

3. **The Constitutional Aspects of Public Sector Bargaining**

Public sector employees enjoy Constitutional protections that their private sector counterparts do not. The First Amendment protects the right to free association and free speech. The Fourth Amendment protects against unreasonable searches and seizures. That the Fifth Amendment provides protections against self-incrimination and denials of due process. As is well-settled, such protections are enforceable against state and local governments by operation of the Fourteenth Amendment. Although beyond the scope of this presentation, state constitutions may well provide additional protections to public employees.

A. **First Amendment Free Association Cases**

A number of United States Supreme Court decisions recognize that the First Amendment's protections of the right to free association extends to union activities in public employment. *See, e.g., Thornhill v. Alabama*, 310 U.S. 88 (1940); *Smith v. Arkansas State Hwy. Employees Local 1315*, 441 U.S. 463, 465 (1979). Such Constitutional protections exist, of course, without regard to whether a state has adopted a public sector collective bargaining statute. Speech relating to union organizing activity is generally deemed to be a matter of public concern. Thus, "the right to discuss and inform people concerning the advantages and disadvantages of unions and joining them . . . is part of free assembly." *Thomas v. Collins*, 323 U.S. 516, 533 ((1945). The same is generally true with regard to union organizing activity. "The first amendment protects

the right of all persons to associate together in groups to further their lawful interests. . . . Such ‘protected First Amendment rights flow to union as well as to their members and organizers.’ *Boddie v. City of Columbus*, 989 F.2 745, 143 LRRM 2172, 2174 (5th Cir. 1993)(citations omitted).

However, the circuit courts are split on the question of whether union activities and free association claims need to meet the “public concern” requirement in the same way that free speech claims must relate to matters of “public concern.” *See Gregorich v. Lund*, 54 F.3d 410, 149 LRRM 2278, 2281 n. 4 (7th Cir. 1995)(discussing split of the circuits). Unlike free speech claims, free association protections are not lost simply because the speech at issue was made only to coworkers or to supervisors. *Cook v. Gwinnett County School Dist.*, 414 F.3d 1313 (11th Cir. 2005). And plainly the right to join a union in the public sector is a right protected by the First Amendment. *Int’l Ass’n of Firefighters Loc. 3808 v. Kansas City*, 220 F.3d 969 (8th Cir. 2000).

That said, there is no overarching right to bargain a collective bargaining agreement, even if there is a right to form and join a union. The right to bargain a contract is governed by state law, and the laws of the states vary from prohibiting public sector bargaining altogether at the one end to requiring public sector bargaining at the other end.

B. First Amendment Free Speech Cases: Garcetti v. Ceballos

i. The Garcetti Case

The United States Supreme Court, by a vote of 5 to 4, has made it much riskier for public employees to speak out in the course of their duties. *Garcetti v. Ceballos*, ___ U.S. ___, 126 S.Ct. 1951, 164 L.Ed.2d 689 (No. 04-473, May 30, 2006). The case adds another hurdle to a public employee’s right to free speech by excluding speech made “pursuant to official duties” from First Amendment protection in furtherance of the government’s interest in managing its employees.

The case involved a deputy district attorney, Ceballos, who claimed to have suffered retaliation after sending an internal memo that questioned the truthfulness of sheriff’s deputies in witness statements made in support of a search warrant. The memo put Ceballos sharply at odds with the sheriff’s deputies.

Speaking for the Court, Justice Kennedy started with the so-called *Connick-Pickering* test. Under *Connick v. Myers*, 461 U.S. 138 (1982), courts first ask if the subject of the speech is a matter of public concern. If the answer is “yes,” then courts assess the free speech claim under *Pickering v. Board of Ed. of Township High School Dist. 205*, 391 U.S. 563 (1968), which “balanced” the free speech right of a public employee “as a citizen, in commenting upon matters of public concern . . . [with] the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.” If “the employee spoke as a citizen on a matter of public concern,” then government restrictions on that speech are permitted only if “the

relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.”

The Court’s majority in *Garcetti* makes a significant shift. In the words of the Court: “We hold 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.” In effect, the Court borrowed the labor relations concept of management rights, because of “the emphasis of our precedents on affording governmental employers sufficient discretion to manage their operations.” Writing a memo “pursuant to his duties,” Ceballos was doing what he was employed to do and, the Court held, his employer had the right to evaluate that as part of its legitimate function as an employer regulating its workforce. Kennedy was joined by Justices Roberts, Scalia, Thomas, and Alito.

Justice Souter, writing in dissent for himself, Justice Stevens, and Justice Ginsburg, rejected the majority’s decision not to protect speech made as part of official duties. Souter concluded that the *Pickering* test should be adapted so that a public employee is protected if “he speaks on a matter of unusual importance and satisfies high standards of responsibility in the way he does it.” Thus, for Justice Souter, “only comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in an employee’s favor.”

Justice Stevens also dissented separately: “The proper answer to the question ‘whether the First Amendment protects a government employee from discipline based on

speech made pursuant to the employee's official duties' is 'Sometimes,' not 'Never.' Justice Breyer would have applied the *Pickering* test without modification.

There are serious questions that flow from the Court's opinion. First, when is speech made "pursuant to official duties"? The majority noted that it did not provide "a comprehensive framework" for identifying the scope of an employee's duties. Second, as Justice Souter observed, the Court did not address the interplay between its ruling and the First Amendment doctrine of academic freedom. In response, Justice Kennedy noted "some argument" that academic expression may implicate additional constitutional interests not fully accounted for by mere "employee-speech jurisprudence."

What does it mean for counsel? A public employee's speech is unprotected if the speech is unrelated to a matter of public concern. If the speech is related to a matter of public concern, counsel should identify the employee's duties and determine whether the employee's speech was part of those duties, because speech pursuant to job duties is no longer protected.

For management counsel, that suggests that job descriptions include requirements that the employee provide written, critical analysis and report misconduct or violations of policy or procedure. For lawyers representing unions or employees, it is important to make clients aware that their First Amendment protection may depend on whether they choose to voice concerns about wrongful conduct by "going public" or by working through "the system" or chain of command. Also, job descriptions that appear to have been drawn overly broad in response to the *Garcetti* ruling should be challenged, because

the Court said that should not be done. Finally, keep “whistleblower” and other statutory protections in mind if First Amendment protections may no longer be available.

ii. Decisions Following Garcetti

The Eleventh Circuit, in *Battle v Board of Regents for the State of Georgia*, decided a case involving an employee at a state university who brought suit on the grounds that she was fired for exercising her First Amendment rights. *Battle v. Board of Regents for the State of Georgia*, 468 F.3d 755 (11th Circ. 2006)

Battle was an employee in the Office of Financial Aid and Veterans Affairs at a Georgia university. Part of her responsibilities involved verifying the accuracies of student files as well as reporting any perceived fraudulent activity. On certain student files that were previously handled by her supervisor, Battle noticed some “improprieties.” She believed the files showed signs of “fraudulent mishandling and mismanagement of federal funds.”

Battle first confronted her supervisor about the improprieties she identified. His reaction, however, was dismissive and he did not make any corrections. “Overwhelmed with by the evidence of fraud,” Battle next went to the president of the university and informed him that she felt her supervisor was falsifying information, awarding financial aid to ineligible recipients, making excessive awards, and forging documents. In the end, despite receiving excellent evaluations from the university, Battle’s contract was not renewed.

In affirming the lower court, the appeals court held that the employee was not entitled to First Amendment protection. In finding for the employer, the court reasoned that Battle’s action of reporting fraudulent activity was part of her official

responsibilities. The court observed, “[she] admitted that she had a clear employment duty to ensure the accuracy and completeness of student files as well as to report any mismanagement or fraud she encountered in the student financial aid files.” And, “[t]he First Amendment [only] protects speech on matters of public concern made by a government employee speaking as a citizen, not as an employee fulfilling official responsibilities.” Furthermore, in drawing similarities between the facts before it and *Garcetti*, the court noted that “The issue in *Garcetti* was whether a public employee was speaking pursuant to an official duty, not whether that duty was part of the employee's everyday job functions.”

The Fifth Circuit, in *Williams v. Dallas Independent School District*, 480 F.3d 689 (5th Cir. 2007), decided a §1983 First Amendment retaliation claim involving a high school athletic director who was also the school’s head football coach. The appeals court affirmed the lower court’s summary judgment for the defendants, holding that the athletic director’s speech was not protected under *Garcetti*.

Williams stemmed from a dispute involving school funds appropriated for athletic activities. Williams made several unsuccessful requests to the office manager about specific information regarding the school’s appropriation of athletic funds. Later in the year, Williams wrote a memorandum to the office manager, copied to the school principal, in which he “protested the manager’s ‘failure to provide [him] with any information and/or balance pertaining to the athletic account.’” The memorandum further went on to explain the “extremely unusual” fact that the athletic fund had a negative balance despite the fact that it had been credited \$1000, of which only \$165 had been spent. Two months later, Williams wrote another memorandum to the school’s

principal “expressing further concern regarding the handling of school athletic funds.”

Shortly after receiving the second memorandum, the principal removed Williams from his position as athletic director. Ultimately, Williams’ contract was not renewed.

The court’s analysis was a straightforward *Garcetti* application. It noted that rather than focus on the content of employee’s speech, it had to focus on “the role the speaker occupied when he made it. And, “[e]ven if the speech is of great social importance, it is not protected so long as it is made pursuant to the worker’s official duties.” In concluding that Williams’ memorandum was written pursuant to his official duties the court observed:

Because the office manager and principal were in charge of allocating and monitoring the athletic accounts (Williams obviously did not have exclusive control of the accounts), in order for Williams to purchase equipment and enter competitions, he needed to consult with his superior about his budget... This is not a case where Williams wrote to the local newspaper or school board with his athletic funding concerns.

Id. at 694. The court’s holding plainly raises the vexing question of whether Williams would have been better off writing the local newspaper with regards to his issue? For Williams, the answer would seem to be: “yes.”

The Seventh Circuit, in *Spiegla v. Hull*, 481 F.3d 961 (7th Cir. 2007), produced a most disturbing result in the wake of *Garcetti*. *Spiegla* was a former Indiana state prison employee who sued her former employer under §1983 in retaliation for exercising her free speech. *Spiegla* argued that she was retaliated against after voicing a possible security concern at the prison to an assistant supervisor. In reversing a lower court’s \$210,000 jury verdict, the *Spiegla* court found that the prison employee, in light of

Garcetti, was not entitled to First Amendment protection when she voiced security concerns to her supervisor.

Spiegla's claim stemmed from an incident she witnessed while working at the prison. While working at the main-gate at a correctional facility with her supervisor, Spiegla witnessed two prison employees transfer bags from their private vehicles into the state owned truck that they were driving. Although Spiegla believed that it was her job to search all vehicles entering the prison, she was dissuaded from searching the trucks by her supervisor. The incident troubled Spiegla and she noted the suspicious behavior in her log. Later in the day, she informed an assistant prison superintendent of the incident who, not surprisingly, told her that she should have in fact searched the vehicle. The assistant superintendent did discuss the incident at the staff meeting. Another superintendent who was at the staff meeting was evidently angry at Spiegla in the manner in which she voiced her concerns. Four days later, Spiegla was reassigned from the main gate to a much less desirable shift. Upset over her transfer, she brought the §1983 claim against the prison administration who had the authority to transfer her.

In finding for the administration, the court noted that “[p]rior to *Garcetti* we considered the content, form, and context of the speech to determine if the employee spoke as a citizen in a matter of public concern [a]fter *Garcetti* however, the threshold inquiry is whether the employee was speaking as a citizen; only then do we inquire into the content of the speech.” The court further observed that “based on the record as a whole, the Plaintiff was speaking pursuant to her official duties--not as a citizen” when she reported the suspicious behavior of her co-workers. . . and was therefore not entitled to First Amendment protection “regardless of the content of her

speech.” The court did not hide its frustration in having to deny Spiegla’s claim in noting that, “Spiegla was punished for simply trying to follow the rules. . . [o]ur holding here, however, is a straightforward application of the principal in *Garcetti*.”

The Eighth Circuit, in *Bradley v. James*, 479 F.3d 536 (8th Cir. 2007), applied *Garcetti* analysis to a University of Central Arkansas police officer who brought a §1983 First Amendment retaliation claim following his termination from the police force. In denying the Plaintiff’s claim, the appeals court affirmed the lower court in finding that the employee was acting pursuant to his official duties, and thus not entitled to First Amendment protection, when he reported that a fellow police officer was intoxicated and disruptive during investigation.

The facts stem from incident involving an alleged gun complaint at one of the university’s dormitories. Bradley, the highest ranking officer on duty, remained at the police station while six other officers were investigating at the school’s dorm right across the street. After the incident was resolved, James, department chief, who was off duty at the time, arrived at the station later and voiced his displeasure to Bradley for not responding to the incident. Following the incident, the department conducted an investigation. During an interview with one of his supervisors, Bradley revealed that James had showed up at the station intoxicated. Bradley was eventually fired and brought a §1983 action, because he felt it was in retaliation for the discussions to the department about James’ intoxication.

In ruling for James and the univeristy the court cited *Garcetti* and observed:

“Even assuming Bradley was fired because of his allegations against James, and that his allegations were a matter of public concern, he cannot prevail. This case is controlled by [*Garcetti*]. . . As a police officer, Bradley had an official responsibility to cooperate with the investigation . . . His allegations of

intoxication against James were made at no other time than during this investigation, and thus his speech was pursuant to his official and professional duties.

Id. at 539.

In *Green v. Board of County Commissioners*, 472 F.3d 794 (10th Cir. 2007), the Tenth Circuit applied *Garcetti* to a case involving an employee of a juvenile justice center in Oklahoma who voiced her concerns about the inaccuracies of the Center's drug testing. Green brought a §1983 First Amendment retaliation suit following her termination. In affirming the lower court's summary judgment for the county, *Green* held that the Plaintiff's speech was not protected.

Green's main duty at the detention center was in the drug-screening lab. At a certain point she became concerned that the tests she was administering were yielding false-positive results. For instance, a client who repeatedly denied taking drugs was nevertheless yielding a positive test. In light of this, Green voiced her concern with her direct supervisors that the test center did not have a confirmation policy.

When Green realized that her supervisors did not share her concerns that the drug tests were inaccurate, she contacted the manufactures of the tests to arrange for confirmation testing. In addition, the plaintiff contacted the Department of Human Services regarding setting up a confirmation test at a hospital. The results confirmed the plaintiff's suspicions that the center's tests were in fact yielding false-positives. Green reported these findings to her direct supervisor and a judge. Neither appeared responsive to Green's findings. In fact, the judge told her that if the clients did not like the results, they could go elsewhere to get tested. Following these episodes, Green claimed that she

was treated less favorably by her employer. Ultimately, Green was fired from her job at the center.

In finding Green not entitled to First Amendment protection, the court first determined what speech exactly was entitled to protection. The court determined that the job related speech was:

(1) communication with the client regarding how to obtain a confirmation test; (2) communication with the testing equipment manufacturer about a confirmation test; (3) communication with another individual to ensure chain of custody for the sample to be used in the confirmation test; and (4) communication with Defendants regarding the confirmation test's determination of a false positive

Id. at 799 The court next looked at Green's job description, noting, however, that "it is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of one's professional duties for First Amendment purposes." The court concluded that Green's actions were taken as an employee and not as a private citizen and, similar to *Garcetti*, it did not matter that Green's speech focused attention on misguided employer decisions. The court further observed:

...[Green] was not communicating with newspapers or her legislators or performing some similar activity afforded citizens; rather, even if not explicitly required as part of her day-to-day job responsibilities, her activities stemmed from and were the type of activities that she was paid to do. Particularly, it was part of her job to ensure that the testing machines were working correctly, and it was part of her job to interact with her supervisors, clients, and third parties regarding testing policies and issues. Her disagreement with her supervisors' evaluation of the need for a formal testing policy, and her unauthorized obtaining of the confirmation test to prove her point, inescapably invoke *Garcetti's* admonishment that government employee's First Amendment rights do 'not invest them with a right to perform their jobs however they see fit.'

Id. at 800-01

Two federal cases have applied *Garcetti* analysis to reach similarly troubling conclusions. *Williams v. Riley*, for instance, came out of Fifth Circuit District Court. Although reviewable, its application of *Garcetti* appears true to the principal and therefore in all likelihood will not be overturned. In *Williams*, several former county correctional officers brought a §1983 First Amendment retaliation claim after they were fired subsequent to submitting a written report which detailed the beating of a restrained prisoner. The court in denying the Plaintiffs' claim held that the former officers were not speaking as citizens when they wrote the report and therefore did not have First Amendment protection. In its analysis the court stated that it was "gravely troubled by the effect of *Garcetti* upon a factual scenario such as that before the bar."

A second troubling district court decision, *Pagani v. Meriden Board of Education*, 2006 WL 3791405 (D. Conn.), came out of Connecticut. Pagani filed a First Amendment retaliation suit when he was demoted following a complaint he filed with the Connecticut Department of Children and Families (DCF). The report alleged that several students had approached Pagani claiming that a substitute teacher had shown them a nude picture of himself with two nude women. Despite being advised not to report the incident by his supervisor, Pagani reported the incident anyway. In granting the Defendant's motion for summary judgment, the court applied *Garcetti* and held that as a matter of law Pagani was speaking pursuant his employment duties when he reported the incident to DCF.

The court observed:

[A]s a matter of law, [Pagani] does not have protection against retaliation for his report to DCF. . . [He] is not insulated from employer discipline because he was not a citizen speaking out on a matter of public concern, but rather an employee legally mandated by statute and written policy to report incidents of child abuse to DCF.

Id. at 4.

iii. Alternative Approaches to Garcetti

From the perspective of public employees, there are other legal protections against retaliation for complaining about discriminatory treatment of themselves and others. Complaints regarding sex discrimination and sexual harassment are protected by Title IX in public schools and some other federally funded programs. *Jackson v. Birmingham Bd. of Educ.*, __U.S.__, 125 S.Ct. 1497 (2005). The same is true regarding complaints about racial discrimination or racial harassment. *Cf. Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979)(concluding that a private right of action exists under Title IX, after pointing out it was “explicitly patterned” after Title VI). Such complaints may also be protected by 42 U.S.C. §1981. *Tucker v. Talladega City Schools*, 2006 WL 688967 (11th Cir. 2006)(complaining about both racial discrimination and about retaliation for opposition to racial discrimination); *Humphries v. CBOCS West, Inc.*, 474 F.3d 387 (7th Cir. 2007)(same).

Anti-discrimination statutes contain broad protections against discrimination on the basis of race, sex, and other protected classes. Thus Title VII prohibits both discrimination and retaliation. 42 U.S.C. §2000e-3(a). Complaints about disability discrimination and harassment are expressly protected by the Americans with Disabilities Act, 42 U.S.C. §12203(a) and §504 of the Rehabilitation Act of 1973. And presumably any retaliation claims would be litigated under the generally more protective standards of the Supreme Court’s recent decision in *Burlington Northern & Santa Fe Ry. Co. v. White*, __U.S.__, 126 S.Ct. 2405 (2006).

As the Court itself noted, state “whistleblower” laws may provide additional protections. Of course, state laws will vary widely in their protections. *See*

<http://www.ncsl.org/programs/employ/whistleblower.htm> for a listing of state whistleblower laws. The list briefly describes who is covered by state law, how long one has to file a claim, and what sorts of remedies are available; however, the list does not provide any analysis. There may also be protections under the federal False Claims Act, 31 U.S.C. §3729 *et seq.*

C. **Fifth and Fourteenth Amendment Due Process Issues**

i. **Procedural Due Process Protections**

Public employees who have a property right to their employment are entitled to procedural due process protections in disciplinary matters. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). Whether that public employee has a property right to his or her job is a question of state law. *Board of Regents v. Roth*, 408 U.S. 564 (1972). Property rights can arise under state law, collective bargaining agreements, employer policies or practices, and sometimes from employee handbooks and common practices in the workplace. *Id.* A public employee with a property right cannot be discharged without being given the reasons for the discharge and an opportunity to respond. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

Notice and an opportunity to be heard are at the heart of procedural due process. *Mullane v. Central Hanover Bank & Trust Co.*, 389 U. S. 306 (1950). In *Loudermill*, the Court clarified how those procedural rights play out in the context of an employee suspension. The availability of a full hearing following an employee's discharge does not relieve the public employer of the duty to provide notice and an opportunity to be heard before an employee is suspended pending discharge.

That employee, said the Court, has a right “to present his side of the story” before a suspension is imposed. *Loudermill, supra*, 470 U.S. at 543 and 546. If the public employer believes that the employee must be suspended before being given the reasons and a chance to respond, then the employer can suspend the employee with pay. *Id.* The Court added that the amount of process due can vary with the circumstances. *See, e.g., Gilbert v. Homar*, 520 U.S. 924 (1997)(pre-suspension hearing not required where police officer had been arrested).

ii. Protections Against Self-Incrimination

The Fifth Amendment protects persons against self-incrimination. For public employees that means that they cannot be forced to answer their employer’s questions under threat of discharge and thereby incriminate themselves. Instead, before being required to answer questions, the employee must be extended immunity from prosecution for answering. That right is commonly referred to as the *Garrity* right, following the United States Supreme Court decision in *Garrity v. New Jersey*, 385 U.S. 493 (1967). As the Court has said, that right protects a public employee “against being involuntarily called as a witness against himself in a criminal prosecution, but also . . . in any other proceeding, civil or criminal, formal or informal, where the answer might incriminate him in future criminal proceedings.” *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973).

D. Fourth Amendment Privacy and Search and Seizure Issues

i. Reasonable Expectations of Privacy

Although the Fourth Amendment does apply to public employers' searches of its employees and their offices, desks and files, a search by a public employer to retrieve work-related materials from, or to investigate alleged misconduct, is permitted if, under all the circumstances, the search is reasonable. *O'Connor v. Ortega*, 480 U.S. 709 (1987).

ii. Drug and Alcohol Testing

Generally, blood tests and urinalysis of public employees cannot be compelled absent individualized suspicion of wrongdoing, because such tests intrude on reasonable expectations of privacy. *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989). That rule does not prevail where positions are deemed safety-sensitive positions, *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), or where drug enforcement is involved. *Von Raab, supra*.

Where such lines are drawn is not always obvious. For example, courts have split on the question of whether the position of public school teachers is a safety-sensitive position or otherwise subject to compelled drug testing. *See, e.g., Knox Cty. Educ. Ass'n v. Knox Cty. Bd. of Educ.*, 158 F.3d 361 (6th Cir. 1998), *cert. denied*, 528 U.S. 812 (1999)(pre-employment urinalysis required for all school employees) and *Patchogue-Medford Cong. of Teachers v. Union Free Sch. Dist.*, 70 N.Y.2d 57, 510 N.E.2d 325 (1987)(New York Court of Appeals struck down compulsory random urinalysis of probationary teachers).