on the fifty-yard line in front of students and parents, immediately after football games, as was his custom to do. The school district took the position that Kennedy was still acting in his supervisory role as an assistant coach after a game since one of the responsibilities of coaches is to make sure the facilities are secured at the end of an event and that players are supervised until they exit the facilities. The district tried different ways to accommodate Kennedy’s religious expression, but none were satisfactory. Ultimately, Kennedy was placed on paid administrative leave after violating school directives not to pray at the fifty-yard line after football games. Applying the Garcetti test, the Ninth Circuit Court of Appeals noted that Kennedy would not even have access to the fifty-yard line right after a football game but for his official position as a football coach. Coupled with his official responsibilities as a coach for after-game supervision, the court held that “when Kennedy kneeled and prayed on the fifty-yard line immediately after games while in view of students and parents, he spoke as a public employee, not as a private citizen, and his speech therefore was constitutionally unprotected” (2017 WL 3613343 at 14). Interestingly, Kennedy invoked the U.S. Supreme Court’s case in Lane to argue that the expression at issue was not part of his “ordinary duties.” Nevertheless, the Ninth Circuit leaned back on its decision in Johnson v. Poway (see below) to make the point that “where, as here, a teacher speaks at a school event in the presence of students in a capacity one might reasonably view as official, we have rejected the proposition that a teacher speaks as a citizen simply because the content of his speech veers beyond the topic of curricular instruction, and instead relates to religion” (Id. at 13) (citations omitted).

Brown v. Chicago Bd. of Educ., 824 F.3d 713 (7th Cir. 2016). A teacher (Brown) found out the hard way that one’s motives can be great and yet totally irrelevant to determining whether one has run afoul of school board policy. Brown caught students passing a note in class that contained lyrics that included the “N-word.” Brown decided to take that teachable moment to
wax eloquent on why such words are harmful and should not be used, and in the course of so doing he used the “N-word.” The Seventh Circuit Court of Appeals described this as “a well-intentioned but poorly executed discussion…” (824 F.3d at 714). Unfortunately for Brown, his school district had a “written policy that forbids teachers from using racial epithets in front of students, no matter what the purpose” (Id.). In what had to be a really bad day for Brown, he was also being observed that day by his principal, and found himself suspended because of his classroom expression in violation of school policy. Brown filed a retaliation lawsuit, claiming that the adverse employment action taken against him was in violation of his freedom of speech. In what had to be another really bad day for Brown, the Seventh Circuit Court of Appeals stated that “Brown’s First Amendment claim fails right out of the gate” (Id. at 715). In ruling against Brown, the court observed that “Garcetti dooms his position. The Board may have acted in a short-sighted way when it suspended him for his effort to educate the students about a sensitive and socially important issue, but it did not trample on his First Amendment rights” (Id. at 718).

Coomes v. Edmonds Sch. Dist. No. 15, 816 F.3d 1255 (9th Cir. 2016). A special education teacher (Coomes) repeatedly communicated with her administrators, fellow teachers, and parents in the district about her dissatisfaction with how the district was handling the mainstreaming of special education students. Eventually her relationship with her school administrators broke down and she began receiving poor teaching evaluations. The teacher’s employment ended when she was about to be transferred to the district’s high school and had a nervous breakdown. Her attorney informed the district that she would not be returning to work and argued that she had been constructively discharged by the district for exercising constitutionally protected speech. The Ninth Circuit Court of Appeals, however, found that all of the teacher’s speech (including the communications with parents) were closely tied to her job responsibilities as a special education teacher. As a result, none of her speech was considered protected citizen speech under Garcetti. The court concluded that Coomes “failed to meet her burden to show that the relevant speech was made in her capacity as a private citizen…” (816 F.3d at 1264).

Dougherty v. Sch. Dist. of Philadelphia, 772 F.3d 979 (3rd Cir. 2014). Dougherty, a Deputy Chief Business Officer with the Philadelphia School District, publicly exposed the Superintendent for inappropriately steering a prime contract to a minority-owned business that was not a pre-
qualified contractor and was therefore ineligible to receive a no-bid contract. In addition to meeting with newspaper reporters, “Dougherty also submitted a report to the FBI Tips and Public Leads website, contacted several state representatives, and submitted a hotline report to the Office of Inspector General for the U.S. Department of Education” (772 F.3d at 983). Thereafter, Dougherty was terminated from his job for alleged ethical violations (based on leaks to the press). He then filed suit alleging, among other things, retaliation for constitutionally protected speech. Working its way through the *Garcetti* test, the Third Circuit Court of Appeals concluded that “‘nothing about Dougherty's position compelled or called for him to provide or report this information,’ whether to the School District, the press, or any other source” (*Id.* at 988). As a result, the court held that Dougherty’s speech was citizen speech protected by the First Amendment. Two important side notes to this case include the following: 1) The defendant argued for an expansive application of *Garcetti* that would broadly categorize any speech that related to one’s job as employee speech rather than citizen speech. The court soundly rejected this approach invoking both *Garcetti* and *Lane* to conclude “that *Lane* reinforces *Garcetti* ’s holding that a public employee may speak as a citizen even if his speech involves the subject matter of his employment” (*Id.* at 990). 2) The court also found that Dougherty survived the *Pickering* balance test in this case, observing the important point that “[s]ome disruption is almost certainly inevitable; the point is that *Pickering* is truly a balancing test” (*Id.* at 993).

**Hubbard v. Clayton Cnty. Sch. Dist.,** 756 F.3d 1264 (11th Cir. 2014). A school administrator (Hubbard) made public remarks critical of his school board while he served as the president of an education association. While technically an employee of the district at the time, Hubbard was actually “on loan” to the education association while he served his term. When Hubbard was not permitted to return to his position as a school administrator, he filed suit against his district for retaliating against him based on constitutionally protected speech. The narrow issue in this case was whether Hubbard was speaking pursuant to his duties as a principal in the district or whether he was engaged in citizen speech on behalf of the education association he was leading at the time. The Eleventh Circuit Court of Appeals found this to be an easy call in favor of Hubbard, and concluded that *Garcetti* had no application to this case as it was clear that Hubbard was speaking in his role as president of the education association.
Mpay v. Rhee, 758 F.3d 285 (D.C. Cir. 2014). A special education teacher (Mpay) sent an email to the Chancellor of schools complaining about conditions in his classroom and about his principal who allegedly pressured him to falsify test scores. Thereafter, Mpay received a termination letter that his contract would not be renewed for the following year based on his poor evaluation. Mpay filed a retaliation lawsuit claiming that he was fired because of the contents of his email, which he argued was protected speech. Applying the Garcetti test to the contents of Mpay’s email, the D.C. Circuit Court of Appeals found that Mpay’s entire email was employee speech related to complaints he had about his job and therefore was not protected citizen speech. Mpay also attempted to argue that his speech should be characterized as citizen speech because he went outside the chain of command by emailing the Chancellor directly. The court, however, was unpersuaded, concluding that “a public employee speaks without First Amendment protection when he reports conduct that interferes with his job responsibilities, even if the report is made outside his chain of command” (758 F.3d at 293-94) (citations omitted).

McArdle v. Peoria Sch. Dist. No. 150, 705 F.3d 751 (7th Cir. 2013). This case involved a middle school principal who confronted a superior about financial improprieties and found herself the target of alleged employment retaliation. “These irregularities included…use of school funds and a school credit card for personal purposes; … direction of payment to a student teacher in violation of district policy against such payments; and…circumvention of rules regarding admission procedures for nonresident students” 705 F.3d at 752. Based on an application of Garcetti, the Seventh Circuit Court of Appeals summarily dismissed the case in favor of the school district because it attributed the expression that formed the basis of the complaint to be expression that owed its very existence to the principal’s job duties. Most people reading the case in the light most favorable to the plaintiff would find her to be in an impossible situation: either turn a blind eye to financial impropriety (potentially implicating an ethical responsibility, though in this case not a legal responsibility) or speak out and risk falling out of favor with one’s superiors and ultimately the loss of one’s livelihood. Hence is the Hobson’s choice some public school employees find themselves in as a result of Garcetti’s pervasive application.

Ross v. Breslin, 693 F.3d 300 (2nd Cir. 2012). Ross, a payroll clerk-typist, believed that when she reported financial malfeasance her speech was protected because she first reported the matter
to the superintendent and then to the board of education rather than reporting to her immediate supervisor. Thus, she believed she went outside the chain of command. The Second Circuit Court of Appeals concluded, however, that reporting these types of concerns was the essence of what was required by an employee in her position. Her speech was classic employee speech under the lens of *Garcetti*. As a result, the court held that the speech at issue was not protected citizen speech since she never communicated the information to the public.

*Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954 (9th Cir. 2011). A math teacher claimed that his district’s order to remove certain historical and religious-oriented banners from his classroom walls was a violation of his First Amendment right to free speech and a violation of the Fourteenth Amendment’s Equal Protection Clause because other teachers in the same building were not required to take down their banners. Relying on *Garcetti* and ruling in favor of the school district, the Ninth Circuit Court of Appeals found the teacher’s banners to be employee speech rather than the speech of a private citizen, and therefore not protected by the First Amendment.

*Decotiis v. Whittemore*, 635 F.3d 22 (1st Cir. 2011). The contract of a speech and language pathologist who provided information to parents regarding possible improprieties in the school’s identification of students eligible for extended school year services was not renewed. The district court dismissed the pathologist’s claim. However, the First Circuit Court of Appeals noted that “[i]t is well settled ‘as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions…for speaking out’” (635 F.3d at 29). The court also noted that employee speech must be analyzed based on workplace effect, the context of the speech, the subject matter, whether the speech was commissioned, the role of the chain of command, the place where the speech occurred, and whether the employee had special knowledge of the subject based on her employment. While calling it a “close call,” the court ultimately found that the pathologist had stated a claim upon which relief could be granted. The court noted that in this particular case the employee “was not literally authorized or instructed to make the speech at issue,” which helped her pass the *Garcetti* test (*Id.* at 32).
Evans-Marshall v. Bd. of Educ. of the Tipp City Exempted Village Sch. Dist., 624 F.3d 332 (6th Cir. 2010). The teacher in this case selected texts from the “100 Most Challenged Books” list for use in her classroom. Several parents who were concerned about the choice of books took the matter before the school board. Subsequently, the relationship between the teacher and the principal diminished to the point where her teaching contract was not renewed. The teacher asserted that as part of her First Amendment free speech she was entitled to choose the texts used in her classroom and that her nonrenewal was based on protected speech. The Sixth Circuit Court of Appeals determined that Ohio law specifically grants school boards, not teachers, the authority to educate children. Therefore, applying the principles of Garcetti, the teacher’s speech owed its existence entirely to her employer and the speech was not protected.

Fox v. Traverse City Area Pub. Sch. Bd. of Educ., 605 F.3d 345 (6th Cir. 2010). A school district refused to renew the teaching contract of a probationary special education teacher on the basis that she failed to file Medicaid and IEP reports in a timely and appropriate manner. The teacher filed a retaliation claim asserting she was the victim of an adverse employment action because she had complained about her work load to her supervisor arguing that her teaching load exceeded what state law permitted. The Sixth Circuit Court of Appeals, finding no evidence the teacher had filed a grievance, gone outside the chain of command, or that the speech was outside the parameters of her job, ruled that the teacher’s speech was the equivalent of an employee/employer disagreement and therefore was not protected speech under Garcetti.

Reinhardt v. Albuquerque Pub. Sch. Bd. of Educ., 595 F.3d 1126 (10th Cir. 2010). Reinhardt, a speech and language pathologist who advocated for a special education student by filing a complaint with a state agency, also persistently criticized the school’s special education program and complained about her own teaching load. She felt the school district retaliated for her speech by subsequently decreasing her workload which meant a decrease in her income. Upon review, the Tenth Circuit Court of Appeals noted that “attempting to protect the rights of special education students constitutes protected activity under the Rehabilitation Act” (595 F.3d at 1132). The court determined that since the speech and language pathologist’s job duties did not require her to report wrongdoing in the special education program and because she went outside
the chain of command to report the misconduct to a state agency, her speech was protected under *Garcetti* as citizen speech.

Weintraub v. Bd. of Educ. of City Sch. Dist. of City of New York, 593 F.3d 196 (2nd Cir. 2010). A teacher who had spoken negatively about and filed a grievance against his building administrator for allegedly failing to ensure proper student discipline experienced what he believed to be adverse employment actions, and filed suit alleging retaliation based on protected speech. Upon review by the Second Circuit Court of Appeals, it was determined that “speech can be 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” (593 F.3d at 208). Consequently, the fact that dealing with student discipline was also part of the teacher’s daily responsibilities provided a sufficient link to constitute employee speech rather than citizen speech, and the teacher’s speech was, therefore, not protected. Consequently, the school district was allowed to appropriately discipline the teacher for his statements.

Posey v. Lake Pend Oreille Sch. Dist. # 84, 546 F.3d 1121 (9th Cir. 2008). A security specialist claimed that a letter he gave to the superintendent outlining school safety issues was protected speech. The school district claimed that since safety was part of the security specialist’s job the letter was not protected speech. The issue then was whether in light of *Garcetti* the inquiry into the protected status of speech in a First Amendment retaliation claim is a question of law properly decided at summary judgment or presents a mixed question of law and facts, in which case facts need to be determined by a jury. The Ninth Circuit Court of Appeals determined that because there was debate as to whether the plaintiff’s letter was created and delivered as part of his official employment duties, the matter would need to be considered by a jury before the court could make a final decision on the status of the plaintiff’s speech.

Borden v. Sch. Dist. of Twp. of East Brunswick, 523 F.3d 153 (3rd Cir. 2008). A football coach was informed he was not allowed to bow his head and “take a knee” during team prayers. The coach asserted the school district was restricting his right to free speech. Based on *Pickering*, the Third Circuit Court of Appeals held that the coach’s prayer was not a matter of public concern and therefore was not protected speech. The court did not use *Garcetti* as the basis for its ruling,
but made a point to explain that had the court used *Garcetti* it would have held that the prayer was unprotected speech based on that fact that it was expression engaged in as part of the coach’s role as an employee and not as a private citizen (523 F.3d at 171 n.13).

**Samuelson v. LaPorte Community School Corp.,** 526 F.3d 1046 (7th Cir. 2008). A school district required one of its coaches to follow the chain of command and to stop contacting the news media regarding perceived disparities between the girls’ and the boys’ athletic programs. When the teacher/coach did not get his coaching contract renewed the following year, he filed suit alleging, among other things, that the chain of command policy was an unconstitutional prior restraint on free speech. The Seventh Circuit Court of Appeals determined the coach’s “speech” owed its origin to his job responsibilities and ruled the school district could require the coach to follow the chain of command and to stop directly contacting news media regarding the perceived disparities because the speech targeted by the policy was employee speech according to *Garcetti*.

**Almontaser v. New York City Dept. of Educ.,** 519 F.3d 505 (2nd Cir. 2008). Contrary to Almontaser’s best judgment, the school district insisted that she meet with the press and discuss a sensitive local issue as an interim principal representing the district’s high school. While the interview went well, the newspaper article contained exaggerations and inaccuracies that led to community unrest. Subsequently, Almontaser applied for a principal position within the same school district and her application was removed from the applicant pool due to the controversy over the interview. Almontaser claimed the interview with the press was protected speech and filed a retaliation claim. The Eight Circuit Court of Appeals determined that since the press had asked her to do the interview because she was a principal (albeit an interim), the speech had a direct link to her job duties and was not protected speech based on *Garcetti*.

**Brammer-Hoelter v. Twin Peaks Charter Acad.,** 492 F.3d 1192 (10th Cir. 2007). In this case the relationship between the teachers and the charter school principal were so tenuous that following poor mid-year evaluations all the teachers resigned. At the school board meeting where the board accepted the teacher resignations, the principal also resigned. The teachers then petitioned to have the board reinstate them to their teaching positions. When the board refused to reinstate the teachers, the teachers filed suit alleging the school had retaliated based on protected expression
and association. Of the twenty-nine allegations of First Amendment violations, the Eleventh Circuit Court of Appeals determined that only four allegations survived the *Garcetti* analysis.

**Mayer v. Monroe Cnty. Cmty. Sch. Corp.,** 474 F.3d 477 (7th Cir. 2007). Even though the teacher had been told not to share personal opinions about the war in Iraq with her students, she did so. And even though she acknowledged that her comments fell under employee speech, her contention was that the “principles of academic freedom supersede *Garcetti* in classrooms” (474 F.3d at 479). The Seventh Circuit Court of Appeals ruled, however, that “[t]he 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” (*Id.* at 477). In the absence of academic freedom for K-12 teachers, Mayer’s retaliation claim based on classroom expression was found to be without merit in light of *Garcetti*.

**Williams v. Dallas Indep. Sch. Dist.,** 480 F.3d 689 (5th Cir. 2007). Four days after the school’s athletic director and head football coach (Williams) submitted a memo to the school district regarding the district’s lack of appropriate fiscal operating procedures, his position as athletic director was terminated and he was not issued a football coaching contract for the following year. Williams filed a retaliation lawsuit alleging the school district took inappropriate action regarding the memo, which he argued constituted protected speech. The Fifth Circuit Court of Appeals noted that even though the memo was not a requirement of the athletic director’s position, the content of the memo was directly tied to his position and therefore did not constitute protected citizen speech based on *Garcetti*.

**D’Angelo v. Sch. Bd. of Polk County, Fla.,** 497 F.3d 1203 (11th Cir. 2007). The principal of a public school attempted to convert his school to a charter school. The initiative did not receive sufficient faculty support and the effort failed. The principal was then terminated for what he deemed to be protected speech based on a Florida statute. The Eleventh Circuit Court of Appeals recognized that even though the speech took place on school property and the administrator had used school resources to communicate with staff members, those factors alone did not automatically exempt his speech from being that of a private citizen. However, since the
principal’s own testimony at trial asserted he believed it was his duty to pursue the conversion to charter school status, the court determined his speech was rooted in his responsibilities as the school’s administrator and therefore under *Garcetti* his speech was not protected.

**Casey v. West Las Vegas Indep. Sch. Dist.**, 473 F.3d 1323 (10th Cir. 2007). A newly appointed superintendent discovered the school district was not in compliance with the requirements for Head Start and that the district was also in violation of several other policies such as the state’s open meetings law. In her short tenure as superintendent Casey attempted to inform the Board of several state and federal non-compliance issues in the district. She also contacted the federal government to ascertain how to rectify the Head Start issue and wrote a letter to the state attorney general regarding the district’s open meeting violations. When the superintendent was subsequently fired she filed a retaliation claim arguing that the school district had terminated her based on expression that was protected speech. The Tenth Circuit Court of Appeals concluded that all of her claims except for one (the report to the attorney general) were made pursuant to her job responsibilities, and were therefore not protected under *Garcetti*. 