GARCETTI v CEBALLOS: BALANCING EMPLOYEE FREE SPEECH WITH EFFICIENT OPERATION OF SCHOOLS IN THE UNITED STATES OF AMERICA

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In 1969, the U.S. Supreme Court opened a Pandora's Box of constitutional free speech interpretative issues with its pronouncement in Tinker v. Des Moines Independent Community School District that teachers did not shed their constitutional rights at the schoolhouse gate. Since Tinker, the Supreme Court has had several occasions to reconsider the appropriate limits to school employee free expression. In Pickering v Board of Education of Township High School District 205, Will County and Connick v Myers, the Court fashioned a test balancing employee speech on an issue of public concern with the employers' need to efficiently operate and manage their workplaces. The Pickering and Connick test has not been easy for federal courts to interpret since it requires a two-step analysis: whether employee speech concerns a matter of public concern: and, whether public concern speech should nonetheless be prohibited if it interferes with employer efficiency. In 2006, the Supreme Court, in Garcetti v Ceballos, fashioned what appears to be a much simpler employee free speech test with employees having no constitutionally protected free speech if it relates to their job duties. In effect, the Garcetti test has changed free speech analysis from the content of employee speech to the nature of the employment relationship. The Garcetti test has already had a significant impact on employee free speech and this article will discuss those changes.

I Introduction

Free speech as a barrier against government intrusion has been broadly defined in the United States of America (United States) as a right to express ideas,[1] a right to be free from speaking at all,[2] and a right of access to ideas.[3] The Supreme Court, in the wellspring student speech case of *Tinker v Des Moines Independent School District* (*Tinker*),[4] gratuitously conferred free speech rights upon teachers, observing that '[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate'.[5] From this common origin, though, the free speech rights of students and school employees within education settings have developed in different directions.

Tinker created a material and substantial likelihood of disruption test which became the primary benchmark for determining whether schools could control student expression.[6] Later, the Supreme Court, in *Lamb's Chapel v Center Moriches Union Free School District*,[7] introduced forum analysis to free expression so that public school districts were obligated to permit speech commensurate with the nature of the forum it had created. However, the Court recognised that student speech needed to be curtailed by factors other than disruption and the nature of the forum and, almost two decades after *Tinker*, the Supreme Court, in *Hazelwood School District v Kuhlmeier* (*Hazelwood*)[8] and *Bethel School District v Fraser* (*Bethel*),[9] permitted school districts

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to curtail student expression using a reasonableness standard when the school's educational mission and curriculum were at stake.[10]

School employees, on the other hand, are the persons responsible for implementing the school board's educational mission and curriculum and, thus, employee free speech rights came to be framed by a different set of factors. Pursuant to two prominent employee speech cases, *Connick v Myers* (*Connick*)[11] and *Pickering v Board of Education of Township High School District 205, Will County* (*Pickering*),[12] employee expression was not entitled to free speech protection unless it involved a matter of public concern[13] and, even if the speech involved public concern, the speech could still be curtailed if it created disruption or interfered with the efficient operation of the school.[14]

In 2006, the Supreme Court handed down its most recent decision, *Garcetti v Ceballos* (*Garcetti*),[15] addressing a further restriction on employee speech. *Garcetti* touches upon a wide range of legal issues: the viability of the existing *Pickering-Connick* test, the definition of free speech, allocation of the elements of burden of proof between the parties, and the availability of alternative theories of recovery for plaintiffs whose free speech claims are foreclosed after *Garcetti*. The purposes of this article are to explore these issues with special attention to the effect of *Garcetti* on the free speech rights of school employees.

Constitutional restraints on higher education employees apply only at public institutions in the United States. The Fourteenth Amendment to the *Constitution* requires state action and, thus, in the absence of a post-secondary institution's having been incorporated into the state educational system, courts have assiduously refused to accord to private college and university employees in the United States the constitutional rights their counterparts in the public sector enjoy.[16] Private post-secondary institutions, however, are free to incorporate into their contracts with employees rights that are very similar to those enjoyed under the Constitution.[17]

II The Pre-Garcetti, Pickering-Connick Employee Free Speech Test

A *The Pickering-Connick Test*

Over twenty years ago in the non-education case, *Connick v Myers* (*Connick*),[18] the United States' Supreme Court declared the law well-settled that 'a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression'.[19] However, not all employee expressive activities are protected speech. The *Connick* Court, relying on an earlier education case, *Pickering v Board of Education of Township High School District 205, Will County* (*Pickering*),[20] observed that a court's responsibility is to determine the 'balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees'.[21]

In *Pickering*, the Court reversed the discharge of a teacher who had written a letter to a newspaper in connection with 'a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools'.[22] In this case, the teacher alleged in his letter that 'too much money [was] being spent on athletics by the administrators of the school system'.[23] The Court held that 'comments on matters of public concern that are substantially correct'[24] will not support school discipline where the difference of opinion between the teacher and the school board 'as to the preferable manner of operating the school system ... clearly concern[ed] an issue of general public

interest'.[25] However, the letter did contain allegations that the Supreme Court agreed were not accurate, but even as to these 'erroneous public statements ... critical of [the] employer', the Court found them protected by free speech where they were 'neither shown nor [could] be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally'.[26] While the Court was concerned about false employee statements and how they might defame school administrators and board members, the Court determined that 'absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment'.[27] In sum, the Court was not willing to strip teachers of their rights as citizens of their right to criticise schools, observing that '[t]eachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent'.[28]

In order to balance 'the interests of the teacher, as a citizen' with 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees',[29] the Supreme Court created a two-step shifting burden of proof. First, an employee must produce evidence that he or she spoke as a private citizen on subject matter which was a matter of public concern, at which point the burden shifts to the school district to produce evidence that the expressive activity has interfered with the employee's duties or the efficient operation of the school district.

Seventeen years after *Pickering*, the Supreme Court in *Connick* further refined the shifting burden of proof and its balancing test. In *Connick*, the Court determined that an assistant district attorney, who was discharged after refusing to accept a transfer to another section of the criminal court and after distributing a questionnaire 'concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns',[30] had not experienced an infringement of her free speech. In addressing the shifting burden of proof, the Court observed that 'the state's burden in justifying a particular discharge varies depending upon the nature of the employee's expression'.[31] The Court determined that plaintiff's questionnaire in *Connick* touched upon matters of public concern 'in only a most limited sense', and in that context her survey could only more accurately be 'characterized as an employee grievance concerning internal office policy' that the employer 'reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships'.[32] Acknowledging a 'common sense realization that government offices could not function if every employment decision became a constitutional matter',[33] the Court affirmed that 'government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment'.[34] Not only is 'a wide degree of deference to the employer's judgment ... appropriate', but the Court saw no necessity 'for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action'.[35] However, the Court cautioned that 'a stronger showing may be necessary if the employee's speech more substantially involved matters of public concern'.[36]

B *The Garcetti Change*

After 23 years of federal court interpretation and application of the *Pickering*-*Connick* balancing test, the Supreme Court in its most recent free speech employment decision, *Garcetti v Ceballos* (*Garcetti*),[37] has clarified that balance. Noting that the balancing process to date has

largely become a two-dimensional one examining public concern speech and workplace disruption or inefficiency,[38] *Garcetti* resuscitated a third dimension of the balancing process (citizen-job related employee speech) that was originally part of the *Pickering-Connick* balancing process,[39] but one that has been largely overlooked,[40] or at best one that has received only lip service from federal courts.[41] In post-*Garcetti* employee free speech litigation, federal courts, in determining whether the expressive rights of employees are protected speech, will now be required to consider whether an employee's expression represents that of a citizen or the job responsibilities of an employee. Just what effect implementation of this third dimension will have on assigning burden of proof and on the operation of schools is the subject of this article.

III Garcetti: Facts and Supreme Court Decision

A *Facts of Garcetti*

Plaintiff, Richard Ceballos, in his capacity as a calendar deputy district attorney,[42] reviewed at the request of defence counsel alleged inaccuracies in an affidavit that had been the basis for issuance of a search warrant. The result of this investigation was the preparation and sending of a memorandum to his supervisors alleging misrepresentations in the affidavit and recommending dismissal of the criminal case that relied on evidence from the search warrant. Following a sometimes heated meeting between plaintiff and his supervisors, the supervisors decided to proceed to trial with the case. At a trial court hearing regarding the appropriateness of the search warrant, plaintiff was called by the defence to recount his observations about the affidavit, but the trial court rejected the challenge to the warrant. Following these events, plaintiff alleged the following retaliatory actions occurred: (1) his reassignment from his calendar deputy position to a trial deputy position; (2) his transfer to another courthouse; and, (3) his denial of a promotion.

As a result of these allegedly retaliatory actions, plaintiff filed a section 1983 lawsuit claiming his memorandum was protected under the *Pickering-Connick* test. The federal district court, granting summary judgment for the employer, ruled that the memorandum was not protected by free speech because plaintiff wrote it pursuant to his employment duties. The Ninth Circuit reversed, finding that the memorandum's content was protected under the *Pickering-Connick* test.[43] The Supreme Court granted certiorari[44] and in a 5-4 decision[45] reversed the Ninth Circuit.

B *Supreme Court Majority Opinion*

Writing for the majority, Justice Kennedy reiterated the Court's position in *Pickering* and *Connick* that,

> public employees do not surrender all their First Amendment rights by reason of their employment ... [when they] speak as a citizen addressing matters of public concern ... So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively ... [However], [g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions [because] without it, there would be little chance for the efficient provision of public services'.[46]

In determining whether plaintiff's speech in *Garcetti* could be restricted by his employer, the Court declared '[t]he controlling factor [to be] that [plaintiff's] expressions were made pursuant to his duties as a calendar deputy'.[47] What was important for this case was 'that [plaintiff] spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a

pending case, [a factor] distinguish[ing] [plaintiff's] case from those in which the First Amendment provides protection against discipline'.[48] When plaintiff 'went to work and performed the tasks he was paid to perform, [plaintiff] acted as a government employee [and, thus] ... [r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen'.[49] As the Court succinctly framed the issue, '[w]hen a public employee speaks pursuant to employment responsibilities, ... there is no relevant analogue to speech by citizens who are not government employees'.[50] To hold otherwise than that employers '[can] ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission' would 'mandate[] judicial oversight of communications between and among government employees and their supervisors in the course of official business' and would demand permanent judicial intervention 'to a degree inconsistent with sound principles of federalism and the separation of powers'.[51]

Having declared that 'speech pursuant to employment responsibilities' is dispositive as to free speech protection, the Court also carefully crafted what is not dispositive as a finding of protected free expression. The Court in the factual context of *Garcetti* observed that a determination as to the job-relatedness of speech would not depend on whether the plaintiff 'expressed his views inside his office, rather than publicly' or whether 'the memo concerned the subject matter of [plaintiff's] employment'.[52]

The Court concluded its opinion with some recommendations and observations regarding employment practices:

(1) Although public employers can limit employee expressions made pursuant to his or her official responsibilities, the Court suggests that '[g]iving employees an internal forum for their speech will discourage them from concluding that the safest avenue of expression is to state their views in public'.[53]

(2) The Court abstains from considering the extent to which employers can create a comprehensive framework for defining employee duties in cases where there is room for serious debate, but rejects the suggestion that 'employers can restrict employees' rights by creating excessively broad job descriptions'.[54]

(3) The Court does not address how its decision might affect 'academic scholarship or classroom teaching' but recognises that academic freedom may 'implicate additional constitutional interests that are not fully accounted for by the Court's customary employee-speech jurisprudence'.[55]

(4) For employees who seek to expose wrongdoing but whose speech would not be protected under the Free Speech Clause, the Court reminds them of 'the powerful network of legislative enactments – such as whistle-blower protection laws and labor codes – available to them'.[56]

C *Supreme Court Dissenting Opinions*

In their dissenting opinions, Justices Stevens, Souter and Breyer speculated about problems of interpretation and implementation flowing from the majority opinion. Justice Stevens, in his brief opinion, observed that 'it is perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors'.[57]

Justice Souter commented that a 'teacher is protected when complaining to the principal about hiring policy, but a school personnel officer would not be if he protested that the principal

disapproved of hiring minority applicants'.[58] In another observation related to education, Justice Souter queried,

> Would anyone doubt that a school principal evaluating the performance of teachers for promotion or pay adjustment retains a citizen's interest in addressing the quality of teaching in the schools? (Still, the majority indicates he could be fired without First Amendment recourse for fair but unfavorable comment when the teacher under review is the superintendent's daughter.)[59]

From Justice Souter's perspective, the majority places beyond First Amendment protection, 'a building inspector [who] makes an obligatory report of an attempt to bribe him, or ... a law enforcement officer [who] expressly balks at a superior's order to violate constitutional rights he is sworn to protect'.[60] At the heart of the majority's interpretation of employee speech is the fallacy 'that any statement made within the scope of public employment is (or should be treated as) the government's own speech ... and, thus, should be differentiated as a matter of law from the personal statements the First Amendment protects',[61] a fallacy underscored by the realisation that the plaintiff 'was paid to enforce the law by constitutional action', not to promote 'a particular message set by the government'.[62] Most telling, though, is Justice Souter's concern whether the 'majority [meant] to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write "pursuant to official duties"'.[63] In response to the majority's confidence that whistle-blower and other federal and state statutes can fill the gap created by the absence of free speech protection, Justice Souter notes that 'the combined variants of statutory whistle-blower definitions and protections add up to a patchwork, not a showing that worries may be remitted to legislatures for relief'.[64]

Justice Breyer, in his dissent, argued that plaintiff had a professional obligation under the legal Canons of Ethics 'to speak out in certain instances' and a constitutional obligation 'to learn of, to preserve, and to communicate with the defense about exculpatory and impeachment evidence in the government's possession'.[65] As a result, '[w]here professional and special constitutional obligations are both present, the need to protect the employee's speech is augmented, the need for broad government authority to control that speech is likely diminished, and administrable standards are quite likely available'.[66]

IV Analysis and Implications of Garcetti

A *Garcetti and Waters v Churchill*

Garcetti is a sequel to *Waters v Churchill* (*Waters*)[67] where the Supreme Court, in a case addressing the free speech rights of a nurse in a public hospital, noted that 'the government as employer ... has far broader powers than does the government as sovereign'.[68] While government as sovereign needs a compelling interest to punish speech,[69] government as an employer functions in a different capacity.

> Government agencies ... hire employees to help do [particular] tasks as effectively and efficiently as possible. When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain her.[70]

In *Waters*, a nurse who had criticised a cross-training plan in the hospital where she worked challenged her discharge alleging that her comments were protected speech.[71] The Supreme Court remanded the case for a hearing with the trial court directed to look 'to the facts as the

employer *reasonably* found them to be'.[72] As long as 'reasonable employers would disagree about who is to be believed, or how much investigation needs to be done, or how much evidence is needed to come to a particular conclusion, ... many different courses of action will necessarily be reasonable'.[73] To the extent that employers act reasonably in employee discipline, employee speech is not constitutionally protected, although an employee 'may be able to challenge the substantive accuracy of the employer's factual conclusions under state contract law, or under some state statute or common-law cause of action'.[74] Ultimately, the Supreme Court determined that if hospital officials reasonably believed the supervisors' story and thereafter fired plaintiff, the hospital must win, reasoning that '[m]anagement can spend only so much of their time on any one employment decision'.[75]

Nonetheless, the Court in *Waters* remanded the case for a hearing because even though the Court agreed with the hospital that some of the nurse's comments about cross-training (even if a matter of public concern) were disruptive, a question of fact existed as to whether she was discharged 'because of nondisruptive statements about cross-training that [the employer] thought she may have made in the same conversation, or because of other statements she may have made earlier'.[76] *Waters* has been variously interpreted as extending First Amendment procedure into new employment areas[77] or as relaxing the standard for discharging employees by holding employers only to a reasonableness standard in assessing employee statements.[78] What *Waters* did not address was whether employers could short-circuit the employee discipline process by determining that, regardless of public concern or disruption, employees can be disciplined as long as comments are job-related.

B *Post- Garcetti Burden of Proof Issues*

The Supreme Court's decision in *Garcetti* leaves unclear how that case will affect the rights and responsibilities of employees of educational institutions that are parties to lawsuits in post-*Garcetti* litigation. The *Pickering-Connick* approach to free speech protection posits a two-dimensional test whereby the employee has the burden of proving his or her speech is on a matter of public concern and, then, the school district has the burden of proving the impact of the speech on the workplace. The Supreme Court has recognised many types of disruption[79] with both statements or actions having been determined as capable of undermining the employee's superiors' or management's authority.[80] Excluded from free speech protection are personal grievances[81] or hostile and accusatory communications.[82] Where, as in *Garcetti*, an employee is alleging retaliation for the exercise of free speech, the issues of whether speech is on a matter of public concern and whether the speech has effected disruption or inefficiency in the workplace are questions of law to be resolved by the court.[83] In addressing these questions of law decisions, courts have tended to consider speech on a matter of public concern to be that of a citizen while speech not on a matter of public concern is not. However, even speech on a matter of public concern will not be protected if courts find the speech to have a negative impact (efficiency, disruption) on the operation of the employer's business.

Garcetti's emphasis on job-related speech adds a new dimension to burden of proof. The job relatedness of speech prior to *Garcetti* has had only limited importance with courts tending to look at the nature of an employee's job only when employee comments were not made to the public at large.[84] Justice Stevens in his *Garcetti* dissent reflected that this pre-*Garcetti* factor may now, in a 'perverse ... fashion', take on new significance with employees having 'an incentive to voice their concerns publicly before talking frankly to their superiors'.[85] However, Justice Stevens undercuts his own observation by noting that 'constitutional protection [after *Garcetti*] ...

hinge[s] on whether [the employee's words] fall within a job description'.[86] While Justice Stevens might be correct that post-*Garcetti* employees may be tempted to make public statements, and avoid frank discussions with employers, with the thought of increasing the likelihood of speech content being treated as public concern,[87] the issue of job relatedness will be defined by the reasonableness of a job description and employees will not be able to bootstrap public statements into protected speech unless those statements themselves are not job-related. Contrary to Justice Stevens' concern, courts have not been disposed in the past to make dispositive the place where comments are made as to whether free speech protection should be extended.[88]

One issue that *Garcetti* does not make clear and what post-*Garcetti* courts will have to address is which party has the burden of producing evidence of the job relatedness of an employee's speech. The normal pattern is to include within a party's burden of proof those factual elements that the party exerts control over, in which case the post-*Garcetti* burden of producing evidence of job relatedness belongs with the school district since it is the party responsible for employee job duties. Viewing this issue from a different perspective, to assign the burden of proving job relatedness to the employee would, in effect, require the employee to prove a negative, namely, that he or she was not engaging in job related speech. As suggested by the Supreme Court in *Garcetti*, the identification of employee speech as the expression of a citizen is the penumbra that remains after a court has determined and isolated, as question of law, the umbra of the employee's job-related duties. Assuming that the proposed above allocation of burden of proof is accurate, courts, depending on how broadly they permit school districts to define job related duties, may well have handed school districts a new powerful affirmative defence. If the district prevails on this job-related defence, the lawsuit is over without ever having to consider whether employee speech is on a matter of public concern or how the speech has affected the workplace. However, even if the school district loses on job relatedness, it can still win by producing (as it has in pre-*Garcetti* cases) evidence that the speech did not involve public concern or by demonstrating that the speech resulted in inefficiency or disruption in the workplace.

C *Post-Garcetti Definition of Free Speech*

Beyond the question of burden of proof though is the definition of free speech. While the difference between citizen and employee job-related speech has always nominally been subsumed into the two-dimensional *Pickering-Connick* test, *Garcetti*'s contribution to free speech analysis is its bright-line refinement of the definition of protected speech. In the future, employee expression is not protected free speech unless it is both on a matter of public concern and not part of the employee's 'ordinary job duties'.[89]

Garcetti requires that courts in the future 'rationalize the distinction ... between speech offered by a public employee carrying out his or her ordinary job duties and that spoken by an employee acting as a citizen expressing his or her personal views on disputed matters of public import'.[90] In other words, once an employer presents an affirmative defence of job-related speech, federal courts must address and resolve the merits of the kind of speech (citizen vs job-related), with the speech's public concern, with its effect on 'inefficiency or office disruption'[91] becoming relevant only if the speech is determined not to be job-related.[92] In rejecting the Ninth Circuit's *Garcetti* approach that had ignored the citizen vs job-related definition of speech, the Supreme Court brought the Ninth Circuit into line with six other circuits that have at least paid lip service to the citizen-job-related distinction as being part of the *Pickering-Connick* free speech test.[93] However, none of these courts of appeal in their decisions engaged in the 'rationalize[d] ... distinction ...

[regarding] job duties' now required after *Garcetti* nor did any of their decisions address adverse employment relationships in education.[94]

D *Post-Garcetti Education Litigation*

Justice Souter's concern for academic freedom highlights the difficult task that courts will face in applying to education what is now the *Garcetti*-refined, *Pickering-Connick* test for protected employee speech. *Pickering* dealt with school employee speech but not with speech related to the employee's job responsibilities. *Garcetti* and *Connick*, on the other hand, addressed job-related employee speech, but not speech involving educational institutions. Whether courts will be as familiar with the 'tasks [school employees are] paid to perform'[95] as they are with those tasks that employees of the legal system are paid to perform remains to be seen.[96]

Applying the *Garcetti* bright-line test to employees of educational institutions will not be easy. The source of public employee job duties varies, even among employees within the same school, depending on the language of state statutes and state regulations, the terms of collective bargaining agreements and school board contracts, and the practices and policies of local school boards. As a further complication, courts are likely to find that jobs as described are different from jobs as performed.

1 *Effect of Garcetti on Higher Education Academic Freedom*

Both *Garcetti* and *Connick* involved employee on-the-job expression that was determined by the Supreme Court not to be protected speech. The *Garcetti* majority summed up the authority of public employers to restrict employee speech with the observation that '[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created'.[97] Justice Souter, in his dissenting *Garcetti* opinion, lamented that the majority had 'accept[ed] the fallacy ... that any statement made within the scope of employment is (or should be treated as) the government's speech ... and should thus be differentiated as a matter of law from the personal statements the First Amendment protects'.[98] Whether the majority's upholding the authority of public employers to restrict employee speech presages Justice Souter's dire prediction that 'academic freedom in public colleges and universities'[99] is in peril gives focus to the unique place of free speech in educational institutions.

The concept of academic freedom as developed in the United States applies to higher education[100] and includes not only the classroom instruction, but also a broad range of other issues.[101] Just how *Garcetti* might affect the relationship between the administration and faculty in higher education is not clear. A quarter-century ago, the Supreme Court held in *NLRB v Yeshiva University* (*Yeshiva*)[102] that the faculty in a private university were exempt from the National Labor Relations Act and, thus, could not form a union because the faculty's control over academic matters, including what courses would be offered, when they would be scheduled, and to whom they would be taught, as well as teaching methods, grading policies, matriculation standards, and which students would be admitted, retained and graduated, represented supervisory and managerial control. However, in his dissent in *Yeshiva*, Justice Brennan, cautioned that academic freedom as a governance function depends on faculty 'not [being] accountable to the administration'.[103]

> Faculty members are judged by their employer on the quality of their teaching and scholarship, not on the compatibility of their advice with administration policy... Faculty

> criticism of administration policies, for example, is viewed not as a breach of loyalty, but as an exercise in academic freedom. So, too, intervention by the university administration in faculty deliberations would most likely be considered an infringement upon academic freedoms. Conversely, university administrations rarely consider themselves bound by faculty recommendations.[104]

While the *Garcetti* majority acknowledged that the Court's decision might 'implicate additional constitutional interests [involving academic freedom] that are not fully accounted for by the Court's customary employee-speech jurisprudence',[105] the majority provided no insight as to 'whether the analysis [conduct[ed] in *Garcetti*] ... would apply in the same manner to a case involving speech related to scholarship or teaching'.[106] Adding to the confusion is that, '[w]hile academic freedom is well-recognized, its perimeters are ill-defined and the case law defining it is inconsistent'.[107] Thus, if higher education faculty, like the calendar deputy in *Garcetti*, '[go] to work and perform[] the tasks [they are] paid to perform', does this mean that '[r]estricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties a [faculty member] might have enjoyed as a private citizen[?]'.[108]

Lack of clarity regarding the parameters of academic freedom regarding higher education faculty appears compounded by the difficulty in distinguishing between the rights of a citizen and the responsibilities of a government employee. The *Garcetti* majority was not disposed to disturbing existing precedent whereby government employees have the 'possibility of First Amendment protection [where their activity] ... is the kind of activity engaged in by citizens who do not work for the government'.[109] Thus, Supreme Court decisions finding free speech protection for 'writing a letter to a local newspaper' as in *Pickering* or 'discussing politics with a co-worker'[110] as in *Rankin v McPherson* (*Rankin*)[111] were cited as examples of the speech of citizens. However, a government employee speaking pursuant to employment responsibilities would not be protected after *Garcetti* because 'there is no relevant analogue to speech by citizens who are not government employees'.[112] The *Garcetti* majority's conclusion that its decision applies 'only to the expressions an employee makes pursuant to his or her official responsibilities'[113] is not particularly useful in determining when higher education faculty speak as a citizen or as an employee. Indeed, the post-*Garcetti* challenge for higher education is not whether faculty can write letters to the editor or discuss politics with colleagues, but whether the content of one's scholarship and teaching constitutes a job-related function making a faculty member subject to employer scrutiny and disciplinary action. The majority's acknowledgement that 'academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence'[114] is somewhat disquieting where these 'additional constitutional interests' (presumably, academic freedom) are themselves not well-defined. Given the federal courts willingness in the past to permit limitation or denial of faculty members' free speech claims as to orders to change grades,[115] decisions as to acceptable classroom materials,[116] and interruptions of a faculty member's class,[117] one must query what additional limitations will be found job-related after *Garcetti.*

2 *Effect of Garcetti on Kindergarten to Grade 12 (K-12) Employees*

Virtually no attention was directed by the *Garcetti* majority or dissent toward employee expression in K-12 education. Although academic freedom does not apply to that level of education, a significant number of cases, nonetheless, are reported each year involving claims by K-12 employees that their expression is protected under the *Pickering*-*Connick* test. Higher education scholarship and teaching afford a powerfully charged flashpoint for post-*Garcetti* job-

related analysis because the expression associated with such faculty scholarship and teaching is reflective of, and coextensive with, the duties for which higher education faculty are hired. However, the free expression issue for K-12 employees, while not as dramatic as academic freedom, presents a minefield of interpretive problems.

Compared with higher education where the difference in job title (assistant professor, associate professor, professor) has little, if any, impact on the job-related nature of the functions of scholarship and teaching, K-12 employees can perform their job functions under a wide range of job titles that may have an equally wide range of job descriptions. Thus, public school districts hire persons to fill positions with a wide range of job titles, all of which have job descriptions that may overlap or conflict with similar titles and descriptions among schools in the same district, among school districts within the same state, and among school districts from one state to another. The myriad of titles utilised for school employees reflecting authorisation from state statutes or regulations, collective bargaining contracts, or local board policies (eg, teacher, head or master teacher, supervisor, coordinator, director, specialist, administrator) all carry with them job descriptions that may, or may not, accurately reflect the responsibilities actually being performed by employees occupying those job titles.[118]

The K-12 free expression analysis expected of courts in a post-*Garcetti* world is a daunting one. Applying the *Garcetti* job-related analysis to existing methods of analysis may present unique challenges for the courts.

The Supreme Court in *Pickering* acknowledged a category of pre-*Garcetti* public employee speech not protected by the First Amendment where the employment relationship represents 'the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning'.[119] While such a relationship has a tantalising tangential connection to *Garcetti*'s job-related speech analysis, it has been applied only rarely to central office or administrative employees and, then, only where disclosure of information would be considered disruptive to shared decision making by high level school employees.[120] Nothing in *Garcetti* would suggest that cases raising employment issues of 'personal loyalty and confidence' could not be subsumed into the *Garcetti* analysis as a kind of job-related speech not entitled to free speech protection. In essence, if the nature of the close-working relationship defines the job-relatedness of the speech, one can argue that nothing will have changed in such cases, but the same cannot necessarily be said for other litigation.

In *McGreevy v Stroup* (*McGreevy*), [121] the Third Circuit found that the following three complaints by a school district school nurse constituted expression on a matter of public concern: (1) her contacting the Bureau of Compliance of the Pennsylvania Department of Education that two boys with disabilities were in danger of being physically injured, resulting in a meeting with the principal, plaintiff school nurse and a Bureau representative, with a memorandum of the meeting placed by the principal in plaintiff's personnel file;[122] (2) her informing the Pennsylvania Department of Health that unlicensed pesticide spraying had occurred at the school with a number of students and teachers becoming ill, information that led to an investigation and ultimately the Department's levying a fine on the District; and (3) her informing the Department of Health that she had been incorrectly listed as a middle school nurse, resulting in an investigation by the Pennsylvania Department of the Auditor General, Office of Special Investigations, and an eventual order by the Department of Health to withhold future reimbursements from the school district for school nurse services.

In reversing a federal district court's summary judgment for the school district, the Third Circuit not only found the school district's retaliation against plaintiff for her complaints to be

a violation of free speech, but held that defendant school officials were not entitled to qualified immunity. What the Third Circuit did not address was whether plaintiff was making her complaints as a private citizen or as part of her job-related duties. Arguably, a school nurse's job functions could include the health and safety of all students in the school and, thus, at least comments 1 and 2 might be considered to be job-related. Item 3 presents a different job-related issue.

McGreevy highlights a dilemma facing post-*Garcetti* courts where the job-related responsibilities of a position, such as a school nurse, may at one level be defined by a school district's job title and job description, but at another level by ethical responsibilities imposed by an authority apart the school employer, such as a state professional licensing board. Justice Breyer in his *Garcetti* dissent suggested that a professional obligation under a Canon of Ethics 'to speak out in certain instances'[123] may augment the need to protect public concern speech because 'the need for broad government authority to control that speech is likely diminished, and administrable standards are quite likely available'.[124] Even assuming, hypothetically, that the school nurse's comments in *McGreevy* could be considered job-related, Justice Breyer would argue that they could still be entitled to free speech protection, in the absence of disruption or workplace efficiency, because the reason for, and content of, the comments can be attributed to a factor other than the employer's requirement for job-related performance (namely, a professional code of ethics).[125]

While the *Garcetti* majority cautioned employers about 'excessively broad job descriptions'[126] as a subterfuge for limiting free expression, it overlooked the fact that employee responsibilities are framed by more than just the language of the employer. State statutes of regulations may require that school employees report certain kinds of offences, as for example child abuse, and, thus, one would argue that such reporting becomes part of every school employee's job description.[127]

Now that post-*Garcetti* courts can no longer just assume that expression on a matter of public concern represents expression as a citizen and must make a separate job-related determination, those courts will have to wrestle with the various sources of authority that may play a role in determining an employee's job duties. The challenging future issue for cases such as *McGreevy* will be the extent to which an employee's employment responsibilities include functions other than those job-related obligations imposed by the employer and, if so, whether these non-job-related obligations are sufficient to circumvent *Garcetti*'s job-related constraint on free speech protection.

E *Future Interpretation of Garcetti*

However, whether lower court analysis of employment responsibilities will be as carefully orchestrated as suggested by the *Garcetti* majority is problematic if the recent Eighth Circuit decision, *Bailey v Department of Elementary and Secondary Education* (*Bailey*),[128] is an indication. *Bailey* is the first post-*Garcetti* federal court of appeals free speech employment decision to cite to *Garcetti*. In *Bailey*, a former contract employee hired by the Department as a consulting psychologist to review disability cases was fired following his criticism of the Department's implementation of new procedures permitted by the U.S. Social Security Administration. The plaintiff-former employee alleged retaliation for his exercise of free speech in two separate meetings with his supervisor and other management personnel regarding the program and other employees' implementation of the program, and for writing a memo to his supervisor making a complaint against another employee. While the *Bailey* court cites to *Garcetti* for the principle that, 'when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their

communications from employer discipline',[129] the Eighth Circuit nonetheless spends virtually all of its opinion analyzing plaintiff's speech in light of the *Pickering-Connick* balancing test. Thus, rather than simply determining whether matters to which the plaintiff's objected were part of his job and, then if finding them job-related, ending the case at that point, the Eighth Circuit labors on to find, even though the plaintiff's comments were public concern, that the plaintiff's discharge was warranted because of the disruptive impact on the workplace. At face value, one reading of *Bailey* is that *Garcetti* has changed little in the way that lower courts analyse the free speech claims of employees. In fairness though, the facts in *Bailey* antedated *Garcetti* and, thus, the Eighth Circuit needed to address plaintiff's review challenges and the existing law prior to *Garcetti.* Even if this explains the *Bailey* court's necessity to discuss the *Pickering-Connick* test, the court of appeals missed a golden opportunity to comment on how *Garcetti* would impact similar cases in the future.

However, if *Bailey* is a bellwether of how lower courts will interpret and apply *Garcetti* in the future, one has reason to suspect that not much will change. Despite the Supreme Court's clear indication in *Garcetti* that a finding of speech as being job-related is sufficient to uphold employee discipline, *Bailey* suggests that courts may be reluctant to depart from the *Pickering-Connick* test. Thus, even if an employer presents evidence that an employee's comments were job-related, courts may still invest time determining whether the employee's speech was on a matter of public concern and then require that employers present evidence of the speech's impact on workplace efficiency or disruption. If job-relatedness under *Garcetti* is treated simply as another part of the *Pickering-Connick* balancing test, one can argue that the significance attached by the Supreme Court to employer discipline and job-related speech has been diminished, if not dissipated.

What *Garcetti* permits is for courts to resolve a case on a motion for summary judgment where the employer produces evidence that an employee's statements were job-related. While some pre-*Garcetti* courts understood that this possibility existed, the question of job relatedness generally was treated as part of the *Pickering-Connick* balancing test. In *Echtenkamp v Loudon County Public Schools* **(***Echtenkemp***)**,[130] a Virginia federal district court determined, on defendant's motion for summary judgment, that a school district's discipline of a school psychologist who criticised a number of changes to special education policies proposed by the Assistant Superintendent of Pupil Services might be a free speech violation. Among the employee's criticisms was **'**an email to the Eligibility Coordinators and her colleagues detailing how a directive from [the Assistant Superintendent] regarding § 504 of the Rehabilitation Act was overly restrictive, contrary to an earlier memorandum by the Department of Education, and contrary to law'.[131] Although the court found this criticism of **'**the [school district's] special education policies [to be] a matter of public concern',[132] it determined that the psychologist was entitled to a trial on the free speech question, but with a *Garcetti***-**like cautionary note that **'**stat[ing] a claim that her speech involved matters of public concern does not, of course, ultimately resolve the difficult and determinative question, not addressed by either party nor made clear in the complaint, whether plaintiff spoke in her role as a private citizen or in her role as a public employee'.[133] While the *Echtenkamp* court's acknowledgement of the significance of the citizen-public employee status is a promising template for post**-***Garcetti* courts, the issue of job relatedness is a question of law that needs to be resolved independently from the *Pickering-Connick* balancing test. Presumably, if this case were to arise after *Garcetti*, a determination that plaintiff made her comments 'in her role as a public employee' would end the lawsuit without a court ever having to address the public concern nature of an employee's speech.

F *Other State Remedies*

For those employees whose speech is determined to be job-related and whose free speech claim is at an end, the possibility exists, according to the *Garcetti* majority, of state remedies. In particular, the Court references state 'whistleblower' statutes, a remedy that Justice Souter in his dissent referred to as 'a patchwork'.[134] Given the considerable variations among the various state statutes as to whom they apply and at what point they can be invoked, one can only speculate that the degree of protection will depend on the geography of the employee's location.[135] Litigation under state whistleblower statutes has, indeed, produced 'a patchwork' of results, something that will probably do little to encourage K-12 employee comments about, or confrontation with, employers.[136]

Another state remedy to consider whenever oral or written words are involved is defamation, an issue that the Supreme Court had wrestled with in *Pickering***.**[137] Defamation, an amalgamation of the common law quasi-intentional torts of libel and slander, involves putative injury to reputation from published untrue statements.[138] Defamation interacts with free speech in two kinds of fact situations — when an employee alleging a constitutional free speech violation also alleges a defamation claim, and when an employer alleges a defamation claim against the employee making a free speech claim. The second of these two fact patterns is more interesting and a court must decide whether an employer's defamation lawsuit (or threat of such a lawsuit) impermissibly chills a plaintiff's free expression. In *Columbo v O'Connell*,[139] the Second Circuit Court of Appeals upheld a school superintendent's right to threaten a defamation claim against a person filing a recall petition against the superintendent for alleged **'**illegal and unethical behavior' because it is well-established 'that public employees do not check all of their First Amendment rights at the door upon accepting public employment'.[140] As long as a school employee (the superintendent in *Columbo*) sued in his private, as opposed to official, capacity, **'**the right of a private individual "to sue and defend in the courts" is itself protected by the First Amendment because it is the "right conservative of all other rights [which] lies at the foundation of orderly government"'.[141]

V Conclusion

Like the Supreme Court's earlier decisions in *Hazelwood* and *Fraser* that have had sometimes unanticipated impact on the student free speech,[142] the effects of *Garcetti* on employee free speech will take time to develop. Future litigation will need to refine procedural issues, such as the allocation of the elements of burden of proof and the authority of trial courts to resolve job-relatedness as a question of law on a motion for summary judgment, as well as the substantive questions of the definition of free speech and the relationship between job-relatedness and the *Pickering*-*Connick* test.

One feature that works in favor of future interpretation is that the majority's decision in *Garcetti* had no concurring opinions. Often in Supreme Court decisions, the votes of Justices authoring concurring opinions are necessary to support the majority opinion, but contain limiting language that cast shadows on the meaning of the opinion identified as that of the Court. As reflected in this article, the majority opinion in *Garcetti* has enough interpretive issues, but at least courts in the future will not have to sift through several opinions supporting a majority conclusion to distill what the Court intended.[143]

Of special note will be the judiciary's interpretation of job-related speech and academic freedom in higher education. Given that federal courts have already removed some areas from

academic freedom, the question for the future is whether universities will be permitted to further tighten control over the classroom.

Alternative state remedies that are recognised by the Supreme Court for those persons no longer protected by free speech will be limited by requirements in various states. Educational employees may well find themselves subject to the vagaries of geography with some states permitting claims under state laws that do not exist to the same extent in other states.

Keywords: free speech; public concern speech; job descriptions; job-related speech; whistle-blower statutes; professional responsibility.

Endnotes

1. See *Board of Regents of University of Wisconsin System v Southworth*, 529 U S 217 [142 *Education Law Reporter* 624] (2000) (upholding public university's collecting fees from all students to support wide range of messages as long as the university is neutral with regard to the content of the messages); *Widmar v Vincent*, 454 U S 263 [1 *Education Law Reporter* 13] (1981) (public university could permit use of its facilities to student groups to present their messages but could not prohibit use based on the basis of the religious content of the speech).
2. See *West Virginia Bd. of Ed. v Barnette*, 319 U S 624, 633 (1943) (invalidating state statute requiring that all students participate in the Pledge of Allegiance to the flag where students' with religious objections to pledging allegiance would be disciplined if they failed to participate; 'the State that employs a flag as a symbol of adherence to government as presently organized. It requires the individual to communicate by word and sign his acceptance of the political ideas it thus bespeaks. Objection to this form of communication when coerced is an old one, well known to the framers of the Bill of Rights.').
3. See *Board of Educ., Island Trees Union Free School Dist. No. 26 v Pico***,** 457 U S 853, 867 [4 *Education Law Reporter* 1013] (1982) (invalidating school board's removal of books from school library on the basis of political content, noting that
   > the Constitution protects the right to receive information and ideas. This right is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution, in two senses. First, the right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them: □The right of freedom of speech and press ··· embraces the right to distribute literature, and necessarily protects the right to receive it.) (citations omitted).
4. 393 U S 503 (1969) (holding that students wearing black armbands at school constituted protected private speech in the absence of evidence that the speech created a material and substantial likelihood of disruption).
5. Ibid 506.
6. Ibid 513 ('But conduct by the student, in class or out of it, which for any reason-whether it stems from time, place, or type of behavior-materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech'.).
7. 508 U S 384 [83 *Education Law Reporter* 30] (1993) (holding that a school district violated free speech clause of First Amendment by denying church access to school premises solely because film dealt with the subject from a religious standpoint).
8. 484 U S 260 [43 *Education Law Reporter* 515] (1988) (upholding school principal's imposing reasonable publication restrictions on school newspaper that was part of the school's journalism course).
9. 478 U S 675, 681 [32 *Education Law Reporter* 1243] (1986) (upholding discipline of student for vulgar speech at voluntary school assembly where sexual innuendoes in the speech were contrary to the school's fundamental values of 'habits and manners of civility').

10. For a number of perspectives as to how *Hazelwood* and *Fraser* have affected student speech in schools, see Timothy Zick, 'Space, Place, and Speech: The Expressive Topography' (2006) 74 *George Washington Law Review* 439; Brett Thompson, 'Student Speech Rights in the Modern Era' (2006) 57 *Mercer Law Review* 857; Ralph Mawdsley, 'The Profane, The Offensive, and The Religious: The Use of Hazelwood to Prohibit Religious Activity in Public Schools' (2005) 195 *Education Law Reporter* 425.
11. 461 U S 138 (1983).
12. 391 U S 563 (1968).
13. Speech is considered to be on a matter of public concern if it relates to 'any matter of political, social, or other concern to the community'. *Holland v Rimmer,* 25 F 3d 1251, 1254 (4th Cir, 1994). To determine whether speech involves a matter of public concern, courts examine the 'content, context, and form of the speech at issue in light of the entire record'. *Urofsky v Gilmore*, 216 F 3d 401, 406 (4th Cir, 2000).
14. For a discussion of this area in pre-*Garcetti* articles, see Natalie Rieland, 'Government Employees' Freedom of Expression is Limited: The Expression Must Touch on Matters of "Public Concern" or Be Intended to Educate or Inform the Public About the Employer to Warrant First Amendment Protection: *City of San Diego V Roe*' (2005) 44 *Duquesne Law Review* 185; Marni M. Zack, 'Public Employee Free Speech: The Policy Reasons for Rejecting a Per Se Rule Precluding Speech Rights' (2005) 46 *Boston College Law Review* 893.
15. 126 S Ct 1951 (2006).
16. See, eg, *Centre College v Trzop*, 127 S W 3d 562 [185 *Education Law Reporter* 1074] (Ky, 2004) (private college not held to the same standard of due process as public colleges).
17. See *Franklin v Leland Stanford, Jr. Univ*., 218 Cal Rptr 228 [27 *Education Law Reporter* 525] (Cal Ct App, 1985) (upholding dismissal of tenured faculty member as a result of 1971 speeches that encouraged physical damage to the university's computation center and which prolonged student disruption, but doing so after applying the *Pickering v Bd. of Educ.,* 391 U S 563 (1968) free speech balancing test and the *Mt. Healthy City Bd. of Educ. v Doyle*, 429 U S274 (1977) mixed motive test)
18. 461 U S 138 (1983).
19. Ibid 142.
20. 391 U S 563 (1968).
21. Ibid 568.
22. Ibid 564.
23. Ibid.
24. Ibid 570.
25. Ibid 571.
26. Ibid 572-73.
27. Ibid 574.
28. Ibid 572.
29. Ibid 568.
30. *Connick*, 461 U Sat 141.
31. Ibid 150.
32. Ibid 154.
33. Ibid 143.
34. Ibid 146.
35. Ibid 152.
36. Ibid.
37. 126 S Ct 1951 (2006).
38. Cf ibid 1958-59 (Supreme Court's interpretation of *Connick* limiting discipline of employee engaged in speech as a employee to that which is 'necessary for their employers to operate efficiently and effectively') with ibid 1959-60 (Ninth Circuit's interpretation in *Garcetti* errantly extended free speech protection to 'expressions made pursuant to his expressions as a calendar deputy'.).

39. *Tinker v Des Moines Independent School District* (*Tinker*) 393 U S 503 (1969) (holding that students wearing black armbands at school constituted protected private speech in the absence of evidence that the speech created a material and substantial likelihood of disruption).
40. See, eg, *Ceballos v Garcetti*, 361 F 3d 1168, 1174-75 (9th Cir, 2004) (rejecting the notion that 'a public employee's speech is deprived of First Amendment protection whenever those views are expressed, to government workers or others, pursuant to an employment responsibility' but without considering whether the plaintiff's speech was made in the capacity of a citizen); *McGreevy v Stroup*, 413 F 3d 359 [199 *Education Law Reporter* 593] (3d Cir, 2005) (finding that three complaints made by a school nurse constituted public concern speech without considering whether the nurse had spoken as a citizen).
41. See, eg, *Weintraub v Bd. of Educ. of City of New York*, 423 F Supp 2d 38, 50 [208 *Education Law Reporter* 435] (E D N Y, 2006) (upholding employee's private complaints about discipline affecting his classroom in denying school district's motion for summary judgment because '[a] public employee speaks as a citizen on a matter of public concern' as long as the speech 'relates to any matter of political, social, or other concern to the community').
42. Calendar deputies in California oversee all of the cases handled by a district attorney's office in a particular judge's courtroom and supervise the trial deputies working there. In *Garcetti*, plaintiff as a calendar deputy would have the authority to,

    > review any of the Office's cases coming in to that courtroom for arraignment, [make] plea bargain offers, ... attempt to settle the cases, handle preliminary motions and discovery, ... assign [a case] to one of the trial deputies who reported to him ... [w]hen it appeared that a case was not going to settle, ... supervise the deputy handling it and assist him or her in preparation for trial, if necessary, [and] ... mentor the junior deputies he supervise[d], teaching them how to be good prosecutors.

    (Brief of Association of Deputy District Attorneys and California Prosecutors Association As Amici Curiae in Support of Respondent, *3).
43. 361 F 3d 1168 (9th Cir, 2004).
44. 543 U S1186 (2005).
45. Justice Kennedy delivered the opinion of the Court joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. For the four dissenting Justices, Justice Stevens authored a brief opinion, Justice Souter wrote an opinion joined by Justices Stevens and Ginsburg, and Justice Breyer filed a separate opinion.
46. *Garcetti*, 126 S Ct 1951, 1957, 1958.
47. Ibid 1959, 1960.
48. Ibid 1960.
49. Ibid.
50. Ibid 1961.
51. Ibid.
52. Ibid 1959.
53. Ibid.
54. Ibid.
55. Ibid 1962.
56. Ibid. The division between constitutional free speech and state whistle-blowing statutes is not as clear as the Court suggests. See, eg, *Lapinski v Bd. of Educ. of Brandywine Sch. Dist.,* 163 Fed Appx 157 [207 *Education Law Reporter* 71] (3d Cir, 2006) (holding that principal's unspecified 'whistle-blowing' letters were protected by free speech).
57. Ibid 1963 (Stevens J, dissenting).
58. Ibid 1965 (Souter J, dissenting). Justice Souter refers specifically to *Givan v Western Consol. Sch. Dist*., 439 U S 410 (1979) where a teacher fired for complaining to his principal about the racial composition of the school's administrative, cafeteria, and library staffs was ordered reinstated because freedom of speech 'is [not] lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public. We decline to adopt such a view of the First Amendment' (415-6).

59. Ibid 1965.
60. Ibid 1967.
61. Ibid 1968.
62. Ibid 1969.
63. Ibid, citing to *Grutter v Bollinger*, 539 U S 306, 329 [156 L Ed 2d 304] (2003).
64. Ibid 1970. See notes 8-10 for comprehensive listing of state whistle-blower statutes.
65. Ibid 1974 (Breyer J, dissenting).
66. Ibid 1975.
67. 511 U S661 (1994).
68. Ibid 671.
69. See, eg, *Freedman v Md*., 380 U S51 (1965) (invalidating state requirement that movies be submitted to censors as a prior restraint violating free speech).
70. Ibid 675.
71. Part of the confusion in *Waters* is determining what plaintiff actually said. The employer alleged that plaintiff's (Churchill) complained about the obstetrics department attempting to dissuade another nurse from transferring there and about her supervisor's (Waters) attempt to get rid of her, while plaintiff alleged that she only criticized the cross-training program 'because it was designed not to train nurses but to cover staff shortages': ibid 665-66.
72. Ibid 678 (emphasis in orginal).
73. Ibid.
74. Ibid.
75. Ibid 680.
76. Ibid 682.
77. See, eg, Charles Hemingway, 'A Closer Look at *Waters V Churchill* and *United States v National Treasury Employees Union*: Constitutional Tensions Between the Government as Employer and The Citizen as Federal Employee' (1995) 44 *American University Law Review* 2231, 2294 ('*Waters* expands federal employee due process rights while attempting to reserve for public managers the ultimate ability to determine whether public employee speech detracts from the Government's ability to perform its mission'.).
78. See, eg, Jeffrey S. Strauss, 'Dangerous Thoughts? Academic Freedom, Free Speech, and Censorship Revisited In A Post-September 11th America' (2004) 15 *Washington University Journal of Law and Policy* 343, 359 ('situations exist in which the employer must rely on third-party reports of the employee's conduct. The Court has generally acknowledged that, although reliance of this sort is tantamount to decision-making based on hearsay, the evidentiary rules of ordinary judicial procedure are not reasonably applicable to everyday life or personnel decisions'.).
79. 'We have previously recognized as pertinent considerations whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationship for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties': *Rankin v McPherson,* 483 U S 378, 388 (1987) (citing *Pickering*, 391 U S 563, 570-73).
80. See, eg, *Waters v Churchill*, 511 U S 661, 680-81 (1994). In *Pickering*, where the Board of Education claimed damage to its professional reputation, it feared an undermining of authority in the form of 'controversy and conflict among the Board, teachers, administrators, and the residents of the district': *Pickering*, 391 U S 563, 570. The Court noted a lack of evidence to support an allegation of damage to reputation, but seemed to suggest that, if substantiated, such a finding would be significant in a review of the employer's actions: ibid. See also, *Pickering*, 391 U S 563, 569-70 (suggesting statements impeding the maintenance of discipline might be actionable by the public employer).
81. See *Connick*, 461 U S, 153-54.
82. See, eg, *Farhat v Jopke*, 370 F 3d 580 [188 *Education Law Reporter* 108] (6th Cir, 2004) (upholding summary judgment for school district and finding confrontational comments of janitor not to be protected speech where janitor's routine response referred to others as 'sick and demented', 'ignorant and abusive', 'mentally ill', 'mindless criminals', 'liars', 'lazy and pampered', 'alcoholic', 'insane', 'ignorant', 'dysfunctional', 'mentally ill freak', and 'jackass'.).

83. See *Kincade v City of Blue Springs, Mo*., 64 F 3d 389, 395 (8th Cir, 1995), *cert. denied*, 517 U S1166 (1996) (finding that discharged city engineer's remarks that the City had paid local developers a substantial amount of money for work on the dam that had not been done and did not affect the efficient operation of the employer constituted questions of law to be resolved by the courts rather than juries). See also, *Howard v Columbia Pub. Sch. Dist*., 363 F 3d 797, 801 [186 *Education Law Reporter* 622] (8th Cir, 2004), cert. denied, 543 U S 956 (2004) (upholding termination of nontenured assistant principal who spoke out in favor of aggressive literacy training and against the exclusionary treatment of minority, disabled, disadvantaged, and special needs children where, even assuming the comments were on a matter of public concern, the assistant principal was not able to produce evidence that her termination was motivated by her comments).
84. See, eg, *Bausworth v Hazelwood Sch. Dist*., 986 F 2d 1197, 1199 (8th Cir, 1993) (finding no speech on a matter of public concern where the teacher received a question from a student's parent, repeated the question to her superior, received the superior's response, and repeated the answer to the parent; while the content of the teacher's speech was a matter of concern to the parent', the speech's form and context show [the teacher] conveyed the speech in the course of acting as a school district employee'.). But see, *McVey v Stacy*, 157 F 3d 271, 279, 280 (4th Cir, 1998) and *Cromer v Brown*, 88 F 3d 1315, 1326 (4th Cir, 1996) (holding that private protests can be protected speech).
85. *Garcetti*, 126 S Ct 1951, 1963 (Stevens J, dissenting).
86. Ibid.
87. For examples of cases where the nature of the forum in which comments were made was considered dispositive, cf *Finch v Fort Bend Indep. Sch. Dist.,* 333 F 3d 555, 564 [178 *Education Law Reporter* 545] (5th Cir, 2003) (school administrator's presentation of school choice to school board and her superiors not public concern speech where the comments were not actually aired or considered in any 'widespread debate in the community') with *Harris v Victoria Independent School Dist***.,** 168 F 3d 216, 222 **[**132 *Education Law Reporter* 662**]** (5th Cir, 1999) (teachers' comments at meeting that had purpose of checking school's progress on implementing improvement plan constituted public concern free speech where 'plaintiffs spoke at the meeting as elected representatives of the faculty, and they simply communicated the views of the faculty to the administration in compliance with their duties as committee members'.).
88. Cf *Rankin v McPherson,* 483 U S 378, 388-92 (1987) (holding public employee's discharge was violative of First Amendment when based on comment by employee as a private citizen on a matter of public concern made at work) and *Cockrel v Shelby County Sch. Dist*., 270 F 3d 1036 [158 *Education Law Reporter* 551] (6th Cir, 2001) (reversing summary judgment for the school district and remanding for trial as to an elementary school teacher whose inviting a person to speak in her class on industrial hemp, an illegal substance in the state, related to a matter of public concern, where the only public involvement represented letters from parents expressing concern about the teacher) with *Finch v Ft. Bend Indep. Sch. Dist*., 333 F 3d 555 [178 *Education Law Reporter* 45] (5th Cir, 2003) (no public concern speech as to comments by middle school principal as to creation of a school within a school where the comments had not been aired or considered in any widespread debate in the community) and *DiMeglio v Haines,* 45 F 3d 790, 805 (4th Cir, 1995) (recognising that speech by a public employee outside the workplace was made in the employee's official, not private, capacity).
89. See, eg, *Buazard v Meridith,* 172 F 3d 546, 548 (8th Cir, 1999) holding that a police officer's comments about alleged prisoner mistreatment were not protected free speech. ('When a public employee's speech is purely job-related, that speech will not be deemed a matter of public concern ···· Unless the employee is speaking as a concerned citizen, and not just as an employee, the speech does not fall under the protection of the First Amendment'.)
90. *Ceballos v Garcetti*, 361 F 3d 1168, 1187 (9th Cir, 2004) (O'Scannlain J, dissenting).
91. Ibid 1179.
92. See *Garcetti*, 126 S Ct 1951, 1960, 1961.

> 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 communications from employer discipline ... When an

employee speaks as a citizen addressing a matter of public concern, the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences. When, however, the employee is simply performing his or her job duties, there is no warrant for a similar degree of scrutiny.

93. See, eg, *Gonzalez v City of Chicago*, 239 F 3d 939, 942 (7th Cir, 2001) ('[T]here are still limits in public employment as to what can be fairly characterized as speech 'as a citizen' on a matter of public concern. Speech exercised by a public employee in the course of his employment will rarely fit the mold of private speech by a citizen'.); *Urofsky v Gilmore*, 216 F 3d 401, 407 (4th Cir, 2000) (en banc) ('[C]ritical to a determination of whether employee speech is entitled to First Amendment protection is whether the speech is 'made primarily in the [employee's] role as citizen or primarily in his role as employee'. ') (quoting *Terrell v Univ of Texas Sys. police*, 792 F 2d 1360, 1362 (5th Cir, 1986)); *Buazard v Meridith*, 172 F 3d 546, 548-49 (8th Cir, 1999) ('Unless the employee is speaking as a concerned citizen, and not just as an employee, the speech does not fall under the protection of the First Amendment ··· [T]here is no indication that[the plaintiff], in making, or refusing to change, his statements, was taking any action as a concerned citizen, rather than simply as an employee following orders or refusing to follow them'.); *Gillum v city of Kerrville*, 3 F 3d 117, 120-21 (5th Cir, 1993) ('[W]e d[o] not focus on the inherent 'importance' of the subject matter of the speech, but on the extent to which the terminated employee spoke as a citizen or employee····'); *Thomson v Scheid*, 977 F 2d 1017, 1020 (6th Cir, 1992) ('First Amendment protection extends to a public employee's speech when he speaks as a citizen on a matter of public concern, but does not extend to speech made in the course of acting as a public employee'.); *Koch v Hutchinson*, 847 F 2d 1436, 1442-43 (10th Cir, 1988) (en banc) (declining 'to establish a per se rule exempting speech made in the course of an employee's official duties', but viewing 'that fact as militating against a finding that the speech addressed matters of public concern' and noting that 'it is a significant factor in the balancing required under *Pickering*').
94. *Gonzalez v City of Chicago*, 239 F 3d 939 (holding that reports about police misconduct prepared while police officer worked as civilian employee for professional standards department were not speech entitled to First Amendment protection); *Urofsky v Gilmore*, 216 F 3d 401 (finding no violation of free speech as to Virginia statute restricting state employees from accessing sexually explicit material on computers that were owned or leased by the state where any right of academic freedom above and beyond the First Amendment rights to which every citizen is entitled inheres in a university, not in individual professors); *Buazard v Meridith*, 172 F 3d 546, (holding that police officer's statements about his conversations regarding alleged prisoner mistreatment were not protected by First Amendment); *Gillum v city of Kerrville*, 3 F 3d 117 (upholding termination of police officer whose continued investigation of police corruption after being told to submit his report and to cease his personal investigation represented employee, as opposed to citizen, speech that had become disruptive in the workplace); *Thomson v Scheid*, 977 F 2d 1017 (upholding termination of county fraud investigator where his conversations to his superiors about his dissatisfaction about an investigation and his continued conduct in derogation of internal department policy regarding investigations did not constitute the speech of a citizen on a matter of public concern); *Koch v Hutchinson*, 847 F 2d 1436 (upholding demotion of fire chief after submission of internal report because a determination as to whether a report is part of an employee's official duties is a 'significant factor' in determining whether the report is protected by free speech).
95. *Garcetti*, 126 S Ct 1951, 1960.
96. Justice Souter in his dissent queried whether the majority has properly understood the responsibilities of deputy assistant attorneys. He commented that plaintiff had not been hired to 'broadcast[] a particular message set by the government', which would have justified greater employer control over speech, but instead 'to exercise the county's prosecutorial power by acting honestly, competently, and constitutionally': ibid 1969 (Souter J, dissenting).
97. Ibid 1960.
98. Ibid 1968 (Souter J, dissenting).
99. Ibid 1969.
100. The constitutionalisation of 'academic freedom' began with the concurring opinion of Justice Frankfurter

in *Sweezey v New Hampshire*, 354 U S 234 (1957). Justice Frankfurter, in agreeing with the Court's decision that the university's investigation of a faculty member's statements for subversive activities during a lecture violated free speech, observed that: 'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university-to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study': ibid 263 (Frankfurter J, concurring). However, the concept of academic freedom does not apply to K-12 schools. See, eg, *United States v Fordice,* 505 U S 717, 728-29 (1992) ('a state university system is quite different in very relevant respects from primary and secondary schools'); *Parents Involved in Community Schools v Seattle School Dist. No. 1***,** 426 F 3d 1162, 1207 (9th Cir, 2005), cert. granted, 126 S Ct 2351 (2006) ('there is no comparable line of U S Supreme Court cases affording high schools the special '[A]cademic freedom[s]' granted to universities by the First Amendment'.).

101. See *Board of Regents of Univ of Wis. Sys. v Southworth***,** 529 U S 217 [142 *Education Law Reporter* 624] (2000) (upholding authority of university to charge its students an activity fee used to fund a program to facilitate extracurricular student speech, provided allocation of funding support is viewpoint neutral, with concurring opinion observation that, 'Our understanding of academic freedom has included not merely liberty from restraints on thought, expression, and association in the academy, but also the idea that universities and schools should have the freedom to make decisions about how and what to teach ... [A]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the academy itself') (Souter J, concurring in judgment); *Central State Univ v AAUP*, 526 U S124, 130 [133 *Education Law Reporter* 34] (1999) (reversing Ohio Supreme Court decision striking down state statute requiring public universities to develop standards for professors' instructional workloads and exempting those standards from collective bargaining as violating equal protection, but with caution from dissent that 'the debate over academic freedom [involving how faculty are to] allocate their professional endeavors between research and teaching' is for the state not the Supreme Court to decide) (Stevens J, dissenting); *University of Pa. v EEOC*, 493 U S 182 [57 *Education Law Reporter* 666] (1990) (Court refused to expand First Amendment right of academic freedom to prevent disclosure of peer review materials that were part of tenure process where former faculty member alleged race and gender discrimination in the process); *Regents of Univ of Mich. v Ewing*, 474 U S 214, 226 [28 *Education Law Reporter* 720] (1985) (upholding decision of university to dismiss student for poor academic performance, observing that, '[a]dded to our concern for lack of standards is a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, a special concern of the First Amendment'); *Regents of Univ of Cal. v Bakke*, 438 U S 265, 312 (1978) (upholding university's decision to use race as a basis for diversity, noting that, 'Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body'); *Keyishian v Bd. of Regents of State of New York*, 385 U S 589 (1967) (invalidating state statute requiring all public teachers to sign affidavit of not being a Communist, the Court observing that,

> To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.): ibid 603.

102. 444 U S 672 (1980).
103. Ibid 699 (Brennan J, dissenting).
104. Ibid 700.
105. *Garcetti*, 126 S Ct 1951, 1962.
106. Ibid.

107. *Hillis v Stephen F. Austin State University,* 665 F 2d 547, 553 (5th Cir, 1982) (upholding termination of nontenured faculty member for refusing to award a specific grade as directed by the department chair where awarding a grade was not considered to be 'teaching methods' protected by academic freedom), citing *Keyishian v Board of Regents,* 385 U S 589, 601 (1967).
108. *Garcetti*, 126 S Ct 1951, 1960.
109. Ibid 1961.
110. Ibid.
111. 483 U S 378 (1987) (holding that statement by clerical employee, made in course of conversation, following attempted assassination of President Reagan, with coemployee addressing policies of President's administration, that, 'if they go for him again, I hope they get him' dealt with matter of public concern, and constable's interest in discharging clerical employee in constable's office for making statement did not outweigh employee's rights under First Amendment).
112. *Garcetti,* 126 S Ct 1951, 1961.
113. Ibid.
114. Ibid 1962.
115. See *Brown v Armenti*, 247 F 3d 69 [153 *Education Law Reporter* 48] (3rd Cir, 2001) (rejecting professor's alleged free speech violation where president ordered a grade to be changed, noting that, 'Because grading is pedagogic, the assignment of the grade is subsumed under the university's freedom to determine how a course is to be taught').
116. See *Edwards v California University of Pennsylvania***,** 156 F 3d 488, 491 [129 *Education Law Reporter* 622] (3d Cir, 1998) (rejecting free speech claim as to acceptable classroom materials and courses to be taught, observing that 'although [the faculty member] has a right to advocate outside of the classroom for the use of certain curriculum materials, he does not have a right to use those materials in the classroom ... Our conclusion that the First Amendment does not place restrictions on a public university's ability to control its curriculum is consistent with the Supreme Court's jurisprudence concerning the state's ability to say what it wishes when it is the speaker'.).
117. See *Parate v Isibor*, 868 F 2d 821 [52 *Education Law Reporter* 47] (6th Cir, 1989) (denying nontenured professor's free speech claim as to university officials' interrupting his class with shouted commands and criticism of professor's teaching skills because 'Although defendants' behavior was unprofessional, their actions ... did not violate [plaintiff's] First Amendment right to academic freedom'.)
118. See, eg, *Coleman v Bd. of Educ. of City of St. Louis*, 324 F Supp 2d 1048 [190 *Education Law Reporter* 273] (E D Mo, 2004) (function of speech pathologist who complained by services being provided by improperly licensed persons was determined by state law); *Love-Lane v Martin*, 355 F 3d 766 [184 *Education Law Reporter* 133] (4th Cir, 2004) (black assistant principal's objections to racially discriminatory practices in assigning black students to time-out room a matter of public speech where such discrimination prohibited under federal and state law); *Settlegoode v Portland Pub. Schs*., 362 F 3d 1118 [186 *Education Law Reporter* 67] (9th Cir, 2004), cert. denied, 543 U S 979 (2004) (upholding almost $1 million in damages for a probationary special education teacher whose written comments to her superiors involving inadequate physical therapy services under the IDEA constituted public concern speech).
119. *Pickering*, 391 U S 563, 570.
120. See, eg, *Sharp v Lindsey*, 285 F 3d 479, 486 [163 *Education Law Reporter* 88] (6th Cir, 2002) (upholding demotion of principal to a teacher position following the principal's skit to teachers that was made fun of the superintendent's new dress code policy as disrupting 'the close working relationship between superintendent and principal-a relationship on which the effective functioning of the school system depends'); *Vargas-Harrison v Racine Unified Sch. Dist*., 272 F 3d 964, 974 [159 *Education Law Reporter* 459] (7th cir, 2001), cert denied 537 U S 826 (2002) (upholding demotion of principal to assistant principal where plaintiff's opposition to the school board's plan to secure aid for disadvantaged students was not protected because plaintiff was a policy-making employee who 'owed her superiors a duty of loyalty with respect to this subject'.). However, employees do not forgo all free speech protection simply because they are policy-making. See *Wilbur v Mahan*, 3 F 3d 214 (7th Cir, 1993) (while finding no free speech violation where deputy sheriff was placed on unpaid leave after

announcing he would run against the sheriff in the next election, the court noted in dictum that while a confidential employee might be fired for belonging to the wrong political party, he cannot be fired for being a member of the wrong church or race).

121. 413 F 3d 359 [199 *Education Law Reporter* 593] (3d Cir, 2005).
122. The Bureau representative also alleged that plaintiff also told her that the District kept two sets of records on the children, and that the principal was gathering information against the boys' mother to release to Children's Services in an effort to have them removed from their home. However, plaintiff denied making these statements and since they seemed to play no significant part in the case, only the facts agreed to by all parties will be considered. See ibid 362.
123. *Garcetti*, 126 S Ct 1951, 1974 (Breyer J, dissenting).
124. Ibid 1975.
125. See also, *Coleman v Bd. of Educ. of City of St. Louis*, 324 F Supp 2d 1048 [190 *Education Law Reporter* 273] (E.D. Mo. 2004) (finding that 'plaintiffs' statements and questions to their supervisor ... their professor, and the Superintendent of Schools concerning whether they were qualified to act as Speech Language Pathologists implicated their interests as citizens because they were alleging, in essence, that the District was violating state law and causing them to violate state law by having them, as unauthorized and unqualified persons, provide speech pathology services to schoolchildren'.).
126. *Garcetti*, 126 S Ct 1951, 1959.
127. See *Yates v Mansfield Bd. of Educ*., 808 N E 2d 861 [187 *Education Law Reporter* 1005] (Ohio, 2004) (finding in non-speech case that a school principal who had investigated, but failed to report to social services, a complaint of sexual harassment could be sued for failure to report if he had the requisite knowledge of the statutory grounds of 'reason to suspect' that an act of child abuse had taken place; in addition, if the principal should have filed a complaint and failed to do so, his school district could be liable under a negligent supervision or retention theory where the investigated employee later sexually harassed another child in another school district; although not part of the case, *Yates* highlights the stakes at issue where a person does not exercise his free speech right to file a complaint pursuant to state law).
128. 2006 WL 1716151 (8th Cir, 2006).
129. *Garcetti*, 126 S Ct 1951, 1960.
130. 263 F Supp 2d 1043 [178 *Education Law Reporter* 271] (E D Va, 2003).
131. Ibid 1050.
132. Ibid 1058.
133. Ibid note 10.
134. *Garcetti*, 126 S Ct 1951, 1970 (Souter J, dissenting).
135. The content of whistleblowing statutes vary considerably among the states. Some statutes protect all government workers including those that work for municipalities and their subdivisions: Del.Code Ann., Tit. 29, § 5115 (2003); Fla. Stat. § 112.3187 (2003); Haw.Rev.Stat. § 378-61 (1993); Ky. Rev Stat. Ann. § 61.101 (West 2005); Mass. Gen. Laws Ann., ch. 149, § 185 (West 2004); Nev.Rev.Stat. § 281.611 (2003); N.H.Rev.Stat. Ann. § 275-E:1 (Supp.2005); Ohio Rev.Code Ann. § 4113.51 (Lexis 2001); Tenn.Code Ann. § 50-1-304 (2006 Cum.Supp.); other statutes protect only state employees: Ala.Code § 36-26A-1 et seq. (2001); Colo.Rev.Stat. § 24-50.5-101 et seq. (2004); Iowa Code Ann. § 70A.28 et seq. (1999); Kan. Stat. Ann. § 75-2973 (2003 Cum.Supp.); Mo.Rev.Stat. § 105.055 (2004 Cum.Supp.); N.C. Gen.Stat. Ann. § 126-84 (Lexis 2003); 2 Okla. Stat., Tit. 74, § 840-2.5 et seq. (West 2005 Supp.); Wash. Rev.Code § 42.40.010 (2000); Wyo. Stat. Ann. § 9-11-102 (2003); some statutes protect employees only if they notify their employers first: Idaho Code § 6-2104(1)(a) (Lexis 2004); Me.Rev.Stat. Ann., Tit. 26, § 833(2) (1988); Mass. Gen. Laws Ann., ch. 149, § 185(c)(1) (West 2004); N.H.Rev.Stat. Ann. § 275-E:2(II) (1999); N.J. Stat. Ann. § 34:19-4 (West 2000); N.Y. Civ Serv Law Ann. § 75-b(2)(b) (West 1999); Wyo. Stat. Ann. § 9-11-103(b) (2003); other statutes prohibit employers from setting any prohibitions: Kan. Stat. Ann. § 75-2973(d)(2) (Cum.Supp.2003); Ky. Stat. Ann. § 61.102(1) (West 2005); Mo.Rev.Stat. § 105.055(2) (2004 Cum.Supp.); 2 Okla. Stat., Tit. 74, § 840-2.5(B)(4) (West 2005 Supp.); Ore.Rev.Stat. § 659A.203 (2003).
136. See, eg, *Hauge v Brandwine Sch. Dist*., 131 F Supp 2d 573 [151 *Education Law Reporter* 664] (D N

J, 2001) where the court upheld both constitutional free speech and statutory whistleblower claims following the school district's chief financial officer disclosed alleged improper financial transactions to state auditor; the disclosure was a matter of public concern for free speech purposes and fell within the language of the whistleblower statute:

> No public employee shall be discharged, threatened or otherwise discriminated against with respect the terms or conditions of employment because that public employee reported, in a written or oral communication to an elected official, a violation or suspected violation of a law or regulation promulgated under the law of the United States, this State, its school districts, or a county or municipality of this State unless the employee knows that the report is false.

(29 Del.C. § 5115(b)).

See also, *Fort Bend Indep. Sch. Dist. v Rivera*, 93 S W 3d 315 [173 *Education Law Reporter* 308] (Tex Ct App, 2002) (upholding former school clerk's right to go to trial under state whistleblowing statute for reporting that her immediate supervisor had falsified documents to allow the supervisor's children and children of other district employees living outside the school system to attend school in the system without paying tuition, pursuant to state whistlebowing statute:

> A state or local governmental entity may not suspend or terminate the employment of, or take other adverse personnel action against, a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority.

(Tex. Gov't Code Ann. § 554.006(a)).

137. See *Pickering*, 391 U S 563, 572-73 (while acknowledging that '[the] teacher ha[d] made erroneous public statements upon issues then currently the subject of public attention, ... [the Court also added that] a State cannot authorize the recovery of damages by a public official for defamatory statements directed at him except when such statements are shown to have been made either with knowledge of their falsity or with reckless disregard for their truth or falsity'.).
138. In the United States, courts distinguish between cases involving public officials or public figures and those not involving those categories. See *New York Times Co. v Sullivan,* 376 U S 254, 279-80 (1964) (elected officials were public officials for purposes of defamation and defamation claims by public officials require proof of malice) and *Curtis Publ'g Co. v Butts,* 388 U S 130, 164 (1967) (public university athletic director was a public figure and must prove malice in order to prevail in defamation claim). See further, *Beeching v Vahle*, 304 N E 2d 669 [162 *Education Law Reporter* 938] (Ind Ct App, 2002) (permitting a school principal to go forward with a defamation claim against a union official for statements that the principal was a 'liar' and 'favored some staff' without proof of malice since the principal was not an elected official and served at least two levels below the board members who were elected officials).
139. 310 F 3d 115 [171 *Education Law Reporter* 51] (2d Cir, 2002).
140. Ibid 118.
141. Ibid.
142. Zick, Thompson, Mawdsley, above n 10.
143. For examples, see *Board of Educ., Island Trees Union Free School Dist. No. 26 v Pico***,** 457 U S 853, 883 [4 *Education Law Reporter* 1013] (1982) (5-4 decision with two of the five majority votes representing concurring opinions; Justice Blackmun filed opinion concurring in part and concurring in the judgment but with a slightly different standard from the majority opinion; Justice White filed opinion concurring in the judgment that the case should be remanded for trial, but rejecting the majority's 'dissertation on the extent to which the First Amendment limits the discretion of the school board to remove books from the school library'); *Mitchell v Helm*s, 530 U S 793 [145 *Education Law Reporter* 44] (2000) (two of six Justices voting with the majority concurred in judgment that loaning instructional materials to religious schools did not violate Establishment Clause, but would vote differently if evidence indicated that the materials were diverted for religious use in the schools).