

University of Nevada, Reno

**Administrator Speech within PK-12 Public Education Systems: An Analysis of the  
Speech Rights of School Administrators in the Wake of Recent Federal Court  
Decisions Post *Garcetti***

A dissertation submitted in partial fulfillment of the  
requirements for the degree of Doctor of Philosophy in  
Educational Leadership

By

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August 2014

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THE GRADUATE SCHOOL

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be accepted in partial fulfillment of the  
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## Abstract

Competing interests exist within PK-12 public education systems regarding the extent the First Amendment protects expression: individuals have the right to express themselves, while public education systems have the right to limit expression in order for the public entity to operate effectively and efficiently (*Pickering v. Board of Education*, 1968; *Connick v. Myers*, 1983). In *Tinker* (1969), the Supreme Court stated, “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” Subsequent decisions, however, have limited the extent of First Amendment protection afforded to government employees, including those in public schools. This study examined the expressive rights of PK-12 public school administrators since the Supreme Court decision in *Garcetti v. Ceballos* (2006).

The study analyzed 25 federal court cases regarding the First Amendment speech rights of PK-12 public school administrators from June 1, 2006 through December 31, 2013. In these cases, the federal courts applied various legal analyses from Supreme Court precedents. In 14 of the 25 cases, the federal courts explicitly applied the *Garcetti* pursuant to duty test. In three of the cases, the federal courts partially applied *Garcetti*; however, these courts also based their decisions on other Supreme Court precedents. As for the eight other cases, the federal courts applied other Supreme Court precedents (i.e. *Pickering*, *Connick*, and/or *Mt. Healthy*) in four of them. In the other four of these eight cases, the courts applied only the elements needed to establish a prima facie case. This study indicates that the nation’s federal courts are developing more nuanced

interpretations of the pursuant to duty test established in the Supreme Court decision in *Garcetti v. Ceballos* (2006).

## Dedication

I dedicate this dissertation to Micha Marie Stevens, my wife and loving partner. Micha, without you, I never would have completed this process. Your unwavering love and support, as well as the infinite amount of patience you demonstrated throughout the process, provided the strength and direction I needed to get through this. You have restored my hope, faith, and direction—I am forever in your debt. Thank you for everything. I love you!! Fifty years, or not another minute...

## Acknowledgments

I am very thankful for everyone who has made this a reality. Specifically, I would like to thank:

Micha Marie Stevens who encouraged and supported me and demonstrated patience in an unbelievable capacity throughout this entire process. Micha—thank you for everything and I love you.

To Dr. George Perreault, my committee chair. Thank you for your guidance, patience, persistence, and counsel. I will never forget the years we spent together and my future students will know your legacy.

To Dr. Bill Sparkman, thank you for Sheparding me through this process. Thank you for the Clark Scholars nomination and the countless hours of editing. Your insights into the legal process have made this dissertation a much more complete study.

Dr. Rita Laden, thank you for your support and candor during my time in my doctoral program.

Dr. Maddux, I am sorry I chose a qualitative study for my dissertation, but I promise I will make up for it in my future body of research. Thank you for contributing to my love of statistics.

Dr. Marsha Read, thank you for helping me navigate the world that is higher education. I will never forget the lessons I have learned from you, which I am sure will be very valuable in the years to come.

## Table of Contents

	<b>Page</b>
Abstract _____	i
Dedication _____	iii
Acknowledgements _____	iv
Table of figures _____	xi
CHAPTER I: Introduction _____	1
Problem Statement _____	3
Purpose Statement _____	5
Significance of the Study _____	5
Research Questions _____	7
Definition of Terms _____	7
Limitations _____	11
Delimitations _____	12
Assumptions _____	13
Organization of the Study _____	14
CHAPTER II: Literature review _____	16
Public Employee Speech Rights Prior to 1968 _____	16
Landmark Supreme Court Free Speech Cases (1968-2005) _____	19
<i>Pickering v. Board of Education</i> (1968) _____	19
<i>Mt. Healthy School District v. Doyle</i> (1977) _____	24
<i>Givhan v. Western Line Consolidated School District</i> (1979) _____	27



<i>Connick v. Myers</i> (1983)	30
<i>Water v. Churchill</i> (1994)	35
Summary of the Threshold-Balancing Test	41
The <i>Garcetti v. Ceballos</i> (2006) Supreme Court Decision	46
A Brief Note on “Whistleblowing” in Public Schools	57
A Brief Note on Policymaking Personnel in Public Schools	57
CHAPTER III: Methodology	60
Research Questions	62
Data Collection	63
Data Analysis	65
CHAPTER IV: Analysis of Reported Cases	68
The Data	69
PK-12 Public Education Administrator Speech-related Progeny of <i>Garcetti</i>	70
First Circuit	72
<i>Brown-Criscuolo v. Wolfe</i> , 601 F.Supp.2d 441 (D. Conn. 2009)	72
Second Circuit	77
<i>Woods v. Enlarged City School Dist. of Newburgh</i> , 473 F.Supp.2d 498 (S.D. N.Y. 2007)	77
<i>Almontaser v. New York City Department of Education</i> , 519 F.3d 505 (2nd Cir. 2008)	79
<i>Almontaser v. New York City Department of Education</i> , 2009 WL 2762699 (S.D. NY 2009)	82

<i>Spang v. Katonah-Lewisboro Union Free School District</i> , 626 F.Supp.2d 389 (S.D. N.Y. 2009).	83
<i>Fierro v. City of New York Department of Education</i> , 341 Fed.Appx. 696 (2nd Cir. 2009)	86
Third Circuit	90
<i>Pribula v. Wyoming Area School District</i> , 2010 WL 1433149 (M.D. Pa. 2010)	91
<i>Whitfield v. Chartiers Valley School District</i> , 707 F.Supp.2d 561 (W.D. Pa. 2010)	95
<i>Homel v. Centennial School District</i> , 836 F.Supp.2d 304 (E.D. Pa. 2011)	99
<i>Mieczkowski v. York City School District</i> , 414 Fed.Appx 441 (3rd Cir. 2011) Question 5	103
<i>Hara v. Pennsylvania</i> , 492 Fed.Appx. 266 (3rd Cir. 2012)	105
Fourth Circuit	108
<i>King v. Charleston County School District</i> , 664 F.Supp.2d 571 (D.S.C. 2009)	108
<i>Baker v. McCall</i> , 842 F.Supp.2d 938 (W.D. Va. 2012)	111
<i>Corbett v. Duerring</i> , 2012 WL 1855193 (S.D. W.Va. 2012)	114
Fifth Circuit	118
<i>Cavazos v. Edgewood Independent School District</i> , 210 Fed.Appx. 414 (5th Cir. 2006)	118
<i>Sanders v. Leake County School District</i> , 546 F.Supp.2d 351 (S.D. Miss. 2008)	122
<i>Alexander v. Brookhaven School District</i> , 428 Fed.Appx. 303 (5th Cir. 2011)	125

<i>Mooney v. Lafayette County School District</i> , 538 Fed.Appx. 447 (5th Cir. 2013)	127
Sixth Circuit	130
<i>Scarbrough v. Morgan County Board of Education</i> , 470 F.3d 250 (6th Cir. 2006)	131
<i>Harris v. Detroit Public Schools</i> , 245 Fed.Appx. 437 (6th Cir. 2007)	135
Seventh Circuit	138
<i>McArdle v. Peoria</i> , 705 F.3d 751 (7 <sup>th</sup> Cir. 2013)	138
Eighth Circuit	143
Ninth Circuit	143
<i>Flores v. Von Kleist</i> , 739 F.Supp.2d 1236 (E.D. Cal. 2010)	143
Tenth Circuit	146
<i>Casey v. West Las Vegas Independent School District</i> , 473 F.3d 1323 (10th Cir. 2007)	146
<i>Houston v. Independent School District No. 89 of Oklahoma County</i> , 949 F.Supp.2d 1104 (W.D. Okla. 2013)	153
Eleventh Circuit	159
<i>D'Angelo v. School Board of Polk County, Florida</i> , 497 F.3d 1203 (11th Cir. 2007)	159
<i>White v. School Board of Hillsborough County</i> , 2008 WL 227990 (M.D. Fla. 2008)	164
Chapter Summary	168
CHAPTER V: Analysis, Discussion, and Guidelines	170
United States Circuit Courts of Appeals	171

Research Questions	172
Inter-Circuit Analysis	174
Failure to State a Claim	174
Cases Reliant upon Supreme Court Precedents Other than <i>Garcetti v. Ceballos</i> (2006)	176
Cases Citing <i>Garcetti v. Ceballos</i> (2006)	178
Cases citing <i>Garcetti</i> in part, but not controlling	179
<i>Garcetti</i> controlling in part, other precedents cited	180
<i>Garcetti</i> controlling, no other precedents cited	183
Discussion of <i>Garcetti</i> 's Effect Based on Trends and Themes	185
No Application of <i>Garcetti</i>	185
Pursuant to Duty	186
Title VII Retaliation Claims in Lieu of First Amendment Retaliation Claim	188
Racial Discrimination	189
First Amendment Protected Association	190
Charter Schools	191
Testimony	191
Reports to Outside Agencies	192
Whistleblowers	193
Policy Makers	194
Guidelines	195

Practicing PK-12 Public School Administrators	_____	196
PK-12 Public School Systems	_____	197
PK-12 Public School Administrator Preparation Programs	_____	199
Further Research	_____	200
Conclusion	_____	201
References	_____	204

**Table of Figures**

Figure	Page
1. United States Supreme Court Public Employee Speech Analysis (1968-2006)	56
2. United States Courts of Appeals Geographic Boundaries	172

## CHAPTER I

### Introduction

The First Amendment states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people to peaceably assemble, and to petition the government for a redress of grievances. (U.S. Const. Amend. 1)

In *Tinker v. Des Moines Independent Community School District* (1969), the United States Supreme Court (Supreme Court) included in its opinion the statement, “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years” (p. 6). However, “The resolution of an issue wherein the contending parties claim a violation of their constitutional rights has never been an easy task for the courts” (Beezer, 1987, p. 763). Furthermore, the extent to which public school employees’ speech receives First Amendment protection has changed. In fact, the speech rights of government employees are not equal to the speech rights enjoyed by private citizens according to the Supreme Court (*Waters v. Churchill*, 1994). A litany of cases (e.g. *Pickering v. Board of Education*, 1968; *Mt. Healthy School District Board of Education v. Doyle*, (1977); *Givhan v. Western Line Consolidated School District*, 1979; *Connick v. Myers*<sup>1</sup>, 1983; *Waters v. Churchill*<sup>1</sup>, 1994) regarding the speech and expressive activities of public school employees demonstrate the

<sup>1</sup>These cases involve public employees, not public school employees; however, they are often referenced in cases involving public school employees.

progression of the extent to which the First Amendment applies in different circumstances.

The Supreme Court, *Pickering v. Board of Education* (1968), established the “*Pickering* balancing test.” According to the Court:

The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees (p. 568).

In stating this balancing requirement, the Court, however, did not “attempt to lay down a general standard against which all such statements may be judged” (p. 569) because of the different fact patterns of such cases.

Some scholars have suggested that the *Pickering* balancing test used to determine whether an employee’s speech qualifies for First Amendment protection includes these factors:

1. Is the speech directed to those in regular contact with the speaker;
2. Could the speech undermine authority and discipline of the supervisor or create disharmony among workers;
3. Does the speech prevent the employee from performing job duties or does it interfere with the efficiency of the organization; and
4. Can the speech cause harm in the relationships among employees, particularly when the job situation requires loyalty and trust among employees for the organization to function properly. (Dagley, 2012, p. 12; Hooker, 1984b, p. 638; *Pickering v. Board of Education*, 1968, p. 568; Wenkart, 2006, p. 2)



Subsequent cases refined various elements of the legal analysis employed in *Pickering*, which provided a relatively comprehensive understanding of when First Amendment protection applied and when it did not. The *Mt. Healthy School District Board of Education v. Doyle* (1977) decision elucidated that employers could discipline employees if the same adverse action would have occurred in the absence of the protected speech. *Givhan v. Western Line Consolidated School District* (1979), *Connick v. Myers* (1983), and *Waters v. Churchill* (1994) clarified that the content, context, time, place, and manner, as well as the possible disruptive nature, of a public employee's speech contributed to the analysis when determining whether the speech qualified for First Amendment protection. However, in *Garcetti v. Ceballos* (2006), the Supreme Court established the "pursuant to duty test". Essentially, *Garcetti* added a new threshold, the determination of whether the employee's speech was pursuant to duty or made as a citizen, prior to employing the balancing test. This test refined the analysis used when determining whether a public employee's speech receives First Amendment protection as a legal shield against retaliatory, adverse, or negative employment actions. The pursuant to duty test narrows the legal analysis by rejecting First Amendment protection for any speech made pursuant to a public employee's job-related duties.

### **Problem Statement**

*Garcetti* (2006) appears to have created a precedent muddling the relatively workable framework governing the speech of public employees, which federal courts had used for over 30 years. Furthermore, the confusion created by *Garcetti* (2006) has led to inconsistent and misapplication of the Supreme Court's decision by federal district and circuit courts of appeal (Schroll, 2008). According to Keenan (2011), the ruling in

*Garcetti* (2006) created a “categorical denial of the Constitution’s protection for speech made ‘pursuant to [an employee’s] official duties’” (p. 841 quoting *Garcetti*, 2006, p. 421). Furthermore, the Court did not provide a “definite framework for delineating the scope of employment.... Instead, the Court merely stated that ‘[t]he proper inquiry is a practical one’” (Keenan, 2011, p. 841 quoting *Garcetti v. Ceballos*, 2006, p. 424) as “Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform...” (*Garcetti v. Ceballos*, 2006, pp. 424-425). Courts must determine whether the speech is pursuant to duty on a case-by-case basis, just as they had to apply the *Pickering* Balancing Test on a case-by-case basis.

Furthermore, some public employees, particularly school administrators, are in unique situations in which they have access to information to which others do not. This unique position creates an environment in which speech pertaining to anything related to their profession could be pursuant to duty. “*Garcetti*’s categorical holding provides no leeway for speech of such public importance that it may deserve constitutional protection despite the fact that it exists because of the employee’s official duties” (Keenan, 2011, p. 842).

The *Garcetti* ruling could hamper the future success of public entities because once protected speech may no longer receive protection, possibly resulting in inefficient operation of and negative sentiment towards public entities—opposing the Court’s objective in *Pickering v. Board of Education* (1968). The Court in *Pickering* stated that public employees are members of the community “most likely to have informed and definite opinions” (*Pickering v. Board of Education*, 1968, p. 572) regarding the operation of the public entity. “When government employees are silenced, it is the *public*

that is the principal loser” (*Brief for Respondent, Garcetti*, 2006, p. 12, emphasis in the original).

### **Purpose Statement**

Dagley (2012) investigated the effect of *Garcetti* on the free speech rights of all PK-12 public school employees. Similar in scope to Dagley’s (2012) dissertation, this study examines federal court cases involving public school employees but limits the public employee selection to administrators who claimed that they suffered adverse employment decisions that were retaliatory in nature in “violation of their First Amendment free speech rights” (p. 3) after the Court’s ruling in *Garcetti*. The application of the *Garcetti* (2006) Supreme Court ruling by the lower federal courts in cases pertaining to the speech of PK-12 (preschool through 12th grade) school administrators’ merits exploration because of the ambiguity created regarding the notion of “pursuant to duty”. That is, the conception of “duty” is nebulous, as the Court in *Garcetti* did not clearly define which actions are pursuant to duty, only that the inquiry regarding the action and its relatedness to duty be “practical” (*Garcetti v. Ceballos*, 2006, 424). The purpose of this study is to examine how federal courts have applied the precedent from *Garcetti v. Ceballos* (2006) to cases involving the speech rights of public school administrators. The analysis of cases post-*Garcetti* will provide necessary guidance and understanding of the free speech context for public school administrators and the systems that employ and prepare them.

### **Significance of the Problem**

Within the public PK-12 public education systems in the United States, freedom of expression has a contentious legal and judicial history. The people within these systems—students, teachers, employees, and administrators—often engage in numerous

expressive activities and courts have established precedents that govern the speech of these individuals within schools. However, the precedents are different. A growing body of case law and corresponding research exists pertaining to the speech rights of students. Relevant case law and related research pertaining to the speech of public school teachers is of similar magnitude; however, this is not the case when expanding the scope of inquiry to public school administrators.

The nexus between the speech of the employee and his or her job within public education systems is hard to define. That is, when is the speech of public school employees, especially public school administrators, truly that of a private citizen, and when is that expression related to the duty of the position? According to Oluwole (2008), summarizing Justice Oliver Wendell Holmes's opinion in *McAuliffe v. Mayor of New Bedford* (1892), public employers set the terms of public employee contracts, which can suspend the right to free speech. Oluwole (2008) categorized this context as "rights versus privileges" (p. 968)—prior to 1952, public employment was viewed as a privilege and public employees waived the right to free speech regarding their employers. Public employees could still exercise their free speech rights; however, in doing so, the employee had no constitutional remedy for any consequences they incur, including termination (Oluwole, 2008).

Draschler (2008) concluded that First Amendment free speech protections no longer apply to public employees. This assertion may be overly broad, but public school administrators and public school systems need guidelines that define the limits of free speech protected by the First Amendment and speech that is pursuant to duty, which is not protected. The position and inherent knowledge of public school administrators

further complicates the analysis of protected speech. Often public school administrators are in the position to observe something that is illegal, inefficient, or contrary to the mission of public education systems; however, speaking about it could result in adverse employment actions. Dagley (2012) stated, “School organizations are also at risk since limited protections for speech could chill employee speech that would improve the organization and prevent fraud” (p. 3). Emerging research in this specific niche of free speech rights is essential, as the ramifications are important to both public school administrators and the systems that employ and prepare them.

### **Research Questions**

1. Since the Supreme Court decision in *Garcetti* (2006), how have various federal courts ruled in cases involving adverse employment actions against public school administrators citing First Amendment protected speech in their complaints, including application of the accepted judicial precedents and the factors that led the courts to apply them?
2. Have the courts applied the *Garcetti* (2006) precedent consistently in cases regarding public school administrator speech? If yes, what was the rationale behind the application of the *Garcetti* (2006) pursuant to duty test? If not, which precedents did the courts apply and why?

### **Definition of Terms**

The definitions of the legal terms relevant to this dissertation are from *Black's Law Dictionary* (9th ed. 2009, available at Westlaw BLACKS).

*Appeal*: “A proceeding undertaken to have a decision reconsidered by a higher authority; especially, the submission of a lower court's or agency's decision to a higher court for review and possible reversal.”

*Burden of Proof*: “A party's duty to prove a disputed assertion or charge.” In civil lawsuits, the burden of proof is by the “preponderance of the evidence” defined below.

*Case Law*: “The law to be found in the collection of reported cases that form all or part of the body of law within a given jurisdiction.” See *stare decisis* below.

*Certiorari*: “An extraordinary writ issued by an appellate court, at its discretion, directing a lower court to deliver the record in the case for review.”

*Compelling State Interest*:

A method for determining the constitutional validity of a law, whereby the government's interest in the law and its purpose is balanced against an individual's constitutional right that is affected by the law. Only if the government's interest is strong enough will the law be upheld. The compelling-state-interest test is used in equal-protection analysis when the disputed law requires strict scrutiny (see below). Under strict scrutiny, the state must establish that it has a compelling interest that justifies and necessitates the law in question, specifically applied in cases involving suspect classifications (such as race) and fundamental (Constitutional) rights and the law is narrowly tailored to achieve the asserted state interest.

*Constitutional Right*: “A right guaranteed by a constitution; especially, one guaranteed by the U.S. Constitution or by a state constitution.”

*Dictum*: “An opinion by a court on a question that is directly involved, briefed, and argued by counsel, and even passed on by the court, but that is not essential to the decision.”

*Dissenting opinion*: “An opinion by one or more judges who disagree with the decision reached by the majority—often shortened to dissent.”

*Injunction*: “A court order commanding or preventing an action. To get an injunction, the complainant must show that there is no plain, adequate, and complete remedy at law and that an irreparable injury will result unless the relief is granted.”

*Majority opinion*: “An opinion joined in by more than half the judges considering a given case.

*Opinion*: “A court's written statement explaining its decision in a given case, usually including the statement of facts, points of law, rationale, and dicta.”

*Original precedent*: “A precedent that creates and applies a new legal rule.”

*Plurality Opinion*: “An opinion lacking enough judges' votes to constitute a majority, but receiving more votes than any other opinion.”

*Preponderance of the evidence*:

The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. This is the burden of proof in most civil trials, in which the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be.

*Precedent*: “The making of law by a court in recognizing and applying new rules while administering justice.”

*Prima Facie*: “At first sight; on first appearance but subject to further evidence or information.” In the context of a lawsuit, whether the party bringing suit can state a claim based on the facts of the case.

*Remand*: “The act or an instance of sending something (such as a case, claim, or person) back for further action.”

*Respondeat Superior*: “The doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency.”

*Shepardize*: “To determine the subsequent history and treatment of (a case) by using a printed or computerized version of Shepard's Citators.”

*Stare Decisis*: “The doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation.”

*Strict Scrutiny*: “The standard applied to suspect classifications (such as race) in equal-protection analysis and to fundamental rights (such as voting rights) in due-process analysis. Under strict scrutiny, the state must establish that it has a compelling interest that justifies and necessitates the law in question.” In this study, speech is a fundamental constitutional right.

*Summary Judgment*: “A judgment granted on a claim or defense about which there is no genuine issue of material fact and upon which the movant is entitled to prevail as a matter of law.” Summary judgment does not necessarily negate the merit of a claim;



it merely means that in the opinion of the judge granting summary judgment the only foreseeable outcome of a trial is that in favor of the moving party if granted.

*Whistle Blower*: “An employee who reports employer wrongdoing to a governmental or law-enforcement agency. Federal and state laws protect whistleblowers from employer retaliation.”

*Vacate*: “To nullify or cancel; make void; invalidate.”

This study also requires the definition of the concept of “pursuant to official duty”.

While *Black’s Law Dictionary* does not define this term, the Supreme Court offered that:

The proper inquiry [in defining pursuant to duty] is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee’s written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee’s professional duties for First Amendment purposes. (*Garcetti v. Ceballos*, 2006, p. 12)

Additionally, for the purposes of this study, the term “public school administrator” includes any public school employee who employed as an administrator (e.g. principal or superintendent). Furthermore, in this study, *retaliation* is a negative employment action including but not limited to demotion, reduction in pay, reduction in authority, suspension, termination, and reassignment.

### **Limitations**

1. The researcher is not a lawyer and the recommendations do not constitute legal advice. This qualitative inquiry attempts to increase understanding and awareness

of the speech rights of public school administrators, which will contribute to the preparation and actual employment practices of public school administrators.

2. Westlaw categorizes cases using a system known as “key numbers”. The key number system is an interactive outline that allows researchers to narrow their searches to specific areas of law. This system may contain errors and editorial bias.

### **Delimitations**

1. This study contains the analysis of cases involving PK-12 public school administrators claiming violations of their First Amendment free speech rights. The judicial opinions included in this study are from federal district courts and Courts of Appeal included in the Westlaw reporting system from June 1, 2006, the day after the Supreme Court issued the *Garcetti v. Ceballos* opinion, through December 31, 2013. For inclusion in this study, the cases had to be listed under the follow West Key Numbers:

Constitutional Law, education, employees 1990—Retaliation (92k1990)

Constitutional Law, education, employees 1991—Public or private concern; speaking as citizen (92k1991)

Constitutional Law, education, employees 1993—Discipline or reprimand (92k1993)

Constitutional Law, education, employees 1994—Discharge (92k1994)

Constitutional Law, education, employees 1995—Nonrenewal of contract (92k1995)

Constitutional Law, education, employees 2001—Administrators (92k2001)

Education, teachers and education professionals 141E.419—Principals (141ek419)

Education, teachers and education professionals 141E.584 (2) —Exercise of rights; retaliation (141ek584)

Education, teachers, and education professionals 141Ek585 k—reporting or opposing wrongdoing; criticism and “whistleblowing” (141ek585)

2. Considerations of the impact of statutory whistleblower protection and public policymaker analyses are beyond the scope of this study.
3. In cases that include more than one legal claim, only the First Amendment free speech claims are analyzed in this study.

### **Assumptions**

1. All court cases were adjudicated in compliance with existing local, state, and federal statutes at the time of the case and adhered to existing legal precedence.
2. West’s National Reporting system included pertinent and relevant cases and identified them appropriately with the *Key Number*.
3. The cases involved litigation regarding the free speech rights of PK-12 administrators.
4. Rulings from the federal appellate courts and district courts are binding within their jurisdictions.
5. The case brief method of analysis produced information that may provide guidance for PK-12 administrators and the systems that train and employ them.
6. Case brief analysis was an appropriate and sufficient data analysis strategy.
7. The researcher interpretations of the law and court decisions, as a graduate student and education scholar (not a lawyer), are consistent with current legal theory.

8. The researcher appropriately interpreted the court decisions, that is he identified the primary ruling of the court with regard to the free speech and other related claims.

### **Organization of the Study**

Chapter I is the introduction to this study. This chapter includes a brief introduction of the free speech rights of public school employees. Also included in this chapter is the statement of the problem, purpose of the inquiry, significance of the problem, and two research questions that guided the study. Furthermore, Chapter I includes some definitions of the legal terms, limitations, delimitations, and assumptions of the study.

Chapter II is a review of the literature pertinent to the free speech rights of public school employees. The review includes all pertinent cases within the delimitations presented in Chapter I prior to the Supreme Court decision in *Garcetti* (2006). The review includes Supreme Court decisions prior to *Garcetti* in order to establish the historical context of cases involving the speech rights of public employees. The literature reviewed in Chapter II constructs the federal court legal landscape used when examining cases involving disciplinary action against public school employees for their speech and establishes the legal foundation for the study.

Chapter III explains the research method used in this study. This study is a qualitative, document-based, legal historical, multiple-case research project that examines federal case law pertaining to the violation of the speech rights of PK-12 school employees, particularly, public school administrators. The method chosen for this study parallels Dagley's (2010) dissertation and is common for legal analysis.

Chapter IV presents the results of this study. The analysis is presented in the form of legal analysis of federal court decisions involving disciplinary action against public school administrators for their speech since the Supreme Court decision in *Garcetti* (2006). The focus of Chapter IV is the decisions of the courts and rationale used by the courts in reaching their determination in the relevant cases. Chapter V summarizes the results from Chapter IV and provides conclusions about and implications of those findings. Additionally, Chapter V provides some guidelines for practicing public school administrators and the systems that employ and train them. Furthermore, Chapter V will discuss the potential effect the *Garcetti* (2006) decision could have on public school administrators and signifies the need for further research pertaining to the free speech rights of public school administrators.

## CHAPTER II

### Literature Review

The First Amendment of the Constitution includes five essential rights. These rights include freedom of religion, freedom of the press, freedom of assembly, freedom to petition the government, and freedom of speech (U.S. Const. Amend. 1). Although initially intended for the federal government, the Supreme Court, over time, selectively incorporated the protections of the 14th Amendment, making them applicable to all states and persons by imposing the same limitations on states and their political subdivisions (Heckman, 2003). Speech encompasses various forms of expression, not just verbal (e.g. symbolic speech such as the armbands worn by students in *Tinker v. Des Moines*, 1969), and the First Amendment protects all persons enabling them to speak without fear of governmental interference (Bernheim, 1986). However, First Amendment free speech protections did not apply to public employees until the mid-20th century (Smith, 2010). Prior to this time, “it was not unusual for public employees who engaged in constitutionally-protected activities to face retaliation in the form of discipline or termination by their employer” (Dagley, 2012, p. 10). This chapter serves to establish, through relevant Supreme Court decisions, the historical legal context of the constitutionality of public employee speech.

#### **Public Employee Speech Rights Prior to 1968**

“Prior to 1968, public employees who experienced employment retaliation for exercising their First Amendment right to speech generally encountered unsympathetic rulings in the courts” (Dagley, 2012, p.10). In fact, court decisions did not support the speech rights of public employees (Bailey & Sindelar, 1987; Smith, 2010) and public

employers could discipline an employee for expression that they considered objectionable (McCarthy, 2006). According to Smith (2010), public employment is a privilege, *not* a right, and therefore the courts reasoned that public employers could refuse to employ or to discipline employees for their speech as conditions of employment without violating the constitution. Justice Oliver Wendell Holmes stated in the decision in *McAuliffe v. Mayor of New Bedford* (1892), a case involving a police officer, “[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman” (Jurenas & Zhang, 1990, p. 436; *McAuliffe v. Mayor of New Bedford*, 1892; Smith, 2010, p. 287). Furthermore, Smith (2010), citing *Adler v. Board of Education* (1952), stated, “If [public employees] do not choose to work on [terms that restrict their freedom of association], they are at liberty to retain their beliefs and associations and go elsewhere” (p. 287).

Court attitudes regarding the free speech rights of public employees began to change in the 1960s (Bailey & Sindelar; 1987, Dagley, 2012). These changes began to substantiate the constitutionally protected free speech rights of employees within the public school context. Bailey and Sindelar (1987) referred to these changes as the “emerging awareness of personal rights”, especially those involving “teachers’ verbal statements” (p. 1153) for teachers within the public education setting.

In a higher education case, *Keyshian v. Board of Regents* (1967), the Supreme Court “rejected the theory that public employment may be subjected to any conditions, regardless of how unreasonable” (Dagley, 2012, p. 11; *Keyshian v. Board of Regents*, 1967; Smith, 2010, pp. 287-288, see also *Wieman v. Updegraff*, 1952; *Shelton v. Tucker*, 1960). These decisions established a foundation opposing the previously established

notion that First Amendment free speech protections did not apply to public employees. However, this principle did not emerge fully regarding public school employees (Dagley, 2012) until the Supreme Court issued its opinion in *Pickering v. Board of Education* (1968).

*Pickering v. Board of Education* (1968) specifically addressed the free speech rights of public employees, namely teachers, within the public school context (Dagley, 2012). “To understand the parameters of protected speech in the context of public school employment, historically one would begin with the U.S. Supreme Court’s decision in *Pickering v. Board of Education*” (Geisel & Kallio, 2010, p. 20). According to Dagley (2012), “*Pickering* is one of only four cases (*Pickering v. Board of Education*, 1968; *Mt. Healthy School District v. Doyle*, 1977; *Givhan v. Western Line Consolidated School District*, 1979; *Connick v. Myers*, 1983) addressing public employee First Amendment freedom of speech rights heard by the United States Supreme Court between 1968 and 2005” (p. 11). However, in *Waters v. Churchill* (1994) a public employee lost her job after criticizing her employer (a public hospital), which undoubtedly raises a First Amendment free speech concern (Roosevelt, 1996-1997). Furthermore, *Waters* provided guidance for the investigative process into a public employee’s speech, which helped refine the balancing test applied to public employee speech. Thus, *Waters* is included in establishing the legal framework of public employee free speech rights. The following section delineates the public employee free speech cases heard by the Supreme Court from 1968 to 2005. In all five of the cases, the Supreme Court sought to balance the interests of employee speech rights with those of the employer to run an efficient and harmonious organization.



### **Landmark Supreme Court Free Speech Cases (1968—2005)**

Freedom of speech has never been an absolute right and courts have ruled that the rights of public school employees are not the same as adults outside of school settings (Geisel & Kallio, 2006; see also *Daugherty v. Vanguard Charter School Academy*, 2000; *Roberts v. Madigan*, 1990). However, in *Tinker v. Des Moines* (1969), the Supreme Court stated that neither students nor public school teachers shed their constitutional rights at the schoolhouse gate. The analysis of the free speech rights of public school employees is further complicated by the fact that public school employees are both citizens and employees. That is, their speech could be made as a citizen or public employee, which has different First Amendment implications. Inherently, the result of all of these factors and competing interests is that the speech rights of public employees require a balance between the rights of the employee engaging in the speech and the employer to operate effectively and efficiently (Mawdsley & Osborne, 2007). The following five cases serve to establish the legal framework of public employee free speech rights.

#### ***Pickering v. Board of Education* (1968)**

In 1964, Marvin Pickering, a public school teacher in Illinois, wrote a letter to the editor of the local paper criticizing the Board of Education of Township High School District 205. The school board had passed a five million dollar bond initiative to build two new high schools and then sought to raise local taxes in an effort to raise more money for the schools (Hudson, 2001). Pickering's letter to the editor criticized the board's allocation of money, specifically, the imbalance of funds spent on each of the two schools, and he accused the board of using the school bonds and attempted tax increase to

fund athletics instead of the much-needed academic, curricular, and facilities needs he claimed were present in the district (Hudson, 2001). Pickering drafted the letter, signed it as “a citizen, taxpayer, and voter, not as a teacher, since that freedom [had] been taken away from the teachers by the administration” (Hudson, 2001, p. 2 quoting Pickering’s letter), and submitted it to the editor. Pickering’s wife warned him that the letter might result in the board firing him, which it did, “finding his letter ‘detrimental to the efficient operation and administration of the schools of the district’” (Hudson, 2001, p. 2).

Pickering was given a full hearing in front of the school board prior to its decision to dismiss him. Pickering appealed the board’s action in state court, claiming that the school board violated his First Amendment free speech rights, but the court affirmed the school board’s decision to dismiss him (Hudson, 2001). Pickering then appealed to the Illinois Supreme Court, which affirmed the state circuit court’s decision 3-2. “The majority rejected Pickering’s free speech claim” (Hudson, 2001, p. 3) stating, “By choosing to teach in the public schools, plaintiff undertook the obligation to refrain from conduct which in the absence of such position he would have an undoubted right to engage in” (*Pickering v. Board of Education*, 1967, p. 577). The majority opinion continued:

A teacher who displays disrespect toward the Board of Education, incites misunderstanding and distrust of its policies, and makes unsupported accusations against the officials is not promoting the best interests of his school, and the Board of Education does not abuse its discretion in dismissing him [citation omitted]. (*Pickering v. Board of Education*, 1967, p. 578)

The two dissenting justices supported Pickering's claim that the board had violated his First Amendment rights. They questioned the impartiality of the board disciplining Pickering after subjecting them to public criticism and emphasized the substance of the letter as "substantially accurate" and not "knowingly false" (Hudson, 2001, p. 3; *Pickering v. Board of Education*, 1967, p. 584). Pickering appealed to the U.S. Supreme Court.

The Supreme Court reversed the decision of the Illinois State Supreme Court in an 8-1 decision, determining that the school board had violated Pickering's First Amendment rights (Hudson, 2001; *Pickering v. Board of Education*, 1968). "The high court noted that oftentimes employee-employer disputes present a conflict between the employee's free-speech interests and the employer's efficiency interests" (Hudson, 2001, p. 4). In the majority opinion, Justice Thurgood Marshall stated:

The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. (*Pickering v. Board of Education*, 1968, p. 5)

Thus establishing the *Pickering* balancing test.

The Supreme Court emphasized that in order for a public employee's speech to receive First Amendment protection, the speech had to address a matter of public concern. Pickering's letter addressed the spending decisions of the school district and the request for more funding, which the Supreme Court determined was an issue of public

interest requiring “free and open debate” (*Pickering v. Board of Education*, 1968, pp. 571-572). The Supreme Court decision stated

The public interest in having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause of the First Amendment—is so great that it has been held 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. (*Pickering v. Board of Education*, 1968, p. 573 citing *New York Times Co. v. Sullivan*, 1964)

The Supreme Court concluded that Pickering’s statements were similar in nature and although his dismissal was different from “criminal sanctions and damage awards”, “it is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech” (*Pickering v. Board of Education*, 1968, p. 574). Thus, “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” (*Pickering v. Board of Education*, 1968, p. 574). That is, the Supreme Court determined that the First Amendment protected Pickering’s speech. Pickering was reinstated in his position in 1969 (Hudson, 2001).

Instead of ruling solely on whether the First Amendment protected Pickering’s speech (Dagley, 2012), the Supreme Court developed a new standard, known as the *Pickering* balancing test, to balance the interests of public employees and employers (Bernheim, 1986; Hooker, 1984b; Nolte, 1985). The *Pickering* standard, often referred to as the *Pickering* balance test (Hassenpflug, 2001, Wenkart, 2006) and the “detrimental effect test” (Bailey & Sindelar, 1987, p. 1153), “weighed the school’s interest in

maintaining peace and order against the employee and community interest in constitutionally protected free speech” (Dagley, 2012, p. 12). The resulting balance of the interests of employees and employers depends upon a number of factors resulting from *Pickering v. Board of Education* (1968). These factors according to several scholars include:

1. Speech directed to those in regular contact with the speaker;
2. Speech that could undermine authority and discipline of the supervisor or create disharmony among workers;
3. Speech that prevents the employee from performing job duties or interferes with the efficiency of the organization; and
4. Speech that can cause harm in the relationships among employees, particularly when the job situation requires loyalty and trust among employees for the organization to function properly. (Dagley, 2012, p. 12; Hooker, 1984b, p. 638; Wenkart, 2006, p. 2)

Hassenpflug (2001) summarized the *Pickering* balance stating:

speech is protected when it is not directed at immediate supervisors, when it is not disruptive of the workplace, when the supervisors’ ability to maintain discipline is not affected, and when the job does not require personal loyalty to the superintendent or board (referencing footnote 3 in *Pickering v. Board of Education*, 1968). (p. 2)

“Commentary and analysis of court cases since *Pickering* often address how these factors are considered by the courts in applying the *Pickering* standard” (Dagley, 2012, p. 13).

Beezer (1987) succinctly summarized the lack of detrimental effect that Pickering's letter had on the operation of the school system. Beezer stated:

It was found that there had been no disruption of the working relationship between the teacher and those he closely worked with. Also there was no effect on the teacher's performance of his daily classroom responsibilities. Finally, the teacher spoke on a matter of public concern as a private citizen. (p. 764)

Essentially, when applying the three-prong *Pickering* standard, courts decide (a) whether the public employee's speech was an issue of public concern and (b) a motivating factor in an adverse employment action, then they (c) balance the interests of the employee and the employer.

In *Mt. Healthy School District v. Doyle* (1977) the Supreme Court provided further guidance refining the balance of the speech rights of public school employees.

***Mt. Healthy School District v. Doyle* (1977)**

In *Mt. Healthy School District v. Doyle* (1977), the Supreme Court ruled that the speech of a teacher qualified for First Amendment protection; however, the Court remanded the school district's decision to non-renew his contract because his protected speech was not the only motivating factor in his dismissal (Hassenpflug, 2001). *Mt. Healthy School District v. Doyle* (1977) established a framework in which school districts could discharge employees as long as the district had sufficient cause independent of the protected First Amendment speech, albeit under careful scrutiny (Bailey & Sindelar, 1987; *Burns v. Rovaldi*, 1979; McCarthy, 2008). That is, if employees engage in speech that is protected, employers can still discipline them if other factors exist that would have led to the dismissal in the absence of the protected speech.

Doyle was an untenured public school teacher in Ohio who called a local radio station to discuss a memorandum received by teachers regarding the appearance and dress of teachers (Bailey & Sindelar, 1987; Dagley, 2012; Jurenas & Zhang, 1990; Nolte, 1985). However, before calling the radio station, Doyle had engaged in and been disciplined for unprofessional behaviors such as swearing and making obscene gestures at female students (Bailey & Sindelar, 1987; Dagley, 2012; Jurenas & Zhang, 1990). The school district dismissed Doyle a month after he called the radio station (Dagley, 2012) citing a “lack of tact in handling professional matters” (Bailey & Sindelar, 1987, p. 1156; Dagley, 2012, p. 14; Jurenas & Zhang, 1990, p. 431). Doyle filed a federal law suit claiming a violation of his First Amendment rights (Bailey & Sindelar, 1987).

The Federal District Court for the Southern District of Ohio ruled in favor of Doyle because it found that the constitutionally protected speech played a substantial part in his dismissal. The Sixth Circuit Court of Appeals affirmed the lower court’s decision. However, the Supreme Court vacated and remanded the decision for trial, instructing the district court to determine if the speech was protected but also whether the board would have reached the decision to non-renew Doyle’s contract in the absence of his constitutionally protected speech (*Mt. Healthy School District v. Doyle*, 1977). Upon remand, the federal district court upheld Doyle’s non-renewal stating that although the speech was protected (Hooker, 1984a; Nolte, 1985), the school district had shown by a preponderance of the evidence that it would have reached the same decision in the absence of the constitutionally protected speech. The Sixth Circuit Court of Appeals affirmed the district court’s decision upon appeal (*Doyle v. Mt. Healthy School District*, 1982).

The Supreme Court therefore refined the test to determine whether an employer's adverse employment action violates an employee's First Amendment free speech rights in *Mt. Healthy School District v. Doyle* (1977) (Dagley, 2012). Under this new test, Wenkart (2006) summarized that courts must determine:

1. Is the speech protected under the First Amendment?
2. If so, was it a motivating factor in the disciplinary decision?
3. If so, would the school district have nonetheless made the same disciplinary decision?

According to Nolte (1985), *Mt. Healthy* expanded the *Pickering* balancing test by shifting the burden of proof in answering the first two questions to the plaintiff, which upon success shifts the burden of proof to the employer to answer the third question.

Bailey and Sindelar (1987) further clarified the meaning of *Mt. Healthy*:

The effect of this case is that employers can dismiss an incompetent teacher even if some of the motivating charges are based on constitutionally protected activity. The employer must show, however, that the teacher would have been dismissed even if the protected conduct had not occurred. (p. 1156)

The *Mt. Healthy* test provided employers with assistance in the form of guidance in addressing personnel issues that included both constitutionally protected activity and other grounds for adverse employment action (e.g. dismissal, non-renewal, etc.) (Bailey & Sindelar, 1987; Dagley, 2012). Furthermore, *Mt. Healthy* refined the *Pickering* balance test by adding an "additional element" (Dagley, 2012, p. 15). The new element allowed employers to make adverse employment decisions that may have been partially motivated by constitutionally protected activities as long as the actions would have



occurred in the absence of such activity and not in violation of the Constitution or other statutory law (Bailey & Sindelar, 1987; Dagley, 2012; Jurenas & Zhang, 1990). This element disallowed teachers facing negative employment actions for legitimate reasons to prevail on claims of First Amendment free speech violations that may have occurred that were not determinative to the employer's decision to discipline them.

In *Pickering v. Board of Education* (1968), the Supreme Court established a test that balanced the speech rights of employees with the right of employers to operate their organizations efficiently. *Mt. Healthy School District v. Doyle* (1977) refined the *Pickering* test to determine whether the employee's speech received First Amendment protection, was a motivating factor in the adverse employment decision, and if the employer would have reached the same decision in the absence of the conduct (See e.g. *Lee v. Consolidated School District No. 4*, 1980). Both *Pickering v. Board of Education* (1968) and *Mt. Healthy School District v. Doyle* (1977) concerned teachers who spoke publicly (i.e. letter to the editor, local radio station) about issues of public concern. However, in *Givhan v. Western Line Consolidated School District* (1979), the Supreme Court considered whether the First Amendment protected the private, personal speech of an employee made to a supervisor in the privacy of the supervisor's office (Nolte, 1985).

***Givhan v. Western Line Consolidated School District (1979)***

Bessy Givhan was an African-American female junior high school teacher in Mississippi who complained, in private (principal's office), to her school principal about the district's desegregation efforts. Her complaints included comments about the court-ordered desegregation efforts, racial desegregation, and the district's employment practices (Bernheim, 1986; Dagley, 2012; *Givhan v. Western Line Consolidated School*

*District.*, 1979; Hassenpflug, 2001, 2002; Jurenas & Zhang, 1990). According to Jurenas and Zhang (1990), the principal claimed that Givhan's speech was "insulting, hostile, loud, and arrogant" (p. 430). After her complaints, the school district terminated her employment (Hassenpflug, 2001). Givhan challenged her termination alleging that the district violated her First Amendment free speech rights by disciplining her for her comments.

The United States District Court for the Northern District of Mississippi ordered that the school district reinstate Givhan; however, the Fifth Circuit Court of Appeals reversed and remanded the decision (DePietro & Zirkel, 2010; *Givhan v. Western Line Consolidated S. D.*, 1979). The Fifth Circuit ruled that Givhan's speech did not receive First Amendment protection because she spoke in private to an "unwilling recipient" (*Givhan v. Western Line Consolidated School District*, 1979). The Supreme Court, on a writ of certiorari, vacated the Fifth Circuit court's decision in part and remanded the case for further proceedings to determine if the district would have terminated Givhan in the absence of her speech citing *Mt. Healthy v. Doyle* (1977) (*Givhan v. Western Line Consolidated School District*, 1979), as *Mt. Healthy* had been decided during the pendency of *Givhan*; that is, while *Givhan* was being litigated. Justice Rehnquist, in delivering the opinion of the Court stated, in part:

- (1) the school principal, having opened his office door to the teacher, was hardly in position to argue that he was the unwilling recipient of her views, and
- (2) constitutional freedom of speech is not lost to a public employee merely because he arranges to communicate privately with his employer rather than

to spread his views before the public. (*Givhan v. Western Line Consolidated School District*, 1979, p. 1)

The lower courts did not apply the test established in *Mt. Healthy v. Doyle* (1977) in *Givhan* because *Mt. Healthy* was pending at the time of the lower courts' decisions (DePietro & Zirkel, 2010). In *Givhan v. Western Line Consolidated School District* (1979), the Supreme Court essentially determined "that the speech [of public school employees] could be made privately and still be protected, if the content of the speech addressed matters of public concern" (Hassenpflug, 2001, p. 2).

In the *Givhan* decision, the Supreme Court established "that a teacher, or any public employee, did not lose freedom of speech protection because the employee chose to speak in private rather than in a public forum like the previous cases [i.e. *Pickering v Board of Education*, 1968, *Mt. Healthy v. Doyle*, 1977]" (Dagley, 2012, p. 16; see also Bauries & Schach, 2011; Bernheim, 1986; Geisel & Kallio, 2010; Hassenpflug, 2001, 2002; Hooker, 1984a; Jurenas & Zhang, 1990; Nolte, 1985). Hassenpflug (2001), however, indicated that the private speech only received First Amendment protection if it addressed a matter of public concern. In *Givhan v. Western Line Consolidated School District* (1979), Givhan's speech addressed racial desegregation and discrimination, which qualified as matters of public concern, and thus received First Amendment protection (Hassenpflug, 2002). In *Givhan*, the Court recognized that in addition to the content of a public employee's speech, the context, time, place, and manner of its delivery must be part of the analysis in determining whether the speech qualifies for First Amendment protection (*Givhan v. Western Line Consolidated School District*, 1979; Hooker, 1984a). This means that when courts examine the speech of a public employee

they must consider not only whether the speech pertained to an issue of public concern, but also consider where the speech occurred, the way in which it was delivered, and when the speech occurred. These factors establish the context of the speech, which contribute to the determination of whether the speech addresses a matter of public concern and its potential disruptiveness (i.e. *Pickering* balancing test).

*Givhan v. Western Line Consolidated School District* (1979) was the last case that the Supreme Court heard that specifically addressed the speech rights of public school teachers (Dagley, 2012; Hassenpflug, 2001). However, public school teachers and administrators are public employees, and cases that involve the speech rights of all public employees affect them (Dagley, 2012; Hassenpflug, 2001). *Connick v. Myers* (1983), a landmark Supreme Court decision, is one case that demonstrates the effect of cases involving public employee speech on public school employees. According to Nolte (1985), *Connick* further clarified the limits of the constitutional right to complain, as previously established by the Supreme Court in *Givhan*, in which the Supreme Court ruled that privately communicated workplace criticisms regarding issues of public concern received First Amendment free speech protections.

### ***Connick v. Myers* (1983)**

Sheila Myers was an assistant district attorney in New Orleans. In 1980, the district attorney, Harry Connick, informed her that he was transferring her to different division of the district attorney's office (Bernheim, 1986; Hooker, 1984a). According to Bernheim (1986), Myers had served "competently" (p. 634) in her position for five and a half years and opposed the transfer, an objection she communicated to her supervisors (Bailey & Sindelar, 1987; Hooker, 1984a, 1984b). After Connick informed her that the

decision to transfer her was final, Myers distributed a questionnaire throughout the district attorney's office that asked the 15 other assistant district attorneys about office morale, the office transfer policy, the need for a grievance committee, their confidence in their supervisors, and whether they felt pressure to work for political campaigns (Bailey & Sindelar, 1987; Bernheim, 1986; Dagley, 2012; DePietro & Zirkel, 2010; Hooker, 1984a, 1984b; Hudson Jr, 2001; Jurenas & Zhang, 1990). Connick terminated Myers's employment immediately after she circulated the questionnaire citing two reasons: (a) failure to accept the transfer and (b) insubordination related to the circulation of the questionnaire (Bailey & Sindelar, 1987; Bernheim, 1986; Dagley, 2012; Dyer, 1997, 2000; Hooker, 1984a, 1984b), which her supervisor reported to Connick as having caused a "mini-insurrection" within the office" (*Connick v. Myers*, 1983, p. 141). Myers filed a lawsuit claiming that the First Amendment protected her actions (Bailey & Sindelar, 1987; Hooker, 1984a, 1984b; Jurenas & Zhang, 1990).

The United States District Court for the Eastern District of Louisiana held that Myers's activity in circulating the questionnaire constituted First Amendment protected speech and ordered that the district attorney's office reinstate her, provide back pay, and pay compensatory damages. District Attorney Connick appealed the decision to the Fifth Circuit Court of Appeals, which affirmed the lower court's decision. The Supreme Court granted certiorari and reversed the decision, holding that Connick did not violate Myers's free speech rights when he terminated her for her office conduct (*Connick v. Myers*, 1983).

The Supreme Court, drawing upon *Givhan*, reached its decision through examining the content of the speech (i.e. the questionnaire Myers circulated around the

office) and whether it addressed issues of public concern as established in *Pickering v. Board of Education* (1968) (Bailey & Sindelar, 1987; Bernheim, 1986; *Connick v. Myers*, 1983; Dagley, 2012; Hooker, 1984a, 1984b). That is, public employers have an interest in operating efficiently and effectively, and in the absence of violating an employee's rights, this decision allowed public employers to make employment decisions without judicial interference. A public employee's speech receives First Amendment protection only to the extent that the content, when viewed in its totality, of the speech is of public concern (Nolte, 1987). The Court's examination of Myers's speech included not only the questions asked (i.e. the content of the speech) but also the context of the district attorney's office where Myers developed and distributed the questionnaire (Bailey & Sindelar, 1987; Bernheim, 1986; Dagley, 2012; Hassenpflug, 2001; Hooker, 1984a).

In their explanation of the Supreme Court's determination of whether the First Amendment protected Myers's speech, Bailey and Sindelar (1987) noted that the Court determined the speech resembled, for the most part, an employment grievance and did not address matters of public concern. In fact, the Court deemed only one item on the questionnaire, the item regarding using office personnel to work on political campaigns, was an issue of public concern (Bailey & Sindelar, 1987; Dagley, 2012; Hassenpflug, 2001; Hooker, 1984a). According to Hassenpflug (2001), once the Court determined that at least part of Myers's speech addressed an issue of public concern, it had to balance the expressive rights of the individual and the efficient operation of the workplace (i.e. the *Pickering* balancing test). The Supreme Court ruled that Myers's speech did not meet the necessary threshold to receive First Amendment protection (Dagley, 2012).

At least a portion of Myers's speech touched upon a matter of public concern, thus the Supreme Court had to determine whether Connick was justified in dismissing her using the *Pickering* balancing test. The Supreme Court determined that Myers's speech had a detrimental effect on the effective and efficient operation of the public employer and negatively affected the close working relationship between Myers and her employer, which were disruptive to the workplace (*Connick v. Myers*, 1983). When balancing Myers's speech rights against those of her employer, the Supreme Court decided that her dismissal was justified.

According to Hooker (1984a):

The Court, to the dismay of the dissent, stripped Myers of First Amendment protection when it determined that her questionnaire, when viewed as a whole, and in the context in which it was prepared and distributed, did not meet the test of public concern as the term was used in *Pickering*. Myers' questionnaire, the Court said, concerned only internal office matters, which is not a matter of public concern. (p. 637)

In *Connick v. Myers* (1983), the Supreme Court considered Myers's questionnaire as a whole, including the context, time, place, and manner, not solely the content of it (Bailey & Sindelar, 1987; *Connick v. Myers*, 1983; Dagley, 2012; Hassenpflug, 2001; Hooker, 1984a).

In *Connick*, the Court accepted all of the standards that were articulated in *Pickering* and *Givhan*. It also ruled that the determination of whether a particular statement by a public employee is addressed to a subject of public concern depends on where it was said and why. (Hooker, 1984a, p. 638)

Thus in ruling against Myers, the Supreme Court clarified that for speech related to matters of public concern, courts must also consider the content, form, and context of the speech in its entirety (*Givhan v. Western Line Consolidated School District*, 1979; Jurenas & Zhang, 1990).

Hooker (1984b) continued to explain the meaning of *Connick v. Myers* (1983):

Thus, although Myers' speech as a whole was not totally outside the ambit of the First Amendment's protection, the lower court had erred in applying the balancing test to the entire questionnaire, as most of the speech was better characterized as an employee grievance. (p. 3)

According to Bernheim (1986), *Connick* refined the speech analysis established in the previous Supreme Court cases. The refined test, after *Connick* and considering *Pickering*, *Mt. Healthy* and *Givhan*, required courts to

1. determine if the employee was speaking as a citizen on a matter of community interest (public concern) or on a matter of internal concern
2. balance an employer's interest in efficiency and harmony in the workplace against the interests of the employee and the community in free expression
3. make the employee prove that the speech was a motivating factor in the employer's adverse action (burden of persuasion)
4. determine if the test is met whether the employer's actions would have been the same in the absence of the protected speech. (Bernheim, 1986, p. 8)

*Connick* did not involve an educational setting or public school employees; however, subsequent court rulings in cases involving public school employees relied upon its decision (Bailey & Sindelar, 1987, Dagley, 2012; Hooker, 1984b, McCarthy, 2006; see



e.g. *Bowman v. Pulaski County Special School Dist.*, 1983; *Gregory v. Durham County Bd. of Educ.*, 1984; *Knapp v. Whitaker*, 1983; *McGee v. South Pemiscot School Dist. R-V*, 1983). *Connick* is not the only case that originated from non-educational settings that courts apply to public school First Amendment retaliation cases. One of these cases, *Waters v. Churchill* (1994), is the next case in the line of Supreme Court decisions that address public employee free speech. However, the *Connick* decision remains relevant in adjudicating the free speech cases involving public employees, including public school employees.

#### ***Waters v. Churchill* (1994)**

In 1987, while on a break, Cheryl Churchill, a nurse at a public hospital, made critical comments to a coworker related to the hospital's training policy and its effect on patient care (Dyer, 1997; McCarthy, 2006; Paukin & Daniel, 2007; Russo & Delon, 1999). Churchill's supervisors conducted an investigation regarding her comments. Several coworkers overheard the comments; however, the content of Churchill's comments was in dispute—some employees claimed the comments were disruptive while others claimed the comments were non-disruptive (McCarthy, 2006; *Waters v. Churchill*, 1994). Nevertheless, hospital supervisors claimed that the comments disrupted the work environment and dismissed her (Leas & Russo, 1994; Tatel, Brannan, & Kohrman, 1993). Churchill filed a lawsuit against the hospital officials claiming that the dismissal violated her First Amendment free speech rights.

The United States District Court for the Central District of Illinois granted summary judgment in favor of the hospital officials. Churchill appealed the decision to the Seventh Circuit Court of Appeals, which reversed the district court's decision

concluding that Churchill's speech addressed a matter of public concern and was not disruptive. The hospital officials applied for a writ of certiorari, which the Supreme Court granted. The Supreme Court vacated the Seventh Circuit decision and remanded the case for further proceedings (*Waters v. Churchill*, 1994). Delivering the plurality opinion of the Court, Justice O'Connor held that

1. government, as employer, has far broader powers in First Amendment context than does the government as sovereign;
2. government employee's speech is treated differently than private person's speech with regard to substance and procedural requirements;
3. before government employer can discharge employee for unprotected speech, it must undertake a reasonable investigation to determine what the supervisor reasonably thought the speech to be rather than what the speech actually was and must in good faith believe the facts on which it purports to act;
4. hospital had undertaken adequate investigation;
5. nurse's speech as believed by hospital officials was not protected; but
6. genuine issue of fact existed as to the motivation of the hospital officials.

(*Waters v. Churchill*, 1994, p. 661)

A plurality opinion is an opinion lacking enough judges' votes to constitute a majority, but receiving more votes than any other opinion (*Black's Law Dictionary*, 2009).

Plurality opinions result when five or more Justices agree on the result in a particular case but no single rationale or opinion garners five votes. The opinion

that receives the largest number of votes among those supporting the result favored by the majority of Justices is generally labeled as the plurality opinion. Other opinions supporting that result (but not the plurality's reasoning) are ordinarily identified as opinions concurring in the judgment. (Spriggs II & Stras, 2011, p. 519)

Plurality decisions are ambiguous in terms of their precedential value because of the traditional value placed upon the Supreme Court's majority decisions. However, plurality decisions apply, similarly to majority decisions, to cases involving similar issues (Hochschild, 2000). According to Hochschild (2000), when applying plurality decisions, courts apply only the most authoritative narrowest grounds of the plurality opinion.

In *Waters v. Churchill* (1994), Justice O'Connor delivered the opinion of the Court, joined by Justices Rehnquist, Souter, and Ginsberg. Four other justices (Souter, Scalia, Kennedy, and Thomas) filed concurring opinions that supported vacating and remanding the circuit court decision. However, Justice Souter and Justice Scalia (joined by Justices Kennedy and Thomas) disagreed, in part, with the rationale presented by the Court. The plurality opinion of the Court emphasized the *Connick* test (emphasizing the holistic context of the speech), whereas, Scalia's concurring opinion relied on *Pickering* and *Mt. Healthy* and questioned "the plurality's recognition of a broad new First Amendment right to an investigation before dismissal for speech [that] is unprecedented and unpredictable in its application and consequences" (*Waters v. Churchill*, 1994, p. 663). Scalia's opinion emphasized that the hospital officials dismissed Churchill for the potential disruption, not her expression on matters of public interest. That is, interpreting Scalia's opinion, the requirement for an investigation prior to an adverse employment

action for potentially disruptive comments is not necessary under *Pickering* and *Mt. Healthy* because of the public employer's interest in maintaining an efficient and harmonious workplace.

The Court's plurality opinion stated that public employers should apply the *Connick* test, regarding "content, form, and context" (Oluwole, 2008, p. 998) to what the employer thought was said, not what was actually said based on the results of a reasonable investigation. Additionally, the opinion indicated that First Amendment speech cases require a case-by-case analysis, consistent with the previous public employee First Amendment protected speech precedents (i.e. *Pickering*, *Mt. Healthy*, *Givhan*, and *Connick*), because of a government employer's interest in operating effectively and efficiently and a public employee's right to free speech. Furthermore, the Court concluded that employers must reach their conclusions about an employee's speech in good faith; that is, the investigation into the potential disruptive nature of the speech and resulting action based on that aspect of the speech must be reasonable in the workplace context. Finally, if a public employee's speech is likely covered within the First Amendment (i.e. addresses a matter of public concern and no evidence supports that it caused a disruption) the public employer (supervisor) must proceed with caution prior to making an employment decision (*Waters v. Churchill*, 1994). That is, employers must conduct a good faith investigation and balance the speech rights of the employee with the potential disruption that the speech may cause.

Applying this test, the Court determined that if Churchill's speech was as reported by the witnesses, the hospital officials' decision to fire her for the potential disruptiveness of the speech was reasonable under *Connick*, based on the result of the supervisor's good

faith investigation. However, the Court determined that the district court erred in granting the hospital summary judgment because Churchill produced enough evidence to create “a material issue of disputed fact” about the supervisor’s actual motivation (*Waters v. Churchill*, 1994, p. 663). This was based on the need to determine what, if any of the alleged protected speech, was disruptive or nondisruptive, and whether there were other statements that Churchill had made that served as the motivating factors in her dismissal. The Court ruled therefore that the district court needed to determine if Churchill’s speech qualified for First Amendment protection and whether her dismissal violated her First Amendment speech rights (*Waters v. Churchill*, 1994) because of the motivation of the supervisor.

Disputing internal policies may not receive First Amendment protection (Borecca & Russo, 2005). According to Cloud (2006), commenting on the probable implications of *Waters*,

Public employees who speak prematurely or incorrectly can contravene public policy and impede the efficient conduct of governmental functions. They can also damage their employers' reputation and credibility. Provocative speech can also distract co-workers and supervisors, impair interpersonal relationships, demoralize the staff, and reduce productivity. In extreme cases, irresponsible speech can endanger lives and property. (p. 861)

Although Churchill raised material issues of fact about the supervisor’s motivation, the hospital administrators claimed that they did not violate her First Amendment speech rights because their investigation was sufficient and reasonably determined that the speech *could* have been disruptive (Tatel et al., 1993; Wenkart, 2011). The Court

determined hospital administrators reasonably interpreted that Churchill's purported speech could have caused a disruption in the workplace and thus did not violate her First Amendment free speech rights.

Whittled to its core, *Waters* permits a government employer to fire an employee for speaking on a matter of public concern if: (1) the employer's prediction of disruption is reasonable; (2) the potential disruptiveness is enough to outweigh the value of the speech; and (3) the employer took action against the employee based on this disruption and not in retaliation for the speech. (*Jeffries v. Harleston*, 1995, p. 13)

It is important to understand that the Court concluded in *Waters v. Churchill* that while supervisor's were given leeway in conducting a good faith investigation to determine what they thought an employee said and whether they reasonably believed that it created a disruption in the workplace, it could not be a pretext for retaliation. The supervisor's motivation still plays a key role in these retaliation cases.

Therefore, public employee speech is not entitled to First Amendment protection if the public employer can reasonably anticipate that the speech could result in a disruption of workplace efficiency (Dyer, 1997; Feaga & Zirkel, 2006; Kohrman & Woodruff, 1995; Paukin & Daniel, 2007). However, Paukin and Daniel (2007) noted that employer disciplinary action must result from the potential disruption of the speech, not retaliation for the speech itself.

The Court posited in *Waters v. Churchill* (1994) that in most occurrences, in cases involving public employee speech, the disruption is speculative, not tangible, especially in cases where the discipline forestalls the expected disturbance. Furthermore, the result

of *Waters v. Churchill* (1994) is that the test resulting from *Connick* “applies to what the government employer reasonably thought the employee said (based on a good faith investigation), not to what the trier of fact ultimately determines the employee said” (DePietro & Zirkel, 2010, p. 825; see also Dyer, 2000; Hassenpflug, 2000; Tatel et al., 1993). McCarthy (2006) described the meaning of *Waters* stating, “In short, the government employer can reach its factual conclusions without being held to the evidentiary rules followed by the courts” (p. 871). That is, public employers’ investigations and resulting actions need not resemble the strict process required by courts of law.

Although *Waters v. Churchill* (1994) is “another non-school case” (McCarthy, 2006, p. 871), the case addressed the speech rights of public employees. Public school administrators are public employees, and thus the decision in *Waters* could apply to their speech rights, similar to *Connick* (another non-school case previously presented). The key to First Amendment analysis of government [adverse] employment decisions, then, is this: The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate. (*Waters v. Churchill*, 1994, p. 675)

Restricting the speech of public employees may be appropriate specifically when the public employer reasonably forecasts or predicts that the public employee’s speech

will result in a disruption to the workplace based on a good faith investigation, rather than a pretext for retaliation.

### **Summary of the Threshold-Balancing Test**

The five preceding Supreme Court cases each attempt to balance the free speech interests of public employees and the efficiency and effectiveness interests of public employers (Bernheim, 1986; Hooker, 1984a). The Supreme Court decisions in *Pickering*, *Mt. Healthy*, *Givhan*, *Connick*, and *Waters* combine to form a threshold-balancing test used by courts to determine if employee speech warrants First Amendment protection, which requires a series of sequential analyses. The emergence of this threshold-balancing test began with *Pickering v. Board of Education* (1968) and the literature refers to it by many names. Some of the names are “balance of interests” (Dyer, 2000; Hassenpflug, 2001), the *Pickering* test (Dyer, 1997; Hassenpflug, 1999; Heckman, 2003; Nolte, 1985), the *Pickering* standard (Hooker, 1984b), and the *Pickering* balance test (Bailey & Sindelar, 1987; Bernheim, 1986; Jurenas & Zhang, 1990). However, the test has evolved to include elements of each of these five cases. The courts used this balancing test, summarized below, until 2006.

The first threshold, emanating from *Pickering*, is the determination of whether the speech addresses a matter of public concern. This step of the threshold-balancing test considers whether the public employee’s speech was made as a citizen on an issue of public interest or public concern (Bernheim, 1986; Dagley, 2012). *Connick* clarified this step through emphasizing that the content, form, and context of the speech had to be of public interest, not personal or work-related concerns (i.e. personal employment grievances) (Bernheim, 1986; *Connick v. Myers*, 1983; Dagley, 2012; Dyer, 1997;



Heckman, 2003). The time, place, and manner of speech (Hassenpflug, 2001; Oluwole, 2008; see also *Givhan v. Western Line Consolidated School District*, 1977), as well as the form and context (Dyer, 1997; Jurenas & Zhang, 1990; see also *Connick v. Myers*, 1983), are contributing factors in determining whether the contested speech is of private or public concern (Dagley, 2012). Bernheim (1986) clarified these components:

Whether speech relates to a personal or public concern ‘must be determined by the content, form, and context of a given statement’ (citing *Connick v. Myers*, 1983, p. 147). The content of speech is, of course, the subject that an employee is talking about. The form is the manner in which opinions are expressed. The context is the circumstances under which the employee’s concerns arose. (p. 10)

If the speech does not pertain to matters of public concern, the analysis concludes, as it does not qualify as protected speech. However, if the speech meets this aspect of the threshold-balancing test, that is public concern, the analysis continues to the second step of the threshold-balancing test.

In the second step of the threshold-balancing test, courts balance the free speech rights of the individual against the public employer’s interests in maintaining harmony, efficiency, and effectiveness of the workplace (Bernheim, 1986; Dagley, 2012; DePietro & Zirkel, 2010; Heckman, 2003; Wenkart, 2006). This step emerged from both *Pickering* (Jurenas & Zhang, 1990) and *Connick* (Hooker, 1984b). If the court determines that the speech even if on a matter of public concern disrupted the workplace based upon the facts presented by the employer, then the speech does not receive First Amendment protection. However, if no evidence of public concern speech causing a

disruption exists, the speech qualifies as protected speech and the courts must apply step three.

The third step requires the public employee to prove that the protected speech was a motivating factor in an adverse employment action (Bernheim, 1986; Wenkart, 2006). This step requires the employee to sustain the burden of proof to show a nexus between the speech and the retaliation (Bailey & Sindelar, 1987; Bernheim, 1986; Heckman, 2003; Nolte, 1985). The Supreme Court's decision in *Mt. Healthy v. Doyle* refined this aspect of the threshold-balancing test (Bernheim, 1986; Dagley, 2012; Dyer, 2000; Hassenpflug, 1999; Heckman, 2003; Nolte, 1985). Specifically, the *Mt. Healthy* decision allows public employers to dismiss employees without fear of First Amendment retaliation claims if the employee cannot prove that the speech qualified as protected and was a motivating factor in the action (Bailey & Sindelar, 1987; Dagley, 2012), that is the employer can prove that it would have taken the same adverse employment action in the absence of the protected speech. Courts must move to the fourth part of the threshold-balancing test if employees are able to meet the burden of proof that the adverse employment action was in retaliation for protected speech.

The fourth step of the threshold-balancing test, emanating from *Mt. Healthy*, shifts the burden back to the employer to demonstrate that the adverse employment decision would have occurred in the absence of the protected speech (Bailey & Sindelar, 1987; Bernheim, 1986; Dagley, 2012; Dyer, 2000; Hassenpflug, 1999; Heckman, 2003; Jurenas & Zhang, 1990; Nolte, 1985). This step does not require an absence of protected speech. In fact, the protected speech can represent some of the motivation for the adverse employment action as long as the employer can prove by a preponderance of the

evidence, resulting from a good-faith investigation, that it would have taken the same action regardless of the protected speech (*Burns v. Rovaldi*, 1979; Dagley, 2012; Jurenas & Zhang, 1990; Wenkart, 2006).

The preceding four steps represent the threshold-balancing test that governs the speech rights of public employees. For the most part, the Supreme Court decisions in *Pickering*, *Mt. Healthy*, and *Connick* created and refined the speech analysis related to public employees. The two other Supreme Court cases, *Givhan* and *Waters*, contributed to the analysis by clarifying the parameters of the application of the test. In *Givhan*, the Court recognized that in addition to the content of a public employee's speech, the context, time, place, and manner of its delivery must be part of the analysis in determining whether the speech qualifies for First Amendment protection or not if it is disruptive (*Givhan v. Western Line Consolidated School District*, 1979; Hooker, 1984a). Specifically, the ruling in *Givhan* clarified that private speech that addressed a matter of public concern qualified as First Amendment protected speech so long as it does not cause a disruption (Bauries & Schach, 2011; Bernheim, 1986; Dagley, 2012; Geisel & Kallio, 2010; Hassenpflug, 2001, 2002; Hooker, 1984a; Jurenas & Zhang, 1990; Nolte, 1985; Wenkart, 2006).

The Court's plurality decision in *Waters v. Churchill* (1994) also provided guidance for determining whether employee speech qualified for First Amendment protection. In *Waters*, the Court's opinion stated that (a) public employers have broader power to limit employee expression under the First Amendment; (b) public employee speech is not equal to that of a private citizen; (c) public employers need only demonstrate that they conducted, in good faith, a reasonable investigation into an

employee's speech and its likelihood of causing a disruption; and (d) the employer can base the employment action on purported speech, not the actual speech, based on its potential to cause a disruption in the workplace (*Waters v. Churchill*, 1994; see also DePietro & Zirkel, 2010; Tatel et al., 1993; Wenkart, 2011). The *Waters* decision encompasses the balancing test; however, it adds the major components of the investigation, specifically stating the difference between public employee and private citizen speech, and the fact that the speech motivating the disciplinary action did not have to be what was actually said, rather the employer's reasonable prediction that the speech, as they believed it to occur, would result in a disruption to the workplace.

#### **The *Garcetti v. Ceballos* (2006) Supreme Court Decision**

In 2006, the Supreme Court issued a 5-4 decision ruling that the speech of a public employee, made as part of or pursuant to his official duties did not qualify for First Amendment protection (Cloud, 2009; Dagley, 2012; Draschler, 2008; Fabian, 2010; Mawdsley & Osborne, 2007; McCarthy, 2006; McCarthy & Eckes, 2008; Wenell, 2006).

From 1968 until 2006, the Supreme Court had developed a very workable standard for the scope of First Amendment protection for employees when they speak out about matters related to their workplace or the agency that employs them. But the Court severely narrowed that protection in *Garcetti v. Ceballos*. (Draschler, 2008, p. 1)

While it may appear that workable standards had emerged from the Supreme Court's decisions, one could argue that the determination of public employee First Amendment protected speech had, in fact, become increasingly complex.

Richard Ceballos was a supervising deputy calendar district attorney in Los Angeles County (Cloud, 2006, 2009; Hassenpflug, 2007; Mawdsley & Osborne, 2007; McCarthy, 2006; Schroll, 2008; Wenell, 2007). He investigated a claim from a defendant's attorney about a search warrant, a task considered to be within his job duties (Cloud, 2006; Mawdsley & Osborne, 2007; McCarthy, 2006; Wenkart, 2006). His investigation revealed that the warrant misrepresented the facts (Draschler, 2008; Mawdsley & Osborne, 2007; McCarthy, 2006; Wenkart, 2006), which he discussed with his immediate supervisor, the head district attorney, Garcetti, and the sheriff (Cloud, 2006; McCarthy, 2006; Schroll, 2008).

Ceballos recommended that the district attorney's office dismiss the case because of the questionable warrant (Cloud, 2006; Mawdsley & Osborne, 2007; McCarthy, 2006; Wenell, 2007; Wenkart, 2006). The head district attorney decided to wait for a ruling on the defense's motion that challenged the search warrant. Ceballos informed the defense attorney that he believed the warrant included false statements (Schroll, 2008). The defense counsel subpoenaed Ceballos to testify at the hearing challenging the warrant, which he did (Cloud, 2006; Hassenpflug, 2007; McCarthy, 2006; Wenkart, 2006). The court denied the motion challenging the warrant and the prosecution proceeded to trial. The district attorney's office removed Ceballos from the prosecution team because he had testified for the defense because of the defense's subpoena (McCarthy, 2006).

Ceballos claimed that following his testimony his supervisors retaliated against him in a number of ways (Geisel & Kallio, 2010). The retaliation included a demotion, denial of promotion, threats from his supervisor, rude and hostile treatment from his supervisor and the head district attorney, the choice of an undesirable transfer or a

reassignment to a lesser position, having one of his cases reassigned to another district attorney, and supervisors barring him from future murder cases (Cloud, 2006, 2009; Mawdsley & Osborne, 2007; McCarthy, 2006; Schroll, 2008; Wenkart, 2006). In response to the alleged retaliation, after an unsuccessful attempt to reach a resolution using the formal grievance process (Cloud, 2009; Dagley, 2012), Ceballos filed a lawsuit in the United States District Court for the Central District of California claiming that the actions of his supervisor and the district attorney violated his First and Fourteenth Amendment rights to free speech. The district court granted the defendants, his supervisors and District Attorney Garcetti, summary judgment (*Garcetti v. Ceballos*, 2006; McCarthy, 2006). Ceballos appealed to the United States Court of Appeals for the Ninth Circuit (*Garcetti v. Ceballos*, 2006; Schroll, 2008).

The Ninth Circuit Court of Appeals reversed and remanded the district court decision upholding Ceballos's free speech claim referencing *Pickering* and *Connick* (Cloud, 2006; Dagley, 2012; McCarthy, 2006). The circuit court concluded that Ceballos's speech addressed misconduct, specifically "allegations of law enforcement perjury" (McCarthy, 2006, p. 874), which constituted an issue of public concern and thus qualified as protected speech under the First Amendment (Cloud, 2006; Dagley, 2012; McCarthy, 2006). Furthermore, the circuit court emphasized that the content of a public employee's speech, in this case the reporting of wrongdoing, outweighed the fact that the speech pertained to the employee's duties (*Ceballos v. Garcetti*, 2004; McCarthy 2006). The Ninth Circuit Court of Appeals applied the *Pickering* test and determined that Ceballos's speech qualified as protected speech under the First Amendment and could not be the basis for the negative employment experiences he experienced (*Ceballos v.*

*Garcetti*, 2004; McCarthy 2006). *Garcetti* appealed the decision to the Supreme Court, which granted certiorari.

The Supreme Court reversed and remanded the circuit court decision (*Garcetti v. Ceballos*, 2006). Justice Kennedy delivered the 5-4 majority decision holding that

- (a) when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline, and
- (b) here, district attorney [Ceballos] did not speak as a citizen when he wrote his memo, but rather as an employee. Thus, his speech was not protected by the First Amendment. (*Garcetti v. Ceballos*, 2006)

Unlike similar First Amendment free speech cases, the Court did not consider whether Ceballos's speech was that of a citizen about a matter of public concern (Cloud, 2006; Dagley, 2012). Instead, in *Garcetti* the primary question considered by the Court was whether the First Amendment protected employee speech made pursuant to their official job duties (Cloud, 2006; Dagley, 2012; Geisel & Kallio, 2010; McCarthy, 2006; Wenkart, 2006). The Court, limiting the scope of the *Garcetti* decision, indicated that speech not within an employee's scope of employment could still qualify for First Amendment protection (*Garcetti v. Ceballos*, 2006; Geisel & Kallio, 2010; McCarthy, 2006). However, the Supreme Court failed to provide a concrete definition of speech pursuant to duty, stating that job descriptions are insufficient as to their inclusion of the actual duties of a position and that in determining the relatedness of the speech and an

employee's duty the inquiry need only be a practical one (*Garcetti v. Ceballos*, 2006).

Specifically, the majority opinion stated

Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes. (*Garcetti v. Ceballos*, 2006, pp. 424-425)

The majority opinion emphasized that they had no inclination "to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate" (*Garcetti v. Ceballos*, 2006, p. 424).

Whereas the Ninth Circuit in *Ceballos* emphasized the content of the speech over the context (McCarthy, 2006), Justice Kennedy's Supreme Court decision indicated that the *Garcetti* decision aligned with the *Pickering* and *Connick* progeny (Cloud, 2006) and *Waters* with its distinction between citizens and public employees. That is, the decision analyzed Ceballos's speech according to its content, form, context, time, place, and manner. According to McCarthy (2006), the Court decision emphasized that the forum or workplace where the speech occurred was not the central consideration (i.e. Ceballos's stated concerns regarding the warrant). Instead, the Court's primary question, or controlling factor, was whether Ceballos was speaking as a citizen or public employee speaking within the context of his job duties (McCarthy, 2006; Wenell, 2007).

McCarthy (2006) summarized the Court's *Garcetti* decision:

The Ceballos majority reasoned that where the comments are made is immaterial as long as they relate to official duties. The majority emphasized that individuals



employed by the government are employees first and have no right to be insubordinate in performing their jobs.... The bottom line according to the Court majority is that the public employer must have control over speech it has commissioned. (p. 875)

According to the Court, public employees who discover and wish to expose wrongdoing in the workplace can seek the protection of state and federal legislation (e.g. whistleblower protection laws) in the absence of First Amendment protection (Cloud, 2006; Dagley, 2012; Mawdsley & Osborne, 2007; McCarthy, 2006). “In short, the Court majority denied First Amendment protection to all public employee expression pursuant to official responsibilities” (McCarthy, 2008, p. 1).

The academic literature related to the dissenting opinions in *Garcetti* is abundant because of the potential consequences of the majority decision. Justice Stevens’s dissent included the notion that the *Garcetti* decision would incentivize public employees to seek public exposure of observed wrongdoing prior to speaking with supervisors (Cloud, 2009; Dagley, 2012; Mawdsley & Osborne, 2007). Justice Breyer argued that public employees’ speech on matters of public concern related to their job duties should receive First Amendment protection, based on *Pickering* and *Connick*, and challenged the legal basis for the decision because previous First Amendment public employee free speech cases did not address speech relating to matters of public concern within the scope of duties as an employee (Cloud, 2006, 2009; Dagley, 2012; *Garcetti v. Ceballos*, 2006). Justice Souter furthered the dissenting opinion stating that public employees are likely to be in positions that allow them to have informed opinions related to issues of public interest (Cloud, 2006, 2009; Dagley, 2012). Additionally, Justice Souter argued that

whistleblower protection laws might not protect employees from retaliation for their speech reporting wrongdoing (Cloud, 2006, 2009; Dagley, 2012). According to McCarthy (2008), the four dissenting justices argued against the majority's opinion that barred all job-related speech from First Amendment protection. The dissent emphasized that the Court should have applied the *Pickering* balancing test and not developed a new threshold question (McCarthy, 2008).

The dissenting opinions contended the majority opinion's focus on speech pursuant to an employee's duty lacked any discussion on the effect the decision would have on public education (Cloud, 2006; Geisel & Kallio, 2010; Mawdsley & Osborne, 2007; McCarthy, 2006). In this regard, "the majority noted that the employee's written job description is not all that is considered in determining whether a task is within the scope of the employee's duties" (McCarthy, 2006, p. 876, see also Wenell, 2007) and "specifically declined to decide whether its decision could impact academic scholarship or classroom instruction" (McCarthy, 2006, p. 876). According to the Court's majority opinion, *Garcetti* did not address factors that might apply to free speech in an educational setting (Cloud, 2006; *Garcetti v. Ceballos*, 2006; Geisel & Kallio, 2010; Mawdsley & Osborne, 2007). Specifically, the majority opinion stated

There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence [i.e. *Pickering*, *Mt. Healthy*, *Givhan*, *Connick*, and *Waters*]. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching. (*Garcetti v. Ceballos*, 2006, p. 425)

Some scholars have suggested that the *Garcetti* decision created a “bright-line” rule (i.e. a clearly defined rule that leaves little room for interpretation) contrary to previous precedent regarding the free speech rights of public employees (McCarthy, 2006; Schroll, 2008). That is, the *Garcetti* court, instead of applying the previously established balancing test, determined that speech pursuant to duty does not qualify for First Amendment protection (McCarthy, 2006; Schroll, 2008). Although the effect of the *Garcetti* decision on the free speech rights of public employees is still being formed based on subsequent federal court decisions and the emerging literature (Dagley, 2012; Wenell, 2007), many legal scholars believe that the decision could have a diminishing, or silencing (chilling e.g. see *Massey v. Johnson*, 2006; *Vargas-Harrison v. Racine Unified Sch. Dist.*, 2001 in which the courts stated that government employment-related retaliation has a chilling effect on an employee’s exercise of First Amendment speech rights), effect on the free speech rights public employees in specific circumstances in which their speech may be construed as pursuant to duty (Mawdsley & Osborne, 2007; McCarthy 2006, 2008; McCarthy & Eckes, 2008; Schroll, 2008). The *Garcetti* decision established a set of three inquiries used by the courts in determining whether speech qualifies as protected according to Smith (2010). The new speech analysis, as stated by Smith (2010) requires the following steps:

1. Courts must determine if the speech was pursuant to an employee’s official duties or as a citizen.
2. If the court determines that the speech is as a citizen, then the court must determine if the speech addressed a matter of public concern.

3. If the court determines that the speech is that of a citizen and a matter of public concern, the court must apply the balancing test (employee interest in free speech versus employer interest in effective functioning) (p. 290)

*Garcetti* created a new threshold, whether the speech was made pursuant to duty by a public employee or as a citizen commenting on matters of public concern, but left the previously established threshold-balancing test (i.e. *Pickering* and *Connick*) intact.

However, Cloud (2006) indicated that the result of *Garcetti* requires public employees to exercise restraint when speaking about issues related to their duties and job functions.

Similar to employees in the private sector, public employees owe allegiance and loyalty to their government employers (Cloud, 2006; Dagley, 2012).

Although the effects of the *Garcetti* decision are still emerging, cases involving public school employees immediately following the decision support the notion that the decision is limiting their free speech rights (McCarthy, 2008). According to McCarthy (2008) and McCarthy and Eckes (2008), approximately 80% of free speech cases post-*Garcetti* involving public educators (teachers and administrators) resulted in the courts determining that the speech was pursuant to duty and not protected. According to McCarthy (2008),

If the answer to any of these questions is ‘yes,’ the First Amendment inquiry ends and the employee can be disciplined:

*Garcetti* (2006)—Was the expression pursuant to official job responsibilities?

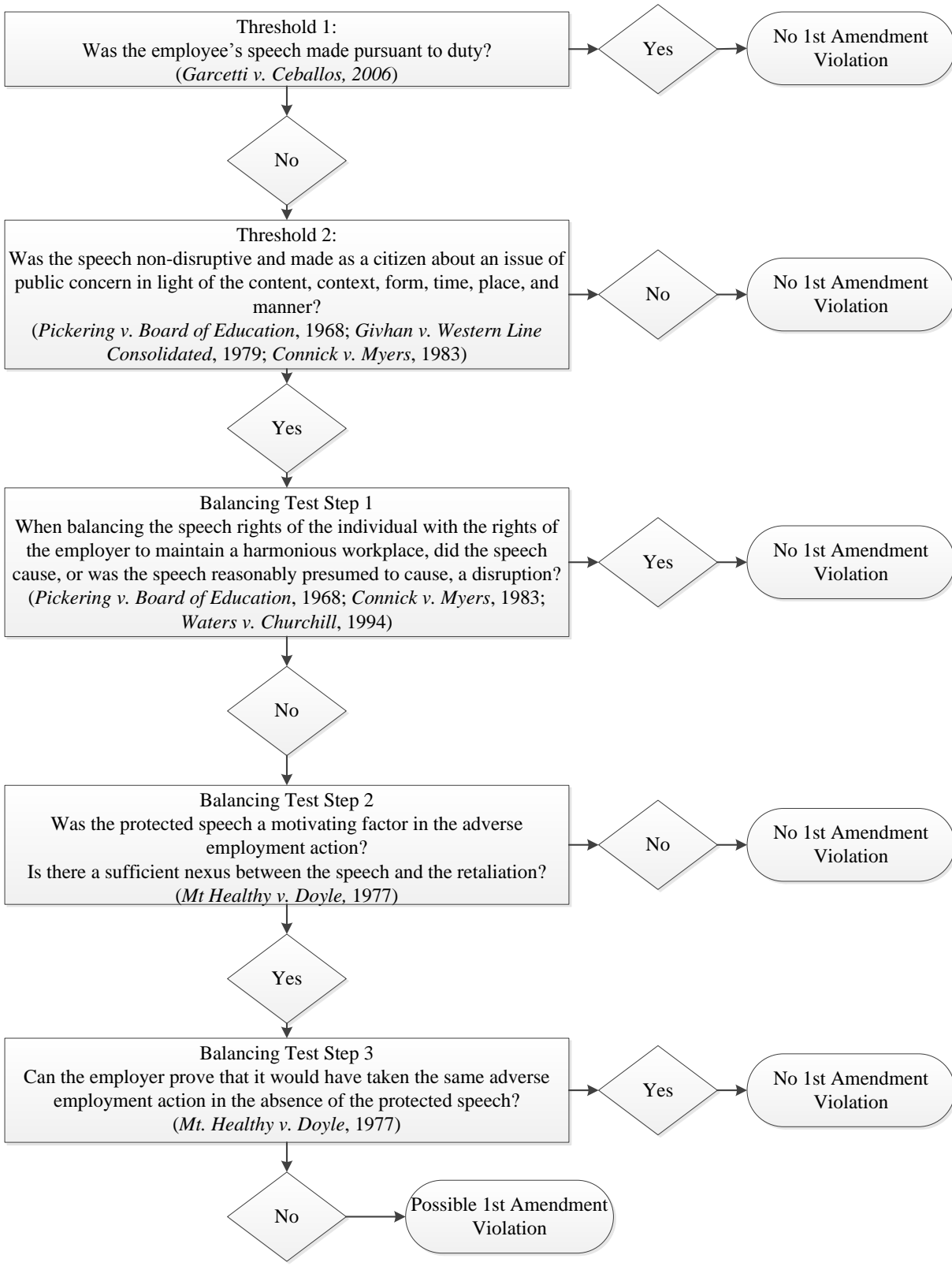
*Connick* (1983)—Does the expression relate to a private grievance instead of a matter of public concern?

*Mt. Healthy* (1977)—If expression on a public issue is the motivating reason for an adverse employment decision, are there other legitimate grounds to justify the decision?

*Pickering* (1968)—If adverse employment consequences are based solely on protected expression on public issues [of an employee as a citizen], does the expression impede job performance, jeopardize relationships with superiors or coworkers, or interfere with agency operations? (p. 3)

*Garcetti* did not overturn *Pickering* or the free speech progeny of the Supreme Court and the use of the balancing test; however, the decision further limited the instances in which courts activate the balancing test (McCarthy, 2008) with the introduction of the speech pursuant to duty threshold. Figure 1 represents the speech analysis used by the courts in determining whether an employee's speech receives First Amendment protection based on the Supreme Court cases through to May 31, 2006. Chapter 4 examines federal court cases involving public school administrators claiming First Amendment free speech violations post-*Garcetti*.

Figure 1. United States Supreme Court Public Employee Speech Analysis (1968-2006)



### **A Brief Note on “Whistleblowing” in Public Schools**

Both the majority opinion and dissenting opinions in *Garcetti v. Ceballos* (2006) mention statutory whistleblower protection as either plausible or inadequate remedies for employees who receive adverse employment actions resulting from their speech.

Whistleblower protection statutes were enacted to protect government employees who report wrongdoing (Garcia, 2008). The literature pertaining to *Garcetti* also often continues the discussion of whistleblowing statutes and their inability to protect public employees (see Garcia, 2008). Cloud (2006) summarized Justice Souter’s dissent in *Garcetti*, “whistleblowers are not always protected from retaliation because speech addressing official wrongdoing can fall outside protected whistleblowing activity” (p. 864). Whistleblowing by public employees, specifically public school administrators, exceeds the scope of this dissertation as these statutes vary state to state. This dissertation focuses on public school administrators who claim retaliation for violations of their First Amendment protected expression after the Supreme Court decision in *Garcetti*.

### **A Brief Note on Policymaking Personnel in Public Schools**

In *Pickering v. Board of Education* (1968), the Supreme Court noted in footnote three that some positions within public employment could require a level of confidentiality that any speech regarding the operation of the entity could provide “permissible ground for dismissal” (p. 570). Policymaking positions within public entities are positions foreseen in the Court’s decision in *Pickering*. Various federal courts have ruled differently in determining whether public school employees are in fact

policymakers and whether their speech is entitled to First Amendment protection. In *Hager v. Pike County Board of Education* (2002), the Sixth Circuit Court of Appeals determined that a teacher's political affiliation was inconsequential to her position as a teacher and was insufficient rationale for her demotion. In *Dabbs v. Amos* (1995), the Fourth Circuit Court of Appeals ruled that Dabbs, a Community-Schools Coordinator (a position with policymaking authority), was not entitled to First Amendment free speech protections when she criticized a series of policy decisions. Citing *Connick v. Myers* (1983), the appellate court balanced Dabbs's speech rights against her employer's right to operate efficiently and effectively, ultimately deciding that the district's actions did not violate her First Amendment speech rights. Dabbs engaged in speech in a policymaking position, which was deemed hostile towards her employer and disrupted the workplace (*Dabbs v. Amos*, 1995). In PK-12 public education cases involving claims of First Amendment speech violations by policy makers, courts have recognized that employees in these role relinquish some free speech rights (McCarthy, 2008; see e.g. *Sharp v. Lindsey*, 2002; *Vargas-Harrison v. Racine Unified School District*, 2001; *Pahmeier v. Marion County Schools*, 2006).

In a higher education case, *Dixon v. University of Toledo* (2012), an associate vice president was terminated after writing an opinion-editorial column in a local paper, which criticized a previous editorial that compared the gay rights movement to the Civil Rights movement. As a vice president, Dixon had policymaking responsibilities. Her speech (op-ed column) addressed a political and policy issue, which is not protected by the First Amendment (*Dixon v. University of Toledo*, 2012). The public employer's (University of



Toledo) interest in efficiency trumped Dixon's free speech rights specifically because her speech directly contradicted university policy.

Nonetheless, at the time of this dissertation, the Supreme Court had not heard or ruled on any cases regarding PK-12 public school employees or administrators with regard to public policymaker status, and cases emanating from higher education institutions are excluded in this analysis. Cases regarding public school administrators as policy-making positions, although important to the preparation and daily duties of school administrators, exceed the scope of this dissertation—the focus of this dissertation is PK-12 public school administrators claiming First Amendment free speech violations.

## CHAPTER III

### Methodology

This study examined federal cases involving the claims of alleged violation of First Amendment protected free speech rights of public school administrators. The study was a “qualitative, document-based, legal-historical, multiple-case” (Dagley, 2012, p. 63) inquiry that analyzes reported federal court cases from June 1, 2006 through December 31, 2013. The study examined, using qualitative research methods and traditional legal analysis “bounded by a legal-historical, document-based point of reference” (Harris, 2011, p. 33), federal court decisions that involve public school administrator speech that resulted in retaliation or other adverse employment actions. The qualitative research analysis was used to determine themes, categories, and patterns that emerged from the case law, which was synthesized to answer the research questions, which were presented in Chapter I.

Historical research is a type of qualitative research (Gall, Gall, & Borg, 2007). “Historical research in education includes a wide range of topics” (Dagley, 2012) including the history of educational legislation (Gall et al., 2007). According to Gall, Gall, and Borg (2007), educational legislation includes court decisions related to education. Furthermore, the focus of this research was twofold: (a) the *ratio decidendi*, “the holding, or the principle of law on which the case was decided” (Barkan, Mersky, & Dunn, 2009, p. 5) and (b) the application of judicial precedents to contemporary cases (Barkan et al., 2009) based on the specific facts of each case.

According to Rowe (2000), legal research requires a few preliminary steps. First, before embarking in legal research, a researcher must understand the issue (Rowe, 2000),

which in this study is the extent to which the First Amendment applies to the speech of public school administrators in different contexts. Once the question is clear, Rowe (2000) recommended developing a common sense approach in organizing the research plan. This plan included identifying primary sources, which were federal court cases in this study (Rowe, 2000). Rowe (2000) insisted that researchers use current law, that is, the researcher must be certain that the cases included in the research have not been modified or rejected by law that is more recent. Finally, Rowe (2000) indicated the need for flexibility in the research plan once the researcher determines the issue, primary sources, and current law. The Shepard© citation system was used to determine that the cases analyzed in Chapter IV were the most recent decisions in each of the cases. The Shepard© citation system is a system used within LexisNexis (a computer-assisted legal research system) that tracks the previous history and subsequent legal decisions of court cases through a process that is known as the verb to “Shepardize©” a case.

Merriam (2009) stated that public records serve as a major source of data for qualitative research. “Public records are the official, ongoing records of a society’s activities... Public documents include actuarial records of births, deaths, and marriages, the U.S. census, police records, court transcripts...” (Merriam, 2009, p. 140). Federal court cases, which are public records, serve as the data source for this study. The examination of these cases provides a historical record that answers the research questions. The method used to examine the federal court opinions was the case brief method presented by Statsky and Wernet (1995). This method of analysis includes the following:

1. Citation—the full citation of the case
2. Key Facts—the important facts that led to the decision of the court.
3. Issues—the rule of law considered in each issue included in the case
4. Holdings—the decision of the court; answers to each of the issues, in one word (yes/no and/or judgment granted or denied in part)
5. Reasoning—an explanation of why the court decided the way it did for each issue
6. Disposition—the order and procedural consequence resulting from the court’s holding (Statsky & Wernet, 1995).

Additionally, subsequent appellate history of each case will be checked using the Shepard© citation system. The results of each case will be analyzed within, integrated, and analyzed across all cases included in the study.

### **Research Questions**

The following were the research questions for this study.

1. Since the Supreme Court decision in *Garcetti* (2006), how have various federal courts ruled in cases involving adverse employment actions against public school administrators citing First Amendment protected speech in their complaints, including application of the accepted judicial precedents and the factors that led the courts to apply them?
2. Have the courts applied the *Garcetti* (2006) precedent consistently in cases regarding public school administrator speech? If yes, what was the rationale behind the application of the *Garcetti* (2006) pursuant to duty test? If not, which precedents did the courts apply and why?

### **Data Collection**

The federal court cases that served as the data for this study were those included in West Publishing Company's National Reporter System. The two main computer-assisted legal research systems are LexisNexis and Westlaw. The vast majority of legal researchers use Westlaw, which is preferred over LexisNexis approximately three-to-one (Lomio & Wayne, 2008). This study used the Shepard© citation system within LexisNexis to track the subsequent appellate history of each case. The federal court cases examined in this study were those available through Westlaw. West's National Reporter System, within Westlaw, includes a system index, the key number system, which categorizes and delineates specific legal concepts. The key number system is the method West's editors organize legal concepts within the West key number digest. The key number system allows researchers to access cases chosen by West's Law editors that address specific points of law (Dagley, 2012). The key number system is an elaborate outline that allows researcher to drill down from broad aspects of law to specific details contained within the legal topic. Similar to Dagley's (2012) study, this study started with the broad heading "Constitutional Law" (key digest number 92) and then narrowed to cases involving freedom of speech (section XVIII). The cases chosen for the study included public employees (subsection p) under the freedom of speech cases within the key number index. The cases selected were included within the education section (section q) under the subheading public employees. The key number system included six pertinent key numbers:

1. k1990—Retaliation
2. k1991—Public or private concern; speaking as "citizen"

3. k1993—Discipline or reprimand
4. k1994—Discharge
5. k1995—Nonrenewal of contract
6. k2001—Administrators

These six key numbers are all included within the West key number digest 92.XVIIIQ.1988 (Constitutional law→freedom of speech, expression, and press→education→employees).

Similar to Dagley's (2012) study, not all of the cases included in the literature appeared within the key numbers listed above. Borrowing from Dagley's (2012) methodology, the literature review unearthed several cases not included in the initial key number search. The fact that not all of the relevant cases were included in the initial key number search is not surprising as qualitative research is an iterative process (Miller & Crabtree, 1999), which requires the cross-referencing of multiple data sources. Gall et al. (2007) stated, "Historical research in education differs from other types of educational research in that most historians typically *discover* their data through a search of historical sources" (p. 529). Furthering this idea, Merriam (2009) indicated that accidentally uncovering data is part of the systematic search for data inherent to qualitative inquiries. The literature revealed that an additional key number (141E: Education) included cases relevant to this study. Additionally, the opinions of the cases themselves revealed additional cases included in the study.

The cases not included within the first set of key numbers were included in West's key number digest under section 141E: Education. Similar to the Constitutional law digest entry, the education entry included several subheadings and sections. Of

particular interest to this study were the entries under section five (adverse personnel actions) within public primary and secondary schools (subheading II). The specific key numbers including relevant cases were key number k419—principals, key number k584—Exercise of rights: retaliation, and k585—Reporting or opposing wrongdoing; criticism and “whistleblowing”. Although whistleblowing is excluded from this study, some of the cases listed under this number did not reference whistleblowing in the decision of the court. These key numbers are included under West’s key digest number 141E.2 (Education→public primary and secondary schools→teachers and education professionals→adverse personnel actions→grounds for adverse action).

“The literature review revealed a dividing line in the commentary between cases prior to and proceeding the landmark U.S. Supreme Court decision in *Garcetti v. Ceballos* (2006)” (Dagley, 2012, p. 67). The literature reviewed in Chapter II echoed the notion that the *Garcetti* decision changed the legal analysis governing public school administrator speech. With this in mind, the analysis excluded all of the cases involving public school employees prior to May 30, 2006, the date the Supreme Court ruled on *Garcetti*. The population of cases, reported in Westlaw, analyzed in this study included all federal district and circuit court opinions that occurred from June 1, 2006 through 2013 pertaining to the free speech rights of public school administrators.

### **Data Analysis**

Similar to Dagley’s (2012) model, the data analysis consisted of briefing each relevant case using the Statsky and Wernet (1995) case brief method. Once selected and briefed, the results (i.e. the court decision) of the cases were interpreted and coded. The interpretation was guided by appropriate legal analysis in which the ratio decendi and the

dicta were carefully separated in determining the results and meaning of each case. “Historical research tends to be positivist rather than purely interpretive” (Gall, et al., 2007, p. 529) meaning that it has a specific outcome; however, researcher interpretation was crucial in the analysis, the importance of which Gall et al. (2007) indicated. The presentation and organization of the data also has an effect on the interpretations of the data by the researcher (Gall et al., 2007). “Like all qualitative research the overall pattern of data analysis in this study was inductive in nature” (Dagley, 2012, p. 68). Hatch (2002) described inductive data analysis as “collecting[ing] as many detailed specifics from the research setting as possible, then set[ting] about the process of looking for patterns of relationship among the specifics” (p. 10). This study employed inductive data analysis, that is, it moved from specifics to analytic generalizations (Hatch, 2002; Lincoln & Guba, 1985).

According to Merriam (2009), once relevant historical documents, in this study federal court decisions, are identified, adoption of a coding system is necessary. The data analysis in this study involved reading each case, which is a form of open coding (Dagley, 2012; Merriam, 2009). Open coding is a coding system in which a researcher identifies data pertinent to the research questions (Merriam, 2009). After completing the open coding process, the open codes are organized analytically (Dagley, 2012). Analytical coding is more specific than descriptive coding because the process is affected by the researcher’s interpretation (Merriam, 2009). The final analytically derived grouping codes provided the categories used in the data analysis.

West’s key number system includes specific legal topics arranged categorically. The key number categories guided the coding process, which resulted in many instances



of *a priori* categories (Dagley, 2012). According to Creswell (2012), *a priori* codes are preexistent categories, which Crabtree and Miller (1999) referred to as prefigured categories. As stated before, some relevant cases were not included in the *a priori* (key number) codes; however, these cases fit the *a priori* categories and were included in the analysis. The coding process evolved during the data analysis to include codes in addition to the *a priori* codes, as recommended by Creswell (2012).

Analysis of all of the categories (*a priori* and those that emerged) served as the basis for Chapter V, which summarized the results from the data (court cases) analyzed in Chapter IV (data analysis) and provide conclusions and implications of those findings. Additionally, the results provide some guidelines for practicing public school administrators and the systems that employ and prepare them. Furthermore, the results will inform the discussion of the potential effect the *Garcetti* (2006) decision could have on public school administrators included in Chapter V. The data analysis and conclusions drawn from it also provides justification for the need of further research pertaining to the free speech rights of PK-12 public school administrators.

## CHAPTER IV

### Analysis of Reported Cases

The free speech rights of public employees have changed over the last 50 years. The emergence of speech rights for PK-12 public school employees began in 1968 with *Pickering v. Board of Education* (1968). The progeny of *Pickering* refined the analytical legal framework applied by the courts in determining whether an employee's speech qualified as protected speech, as the Supreme Court clarified in *Waters v. Churchill* (1994), reiterating its position in *Connick v. Myers* (1983) and *Mt. Healthy School District v. Doyle* (1977), that the speech of public employees is not equal to the speech of private citizens. Several Supreme Court decisions contributed to refining the public employee free speech framework. Holistically referred to as the *Pickering/Connick* balancing test, *Mt. Healthy School District Board of Education v. Doyle* (1977), *Givhan v. Western Line Consolidated School District* (1979), *Connick v. Myers* (1983), and *Waters v. Churchill* (1994) clarified that the content, context, time, place, and manner, as well as the possible disruptive nature, of a public employee's speech and the role the speech, even speech that might otherwise be considered protected, had in the disciplinary action against the public employee. *Garcetti v. Ceballos* (2006) added a new threshold for courts to apply in analyzing the speech of public employees in determining if the speech qualifies for First Amendment protection known as the "pursuant to duty test." Several federal courts have referred to the refined speech analysis framework governing public employee speech as the "five-prong *Garcetti/Pickering* test" (*Houston v. Independent School Dist. No. 89 of Oklahoma County*, 2013, p. 1112; see also e.g. *Morris v. City of Colorado Springs*, 2012; *Couch v. Board of Trustees*, 2009).

This chapter describes the 25 federal court cases involving public school administrators who claimed retaliation in violation of their First Amendment free speech rights following the Supreme Court decision in *Garcetti v. Ceballos* (2006), from June 1, 2006 to December 31, 2013. Each case addressed the free speech rights of PK-12 public school administrators (i.e. assistant principals, principals, assistant superintendents, and superintendents), which, “were analyzed individually and then compared for similarities and differences to find emergent themes” (Dagley, 2012, p. 69).

### **The Data**

The population of 25 federal court cases involving PK-12 public school administrators included in this study span from *Cavazos v. Edgewood Independent School District* (2006) to *Houston v. Independent School Dist. No. 89 of Oklahoma County* (2013). The initial source for the cases was *West’s Education Law Digest*. The cases included were identified by specific key numbers that indicated each case involved public school administrators who claimed retaliation for their speech. Each case was briefed using the Statsky and Wernet (1989) case brief method, which includes:

1. Citation—the full citation of the case
2. Key Facts—the important facts that led to the decision of the court.
3. Issues—the rule of law considered in each issue included in the case
4. Holdings—the decision of the court; answers to each of the issues, in one word (yes/no and/or judgment granted or denied in part)
5. Reasoning—an explanation of why the court decided the way it did for each issue

6. Disposition—the order and procedural consequence resulting from the court’s holding

**PK-12 Public Education Administrator Speech-Related Progeny of *Garcetti***

In order for a plaintiff to succeed on a First Amendment retaliation free speech claim, the plaintiff must prove that his or her speech was not pursuant to duty (*Garcetti v. Ceballos*, 2006) and then make a prima facie case. In order to establish a prima facie case, the public employee must prove that he engaged in protected speech that was the cause of an adverse employment action. The Supreme Court established the requirements for a prima facie case in a Title VII employment discrimination case, *McDonnell Douglas Corp. v. Green* (1973), which the Supreme Court applied to First Amendment free speech cases beginning with *Mt. Healthy School District v. Doyle* (1977). A prima facie case requires the following elements, known as the McDonnell Douglas test:

1. The plaintiff engaged in constitutionally protected speech or conduct
2. An adverse employment action was taken against him that would deter a person of ordinary firmness from continuing to engage in that conduct
3. A causal connection exists between the first two elements, that is, the adverse action was motivated at least in part by the employee’s protected speech.

(*Massey v. Johnson*, 2006, pp. 716-717)

In cases where an employee succeeds in establishing a prima facie case, the burden of proof shifts to the employer to demonstrate by the preponderance of the evidence that the adverse employment actions would have occurred in the absence of the protected activity (*Massey v. Johnson*, 2006).

Many of the cases involving PK-12 public school administrators included in this study contained claims in addition to First Amendment free speech violations. These claims are included in the facts of the case; however, the emphasis of the analysis is each administrator's free speech claim. This section presents each case involving PK-12 public school administrators citing First Amendment free speech retaliation, in text arranged by federal circuit court and includes analysis specific to each case, as courts decide cases on a case-by-case basis, from the relevant federal district court and court of appeals.

The United States federal court system is comprised of 12 geographical circuits, 11 of which are included in this analysis (see figure 2 in Chapter V). The 12th circuit, known as the Federal Circuit, is not included in this study because it is a court of special jurisdiction. Within the other 11 circuit courts are federal district courts, each state has at least one federal district court. The organization of the court system is essential to the analysis of federal court cases because of the jurisdiction of each court. The U.S. Supreme Court has national jurisdiction, which means that its decisions are binding, or applicable, throughout the country at all court levels. However, in the absence of Supreme Court decisions regarding specific questions of law, the 11 circuits are bound by decisions emanating from each circuit's court of appeals. That is, each circuit court of appeals has jurisdiction over its specific geographical boundaries and the federal district courts within each circuit are bound by their decisions regarding specific questions of law. Some of the cases presented in this analysis were reported in the Federal Appendix, which is published by West Publishing Company. The opinions in the Federal Appendix are generally considered "unpublished" opinions, because of their exclusion from the

Federal Reporter, and have no precedential value. This means that the opinions issued in these cases are not binding within the circuit court from which they occur.

### **First Circuit**

Since the Supreme Court decision in *Garcetti v. Ceballos* (2006), only one case involving PK-12 public school administrators claiming First Amendment free speech violations has occurred in the First Circuit (Northeastern United States). The one decision emanated from the Federal District Court of Connecticut. As of the completion of this dissertation, the First Circuit Court of Appeals has not issued a decision in a case involving a PK-12 public school administrator citing retaliation for First Amendment free speech.

***Brown-Criscuolo v. Wolfe*, 601 F.Supp.2d 441 (D. Conn. 2009).** Robin Brown-Criscuolo was a principal at a middle school in North Branford, Connecticut and Robert K. Wolfe was the superintendent of schools. Brown-Criscuolo, as part of her day-to-day duties as a principal, supervised the special education program at her school. Her duties as the special education program supervisor required her to ensure the adherence to special education laws and procedures and notify the superintendent of schools of any observed violations or problems that arose regarding the special education program. Additionally, Brown-Criscuolo was in charge of the student placement team that determined whether students qualified for special education services. Wolfe hired a new director of special education who changed the student referral process used to refer students to the student placement team. Brown-Criscuolo believed that the new policy requiring the special education director to approve all referrals to the student placement team resulted in students not receiving necessary educational services (e.g. individualized

education programs). In February of 2004, Brown-Criscuolo wrote a letter to Wolfe concerning the new special education director's policy and the negative effect it had on her performing her job (*Brown-Criscuolo v. Wolfe*, 2009).

In February 2004, Brown-Criscuolo and Wolfe disagreed on the placement of a student in special education. Brown-Criscuolo claimed that Wolfe summoned her to his office and accused her of performing illegal activities, after which she called the Connecticut Department of Education (DOE) to determine if her activities were, in fact, illegal. The DOE informed Brown-Criscuolo that her actions were not illegal. Brown-Criscuolo claimed that after the call, Wolfe informed her that she was not allowed to call the DOE. According to Brown-Criscuolo, in April 2004, Wolfe held a staff meeting at her school to inform the staff that she had performed an illegal activity, an allegation that Wolfe denied. In September 2004, a student at Brown-Criscuolo's school began exhibiting problematic behaviors and Brown-Criscuolo informed Wolfe that the special education director was delaying the student's review by the student placement team. In January 2005, Wolfe informed Brown-Criscuolo that an investigation determined that many procedural violations occurred related to the placement of the student and that the associated costs would come from her school's budget (*Brown-Criscuolo v. Wolfe*, 2009).

Brown-Criscuolo took extended medical leave on January 31, 2005. While Brown-Criscuolo was on medical leave, Wolfe accessed her email account and discovered an email from Brown-Criscuolo to her attorney describing work-related issues she had with Wolfe. Brown-Criscuolo filed a lawsuit on September 22, 2005 claiming that Wolfe violated several of her rights, and she retired from the school in January 2007. Brown-Criscuolo's lawsuit alleged improper search and seizure in violation of the Fourth

Amendment, First Amendment retaliation, and state-law claims for intentional or reckless infliction of emotional distress and invasion of privacy. Wolfe moved for summary judgment (*Brown-Criscuolo v. Wolfe*, 2009).

The district court granted Wolfe's motion in part and denied it in part. The court ruled that

1. Brown-Criscuolo had a reasonable expectation of privacy regarding her email on her work computer (summary judgment denied to Wolfe),
2. Material issues of fact existed regarding whether the scope of Wolfe's search exceeded its reasonable scope (summary judgment denied to Wolfe),
3. Brown-Criscuolo did not engage in protected speech when she communicated with a parent of a special education student (summary judgment granted to Wolfe),
4. Even if the aforementioned speech qualified as protected, Brown-Criscuolo failed to demonstrate that Wolfe subjected her to an adverse employment action and causation [Brown-Criscuolo failed to prove that her speech caused the adverse employment action] required for First Amendment retaliation claims (summary judgment granted to Wolfe),
5. Wolfe was not entitled to qualified immunity (summary judgment denied to Wolfe)
6. Material issues of fact existed regarding Brown-Criscuolo's claims for emotional distress and invasion of privacy (summary judgment denied to Wolfe). (*Brown-Criscuolo v. Wolfe*, 2009, p. 441)



In the opinion of the court, the district court judge indicated that Brown-Criscuolo must meet the requirements of prima facie case in order to prevail on a First Amendment retaliation claim. Additionally, the judge stated that if the speech was protected, Wolfe must demonstrate that the same adverse action would have occurred in the absence of the speech (citing *Mt. Healthy v. Doyle*, 1977) or that the speech would have been disruptive (i.e. *Connick v. Myers*, 1983). Furthermore, the judge indicated that whether the speech qualified as protected under the First Amendment is a question of law, not fact (*Brown-Criscuolo v. Wolfe*, 2009) which is consistent with the progeny of the Supreme Court public employee First Amendment speech cases. However, citing *Garcetti v. Ceballos* (2006), the judge stated that prior to reaching these issues, the court had to address a preliminary question—“Whether the plaintiff [Brown-Criscuolo] expressed his [sic] views as a citizen, or as a public employee pursuant to his official duties” (*Brown-Criscuolo v. Wolfe*, 2009, p. 452).

Brown-Criscuolo claimed that Wolfe retaliated against her for informing a parent that she did not have to accept the recommendation of the school psychologist, who had determined that the student did not require special education services. Additionally, Brown-Criscuolo claimed that Wolfe retaliated against her for contacting the DOE. The district court ruled that Brown-Criscuolo’s First Amendment claim failed as a matter of law because her speech was pursuant to her official duties, consistent with *Garcetti*. Brown-Criscuolo “was not speaking as a citizen for First Amendment purposes” (*Brown-Criscuolo v. Wolfe*, 2009, pp. 452-453). Furthermore, the district court stated that even “if *Garcetti* did not have a preclusive effect, the court believes that the plaintiff’s [Brown-Criscuolo] First Amendment claim would fail under the three-prong prima facie

test of (1) public concern, (2) adverse employment action, and (3) causal connection” (*Brown-Criscuolo v. Wolfe*, 2009, p. 453). The court’s rationale behind this part of the decision was Brown-Criscuolo failed to substantiate an adverse employment action and a causal connection between her alleged protected speech and any adverse employment action (*Brown-Criscuolo v. Wolfe*, 2009).

According to the district court, the adverse actions Wolfe took against Brown-Criscuolo were accusing her of engaging in illegal activities and threatening to freeze her salary. Brown-Criscuolo’s speech took place in 2005, while the accusations of illegal activity occurred in 2004, which the court rejected as a causal connection. As for the threat to freeze Brown-Criscuolo’s salary, the court deemed the action as insufficient as an adverse employment action. Wolfe’s threat to freeze Brown-Criscuolo’s salary resulted from a decision to use school funds to provide payment to parents of a student that did not receive services. The decision affected all of the employees of the school, not just Brown-Criscuolo. Brown-Criscuolo failed to rebut Wolfe’s assertion that the school district’s special education budget lacked the funds for the payment and Wolfe had the necessary budgetary control to make the decision to use Brown-Criscuolo’s school’s funds. Thus, the district court granted summary judgment for Wolfe on Brown-Criscuolo’s First Amendment protected speech retaliation claim (*Brown-Criscuolo v. Wolfe*, 2009). Brown-Criscuolo did not engage in protected speech as a citizen and, therefore, Wolfe did not violate her First Amendment free speech rights.

The lynchpin in *Brown-Criscuolo v. Wolfe* (2009) was the district court’s determination that Brown-Criscuolo’s speech was made pursuant to her official job duties. Thus, it was not protected as a matter of law (*Brown-Criscuolo v. Wolfe*, 2009).

Furthermore, the court indicated that even if *Garcetti* did not apply, Brown-Criscuolo's claim failed to meet the three prongs required in a prima facie free speech retaliation claim in that she failed to demonstrate that she engaged in protected speech, which resulted in an adverse employment action. No subsequent case history exists for *Brown-Criscuolo v. Wolfe* (2009).

### **Second Circuit**

Since the Supreme Court decision in *Garcetti v. Ceballos* (2006), four cases involving PK-12 public school administrators claiming First Amendment free speech violations have occurred in the Second Circuit. Two decisions emanated from the Federal District Court for the Southern District of New York. The Second Circuit Court of Appeals issued the other two decisions.

***Woods v. Enlarged City School Dist. of Newburgh*, 473 F.Supp.2d 498 (S.D. N.Y. 2007).** Denise Woods was an African American female probationary assistant principal in the Enlarged City School District of Newburgh, New York. Woods brought action against the school district and the superintendent, Dr. Johns, citing Title VII racial discrimination claims and a First Amendment retaliation (retaliatory discharge). The district and Johns moved for summary judgment (*Woods v. Enlarged City School Dist. of Newburgh*, 2007).

The vast majority of the district court's decision pertained to Woods's Title VII claims of racial discrimination. Woods claimed that she was subjected to a racially hostile workplace, terminated because of her race, and retaliated against for making statements regarding treatment she felt was racially discriminating, which constituted her First Amendment speech claim. Woods claimed that over a period of approximately five

years, Newburgh employees subjected her to various forms of racial discrimination, which she reported to Johns. The district court judge granted the motion for summary judgment for the district and Johns, which means that the court ruled that no Title VII violations occurred based on its conclusion that no material facts were in dispute. Specifically, the court ruled Woods's discharge was not motivated by race; rather, her poor job performance resulted in her dismissal (*Woods v. Enlarged City School Dist. of Newburgh*, 2007).

As for Woods's First Amendment retaliatory discharge claim, the district court ruled that the district and Johns did not violate her First Amendment speech rights. The speech in question in this case refers to Woods's complaint of racial discrimination to Johns after she received a negative job performance evaluation. Referencing the three-prong prima facie test necessary to succeed on a First Amendment speech claim, the district court judge ruled that Woods failed to establish that her complaints about her purported racial discrimination were constitutionally protected. Specifically, the court determined that Woods's speech did not address a matter of public concern, thus was not constitutionally protected, which failed to meet the first prong required in a prima facie case—she did not engage in constitutionally protected speech. Citing *Connick* (1983), the court determined that Woods's comments did not pertain to an issue of public or community concern. The court determined that the motive of Woods's speech was personal in nature as it only addressed “her individual employment and the manner in which she was treated in the workplace” (*Woods v. Enlarged City School Dist. of Newburgh*, 2007, p. 531).

In *Woods v. Enlarged City School Dist. of Newburgh* (2007), the district court determined that the district and Johns did not violate Woods's First Amendment free speech rights. Ignoring *Garcetti* (2006), the district court reached its decision based on the *Connick* (1983) test involving the content, form, and context of the speech. Because Woods complained of her perceived racially discriminatory treatment in private in an attempt to alleviate her individual workplace situation and did not address any public concern about racism (i.e. district- or school-wide), the district court ruled that her speech was not protected. According to the court, no evidence existed that Woods's speech occurred "for any other reason than to protect [her] own[s] [sic] rights or to air [her] personal grievances" (*Woods v. Enlarged City School Dist. of Newburgh*, 2007, p. 531). Thus, in context, her speech did not qualify for First Amendment protection. No subsequent appellant history exists for *Woods v. Enlarged City School Dist. of Newburgh* (2007).

***Almontaser v. New York City Department of Education*, 519 F.3d 505 (2nd Cir. 2008).** In 2007, Debbie Almontaser, an Arab-American female, was the acting interim principal of the Khalil Gibran International Academy (KGIA), a public high school in New York City that offered classes in Arabic language and culture. After the school opened, several groups claimed that the school and Almontaser were affiliated with radical Islam. One group issued a press release that claimed Almontaser was associated with a group known as Arab Women Active in the Arts and Media (AWAAM), which was selling t-shirts that had the slogan "Intifada NYC" on them (*Almontaser v. New York City Department of Education*, 2008). Almontaser had no affiliation with AWAAM or the t-shirts; however, a reporter from the *New York Post*

wanted to interview her about both. Almontaser did not want to participate in the interview, but the New York Department of Education (DOE) instructed her to participate in the interview; however, she was not to address the t-shirts (*Almontaser v. New York City Department of Education*, 2008).

During the interview, with a DOE press officer on the phone, Almontaser told the reporter that she nor the school were associated with AWAAM. However, when the reporter asked her about the meaning of the t-shirt slogan, Almontaser explained that “intifada” meant “shaking off” and has evolved to have a negative connotation because of its association with violence in the Palestinian/Israeli conflict (*Almontaser v. New York City Department of Education*, 2008). The DOE press officer only interjected in the interview once, which she did to reiterate that Almontaser did not believe in violence, and called Almontaser after the interview to tell her that she did a good job (*Almontaser v. New York City Department of Education*, 2008).

The next day, the *New York Post* ran an article that grossly misrepresented Almontaser’s comments to the reporter, facts which neither Almontaser or the DOE dispute. Specifically, the article reported that Almontaser belittled the significance of the t-shirt slogan and had ties to AWAAM. Following an immediate media outburst, the Deputy Mayor of Education met with Almontaser and insisted on her resignation. Almontaser issued an apology letter drafted by the DOE and resigned from her position (*Almontaser v. New York City Department of Education*, 2008). Approximately two months later, Almontaser applied for the position of permanent principal at KGIA. Two days later, the *New York Times* reported that a press officer from the New York City DOE stated that Almontaser would not become the principal of KGIA. Almontaser’s

application did not proceed to the next level of review. Almontaser sued, seeking an injunction that would allow her to continue through the application process, claiming “retaliation in violation of her First Amendment free speech rights and infringement of her Fourteenth Amendment right to due process. The federal district court for the southern district of New York denied the injunction and Almontaser appealed (*Almontaser v. New York City Department of Education*, 2008, p. 507).

The Second Circuit Court of Appeals affirmed the district court’s decision to deny the injunction. Citing *Garcetti v. Ceballos* (2006), the circuit court opinion stated that “Almontaser’s statements to the *New York Post* ‘were manifestly made in her official capacity’ and therefore not constitutionally protected” (*Almontaser v. New York City Department of Education*, 2008, p. 508). Consequently, Almontaser failed to convince the district court that she would prevail on the merits of her First Amendment retaliation claim, which injunctive relief requires. Furthermore, citing *Pickering v. Board of Education* (1968), the circuit court stated that “the DOE’s decision to not forward her application after [hiring manager] Stuart’s review was justified under the balancing test used to determine constitutional limitations on public employees’ speech” because her comments “‘were manifestly made in her official capacity’ and therefore not constitutionally protected” (*Almontaser v. New York City Department of Education*, 2008, p. 508). According to the court, the DOE’s right to operate efficiently and effectively exceeded Almontaser’s speech rights and the district court did not abuse its discretion in denying the injunction (*Almontaser v. New York City Department of Education*, 2008).

However, after determining that the district court did not abuse its discretion in denying the injunction because of its determination that Almontaser's speech was not protected, the circuit court stated that this "complex issue" needed to be "addressed in the first instance by the district court" (*Almontaser v. New York City Department of Education*, 2008, p. 508). Specifically whether a public employee can be sanctioned by his or her employer for speaking to the press, as a condition of employment, when the report misconstrues what was said (*Almontaser v. New York City Department of Education*, 2008).

***Almontaser v. New York City Department of Education, 2009 WL 2762699 (S.D. NY 2009)***. Almontaser filed a suit against the New York DOE claiming First and Fourteenth Amendment violations. The DOE moved for summary judgment, which the district court granted. Regarding her due process rights, as an interim principal, Almontaser had no property right in her employment. As for her First Amendment claim, referencing the necessary components for a prima facie First Amendment retaliation claim, the district court explained that Almontaser's speech did not qualify as protected speech as her interview was pursuant to duty. Thus, Almontaser's speech did not meet the first requirement of a prima facie case (i.e. she did not engage in constitutionally protected conduct) (*Almontaser v. New York City Department of Education*, 2009).

Although Almontaser did not want to participate in the interview, communication with the press regarding KGIA was part of her role as the acting interim principal. The district court found that "as a matter of law, Almontaser spoke to the [*New York*] *Post* pursuant to her official duties" (*Almontaser v. New York City Department of Education*, 2009, p. 3). To address Almontaser's assertion that the comment about the t-shirt slogan



was not within the topics the DOE directed her to address in the interview, the district court stated that the relatedness of the speech and the official duties of an employee need only be practical (*Almontaser v. New York City Department of Education*, 2009 citing *Garcetti v. Ceballos*, 2006). According to the court, *Garcetti* does not require public employers to “parse each phrase of every sentence of an employee’s speech to determine which were said in an official capacity and which were not” (*Almontaser v. New York City Department of Education*, 2009, p. 4). The district court ruled that Almontaser’s speech was pursuant to her duty, thus it was not protected by the First Amendment (*Almontaser v. New York City Department of Education*, 2009). *Almontaser* has no subsequent appellant history.

***Spang v. Katonah-Lewisboro Union Free School District*, 626 F.Supp.2d 389 (S.D. N.Y. 2009)**. John Spang, Jr. was the assistant superintendent for business of the Katonah-Lewisboro Union Free School District. He was terminated on August 31, 2006 for his poor work-related performance, according to the school district. Spang filed a lawsuit seeking relief on seven counts, four of which the defendants (school district, superintendent, and school board) moved to dismiss (*Spang v. Katonah-Lewisboro Union Free School District*, 2009). These claims included:

- (1) Denial of federally protected liberty interests without due process; (motion to dismiss granted)
- (2) Fraudulent misrepresentation;
- (3) Tortious interference with advantageous business relations;
- (4) Tortious interference with pension rights; (motion to dismiss granted)
- (5) Self-defamation;

(6) Breach of contract; (motion to dismiss denied) and

(7) First Amendment retaliation (motion to dismiss denied). (*Spang v. Katonah-Lewisboro Union Free School District*, 2009, p. 392)

Superintendent Lichtenfeld encouraged Spang to apply for the position of assistant superintendent for business in the Katonah-Lewisboro union free school district in 2004 and on February 1, 2005, Spang assumed the position. Lichtenfeld did not inform Spang that the district was under investigation by the state comptroller, and that he would have to cooperate with that office as part of his position. Spang claimed that if he had known this prior to being hired, he would not have taken the position. Regardless, Spang served as the assistant superintendent until the district terminated him on August 31, 2006. During his employment, the school board never provided a written job description of his position, which the employment agreement between Spang and the district required (*Spang v. Katonah-Lewisboro Union Free School District*, 2009).

In April of 2006, Lichtenfeld conducted a performance evaluation on Spang. Most of the review was negative and pointed out Spang's inabilities to perform in several aspects of his job. Lichtenfeld notified Spang that he was going to recommend his dismissal, a decision reached by the school board on August 1, 2006. Spang never had the chance to address his negative evaluation with the board (*Spang v. Katonah-Lewisboro Union Free School District*, 2009). Spang notified the school board that he was going to sue them based on his termination, which the school board responded to by publishing a disparaging report about his job performance on their website. Spang claimed that his termination, subsequent board actions, and the surrounding publicity

precluded him from securing employment after his dismissal. Spang filed suit in the Federal District Court for the Southern District of New York on March 16, 2007.

Referencing the three components of a prima facie First Amendment retaliation claim, the district court stated, and the school district conceded, that his speech was constitutionally protected (i.e. informing them of his intent to sue), thus meeting the first prong. Spang claimed that the district engaged in two adverse employment actions when they stated that he refused to be fingerprinted, which Spang perceived as an implication that he had something to hide, and that Spang had approved stipends that the board did not authorize. The court determined that a jury could find these actions construed adverse employment actions aimed at deterring a reasonable person from exercising his First Amendment speech rights. Thus, the court determined that Spang met the second prong of a prima facie case (*Spang v. Katonah-Lewisboro Union Free School District*, 2009).

Citing *Mt. Healthy School District v. Doyle* (1977), the court stated that because Spang could meet the first two prongs of a prima facie case, the district could defeat his retaliation claim by demonstrating that they would have taken the same adverse employment action (i.e. terminating him) in the absence of his speech. However, the school district failed to address the fact that they would have released the same reports and terminated Spang in the absence of his speech. Based on this, the court did not grant the district its motion to dismiss Spang's claim of First Amendment retaliation (*Spang v. Katonah-Lewisboro Union Free School District*, 2009).

Although the district claimed that they would have terminated Spang in the absence of his speech, as *Mt. Healthy School District v. Doyle* (1977) would support, they

failed to articulate that fact. The court stated that if they had, the district could have prevailed on their motion to dismiss through a summary judgment of the court (*Spang v. Katonah-Lewisboro Union Free School District*, 2009). Other than the federal court decision in *Spang v. Katonah-Lewisboro Union Free School District* (2009) as reported above, no record exists in Westlaw pertaining to the results of the case. The district's motion to dismiss Spang's First Amendment retaliation claim failed; however, no court record exists pertaining to whether the case went to trial. Because of this fact, it is unclear whether Spang suffered First Amendment retaliation in violation of his speech rights.

***Fierro v. City of New York Department of Education*, 341 Fed.Appx. 696 (2nd Cir. 2009).** Joseph Fierro was an assistant principal in New York City. Fierro claimed that Ronna Bleadon, the school principal, made a series of inappropriate comments to him that he perceived as sexual harassment. Additionally, Fierro claimed that Bleadon directed him to observe teachers and "find things for which the administration could give [that teacher] a "U" (unsatisfactory) rating" (*Fierro v. City of New York Department of Education*, 2008, p. 435). Fierro claimed he engaged in First Amendment protected speech when he explained to Bleadon that he found nothing warranting an unsatisfactory rating for the teachers he observed and that she retaliated against him in several ways. Fierro claimed the retaliation manifested as (a) profane and abusive remarks, (b) taking away his vacation days, (c) directing him to perform manual labor tasks outside of his job duties, (d) derogatory comments about Italian people (Fierro was Italian), (e) taunting him for his learning disabilities, (f) criticizing and ostracizing him, (g) questioning his

sexuality, (h) threatening to transfer him, (i) actually transferring him, and (j) falsifying his attendance record (*Fierro v. City of New York Department of Education*, 2008).

Fierro was transferred to a different school and in August of 2005 informed an assistant superintendent about the sexual harassment he experienced from Bleadon. He was then transferred to one of the most dangerous schools in New York. Fierro claimed that the transfer resulted from his complaints of sexual harassment. Furthermore, Fierro claimed he was dismissed from the school because of his complaint. Fierro filed suit in the Supreme Court of the State of New York (a civil trial court) alleging sexual harassment, hostile work environment, retaliation, and free speech violations, which the New York City Department of Education (DOE) removed to the federal district court because of the nature of the claims involving federal constitutional issues. The DOE moved to dismiss the case (*Fierro v. City of New York Department of Education*, 2008).

Citing the necessary components of a prima facie First Amendment free speech retaliation claim, the district court determined that Fierro's refusal to satisfy a corrupt objective, that is, find things warranting an unsatisfactory teacher rating, and reporting that he found no such reason to rate a teacher as unsatisfactory constituted protected speech. The court determined that he engaged in this speech as a citizen. Additionally, the district court determined that Fierro's transfer to another school was sufficient to meet the adverse employment action prong and that the timing of the transfer was proximal enough to suffice as a causal connection. Thus, the district court determined that Fierro suffered adverse employment actions for his constitutionally protected speech in violation of the First Amendment (*Fierro v. City of New York Department of Education*, 2008).

The district court, citing *Garcetti v. Ceballos* (2006), indicated that in this case the question was whether Fierro engaged in speech as a citizen or pursuant to his official duties. The DOE claimed that Fierro's speech was pursuant to his duty as an assistant principal, while Fierro claimed that "he was 'exercising his First Amendment freedoms as a citizen when he refused to participate'" in Bleadon's plan to rate teachers as unsatisfactory (*Fierro v. City of New York Department of Education*, 2008, p. 441). The district court sided with Fierro stating, "Failing to protect his right to refuse to perpetrate or participate in the lodging of false allegations and the falsifying of records would be an inappropriate expansion of *Garcetti*" (*Fierro v. City of New York Department of Education*, 2008, p. 442). Because of the district court's determination that Fierro's speech was made as a citizen and not pursuant to his duties, the court proceeded with determining whether Fierro's First Amendment retaliation claim would withstand the prima facie analysis. The court decided that the DOE, through Bleadon's actions, violated Fierro's First Amendment speech rights (*Fierro v. City of New York Department of Education*, 2008).

Bleadon, and the DOE, claimed that she was entitled to qualified immunity because she reasonably believed that she was not violating Fierro's clearly established rights. The DOE based this claim on the facts that Fierro's speech occurred prior to the Supreme Court's ruling in *Garcetti* and Bleadon's actions did not clearly violate Fierro's First Amendment speech rights. The district court dismissed the DOE's claims because it determined that Fierro's speech fell outside of the scope of *Garcetti* (i.e. speaking as a citizen not pursuant to duty) and that Bleadon's actions were in fact retaliatory for his speech (*Fierro v. City of New York Department of Education*, 2008). The district court

denied the DOE's motion to dismiss Fierro's First Amendment retaliation claim (*Fierro v. City of New York Department of Education*, 2008).

Bleadon appealed the district court decision denying the motion to dismiss Fierro's First Amendment retaliation claim to the Second Circuit Court of Appeals (*Fierro v. City of New York Department of Education*, 2009). She claimed that Fierro's speech rights were not clearly established and that she was entitled to qualified immunity. The circuit court reversed the decision of the district court ruling that Bleadon was entitled to qualified immunity. The rationale employed by the circuit court was that it was unclear at the time of the district court decision whether Fierro's refusal to engage in misconduct was protected under the First Amendment (*Fierro v. City of New York Department of Education*, 2009).

Specifically, the circuit court stated, regarding the requirement for qualified immunity:

we note that neither the Supreme Court nor this Court has held that there is a constitutionally protected right for public employees to refuse to follow orders to engage in misconduct. Nonetheless, the district court declared that under *Garcetti* such speech is protected by the First Amendment and that Bleadon was not protected by qualified immunity at the time she allegedly retaliated against Fierro in 2005 because "drawing all inferences in [Fierro's] favor, it is not objectively reasonable for Bleadon to have believed that her conduct did not violate [Fierro's] clearly established constitutional right." (*Fierro v. City of New York Department of Education*, 2009)

The circuit court reversed and remanded the district court decision regarding Fierro's First Amendment protected speech claims. Additionally, Bleadon was protected under qualified immunity because it was unclear whether the ruling in *Garcetti* applied to Fierro's speech regarding his refusal to engage in misconduct.

Fierro filed another lawsuit against the City of New York DOE in 2013 claiming employment discrimination under Title VII (*Fierro v. City of New York Department of Education*, 2013). Although this lawsuit pertained only to employment discrimination, the court record indicated that Fierro and the DOE reached a settlement in the previous case involving Fierro's First Amendment retaliation claims (*Fierro v. City of New York Department of Education*, 2013). The circuit court's determination that Bleadon was entitled to qualified immunity merely means that she did not knowingly violate Fierro's First Amendment free speech rights and the settlement included a release signed by Fierro claiming no wrongdoing on behalf of the DOE. However, the fact remains that it is unclear in the second circuit, in cases involving PK-12 public school administrators, whether refusing to engage in misconduct or wrongdoing is protected speech for First Amendment purposes.

### **Third Circuit**

Since the Supreme Court decision in *Garcetti v. Ceballos* (2006), five cases have occurred in the third circuit involving PK-12 public school administrators citing First Amendment speech retaliation claims. Of these cases, three cases have been decided by federal district courts, while two have been decided by the Third Circuit Court of Appeals. The cases below occurred between 2010 and 2012 and are presented chronologically.



***Pribula v. Wyoming Area School District, 2010 WL 1433149*<sup>2</sup> (M.D. Pa. 2010).**

Patrick Pribula was hired in 2004 as the assistant superintendent of buildings and grounds in the Wyoming Area School District. James Zarra was hired as a network engineer and personal computer administrator in the school district in 2001. Robert Micheletti was hired by the school district in 1997 as an assistant principal (*Pribula v. Wyoming Area School District, 2010*). Collectively, Pribula, Zarra, and Micheletti (plaintiffs), filed suit against the school district claiming that the school district violated their speech rights under the First and Fourteenth Amendments (*Pribula v. Wyoming Area School District, 2009*).

Pribula was active in the school board elections in the school district in the early 1990s. The school board did not renew his contract in 1997 and Pribula sued them claiming First Amendment retaliation for his election-related activities. However, the outcome of this initial law suit is not reported. The school board rehired Pribula as the assistant superintendent of buildings and grounds in 2004, a decision which some of the school board members opposed. In the 2005 school board elections, Pribula again took an active role in campaigning for candidates, some of whom were elected and some not. After the elections, Pribula claimed that the superintendent engaged in a series of activities designed to force him from his job (*Pribula v. Wyoming Area School District, 2009*).

The adverse employment actions claimed by Pribula included (a) negative evaluations that did not reflect his actual job performance, (b) altering the terms and conditions of his employment, (c) reducing his compensation, and (d) interfering with the performance of his duties (*Pribula v. Wyoming Area School District, 2009*). Pribula quit

<sup>2</sup>Case citations in this format (YEAR WL #####) are for cases not reported in F.Supp.2d. or that are so recent that the opinion has not yet been published in the reporter. Not all federal court opinions are selected for publication.

his job as assistant superintendent in 2006. Pribula claimed that he suffered retaliation in violation of his First Amendment speech rights because of his lawsuit in 1997 and his political activities (*Pribula v. Wyoming Area School District*, 2009).

Zarra was Pribula's personal friend. The school board hired Zarra as a network engineer in 2001 and extended his contract until 2006 and then until 2009. The school board rescinded Zarra's contract in 2005 and his employment ended in 2006. Zarra claimed that the school board rescinded his contract because of his friendship with Pribula and his attending a political function with Pribula in 2005 (*Pribula v. Wyoming Area School District*, 2009).

Micheletti worked for the school district from 1997 until he retired in 2006. In 2004, the school board appointed Micheletti as the acting assistant superintendent. Micheletti informed the board in March of 2006 that he intended to retire in May of 2006. He then delivered another letter to the board asking to retire in June of 2006, making him eligible for increase retirement benefits. The school board denied his request to retire in June, which resulted in a substantial decrease in benefits (~\$88,000). Micheletti claimed that the board refused to accept his later retirement date because of his friendship with Pribula and political activities. Micheletti claimed that the school board's actions violated his First Amendment rights, specifically, that of association (*Pribula v. Wyoming Area School District*, 2009).

In *Pribula v. Wyoming Area School District* (2009), the school district sought summary judgment, which the district court granted in part and denied in part. For the most part, material issues of fact existed that precluded summary judgment on behalf of the school district. The record was unclear as to whether the district constructively

discharged Pribula. Additionally, the facts were unclear whether the school board retaliated against Pribula and Zarra because of their association and political activities. Furthermore, the facts were unclear regarding the school board's denial of allowing Micheletti to retire in June instead of May (i.e. his association with Pribula and political activities) (*Pribula v. Wyoming Area School District*, 2009). Moreover, the district court determined that the school district was not liable for the individual school board member's actions. The court determined that the school board members, as individuals, were not entitled to qualified immunity. As a school board, however, they were entitled to legislative immunity regarding changing the retirement compensation plan. Lastly, the district court ruled that the individual board members were not entitled to summary judgment on the plaintiffs' First Amendment claims because of the disputed facts surrounding their actions (*Pribula v. Wyoming Area School District*, 2009).

The case went to trial in 2009 (*Pribula v. Wyoming Area School District*, 2010). The jury found in favor of the plaintiffs, deciding that the school district violated their First Amendment rights of speech and association. The school district filed a motion for a new trial following the decision claiming an error of law in the district court's instructions to the jury (*Pribula v. Wyoming Area School District*, 2010).

The school district claimed that the district court erred in explaining the First Amendment conduct in question. The district court judge had informed the jury that Pribula's 1997 lawsuit was protected activity under the First Amendment. Additionally, the judge instructed the jury that the plaintiffs' political activity was also protected and informed the jury that the First Amendment also protected the plaintiffs' friendship as a form of association. The school district contested the third instruction claiming that a

social friendship too broad to apply to their right of association (*Pribula v. Wyoming Area School District*, 2010).

The district court agreed with the school district's assertion. In its decision, the district court stated that only the plaintiffs' association related to their political activity would constitute constitutionally protected association for First Amendment purposes. The district court agreed with the school district's assertion that the plaintiffs' association precluded the jury from applying the requirements of a prima facie in their decision as to whether the school district violated their First Amendment rights. Specifically, the district court reasoned that the instruction allowed the jury to determine a constitutional violation based on any one specific speech claim (the lawsuit, political activity, or friendship) or any combination of the three (*Pribula v. Wyoming Area School District*, 2010). In light of this determination, the district court vacated the trial court's decision and granted the school district's motion for a new trial.

No record exists in Westlaw after the decision in *Pribula v. Wyoming Area School District* (2010) granting a new trial. This is not surprising because when cases are remanded for further proceedings, new trials are granted, or motions to dismiss or for summary judgment are denied, the parties involved in the cases often reach a settlement, and no subsequent case history exists. Federal court cases are expensive to litigate and are very time consuming, thus in the event of court-ordered continued proceedings often settlements occur. In the *Pribula* decisions discussed above, the district court failed to mention any of the Supreme Court landmark decisions involving the speech rights of public employees (e.g. *Pickering v. Board of Education*, 1968; *Mt. Healthy v. Doyle*, 1977; *Givhan v. Western Line Consolidated School District*, 1979; *Connick v. Myers*,

1983; *Waters v. Churchill*, 1994; *Garcetti v. Ceballos*, 2006). The court never addressed whether the plaintiffs' speech or activities were pursuant to duty or whether they addressed an issue of public concern. Furthermore, the lack of a subsequent decision fails to provide information supporting or rejecting the plaintiffs' First Amendment retaliation claims.

***Whitfield v. Chartiers Valley School District*, 707 F.Supp.2d 561 (W.D. Pa. 2010).** Tammy Whitfield entered into a five-year contract as the assistant superintendent in Chartiers Valley School District in 2004. In 2006, Whitfield participated in an employment action involving a school district employee working as a dean of students and a basketball coach. The employee did not have the certification required by the position even though he had been employed in the position for three years. The school board decided, in executive (closed) session, to suspend the employee for 20 days without pay and the employee appealed. During the public hearing of the appeal, Whitfield testified that the employee refused to gain the proper certification for his position. Two school board members expressed their disapproval for Whitfield's testimony by booing throughout her testimony (*Whitfield v. Chartiers Valley School District*, 2010).

In March 2009, Whitfield received notice that her contract was going to expire on October 31, 2009. The letter stated that the notice complied with the 210-day notice requirement of her contract. Whitfield claimed that her contract expiration date was November 1, 2009 and that the notice was required 365 days in advance. In May of 2009, Whitfield worked with the school district human resources (HR) department to draft a new contract, which the HR department recommended the school board assign a

committee to review. A district employee informed Whitfield that a school board member had told him that Whitfield would never receive a contract because of her testimony in 2006 (*Whitfield v. Chartiers Valley School District*, 2010).

On May 28, 2009, the school board considered Whitfield's employment in the school district. The school district general counsel recommended that the board should either open Whitfield's position after non-renewing her contract or accept the newly drafted contract because if they did not take action Whitfield's previous contract would renew and he was uncertain of some of its terms. The school board decided to open Whitfield's position after a board member, the one Whitfield claimed told the employee that informed her she would never receive a contract, moved to do so. In early 2009, Whitfield filed an action in the Federal District Court for the Western District of Pennsylvania seeking a preliminary injunction that would allow her to keep her position. Although the district HR department and Whitfield presented a newly drafted employment contract for consideration, the school board never acted on Whitfield's proposed contract and her employment ended on either October 31, 2009 or November 1, 2009 (*Whitfield v. Chartiers Valley School District*, 2010).

The question before the district court was whether the school district unlawfully retaliated against Whitfield, by non-renewing her contract and opening her position, in response to her testimony, which Whitfield claimed constituted protected speech under the First Amendment. The school district disputed the fact that Whitfield suffered harm in the form of retaliation for protected speech because she had no right to the renewal of her contract. However, the district court explained that if the nonrenewal was based on Whitfield's protected speech, the school district violated her rights even though she had

no right to the renewal. That is, non-renewing her contract for her speech was retaliatory in violation of the First Amendment (*Whitfield v. Chartiers Valley School District*, 2010).

The school district claimed that Whitfield's speech was not protected because her testimony during the employment dispute in 2006 was made pursuant to her duty, citing the decision in *Garcetti v. Ceballos* (2006). However, Whitfield claimed that her testimony was protected speech because testifying was not included in her job duties.

Specifically, Whitfield claimed:

she had an independent duty as a citizen to testify truthfully, and the protection afforded by the First Amendment to her fulfillment of that duty is not displaced by the fact that work-related matters were an impetus for the subject matter of her testimony. (*Whitfield v. Chartiers Valley School District*, 2010, p. 572)

The district court agreed with Whitfield's claim and decided that testimony is protected speech under the First Amendment, even in light of the Supreme Court decision in *Garcetti* (*Whitfield v. Chartiers Valley School District*, 2010).

Citing *Reilly v. City of Atlantic City* (2008), a case in which a police officer testified truthfully and was subjected to retaliation for his testimony in the form of adverse employment actions, the district court stated that testimony was protected speech for First Amendment purposes in the third circuit (*Whitfield v. Chartiers Valley School District*, 2010). The precedent in the third circuit, post-*Garcetti*, emanating from *Foraker v. Chaffinch* (2007), was that *Garcetti* narrowed the protected speech rights of public employees by specifying that

1. In making it, the employee spoke as a citizen,
2. The statement involved a matter of public concern, and

3. The government employer did not have ‘an adequate justification for treating the employee differently from any other member of the general public [i.e. the *Pickering* balancing test]. (*Whitfield v. Chartiers Valley School District*, 2010, p. 574 citing *Foraker v. Chaffinch*, 2007)

Moreover, the district court stated that the *Garcetti* decision “left open the question of whether testimony given as a result of an investigation prefomed [sic] by the employee as part of his or her official duties enjoys First Amendment protection” (*Whitfield v. Chartiers Valley School District*, 2010, p. 575). Because the Supreme Court failed to address testimony in the *Garcetti* decision, the third circuit supported the notion that truthful testimony is speech made as a citizen and thus protected by the First Amendment (*Whitfield v. Chartiers Valley School District*, 2010).

The district court did not find the school district’s claim that Whitfield testified only pursuant to her duty persuasive to defeat her claim of First Amendment retaliation under *Garcetti* (*Whitfield v. Chartiers Valley School District*, 2010). Specifically, Whitfield’s testimony was given under oath and the school board had no right to control what she said. After determining that Whitfield’s speech was not pursuant to her duties and was made as a citizen under oath, the district court applied a prima facie analysis to her speech claim. The district court noted that her speech addressed a matter of public concern, the nonrenewal of her contract constituted an adverse employment action, and that her speech was related to the action. Applying the *Pickering* balancing test, the district court determined that the school district failed to establish a legitimate reason (e.g. significant disruption) other than Whitfield’s protected speech for nonrenewal of her contract (*Whitfield v. Chartiers Valley School District*, 2010).



The district court granted injunctive relief for Whitfield, which resulted in her reinstatement as the assistant superintendent. The court referenced all of the relevant Supreme Court decisions regarding the speech rights of public employees. Whitfield's speech was made as a citizen (*Garcetti v. Ceballos*, 2006) and it addressed a matter of public concern (*Pickering v. Board of Education*, 1968; *Connick v. Myers*, 1983). The school district failed to meet the burden set forth in *Mt. Healthy School District v. Doyle* (1977) that it would have taken the same action in the absence of Whitfield's protected speech by the preponderance of the evidence. Additionally, the district court weighed the reasonableness of the school district's nonrenewal of Whitfield's contract (*Waters v. Churchill*, 1994) when it applied the *Pickering* balancing test (*Whitfield v. Chartiers Valley School District*, 2010). The district court, citing *Waters v. Churchill* (1994), concluded that the school district's justification for the adverse employment action (opening the position) against Whitfield's was pretextual and an unreasonable response based on the facts they presented justifying the adverse employment action. That is, the court determined that although the school district cited other reasons for the adverse employment action, the school district actually retaliated against her for her First Amendment protected speech. The decision in *Whitfield v. Chartiers Valley School District* (2010) specified that testimony is protected speech for First Amendment purposes and any adverse employment action resulting from the speech substantiates unconstitutional retaliation.

***Homel v. Centennial School District*, 836 F.Supp.2d 304 (E.D. Pa. 2011).**

Sandy Homel was an assistant superintendent in the Centennial School District (CSD) in Pennsylvania. The school district had experienced several years of administrative

turnover (four superintendents in four years) and been divided by “political factions and personal quarrels”, in which Homel played an integral role (*Homel v. Centennial School District*, 2011). The school district consists of three geographical regions, each of which has three representative seats on the school board. However, two of the regions, known as the Warminster majority, regularly vote together against the Southampton minority, resulting in numerous 6-3 decisions. Homel was one of the issues in which the board demonstrated this divide (*Homel v. Centennial School District*, 2011).

In 2007, CSD hired a new superintendent, Masko. Homel applied for the assistant superintendent position, but Masko offered her a different position, assistant to the superintendent, which she accepted. In 2008, CSD offered Homel the position of assistant superintendent, which she accepted after asking Masko to remove a “termination without cause” clause. The result of her request remained in question as CSD denied ever giving Homel the opportunity to negotiate her contract (*Homel v. Centennial School District*, 2011).

Shortly after becoming assistant superintendent, a school board member from the Southampton minority asked her about the purchase of a large kiln for the high school art department, citing concerns that Masko made a large purchase without following the district purchasing policy and that Masko’s wife was a teacher in the art department (*Homel v. Centennial School District*, 2011). Two board members from the Southampton minority led the investigation into the kiln purchase after Homel provided the paper trail for the transaction. Masko resigned as superintendent in June 2008. Homel became the acting superintendent in July 2009 (*Homel v. Centennial School District*, 2011).

Homel applied for the full-time superintendent position in 2009, the board voted against her with the typical Warminster/Southampton split, and she continued in her assistant superintendent position. The board selected a new superintendent, Turnbaugh. Homel and CSD disagreed regarding their motive for choosing Turnbaugh. The CSD claimed Turnbaugh was more qualified, while Homel contended that the “kiln purchase incident” (*Homel v. Centennial School District*, 2011, p. 310) factored into their decision, as well as her perceived alignment with the Southampton minority.

Homel claimed that Turnbaugh subjected her to negative treatment, including consistently reminding her that he could terminate her without cause. Turnbaugh placed Homel on administrative leave utilizing this clause. Homel filed an internal complaint against Turnbaugh, which she claims that the CSD did not take seriously “keeping with its practice of not taking women’s discrimination complaints seriously” (*Homel v. Centennial School District*, 2011, p. 311). Although the board never ratified Turnbaugh’s decision to place Homel on administrative leave, the board discussed it and voted 6-3 to ratify the superintendent’s decision. While Homel was on leave, the board appointed two younger employees (one male) to handle Homel’s responsibilities. In August of 2010, the board voted to terminate Homel’s employment in the CSD at the end of her contract, again on the 6-3 Warminster/Southampton dividing line. Turnbaugh resigned in December 2010 and Homel applied for the superintendent position, but the board voted in the same fashion for a candidate 22 years young than Homel (*Homel v. Centennial School District*, 2011).

Homel filed suit against the CSD citing numerous claims including equal employment opportunity violations, Title VII employment discrimination claims, age

discrimination in violation of the Age Discrimination in Employment Act of 1967, and First Amendment speech retaliation claims. The CSD moved for summary judgment, which the district court granted in part and denied in part (*Homel v. Centennial School District*, 2011). Of specific interest for this study, the district court granted summary judgment to the CSD on Homel's First Amendment retaliation claim.

Homel claimed that the CSD retaliated against her by not promoting her to superintendent because of the kiln-purchasing incident, which she only reported to the board members from Southampton, in violation of her First Amendment speech rights. The district court explained that in order for Homel's claim to prevail, her speech must be protected as a matter of law and that the speech was a motivating factor in CSD's actions as a matter of fact. Citing *Garcetti v. Ceballos* (2006), the district court determined that Homel was not speaking as a citizen when she discussed the kiln purchase with a school board member from the Southampton minority. Homel claimed that reporting purchases to board members was not part of her official job responsibilities; however, the court disagreed determining that its "practical inquiry", presented in *Garcetti* pertaining to duties of public employees, deemed that she spoke pursuant to her duties as an assistant superintendent (*Homel v. Centennial School District*, 2011).

Couching its decision heavily in *Garcetti*, the district court stated that Homel reported potential wrongdoing to a supervisor (the board member from the Southampton minority), which "falls within an employee's professional responsibilities" (*Homel v. Centennial School District*, 2011, p. 314). The district court decision also referenced other U.S. Supreme Court, third circuit, and federal district court decisions (e.g. *Borough of Duryea v. Guarnieri*, 2011; *Foraker v. Chaffinch*, 2007; *O'Neill v. Phila. Hous. Auth.*,

2011; in each case the court determined that speech reporting wrongdoing to a supervisor was pursuant to duty, thus not protected by the First Amendment) that supported its decision that reporting wrongdoing to a supervisor is pursuant to duty and thus is not protected speech for First Amendment purposes (*Homel v. Centennial School District*, 2011). The district court defeated Homel's argument that she spoke as a concerned citizen because of the facts surrounding the kiln purchase. According to the court, when the board member from the Southampton minority asked her about the purchase, she responded "only to the extent that her job responsibilities required it" (*Homel v. Centennial School District*, 2011, p. 315). No subsequent legal history exists for *Homel v. Centennial School District* (2011).

***Mieczkowski v. York City School District*, 414 Fed.Appx 441 (3rd Cir. 2011).**

Deborah Mieczkowski was employed as an assistant superintendent in the York City School District, Pennsylvania beginning in July 2006. She filed a lawsuit against the school district claiming "reverse discrimination" and First Amendment retaliation in 2010. The federal district court granted summary judgment in favor of the school district, which Mieczkowski appealed (*Mieczkowski v. York City School District*, 2011). Pertinent to this dissertation Mieczkowski's First Amendment claim and the circuit court's decision addressing that claim ensues.

Mieczkowski claimed that she received two letters of reprimand while employed at the school district, which she construed as adverse employment actions. In November 2006, Mieczkowski received a letter of reprimand from Superintendent Diggs because she had not submitted two reports to the Pennsylvania Department of Education. The failure to submit the reports would have resulted in the school district not receiving 2.8

million dollars in funding, although the school district did not actually lose the funding Mieczkowski's actions jeopardized. Mieczkowski refused to accept the letter of reprimand and stated that she wanted legal representation. In December 2010, Diggs issued another letter of reprimand to Mieczkowski that accused her of insubordination because of her refusal to accept the first letter of reprimand. Mieczkowski, accompanied by her attorney, met with Diggs later in December and both letters of reprimand were placed in Mieczkowski's permanent personnel file. The school district did not take any formal employment action against Mieczkowski, nor did it consider terminating or disciplining her. Mieczkowski retired on June 22, 2007 (*Mieczkowski v. York City School District*, 2011).

Mieczkowski claimed that she received the second letter of reprimand because she informed Diggs that she wanted to acquire legal counsel. The circuit court agreed with Mieczkowski in that her speech pertaining to acquiring legal counsel constituted First Amendment protected speech. However, referencing the components required to sustain a prima facie free speech retaliation claim (i.e. protected speech, adverse employment action, and a causal connection), the circuit court stated that Mieczkowski failed to meet the second and third prongs. That is, the school district took no adverse employment actions against her and no causal connection existed between her speech and the letters of reprimand (*Mieczkowski v. York City School District*, 2011).

The circuit court explained that although a letter of reprimand may not constitute an adverse employment action, a reprimand may support a prima facie First Amendment retaliation case if it deters the employee from exercising her rights. However, Mieczkowski failed to demonstrate that the second letter had that effect (*Mieczkowski v.*

*York City School District*, 2011). Specifically, Mieczkowski indicated that she received the second letter because of her refusal to accept the first, which the court determined was an insufficient reason to deter her from requesting counsel—the protected speech for which she claimed retaliation. The circuit court determined that the school district took no formal employment action against her, ruling that the second letter was not retaliatory, and no causal connection existed between her requesting counsel and the second letter accusing Mieczkowski of insubordination. In light of this determination, the circuit court ruled that no First Amendment violation occurred (*Mieczkowski v. York City School District*, 2011).

In *Mieczkowski v. York City School District* (2011), the circuit court affirmed the district court’s decision to grant summary judgment for the school district. Neither the circuit nor district court applied any of the public employee speech precedents in this case. Instead, the courts applied a prima facie analysis and concluded that Mieczkowski failed to state a claim. Specifically, Mieczkowski was unable to demonstrate that the school district took adverse employment actions against her related to her constitutionally protected speech (requesting counsel) under the First Amendment. No subsequent legal history exists for *Mieczkowski v. York City School District* (2011).

***Hara v. Pennsylvania*, 492 Fed.Appx. 266 (3rd Cir. 2012).** Employed by the Pennsylvania Department of Education (DOE), Monita Hara was the superintendent of the Scranton State School for the Deaf (SSSD). In April 2009, Hara criticized the DOE’s plan to cut SSSD’s budget and transfer ownership and control of the school to a private non-profit entity in an article published in a Scranton paper (*Hara v. Pennsylvania*, 2012). In May, Hara met with the DOE special education director, Tommasini, and

human resource director, Brennan. During the meeting, the DOE officials informed Hara that in response to the article and her critical comments, they were suspending her for 10 days and reassigning her to the Harrisburg office. Hara resigned from her position (*Hara v. Pennsylvania*, 2012).

On May 29, 2009, Hara filed a complaint against the DOE in the Federal District Court for the Middle District of Pennsylvania alleging constructive discharge in violation of the First Amendment. The DOE filed for summary judgment, which the district court granted. Hara appealed to the Third Circuit Court of Appeals, which affirmed the district court decision for the reasons explained below (*Hara v. Pennsylvania*, 2012).

The circuit court opinion stated the elements a plaintiff must demonstrate to succeed on a prima facie First Amendment speech retaliation claim, specifying that first, the alleged speech must be protected by the First Amendment as a matter of law, result in an adverse employment action, and the two must have a causal connection (*Hara v. Pennsylvania*, 2012). If a plaintiff can meet these elements, the *Pickering* balance test ensues. The district court granted summary judgment to the DOE citing *Pickering*, because it determined that the DOE reasonably forecasted that Hara's comments would disrupt the DOE's daily operations. Because of Hara's "hierarchical proximity" (*Hara v. Pennsylvania*, 2012, p. 268) as the highest ranking official at the school and her position in the DOE and of her task of facilitating the transition of the SSSD to the private entity, the district court deemed that her comments could have been disrupted (*Hara v. Pennsylvania*, 2012). Thus, disciplining her did not constitute a First Amendment speech violation.



Although no evidence supported that an actual disruption occurred resulting from Hara's speech, citing *Garcetti v. Ceballos* (2006) and *Pickering v. Board of Education* (1968), the circuit court determined that the comments had potential to affect daily operations (*Hara v. Pennsylvania*, 2012). Specifically, because of Hara's "hierarchical proximity" as Superintendent of SSSD to the DOE, the DOE had "an adequate justification for treating the employee differently from any other member of the general public' as a result of the statement she made" (*Hara v. Pennsylvania*, 2012, p. 267 citing *Garcetti v. Ceballos*, 2006, pp. 241-242). Additionally, again citing *Pickering*, the circuit court stated that in this case, the DOE had adequate justification (i.e. the potential disruption) to discipline Hara for her speech as it was reasonable to assume that her speech would "seriously undermine the effectiveness of the working relationship" between her and the DOE (*Hara v. Pennsylvania*, 2012, p. 268 citing *Pickering v. Board of Education*, 1968, p. 570 footnote 3). In employing the *Pickering* balancing test, in which "courts balance the First Amendment interest of the employee against 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees'", the circuit court reasoned that the DOE had the right to curtail Hara's speech in its efforts to promote efficient operations because of the disruptiveness reasonably calculated to result from her speech (*Hara v. Pennsylvania*, 2012, p. 267 citing *Pickering v. Board of Education*, 1968, p. 568).

The circuit court affirmed the district court decision, holding that the DOE did not violate Hara's First Amendment speech rights. Although *Garcetti* is mentioned in the opinion, the court fails to address whether Hara's speech was pursuant to duty, although this fact is apparent. Instead, the district court couched its decision in the disruption of

the workplace element emanating from *Pickering v. Board of Education* (1968) and *Connick* (1983), which the circuit court supported. The only parts of the *Garcetti* speech analysis mentioned in the decision is whether Hara spoke as a citizen and whether the DOE treated her differently than it would have if the speech was made as such. The court's opinions fail to establish whether Hara spoke as a citizen, emphasizing only the possible disruptive effect of her comments, and that the DOE had sufficient reason to treat her differently based on her position within the organization. Based on the potential disruptiveness of her comments on the close working relationships within the DOE, the courts determined that the DOE was justified in suspending and transferring her (*Hara v. Pennsylvania*, 2012 citing *Pickering v. Board of Education*, 1968). No subsequent legal history exists regarding *Hara v. Pennsylvania* (2012).

#### **Fourth Circuit**

The fourth circuit has had three cases involving the speech right of PK-12 public school administrators since the Supreme Court decision in *Garcetti v. Ceballos* (2006). All three of the cases originate from the federal district court level. The cases below occurred between 2009 and 2012 and are presented chronologically.

##### ***King v. Charleston County School District*, 664 F.Supp.2d 571 (D.S.C. 2009).**

William King was a principal in the Charleston County School District (CCSD) at LaSaine Elementary School. King was hired in 2004 and the CCSD renewed his contract in 2005. King's school served low-income students and qualified for supplemental funding under federal Title I. In January 2006, King reported to the assistant superintendent, Gepford, that he was concerned that several students not zoned for his school were attending, which he believed was in violation of Title I. Specifically, King

was concerned that his school was misusing funds. King addressed his concerns with both the district's and the state's Title I directors (*King v. Charleston County School District*, 2009).

In February 2006, Gepford visited King's school as part of his regular visitation to the CCSD schools. King was not at the school when Gepford visited. While there, several teachers complained to Gepford about King's leadership and management. The complaints included intimidation, threats, and unprofessional acts. Gepford directed the CCSD human resources (HR) director to investigate the teachers' claims. The investigation resulted in the HR director recommending that the CCSD take action regarding renewing King's contract and the capacity (which type of employee i.e. principal or teacher) of his future employment (*King v. Charleston County School District*, 2009).

King claimed that he took immediate action to address the teachers' concerns about the negative working environment at the school. However, on April 7, the CCSD school board informed King that his principal contract would not be renewed for the next school year, but they offered him a teaching contract at a different school. King and the CCSD officials agreed that King was to finish his current employment contract as principal at the school until the end of the 2005-2006 school year (*King v. Charleston County School District*, 2009). Over spring break, immediately following the April 7 meeting, King cleaned out his office and did not return to work when the break ended on April 17, 2006 (*King v. Charleston County School District*, 2009).

King claimed that he was ill and was taking medical leave, but when Gepford attempted to contact him, King failed to respond. Gepford suspended King, with pay

pending an investigation, for failing to respond to two letters and two phone calls, and cleaning out his office, which Gepford interpreted as King's intent not to return to the school (*King v. Charleston County School District*, 2009). King's doctor contacted the CCSD and extended his medical leave until April 26 and on April 27, 2006 the CCSD sent King the Family Medical Leave Act forms. King had not returned the forms by May 2, and the superintendent informed him via letter that she was recommending that the CCSD immediately terminate his employment. In July 2006, the CCSD terminated King's employment. King appealed the CCSD decision to the Charleston County Court of Common Pleas, which affirmed the CCSD decision to terminate him. In November 2007, King filed suit in common pleas court alleging violations of various constitutional and federal rights, which the CCSD removed to the federal district court of for the Federal District of South Carolina (*King v. Charleston County School District*, 2009).

The CCSD moved for summary judgment against all of King's claims. Specific to this dissertation, King claimed that the CCSD violated his First Amendment speech rights by retaliating against him for expressing his concerns on the use of Title I funds at his school, which he believed established the first two elements of a prima facie claim (i.e. protected speech for which he was retaliated against). King and the CCSD disagreed whether King's speech regarding the Title I funds was made "as a citizen, thus entitling him to a First Amendment cause of action, or as an employee, thus barring his First Amendment cause of action against the School District" (*King v. Charleston County School District*, 2009, p. 582). The district court, however, stated that it did not have to resolve this claim because King failed to establish a prima facie case of First Amendment retaliation (*King v. Charleston County School District*, 2009).

Specifically, the district court stated that King failed to present evidence supporting his assertion that the CCSD reassigned him in response to his speech. “Even if the court were to find that Plaintiff satisfied the first two elements noted above, it does not believe a reasonable jury could conclude that Plaintiff’s reassignment was ‘substantially motivated’ by his protected speech” (*King v. Charleston County School District*, 2009, p. 583). The district court agreed with the CCSD assertions that the motivation for reassigning him was based on his performance, not his communicated concerns regarding Title I funding, which was protected speech (*King v. Charleston County School District*, 2009).

Although the district court decision does not specifically reference *Mt. Healthy v. Doyle* (1977), its decision aligns with this Supreme Court decision. King might have been able to meet the requirements of a prima facie case (i.e. he engaged in protected speech, CCSD retaliated against him, and the causal connection between the two); however, the district court believed that the CCSD could prove by a preponderance of the evidence that it would have reassigned him in the absence of his speech (*King v. Charleston County School District*, 2009). Because of this finding, the district granted the CCSD summary judgment on King’s First Amendment retaliation claim—their actions did not violate King’s First Amendment speech rights. No subsequent legal history exists related to *King v. Charleston County School District* (2009).

***Baker v. McCall*, 842 F.Supp.2d 938 (W.D. Va. 2012).** Rocky Baker was an assistant principal in the Norton City Schools (NCS) from 2004 until 2009 when he became a high school principal. In November 2010, Baker became the assistant to the superintendent and on June 30, 2011 the NCS effectively terminated him by not renewing

his contract (*Baker v. McCall*, 2012). McCall was a member of the school board, as were several of the other defendants, and Comer was the NCS superintendent when Baker's contract was not renewed (*Baker v. McCall*, 2012).

Baker informed Comer in September 2010 that he planned to marry a subordinate employee, Phillips, which Comer explained was a violation of the NCS nepotism policy. After the meeting, Baker informed Comer that he and Phillips decided not to get married so that Baker could keep his position as principal. Baker claimed that NCS school board demoted him and reassigned him to the central office because of his declaration of intent to marry Phillips, even though the two decided not to get married (*Baker v. McCall*, 2012). After his reassignment, Baker asked Comer if marrying Phillips would violate the nepotism policy. Comer informed Baker that their marriage would not violate the policy because he was no longer her supervisor (*Baker v. McCall*, 2012). Baker married Phillips sometime during the school year and NCS declined to renew his contract for the 2011-2012 school year. Baker immediately filed a complaint against the NCS citing deprivation of property and liberty rights, as well as First Amendment free speech deprivation. The NCS filed a motion to dismiss all of Baker's complaint, which the district court granted (*Baker v. McCall*, 2012). The district court's decision pertaining to Baker's First Amendment speech claim is below.

Baker claimed that the NCS retaliated against him in violation of the First Amendment by demoting him and reassigning him after he stated that he intended to marry Phillips. Citing *Pickering v. Board of Education* (1968) and *Garcetti v. Ceballos* (2006), the district court stated that public employees retain some First Amendment speech rights in the workplace and that the speech rights of the individual must be

weighed against the rights of the public employer to operate effectively and efficiently (*Baker v. McCall*, 2012). The district court specified that in order for a public employee's speech to receive First Amendment protection, the speech must address an issue of public concern, the balance must lean towards the employee, and a nexus must exist between the protected speech and the adverse or retaliatory employment action (*Baker v. McCall*, 2012 citing *Pickering v. Board of Education*, 1968; *Connick v. Myers*, 1983; *Garcetti v. Ceballos*, 2006).

In determining whether Baker's speech was constitutionally protected, the court utilized the citizen/employee threshold presented in *Connick v. Myers* (1983). Referencing *Connick's* content, form, and context analysis in determining if the speech was made as a citizen or as employee and if it addressed a matter of public concern, the court determined that Baker's speech was not First Amendment protected speech. The district court explained that an employee's speech regarding a personal interest, in this case the marriage of Baker and Phillips, received no First Amendment protection (*Baker v. McCall*, 2012 citing *Stroman v. Colleton Cnty. Sch. Dist.*, 1992). Furthermore, the district court stated:

In this case, the content, form, and context of the conversation alleged in the first amended complaint establish that Baker's speech was made as an employee to his supervisor on a matter of personal interest, rather than as a citizen speaking out about matters of public concern. Accordingly, Baker's First Amendment claim must be dismissed. (*Baker v. McCall*, 2012, p. 950).

Baker's demotion and transfer by the NCS for his speech related to his intended marriage to a subordinate employee did not violate Baker's First Amendment rights.

Specifically, the court determined that the facts in this case indicated that Baker's speech was private and that of an employee made to his supervisor, not made as a citizen addressing an issue of public concern. Employee speech addressing of matters of personal interest are not afforded First Amendment protection (*Baker v. McCall*, 2012). Although the district court mentions *Garcetti v. Ceballos* (2006) in *Baker v. McCall* (2012), it based its decision on the content, form, and context standard presented in *Connick v. Myers* (1983), not on *Garcetti's* pursuant to duty threshold. No subsequent legal history exists pertaining to *Baker v. McCall* (2012).

***Corbett v. Duerring*, 2012 WL 1855193 (S.D. W.Va. 2012).** Peter Corbett was a vice principal at George Washington High School (GW) in the Kanawha County School District in West Virginia in 1998. Ronald Duerring became the superintendent in 1999. Duerring held a meeting with Corbett in 1999 questioning some of his student-related disciplinary actions. Specifically, Corbett claimed that Duerring wanted him to provide preferential treatment for students from affluent families. Corbett claimed Duerring retaliated against him by not allowing him to use his sick leave because of some parents' disapproval of not providing preferential treatment (*Corbett v. Duerring*, 2012).

On April 20, 2007, Corbett was supervising a group of students who were grilling hotdogs in the parking lot. The principal of GW had ordered the outside of the school closed for safety reasons, because April 20, 2007, was the eighth anniversary of the Columbine student massacre. Corbett claimed that he did not know that the students could not be outside, considering he was supervising them. On June 15, 2007, the school board held a hearing to determine Corbett's punishment for his insubordinate act. The hearing examiner recommended a one-day suspension without pay, but at the



recommendation of Duerring opted to suspend him for five days without pay. Corbett believed that the extended suspension resulted from his refusal to adhere to Duerring's directive to give some students special treatment (*Corbett v. Duerring*, 2012).

On November 27, 2007, during his suspension, Corbett grilled and sold hotdogs outside of the school board's headquarters. He claimed that he did this in protest, the reasons for which were twofold:

1. [To bring attention] to issues relating to defendants' [Duerring] unequal treatment of students, arbitrary enforcement of rules at GW, and mistreatment of administrators who refused to comply with defendants' corrupt practices; and
2. [To address] the lack of clarity and effective communication at GW regarding protocols that affect student safety, such as the procedures for closing of the campus. (*Corbett v. Duerring*, 2012, p. 2)

A few days after Corbett's protest, Duerring sent him a letter explaining to him that his actions were insubordinate and that, because of his position of vice principal, the First Amendment did not protect them (*Corbett v. Duerring*, 2012). The letter also informed Corbett that he was suspended with pay "pending further review and a determination of appropriate action to be taken" (*Corbett v. Duerring*, 2012, p. 3).

In March of 2008, Corbett received a letter from Duerring listed several charges of insubordination, violations of the employee code of conduct, misappropriations of funds, neglect of duty, and unprofessional conduct. The letter also served to notify him that the school board was going to hold a hearing to determine whether he would receive further disciplinary action. The hearing occurred in May of 2008 and resulted in the

hearing officer concluding that the school board could dismiss him. On August 28, 2008, Duerring informed Corbett that he was going to recommend his termination to the school board, which he did. In light of Duerring's actions, Corbett retired which entitled him to his accrued sick leave. The school board terminated Corbett's employment on September 9, 2008 (*Corbett v. Duerring*, 2012).

Corbett first filed suit in the Circuit Court of Kanawha County, which the school board removed to the Federal District Court for the Southern District of West Virginia. The board moved to dismiss Corbett's claims, which the district court granted, ruling that Corbett failed to exhaust administrative remedies regarding his wrongful termination claim and that he failed to state a First Amendment retaliation claim (*Corbett v. Duerring*, 2010). Corbett filed another complaint in August 2010, citing First Amendment retaliation related to his "hotdog sale protest" (*Corbett v. Duerring*, 2012, p. 4). The school district again moved to dismiss the Corbett's claims, which the court denied because the judge determined that Corbett sufficiently articulated a prima facie First Amendment speech retaliation case (*Corbett v. Duerring*, 2011). According to the district court judge, Corbett engaged in protected speech and suffered an adverse employment action based on that speech, thus meeting the requirements of a prima facie case (*Corbett v. Duerring*, 2011). Because the district court denied the school district's motion to dismiss, the school district filed for summary judgment in *Corbett v. Duerring* (2012), claiming no material issues of fact existed in the record.

The district court opinion referenced the *Pickering* balancing test and the necessary components for Corbett to prevail on a prima facie First Amendment speech retaliation case. In determining whether Corbett's speech addressed a matter of public

concern, the district court employed the content, form, and context analysis from *Connick v. Myers* (1983). The district court determined that Corbett's hotdog sale protest constituted protected speech for First Amendment purposes because it addressed issues of public concern (i.e. treatment of students and student safety). The court noted that Corbett's protest may have been partially motivated by his suspension; however, it also "touched on matter of public concern" (*Corbett v. Duerring*, 2012, p. 7).

The court continued with the prima facie analysis to determine if a causal connection existed between Corbett's protest and his termination. The district court determined that the proximity of Corbett's suspension to his protest was sufficient to prove causation. Thus, the district court determined that Corbett's hotdog protest constituted speech for First Amendment purposes. The court then explained that because the speech was protected, the school district had the burden of proof to demonstrate that they would have terminated him in the absence of the protected speech, echoing *Mt. Healthy School District v. Doyle* (1977), although the court did not specifically cite *Mt. Healthy*. Because material issues of fact existed as to whether Corbett would have been terminated in the absence of his protest, the district court denied the district's motion for summary judgment (*Corbett v. Duerring*, 2012).

The district court couched its decision in *Pickering*, relying heavily on the *Pickering* balancing test to weigh Corbett's speech rights against the right of the school district to operate an efficient workplace. The court determined, using the *Connick* standard (content and context), that Corbett's speech addressed an issue of public concern. The district court opinion applied *Garcetti v. Ceballos* (2006) only in that Duerring conceded that Corbett's speech was made as a citizen and not pursuant to duty

(*Corbett v. Duerring*, 2012). Because of its determination that material issues of fact existed regarding the school district's claim that they would have dismissed Corbett in the absence of his protest, the district court denied summary judgment and allowed the case to go to trial. However, the case never went to trial, that is, no subsequent legal history exists regarding *Corbett v. Duerring* (2012). Corbett and Duerring reached a settlement (Oppenheim, 2012). The absence of a court record leaves the result of *Corbett v. Duerring*, (2012) unsettled about whether Duerring unlawfully retaliated against Corbett in violation of his First Amendment speech rights.

### **Fifth Circuit**

Since *Garcetti v. Ceballos* (2006), the fifth circuit has had four cases involving the First Amendment speech rights of PK-12 public school administrators. Three cases were heard in the Fifth Circuit Court of Appeals while one case was heard at the federal district court level. This section presents the results of those cases in chronological order.

***Cavazos v. Edgewood Independent School District*, 210 Fed.Appx. 414 (5th Cir. 2006).** Norma Cavazos was the school principal at John F. Kennedy High School (JFK) in San Antonio, Texas. She claimed that the school district reassigned her in an act of retaliation for disciplining a school board member's son for possession of marijuana (*Cavazos v. Edgewood Independent School District*, 2006). Cavazos claimed that she engaged in First Amendment protected speech when she informed her superiors that the student, the board vice-president's son, had been apprehended by police for possession of marijuana (*Cavazos v. Edgewood Independent School District*, 2006).

Cavazos had been the principal of JFK since August 2002. In February 2003, Nick Perez, the son of the school board vice-president Johnny Perez, was apprehended on

the school campus in possession of marijuana. Per the Texas Education Code, this required Nick to be removed from the school and placed in an alternative education program. Nick was brought to the school office and Cavazos contacted his mother. Mrs. Perez threatened Cavazos's job, stating that her husband, Mr. Perez, was on the school board, and that Nick should not be disciplined. Cavazos informed Mr. and Mrs. Perez that she was going to recommend Nick's placement in the alternative education program, which Mr. Perez agreed with because it was her job as school principal to recommend the new placement (*Cavazos v. Edgewood Independent School District*, 2006).

Following their meeting, Cavazos claimed that she felt threatened by Mr. Perez, because of comments made by Mrs. Perez in a December 2003 school board meeting implying that she would get revenge if anyone hurt her son (*Cavazos v. Edgewood Independent School District*, 2005). According to Cavazos, after Mrs. Perez made the comments, several board members began acting negatively towards her. The school district hired a new superintendent, Bocanegra, in October 2003, who knew Cavazos but claimed to know nothing about the dispute between Cavazos and the Perezes. In January 2004, Bocanegra transferred Cavazos to another high school. Cavazos claimed that this transfer was a negative employment action because the new school was an alternative school that served students who did not complete high school. Bocanegra claimed that he had the right to reassign principals at any time and that JFK's dwindling performance and a number of teacher grievances against Cavazos served as his justification for reassigning her. Cavazos served as principal of the new school until May 2004 when she voluntarily resigned (*Cavazos v. Edgewood Independent School District*, 2005).

Cavazos filed suit in April 2004 claiming First Amendment retaliation asserting that her actions regarding the marijuana incident resulted in her transfer. The school district filed a motion for summary judgment claiming that Cavazos did not engage in First Amendment retaliation because her speech was not protected because it failed to address a matter of public concern (*Cavazos v. Edgewood Independent School District*, 2005). The court applied a prima facie analysis to Cavazos's speech, which included a determination of whether she was subjected to an adverse employment action because of and in close proximity to First Amendment protected speech. Applying a prima facie case analysis, albeit in a different order than usual (protected speech, retaliation, and a causal connections between the two), the district court determined that Cavazos's transfer constituted an adverse employment action because of the pay difference of the two positions (at the alternative school, Cavazos's pay was two pay grades below her salary at JFK). Applying the content, form, and context standard set forth in *Connick v. Myers* (1983), the district court determined that when Cavazos informed the police and Perez, as a board member (a superior), her speech did not address a matter of public concern, given the context of her employment. Because of this determination, the district court ruled that transferring Cavazos in response to her speech did not violate the First Amendment, as it did not address a matter of public concern. The district court granted the school district summary judgment on Cavazos's First Amendment claim stating, "no evidence [exists] to support plaintiff's claims that Mrs. Cavazos spoke on matters of public concern" and that "Mrs. Cavazos's actions were required of her by her position as Principal of JFK (*Cavazos v. Edgewood Independent School District*, 2005, p. 966).

Cavazos appealed the decision of the district court to the Fifth Circuit Court of Appeals (*Cavazos v. Edgewood Independent School District*, 2006). In a very brief opinion, issued on December 18, 2006, the circuit court affirmed district court's decision. Specifically, the Fifth Circuit Court, citing *Garcetti v. Ceballos* (2006), stated that Cavazos's speech about the marijuana incident was pursuant to duty. Because of this determination, the circuit court stated, "Cavazos's expression consisted of disciplining a student and reporting his conduct to administrators for the school district, both of which clearly fall within her official duties. Her First Amendment claim therefore cannot stand" (*Cavazos v. Edgewood Independent School District*, 2006, p. 1). The circuit court explained that, although Cavazos claimed her speech was protected by the First Amendment, "all of her speech was made pursuant to her official duties as principal, and thus her First Amendment argument is foreclosed by the Supreme Court's recent decision in *Garcetti v. Ceballos* (2006)" (*Cavazos v. Edgewood Independent School District*, 2006, p. 1).

The circuit court affirmed the district court decision; however, it couched its decision in *Garcetti*, while the lower court relied upon *Pickering* and the determinants of a prima facie retaliation claim. The circuit court decision in *Cavazos v. Edgewood Independent School District* (2006) is a clear example of the "pursuant to official job duties" threshold set forth in *Garcetti v. Ceballos* (2006), which was handed down by the Supreme Court between the district court decision in 2005 and the circuit court decision in 2006. That is, the First Amendment does not protect PK-12 public school administrator speech that is pursuant to duty. No subsequent legal history pertaining to *Cavazos v. Edgewood Independent School District* (2006) exists.

***Sanders v. Leake County School District*, 546 F.Supp.2d 351 (S.D. Miss. 2008).**

Martha Sanders, an African American female, was a school principal in the Leake County School District, Mississippi. Superintendent Hartley recommended that the school board not renew Sanders's contract in the spring of 2005, citing performance issues, which the board adopted after conducting a three-day hearing at Sanders's request (*Sanders v. Leake County School District*, 2008). Sanders claimed that the school district chose not to renew her contract because of a failed Equal Employment Opportunity Commission (EEOC) charge she had previously filed against the school district, alleging racism in the treatment of African American principals in the school district. She believed this violated her First Amendment speech rights. Sanders also claimed that the school district violated her due process rights and breached her contract. The school district moved for summary judgment, which the district court granted (*Sanders v. Leake County School District*, 2008).

As for Sanders's First Amendment speech retaliation claim, the district court determined that the school district did not violate her speech rights. The school district contended that Sanders's EEOC claim was an individual employment grievance, barring it from First Amendment protection, and that even if the complaint constituted protected speech, the district would have non-renewed her contract based on her employment performance. Citing *Pickering v. Board of Education* (1968) and *Connick v. Myers* (1983), the court applied the *Pickering* balance test, the *Connick* analysis of content, form, and context, and the criteria required for a successful prima facie case.

Additionally, the district court stated that the *Garcetti* pursuant to duty test must initially



be applied to determine whether Sanders's speech was made as a citizen or as pursuant to her official duties (*Sanders v. Leake County School District*, 2008).

Specific to *Garcetti's* pursuant to duty test, the district court determined that when Sanders filed her EEOC claim, she spoke as a citizen, not an employee pursuant to duty, because she addressed her employment concerns with an outside agency. Because of this determination, the district court then applied the *Connick* content, form, and context analysis and determined that Sanders's speech was not protected. The district court explained that courts must determine whether EEOC complaints are protected by the First Amendment on a case-by-case basis. That is, if the EEOC complaint addresses an interest of public concern (e.g. systemic racism) that exceeds personal allegations (e.g. individual claims of racism) then the speech may qualify for First Amendment protection. Although Sanders's EEOC complaint addressed racism, undoubtedly an issue of public concern, the court pointed out Sanders:

made no attempts to make her alleged concerns public but rather presented them in the context of a private employment grievance, which leads the court to conclude that she did not file a "grievance" as a "citizen"; rather, she filed an EEOC charge as an employee. As such, she cannot succeed on her First Amendment claim for that reason. (*Sanders v. Leake County School District*, 2008, p. 359)

Even though Sanders's EEOC complaint addressed large-scale racism in the school district, the EEOC complaint was not available to the school district when it decided not to renew her contract. The district court explained that the contents of the EEOC

complaint were immaterial because the school district was unaware of them until after it decided not to renew her contract (*Sanders v. Leake County School District*, 2008).

In addition to determining Sanders's complaint was a personal matter not entitled to First Amendment protection, the district court explained that even if her EEOC complaint was protected speech, Sanders failed to demonstrate that the complaint was a motivating factor in the school district's decision. The court reasoned that if the EEOC complaint was protected speech and if her nonrenewal was based on it, Sanders failed to meet the proximal connection (temporal proximity, that is the nonrenewal did not occur close in time to her complaint) of the two (the third prong of a prima facie case) because the nonrenewal occurred more than a year after she filed her complaint (*Sanders v. Leake County School District*, 2008). Sanders claimed that her nonrenewal occurred as soon as legally possible because of the notice requirements in Mississippi. Entertaining this assertion, the district court determined that the school district had provided enough evidence that even if Sanders succeeded in establishing a prima facie case, the school district would have non-renewed her contract based on her unsatisfactory performance (*Sanders v. Leake County School District*, 2008).

The district court stated:

Plaintiff [Sanders] has offered no evidence that would create an issue of fact in the face of defendants' evidence that the nonrenewal decision was based on performance issues and would have been made irrespective of plaintiff's EEOC charge. Accordingly, for this reason, as well as those given *supra*, the court concludes that summary judgment is in order on plaintiff's First Amendment retaliation claim. (*Sanders v. Leake County School District*, 2008, pp. 361-362)

The district court determined that the school district did not violate Sanders's First Amendment speech rights because although she spoke as a citizen (*Garcetti*), her speech did not address a matter of public interest (*Connick* context analysis) and if it had (establishing a prima facie case), the school district proved by a preponderance of the evidence that it would have reached the same employment decision in the absence of the EEOC complaint (*Mt. Healthy*). *Sanders v. Leake County School District* (2008) has no subsequent legal history.

***Alexander v. Brookhaven School District*, 428 Fed.Appx. 303 (5th Cir. 2011).**

Dorothy Alexander, an African American female, was an assistant superintendent in the Brookhaven School District (BSD) until her contract was not renewed in 2005. Lea Barrett was the superintendent in BSD, which is located in Mississippi. In 2005, Barrett notified Alexander via letter that the district was not going to renew her contract for failure to report and investigate a claim of sexual harassment, unauthorized calls to parents of students, offering to destroy evidence, and disrespectful behavior towards Barrett. Alexander requested a hearing before the school board but did not attend, thus the board followed through with the nonrenewal of her contract. Alexander filed a suit against Barrett and the district claiming racial discrimination and retaliation under Title VII, unequal pay under the Equal Pay Act of 1963, and First Amendment retaliation. Alexander failed to specify which claims she brought against each defendant (the district and Barrett) and both the school district and Barrett moved to dismiss her claims. The district court granted the motions to dismiss all of the claims against Barrett and three of the claims against BSD, and granted summary judgment for the fourth claim for BSD.

The circuit court affirmed the district court decision (*Alexander v. Brookhaven School District*, 2011).

Alexander claimed that Barrett recommended the nonrenewal of her contract to the BSD because of her involvement with a teacher-on-student sexual harassment case. Specifically, Alexander claimed that her reports and testimony related to the issue constituted protected speech under the First Amendment (*Alexander v. Brookhaven School District*, 2009). Referencing *Pickering v. Board of Education* (1968) and *Connick v. Myers* (1983), the district court stated that the First Amendment protected public employees' speech addressing matters of public concern. However, the court then referenced the threshold consideration presented in *Garcetti v. Ceballos* (2006) that serves as a trigger for the speech analysis (*Alexander v. Brookhaven School District*, 2009). Alexander never claimed that her speech related to the sexual harassment issue was made as a citizen. Alexander stated in her complaint that she was required by law to report the alleged sexual harassment as part of her position, which was critical in the court's determination that her speech was pursuant to duty. Even though Alexander's speech addressed a matter of public concern, "this inquiry [was] secondary to her role at the time she spoke. Therefore, Plaintiff [Alexander] cannot maintain a claim for retaliation based on her alleged report of a teacher's unlawful conduct" (*Alexander v. Brookhaven School District*, 2009, p. 3, internal citations omitted).

However, the court denied BSD's motion to dismiss stating that Alexander had sufficiently stated a First Amendment speech claim against BSD. In 2010, the district court granted the BSD's motion for summary judgment (*Alexander v. Brookhaven School District*, 2010). The district court granted summary judgment to BSD because Alexander

failed to comply with the nonrenewal appeal process (i.e. her failure to appear at the hearing), and in accordance with Mississippi state law, Barrett did not have the final authority in the nonrenewal of Alexander's contract. That is, under state law, only the school board had the final authority to non-renew Alexander's contract, which cleared Barrett of any wrongdoing. The board accepted Barrett's recommendation, which did not violate Alexander's speech rights, as the district court determined in *Alexander v. Brookhaven School District* (2009).

The circuit court affirmed both decisions from the district court in 2011. Specifically on the issue of Alexander's First Amendment retaliation claim, the circuit court stated that Alexander failed to prove that the First Amendment protected her speech. The district court had determined that Alexander's testimony in the sexual harassment case was pursuant to her official duties, thus the First Amendment did not shield her from retaliation, which manifested itself as the nonrenewal of her contract by BSD (*Alexander v. Brookhaven School District*, 2009), which the circuit court affirmed (*Alexander v. Brookhaven School District*, 2011). Additionally, Barrett claimed qualified immunity in her motion to dismiss, which the district court granted, because she did not know that Alexander's status as a witness, and her ensuing speech, was protected by the First Amendment (*Alexander v. Brookhaven School District*, 2011). Based on the Fifth Circuit Court of Appeals affirmation of the district court ruling, Alexander's testimony was pursuant to her duty and not protected speech for First Amendment purposes. *Alexander v. Brookhaven School District* (2011) has no subsequent appellate history.

***Mooney v. Lafayette County School District*, 538 Fed.Appx. 447 (5th Cir. 2013).** Lisa Mooney became an assistant principal in the Lafayette County School

District (LCSD) in Mississippi in 2006. In 2007, Mooney supported a challenger in the superintendent election who lost to the incumbent (*Mooney v. Lafayette County School District*, 2013). In May of 2009, LCSD demoted Mooney, which she claimed resulted from her political activities during the superintendent election. The LCSD claimed that they demoted her because of her unsatisfactory job performance, citing her repeated tardiness, absenteeism, and treatment of students (*Mooney v. Lafayette County School District*, 2012). In May 2010, the LCSD non-renewed Mooney's contract, claiming legitimate financial reasons, while Mooney claimed the nonrenewal was based on her political activities (*Mooney v. Lafayette County School District*, 2012). Mooney filed a complaint against the LCSD claiming Title VII employment discrimination and First Amendment retaliation (*Mooney v. Lafayette County School District*, 2012).

The district court stated that in order for Mooney to prevail on her First Amendment retaliation claim, she had to demonstrate that she (a) engaged in protected speech, not pursuant to her duty, (b) suffered an adverse employment action, and (c) that the two were related (*Mooney v. Lafayette County School District*, 2012 modifying the first element considering *Garcetti*). The district court stated that if Mooney could meet this burden, then the *Pickering* Balancing test must be applied to balance her speech rights against the rights of the LCSD's interests in promoting effectiveness and efficiency in the workplace. Furthermore, the district court stated that in the fifth circuit, the *Mt. Healthy School District v. Doyle* (1977) "mixed-motives" (*Mooney v. Lafayette County School District*, 2012, p. 3) framework applied to claims of First Amendment retaliation.

The LCSD conceded that the nonrenewal of Mooney's contract was an adverse employment action; however, the district claimed that Mooney's political activity and her

nonrenewal were not related. The district court determined that Mooney's political activity was protected speech for First Amendment purposes. However, the district court also determined that Mooney failed to meet the burden of causation required to prevail in a prima facie First Amendment retaliation claim. Thus, her demotion and eventual nonrenewal did not violate her speech rights, and the district court granted summary judgment to LCSD (*Mooney v. Lafayette County School District*, 2012).

In affirming the district court decision, the circuit court stated that Mooney could not be subjected to adverse employment actions based upon her First Amendment protected speech based on *Connick v. Myers* (1983) and *Pickering v. Board of Education* (1968) if Mooney could meet the burden of a prima facie case (*Mooney v. Lafayette County School District*, 2013). The circuit court stated that because Mooney met the necessary burden, that she engaged in protected speech and was subjected to an adverse employment action in close proximity to it, the *Mt. Healthy* mixed-motive analysis was appropriate in determining whether her nonrenewal was unconstitutional under the First Amendment. The court determined that Mooney's political activities were protected speech under the First Amendment and that her timely demotion and subsequent nonrenewal constituted adverse employment actions in temporal proximity to her speech, thus meeting the burden of a prima facie case. According to the circuit court, this supported Mooney's claim. Three years had transpired between her political activity and the nonrenewal of her contract, but her immediate demotion following her political activity, in the view of the court, was sufficient to raise a "genuine issue of material fact regarding the causal connection" (*Mooney v. Lafayette County School District*, 2013, p. 455), thus precluding the summary judgment granted by the district court.

The circuit court also determined that the LCSD did not prove by a preponderance of the evidence that it would have non-renewed her Mooney's contract in the absence of her political activity. Although the LCSD introduced evidence (i.e. poor job performance, lack of punctuality, and a required reduction in force [RIF]) supporting Mooney's nonrenewal, Mooney was the only administrator in LCSD removed by the RIF, which was conducted by another administrator who supported the incumbent superintendent. The circuit court determined that this fact could support Mooney's claim that the RIF was pretextual, that is, the LCSD used the RIF as a reason, as pretext, to non-renew Mooney's contract for her First Amendment protected political activity (*Mooney v. Lafayette County School District*, 2013).

The circuit court vacated and remanded the district court decision granting summary judgment for LCSD in Mooney's First Amendment retaliation claim. Couching its decision in *Mt. Healthy School District v. Doyle's* (1977) "mixed-motives" framework, the circuit court determined that Mooney's claims created material issues of fact that precluded summary judgment (*Mooney v. Lafayette County School District*, 2013). As of the writing of this dissertation, no subsequent case history exists pertaining to *Mooney v. Lafayette County School District* (2013). Thus, whether the LCSD violated Mooney's First Amendment speech rights is unclear.

### **Sixth Circuit**

The sixth circuit has had two cases involving PK-12 public school administrators since the Supreme Court decision in *Garcetti v. Ceballos* (2006). Both of the cases were heard in the Sixth Circuit Court of Appeals. The two cases are discussed below in chronological order.



***Scarborough v. Morgan County Board of Education, 470 F.3d 250 (6th Cir. 2006).*** Paul Scarborough was the elected superintendent of Morgan County, Tennessee. The position of elected superintendent of schools expired by Tennessee state law on August 31, 2000, and the position was replaced by the new Director of Schools position, which was appointed by local boards of education (*Scarborough v. Morgan County Board of Education, 2006*). He was not appointed to the new position of Director of Schools for the county school system after a newspaper article indicated that he was going to be the speaker at a church function that served a predominately homosexual congregation (*Scarborough v. Morgan County Board of Education, 2006*). Scarborough claimed that the school board did not appoint him to this new position because of this article, which violated his First Amendment rights of freedom of speech, association, and religion and his equal protection rights under the Fourteenth Amendment (*Scarborough v. Morgan County Board of Education, 2006*).

In the spring of 2000, a friend of Scarborough asked him to speak at the Metropolitan Church of Knoxville. Scarborough did not know at the time that the church had a predominately homosexual congregation. Scarborough agreed to speak but was unable because of a scheduling conflict. He then agreed to consider speaking at a church convention, but was unable to accept and declined (*Scarborough v. Morgan County Board of Education, 2006*).

On May 13, 2000, the *Knoxville News-Sentinel* ran an article that stated Scarborough was going to speak at the church convention. Scarborough had declined to speak at the church following the release of information from the church to the newspaper. Scarborough issued two written statements to local newspapers indicating that

“Scarborough had declined the speaking engagement and further noted that he did not endorse, uphold, or understand homosexuality, but that he would not refuse to associate with gay people or refuse the opportunity to share with them his beliefs” (*Scarborough v. Morgan County Board of Education*, 2006, p. 254).

After receiving numerous complaints about Scarborough’s articles, several board members began to question Scarborough’s judgment and his ability to perform as the Director of Schools. The board interviewed the five candidates for the director position and the MCBE elected Freels, their third choice, as the director. Scarborough was listed as their fourth choice. Scarborough claimed that the MCBE elected Freels instead of him because of the original newspaper article, which he believed violated his First Amendment rights. Scarborough filed a complaint in the federal district court for the Eastern District of Tennessee, which granted summary judgment for the MCBE. The district court had determined that Scarborough did not engage in speech because he never spoke at the church or the church convention (*Scarborough v. Morgan County Board of Education*, 2006).

The circuit court stated that in order for Scarborough to prevail on his First Amendment retaliation claim, he must substantiate a prima facie case. Citing *Connick v. Myers* (1983), *Givhan v. Western Line Consolidate School District* (1979), and *Pickering v. Board of Education* (1977), the circuit court stated that Scarborough had engaged in “speech” (e.g. his comments in the newspaper article) and thus an analysis of the speech was necessary. Citing the content, form, and context analysis established in *Connick*, the circuit court determined that Scarborough’s speech touched on a matter of public concern and did not pertain to his employment. Because of this determination, the circuit court

applied the *Pickering* balancing test (*Scarborough v. Morgan County Board of Education*, 2006).

In its application of the *Pickering* Balancing test, the circuit court discussed the effect Scarborough's speech had on the close working relationships between the MCBE and him. Some of the MCBE members claimed that Scarborough's intended speech created a difficult environment in which to work because they did not condone homosexuality and Scarborough's choice to speak at the church raised tensions resulting in an inefficient workplace. This MCBE assertion, according to the circuit court, became the primary issue of fact that Scarborough's speech was disruptive to the workplace. That is, the court had to determine if the potential disruption of Scarborough's protected speech was the reason why the MCBE did not hire him as the director (*Scarborough v. Morgan County Board of Education*, 2006). The MCBE claimed that Scarborough's speech interfered with the operations of the school system because it called into question his loyalty to MCBE and his effectiveness as a director in carrying out the directives of the board. The circuit court found this claim unpersuasive, stating that Scarborough's speech did not indicate his political or policy views that might be disruptive to the daily operations of the MCBE (*Scarborough v. Morgan County Board of Education*, 2006).

The district court had granted summary judgment for the MCBE on Scarborough's First Amendment claim. However, the circuit court reversed the judgment against some of the named board members. Summary judgment requires that no material issues of fact exist and the circuit court determined that fact issues still existed regarding the motivation of not hiring Scarborough (*Scarborough v. Morgan County Board of Education*, 2006). Specifically, the record of the board meeting in which the MCBE elected Freels

indicated that the motive for each members' vote was unclear. That is, some board members testified that other board members, who voted against him, treated Scarbrough differently after the original newspaper article. The circuit court ruled that because of the material issues of fact regarding motivation apparent in this case, the district court erred in granting summary judgment and remanded the case for further proceedings to determine if in fact Scarbrough suffered First Amendment retaliation. Specifically, the circuit court stated that the MCBE had to prove by the preponderance of the evidence that they would have not hired him in the absence of his protected speech (*Scarbrough v. Morgan County Board of Education*, 2006 citing *Mt. Healthy v. Doyle*, 1977).

The circuit court did not mention or apply the ruling in *Garcetti v. Ceballos* (2006). Instead, the circuit court applied the precedents set forth in *Connick v. Myers* (1983), *Givhan v. Western Line Consolidated School District*, (1979), *Mt. Healthy v. Doyle*, (1977), and *Pickering v. Board of Education*, (1968). Specifically, the circuit court determined that Scarbrough's speech qualified for First Amendment protection because his "interest in sharing his religious beliefs with the Metro congregation and the community at large is protected conduct," and his speech did not relate to his employment or occur during his work hours (*Scarbrough v. Morgan County Board of Education*, 2006, p. 258). Additionally, the MCBE failed to prove that Scarbrough's speech was disruptive and that they would have not hired him in the absence of his speech (*Scarbrough v. Morgan County Board of Education*, 2006). Other than a request for a rehearing *en banc*, which was denied in April 2007, no further case history exists regarding *Scarbrough v. Morgan County Board of Education* (2006). Thus, it is unclear

whether the MCBE violated Scarbrough's First Amendment speech rights by not hiring him as the director of schools.

*Harris v. Detroit Public Schools*, 245 Fed.Appx. 437 (6th Cir. 2007). Sammie Harris was a high school principal in the Detroit Public Schools (DPS) from August 2000 until June 2004 at Northern High School (NHS). Harris claimed that in 2001 he discovered "that the NHS bookkeeper had engaged in improper accounting practices and, as a result, funds were missing" (*Harris v. Detroit Public Schools*, 2007). Harris ordered an audit that confirmed thousands of dollars were missing, after which the bookkeeper resigned. Harris reassigned a teacher, Davis, as the interim bookkeeper. In December 2003, the NHS executive director informed Harris that Davis had informed DPS of several accounting irregularities. In January of 2004, Harris informed the DPS human resource (HR) department that he intended to retire at the end of the school year, citing health-related issues, and that he wanted information regarding compensation for his accrued sick time. The HR responded to Harris and informed him that he would be compensated for 35 sick days. On the same day, DPS released the results of the second audit initiated by Davis, which indicated large sums of money were missing from NHS (*Harris v. Detroit Public Schools*, 2007).

A newspaper article in the *Detroit Free Press* reported the findings of the audit, which Harris claimed was "character assassination" (*Harris v. Detroit Public Schools*, 2007, p. 3) at the behest of DPS, which was unwarranted because he was not the principal at the time the money in question went missing. Following Harris's complaint to the district, DPS placed Harris on paid administrative leave until an investigation into NHS's finances was completed. The same day (February 6, 2004), the DPS chief HR officer

sent a memorandum to the Chief Academic Officer to clarify DPS's retirement procedure. Specifically, the memorandum clarified that once submitted, a notice of retirement could only be rescinded at DPS's discretion (*Harris v. Detroit Public Schools*, 2007).

On February 7, 2004, the *Detroit News* reported that DPS placed Harris on administrative leave and indicated that he was under investigation for the uncovered financial issues at NHS. Harris attempted to rescind his retirement, which DPS denied. Harris received his full salary until the end of his contract in June 2004 (*Harris v. Detroit Public Schools*, 2007).

Harris filed suit against DPS on May 27, 2004 in the federal district court for the Eastern District of Michigan claiming First Amendment retaliation and Fourteenth Amendment due process violations based on the school district's refusal to rescind his retirement and his paid suspension (*Harris v. Detroit Public Schools*, 2006). The district court referred the case to a magistrate judge, who recommended that the district court grant the summary judgment for DPS, for which it had filed. Harris did not object to the magistrate judge's recommendation and the district court granted summary judgment for DPS (*Harris v. Detroit Public Schools*, 2006). Harris appealed to the circuit court (*Harris v. Detroit Public Schools*, 2007).

Harris claimed that DPS violated his First Amendment speech rights by not rescinding his retirement and placing him on paid suspension. In order to establish a First Amendment retaliation case, the circuit court explained that Harris had to establish a prima facie case (i.e. he engaged in protected speech, was subjected to an adverse employment action, and a causal connection between the two) (*Harris v. Detroit Public*

*Schools*, 2007). The circuit court determined that Harris's claim failed to establish the second prong of a prima facie case, that is, DPS did not subject him to an adverse employment action. In a footnote, the circuit court indicated that it was possible that Harris did not meet the first prong (he engaged in protected speech) in light of the Supreme Court's decision in *Garcetti v. Ceballos* (2006), which occurred after the district court decision (*Harris v. Detroit Public Schools*, 2007). Although the *Garcetti* decision occurred after the district court decision, the circuit court explained that the ruling applied in this case because the circuit court case occurred after *Garcetti*. However, because neither Harris nor DPS relied on *Garcetti* in arguing the case and it was unclear whether Harris's speech was pursuant to his duty, the circuit court specifically stated that it declined to consider the application of the *Garcetti* in its decision (*Harris v. Detroit Public Schools*, 2007).

According to the circuit court opinion, Harris voluntarily retired from his position and DPS did not rescind his retirement in accordance with DPS's retirement policy. Harris's contract explicitly stated that when he submitted his retirement forms, he terminated his services with DPS at the effective date of the retirement. Furthermore, according to the circuit court, Harris's claim that his paid suspension was an adverse employment action was meritless. Citing *Peltier v. United States* (2004), the circuit court explained, "that a suspension with pay and full benefits pending a timely investigation into suspected wrongdoing is not an adverse employment action" (*Harris v. Detroit Public Schools*, 2007, p. 6). Thus, the court determined that Harris's First Amendment retaliation claim failed because he failed to establish a prima facie case and affirmed the

district court decision (*Harris v. Detroit Public Schools*, 2006) awarding DPS summary judgment.

In *Harris v. Detroit Public Schools* (2007), the circuit court hinted that Harris's speech might have been pursuant to his official duties in accordance with the ruling in *Garcetti v. Ceballos* (2006). However, the circuit court couched its opinion in the requirements of a prima facie case, which it determined Harris failed to establish. Specifically, Harris failed to establish that DPS subjected him to an adverse employment action, which was fatal to his First Amendment retaliation claim. No subsequent legal history exists regarding *Harris v. Detroit Public Schools* (2007).

### **Seventh Circuit**

The seventh circuit has heard one case involving PK-12 public school administrators since the Supreme Court decision in *Garcetti v. Ceballos* (2006). The case was heard in the Seventh Circuit Court of Appeals.

***McArdle v. Peoria*, 705 F.3d 751 (7th Cir. 2013).** Julie McArdle became the principal of Lindbergh Middle School in Peoria School District 150 on August 4, 2008. Her contract was from July 1, 2008 through June 30, 2010. Kenneth Hinton was the superintendent, Herschel Hannah was the assistant superintendent, and Mary Davis was the academic officer for the school district and former principal of the Lindbergh Middle School. McArdle reported to Davis, Davis reported to Hannah, and Hannah reported to Hinton (*McArdle v. Peoria*, 2011).

Starting in October 2008, Davis contacted McArdle about numerous parent complaints regarding McArdle's performance. These complaints continued throughout the 2008-2009 school year. Hinton became concerned about the school and brought his



concerns to the school board. On May 27, 2009, the school board decided to terminate McArdle effective June 30, 2009 by exercising the “no-cause buy-out provision of McArdle’s contract, and subsequently paid McArdle liquidated damages pursuant to this contract provision” (*McArdle v. Peoria*, 2011, p. 1025).

While serving as principal at the school, McArdle discovered some financial and administrative irregularities from Davis’s time as principal. These findings included:

1. a student teacher who agreed to work without pay was being paid a teacher's aide salary;
2. a private counselor was charging private fees contrary to District 150's obligation to provide such services for free as a part of a public education;
3. addresses were falsified to show students living within District 150's boundaries when they did not physically live within those boundaries; and
4. financial discrepancies regarding the Student Activities Funds, which are the only funds that the Lindbergh Principal handles. (*McArdle v. Peoria*, 2011, p. 1025)

The district court noted that after McArdle’s termination, Davis had been indicted on eight counts each of felony theft and felony official misconduct related to her misconduct while principal at the school, prior to her promotion to academic officer. According to McArdle, she tried to address these issues with Davis throughout the school year, but Davis contended that the school had already been audited (*McArdle v. Peoria*, 2011).

McArdle claimed that shortly after mentioning the financial irregularities, Davis began discrediting her to Hinton, which resulted in the school board deciding to terminate McArdle. McArdle informed Hinton and the vice-president of the school board, Thomas

Broderick, of the theft and misconduct. McArdle also filed a police report with the Peoria Police Department. Davis, Hinton, and Broderick knew the charges had been filed against Davis when the board voted to terminate McArdle on May 27, 2009 (*McArdle v. Peoria*, 2011).

McArdle filed a complaint in the federal district court for the Central District of Illinois on December 23, 2009 claiming that the school district had engaged in First Amendment retaliation, violated the Illinois Whistleblower Act, and engaged in tortious interference with a contract. The school district moved for summary judgment. McArdle dismissed her claims under the Whistleblower Act. The district court granted the school district's motion to dismiss all of McArdle's claims (*McArdle v. Peoria*, 2011).

McArdle claimed that Davis and the school district violated her First Amendment speech rights by terminating her for reporting the financial irregularities and administrative misconduct. The district court explained that in order for McArdle to prevail on her claim, she must meet the burden of a prima facie case. In its determination of the first prong required by a prima facie case, whether the speech was protected by the First Amendment, the district court determined that McArdle's speech was pursuant to her duties as principal of the school (*McArdle v. Peoria*, 2011 citing *Garcetti v. Ceballos*, 2006). Specifically, although her formal job description did not include monitoring the student activities account, the district court reasoned that, "McArdle's formal and practical responsibilities as principal included oversight of the Student Activities Fund and would include reporting any discovered misconduct associated with the it" (*McArdle v. Peoria*, 2011, p. 1028). Thus, McArdle's speech was pursuant to duty, not as a citizen.

The district court then stated that if McArdle could articulate that she spoke as a citizen, her speech would be considered in its content, form, and context, referencing *Connick v. Myers* (1983). However, the district court reasoned that McArdle's speech was not a matter of public concern because she only reported the misconduct after she learned that the school board was considering terminating her. The court construed this as McArdle attempting to save her own job and categorized it as a personal employment grievance, which is not protected under the First Amendment (*McArdle v. Peoria*, 2011). Furthermore, McArdle never contested the school district's assertion that her speech was merely an attempt to avoid her termination (*McArdle v. Peoria*, 2011).

The district court also stated that McArdle failed to demonstrate a causal connection between her speech and her termination. The school board had already decided to terminate her prior to McArdle informing them of Davis's misconduct. McArdle claimed that Davis's complaints about her performance constituted pretext to support her termination because of McArdle's reporting of Davis's misconduct. The district court found this argument unpersuasive as the complaint against McArdle emanated from people other than Davis. McArdle also claimed that Davis orchestrated her termination, "which arguably constituted prior restraint to deter McArdle from reporting Davis' alleged illegal conduct" (*McArdle v. Peoria*, 2011, p. 1030). The district court dismissed this assertion because the school district based her termination on evidence presented in addition to that presented by Davis. The district court dismissed McArdle's First Amendment claim. The district court granted summary judgment to the school district because McArdle's speech was pursuant to duty and even if it was not, she failed to establish a prima facie case (*McArdle v. Peoria*, 2011).

McArdle appealed the district court decision to the Seventh Circuit Court of Appeals, which affirmed the decision (*McArdle v. Peoria*, 2013). In its brief treatment of McArdle's First Amendment claim, the circuit court determined that McArdle's speech was made pursuant to her job duties, not as a citizen, and thus did not constitute protected speech for First Amendment purposes. Citing *Renken v. Gregory* (2008), a case involving an educator's criticisms about the use of departmental funds, the circuit court ruled that McArdle's speech was made as an employee (*McArdle v. Peoria*, 2013). Furthermore, according to the circuit court:

This court has held that a public employee's commentary about misconduct affecting an area within her responsibility is considered speech as an employee even where investigating and reporting misconduct is not included in her job description or routine duties. (*McArdle v. Peoria*, 2013, p. 754 citing *Vose v. Kliment*, 2007)

Even though McArdle claimed that material issues of fact existed regarding the justification used by Davis and the school board in her termination, the circuit court determined that the issues were moot because McArdle's speech was unprotected. Relying on the *Garcetti* pursuant to official duties threshold, the circuit court ruled that Davis and the school district did not violate McArdle's First Amendment speech rights and affirmed the district court decision granting summary judgment for the defendants. Interestingly, the circuit court stated, "The Supreme Court has noted that protection of a government employee's exposure of misconduct involving his workplace is more properly provided by whistleblower protection laws and labor codes" (*McArdle v. Peoria*, 2013, p. 754 citing *Garcetti v. Ceballos*, 2006) than the First Amendment does, but

McArdle had voluntarily dismissed her Whistleblower Act claim. *McArdle v. Peoria* (2013) has no subsequent legal history.

### **Eighth Circuit**

As of December 31, 2013, the eighth circuit has not had any cases appearing in federal courts involving the First Amendment Speech rights of PK-12 public school administrators since the Supreme Court decision in *Garcetti v. Ceballos* (2006).

### **Ninth Circuit**

Since the Supreme Court decision in *Garcetti v. Ceballos* (2006), the ninth circuit has had one case involving the First Amendment speech rights of PK-12 public school administrators. The case was heard at the district court level.

***Flores v. Von Kleist*, 739 F.Supp.2d 1236 (E.D. Cal. 2010).** In 2004, Francisco Flores, a Hispanic male, was the summer school principal at North Valley High School in the Orland Unified School District. The school district rehired Flores as a special needs program teacher (80%) and alternative education principal (20%) in the 2004-2005 school year. During that school year, Flores was deployed on active military duty that lasted from October 15, 2004, to February 8, 2006. Upon his return, he was rehired as in the same position, but on March 6, 2006, he was promoted to the principal position at Mill Street School. He served in this position for the 2006-2007 and 2007-2008 school years “under a one-year employment contract and an internship administrative credential” (*Flores v. Von Kleist*, 2010).

During the 2006-2007 school year, Von Kleist, the superintendent, received numerous complaints about Flores, including complaints from parents, teachers, and union representatives. One teacher complained to her union representative about Flores’s

use sexual innuendos and failure to provide her teaching evaluation. Von Kleist met with Flores to discuss these issues. Additionally, the employee responsible for student placement in the school district informed Von Kleist that she was going to remove two students from Flores's school because of his conduct. Furthermore, two teachers complained of sexual harassment by Flores during the 2007-2008 school year. On February 11, 2008, Von Kleist placed Flores on paid administrative leave citing Flores's conduct (*Flores v. Von Kleist*, 2010).

Von Kleist conducted an investigation and discovered that Flores's purported behaviors were consistent with what other school systems had experienced with him. Von Kleist held a pre-termination meeting with Flores and on February 21, 2008 asked the school board for permission to proceed with disciplinary action against Flores, which the board granted. Flores received a notice of termination citing insubordination and a history of harassment. Flores's attorney sent a letter to Von Kleist demanding that Flores be paid for the remainder of his contract and be afforded a due process hearing (*Flores v. Von Kleist*, 2010).

In a special meeting of the school board, Von Kleist requested and the board passed a resolution terminating Flores. Von Kleist notified Flores of the decision to terminate him as principal of his school and informing him that the school district did not elect to employ him for the 2008-2009 school year. Flores claimed he was never provided the opportunity to respond to the school district's charges against him. After his termination, a newspaper article was published indicating that Flores engaged in sexual harassment at his school (*Flores v. Von Kleist*, 2010).

Flores filed a complaint in the district court claiming First Amendment retaliation, along with a myriad of charges ranging from Fourteenth Amendment due process violations to discrimination based on his military service to defamation. Von Kleist and the school board moved for summary judgment, which the district court granted for all of Flores's claims (*Flores v. Von Kleist*, 2010). The district court decision, specific to Flores's First Amendment retaliation claim, is explained in the following paragraphs.

Flores claimed that Von Kleist terminated him because he was a school board member in a neighboring district. Von Kleist claimed that no evidence existed to support this assertion. Furthermore, the school board claimed that Flores had no constitutional right to be a school board member and that even if he had, "his membership on that board was not a substantial or motivating factor for Von Kleist's decision to dismiss him or ... the Board's decision to ratify Von Kleist's action" (*Flores v. Von Kleist*, 2010, p. 1248). Flores claimed that material issues of fact existed pertaining to Von Kleist's motives to terminate him, which would preclude summary judgment (*Flores v. Von Kleist*, 2010).

The district court stated that in order to prevail on a First Amendment speech retaliation claim, Flores had to substantiate a prima facie case. The district court determined that even if Flores's board membership was protected under the First Amendment, Flores failed to provide evidence supporting that his membership on the neighboring school board was a motivating factor in his termination. Because of this determination, Flores's prima facie claim failed and the district court granted summary judgment to Von Kleist and the school board. Specifically, the court stated that Flores failed to support the assertion that his school board membership was a motivating factor in the school district's decision to terminate him, thus failing to meet the third prong of a

prima facie case requiring a causal connection between the adverse employment action and the protected activity (*Flores v. Von Kleist*, 2010).

In *Flores v. Von Kleist* (2010), the district court did not apply any of the public employee free speech precedents (i.e. *Pickering v. Board of Education*, 1968; *Mt. Healthy v. Doyle*, 1977; *Givhan v. Western Line Consolidated School District*, 1979; *Connick v. Myers*, 1983; *Waters v. Churchill*, 1994; *Garcetti v. Ceballos*, 2006). Instead, the district court determined from the facts presented that Flores failed to state a prima facie First Amendment speech retaliation claim because he was unable to substantiate a causal connection between his First Amendment protected activity and his termination, which although not directly cited, echoed *Mt. Healthy School District v. Doyle* (1977). *Flores v. Von Kleist* (2010) has no subsequent legal history.

### **Tenth Circuit**

The 10th circuit has had two cases involving the First Amendment speech rights of PK-12 public school administrators since the United States Supreme Court's *Garcetti v. Ceballos* (2006) decision. One of the cases was heard in the Tenth Circuit Court of Appeals, while the other was heard at the federal district court level. The two cases appear below in chronological order.

***Casey v. West Las Vegas Independent School District*, 473 F.3d 1323 (10th Cir. 2007).** Barbara Casey was the superintendent of schools for the West Las Vegas Independent School District, New Mexico, from January 2002 until April 2003. As part of her responsibilities, Casey was the Chief Executive Officer of the school district's Head Start program that provided educational opportunities, meals, and healthcare services to low-income students between the ages of three and five (*Casey v. West Las*



*Vegas Independent School District, 2007*). The district's Head Start program had experienced difficulties and faced having its funding suspended. Casey hired Jacqueline Padilla to run the Head Start program to help correct the deficiencies. In late 2002 or early 2003, Padilla informed Casey that upwards of 50% of the families in the Head Start program exceeded the required income levels and did not qualify for the program. Casey reported Padilla's findings to the school board president, who told her not to worry about it. Casey then addressed it with another board member, who responded similarly. Casey felt that she had a duty to report the wrongdoing and instructed Padilla to contact the regional Head Start office in Dallas, Texas. In August 2003, the United States Department of Health & Human Services (HHS) confirmed Casey's concerns and ordered the school district to pay back more than \$500,000 (*Casey v. West Las Vegas Independent School District, 2007*).

Also during the 2002-2003 school year, Casey informed the school board that it was violating New Mexico's Open Meeting Act by inappropriately making personnel decisions in executive session without proper notice and without including the actions on the board meeting agendas. The school board ignored Casey's concerns and she filed a complaint with the New Mexico Attorney General's (AG) office. The AG's office contacted the school board, and based on the board's response, determined that the school district had violated the Open Meetings Act (*Casey v. West Las Vegas Independent School District, 2007*).

Furthermore, during the 2002-2003 school year, Casey informed the school board that several of their operating practices violated several state and federal laws. Specifically, she alleged that the school district hired personnel "without advertising

vacancies or conducting a review process, and that it improperly handled a case where a teacher and school principal were carrying on an affair” (*Casey v. West Las Vegas Independent School District*, 2007, p. 1326). On April 10, 2003, the school board demoted Casey to assistant superintendent and sometime between April 10, 2003 and May 8, 2003, the school board decided not to renew her contract for the 2003-2004 school year (*Casey v. West Las Vegas Independent School District*, 2007).

Following her nonrenewal, Casey filed a complaint in the federal district court of New Mexico claiming that the school district retaliated against her in violation of her First Amendment speech rights by non-renewing her contract. The school district sought summary judgment based on qualified immunity, which the district court denied. The school district appealed and during the appeal process, the U.S. Supreme Court issued the *Garcetti v. Ceballos* (2006). The circuit court asked Casey and the school district to provide additional briefs in light of the *Garcetti* decision (*Casey v. West Las Vegas Independent School District*, 2007).

Citing *Pickering v. Board of Education* (1968) and *Connick v. Myers* (1983), the circuit court explained that when examining public employee speech, the court must determine if the employee spoke as a citizen or an employee and if speech addressed a matter of public concern and then balance the rights of the speaker against the rights of the public employer (*Casey v. West Las Vegas Independent School District*, 2007). The circuit court then explained the significance of the *Garcetti* decision:

The Supreme Court last Term in *Garcetti* did revisit *Pickering*'s first prong, however, and added some clarity to the question when a public employee speaks as a citizen rather than as an employee. Specifically, the Court held that when public employees speak

“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.” (*Casey v. West Las Vegas Independent School District*, 2007, citing *Garcetti v. Ceballos*, 2006, p. 1960)

The circuit court asked Casey to clarify whether she spoke as a citizen or pursuant to her official duties in each of the instances of her speech for which she claimed unlawful retaliation. Casey stated, and the circuit court agreed, that her speech regarding the unlawful actions occurring in the school district were made pursuant to her duty and “no longer actionable after *Garcetti* (*Casey v. West Las Vegas Independent School District*, 2007, p. 1329). Regarding Casey’s speech about the school district’s Head Start program, Casey conceded that under *Garcetti*, her comments to the school board members were not protected speech, as they were pursuant to her duties. The circuit court agreed with this analysis and affirmed the district court decision awarding summary judgment to the school district (*Casey v. West Las Vegas Independent School District*, 2007). As for Casey’s informing the regional HHS office about the school district Head Start program, the circuit court determined that Casey’s speech was pursuant to her duty as superintendent, thus it was not constitutionally protected (*Casey v. West Las Vegas Independent School District*, 2007).

However, the court deliberated this part of Casey’s speech at length. Specifically, the circuit court stated:

While we feel obliged after *Garcetti* to conclude that Ms. Casey's actions were taken pursuant to her official position, we do not mean to suggest that every agent who disregards a principal's instructions not to disclose information is barred from

suit by *Garcetti*. To the contrary, we are confronted in this case with a rather narrower and subtler set of facts in which the plaintiff's job, as the chief overseer of Head Start for the District, included the sound administration of federal funds; federal law directed the disclosure of any irregularities in the use of such funds; the plaintiff conceded that her job duties required her to report to federal authorities; and she acted in a manner consistent with this admission. (*Casey v. West Las Vegas Independent School District*, 2007, p. 1331)

The circuit court concluded that Casey's report to the Head Start office was pursuant to her duty, thus not shielded by the First Amendment in light of *Garcetti*. Even though the circuit court conceded that Casey's speech addressed a matter of public concern, based on *Garcetti* (2006), it determined that her speech was pursuant to duty and not protected. Thus, the court did not need to apply the *Pickering* balancing test because her speech was not protected speech for First Amendment purposes, as it failed to meet the pursuant to duty threshold established by *Garcetti*, and affirmed the district court decision awarding summary judgment to the school district (*Casey v. West Las Vegas Independent School District*, 2007).

The circuit court then turned its focus to Casey's speech regarding the Open Meetings Act. Similarly to the first part of the Head Start speech analysis, the circuit court determined that Casey's speech to the school board (i.e. informing them of their Open Meeting Act violations) was pursuant to duty, and her First Amendment claim was precluded by the *Garcetti* decision (*Casey v. West Las Vegas Independent School District*, 2007). However, "The statements made to the New Mexico Attorney General, however, are another kettle of fish" (*Casey v. West Las Vegas Independent School*

*District*, 2007, p. 1332) in the words of the circuit court. Unlike Casey's report to HHS, the circuit court determined that her report to the AG's office "fell sufficiently outside the scope of her office to survive even the force of the Supreme Court's decision in *Garcetti*" (*Casey v. West Las Vegas Independent School District*, 2007, pp. 1332-1333). That is, the circuit court decided that this aspect of Casey's speech was made as a citizen rather than an employee addressing a matter of public concern.

Applying the *Pickering* balance test, the circuit court explained that based on the post-*Garcetti* analysis, even though Casey's complaint to the AG's office was pursuant to her duty, as a citizen, however, it constituted protected speech, as it did not cause a disruption in the workplace. The school board failed to support the notion that Casey's complaint had a negative effect on the operations of the school district. Furthermore, the circuit court rejected the school district's assertion that Casey's speech failed to meet the causal connection required because of the elapsed time between Casey's complaint to the AG and their decision to demote her. Thus, the circuit court determined that Casey's complaint as a possible motivator for her nonrenewal created a material issue of fact, which precluded summary judgment. The school district claimed that it qualified for summary judgment citing qualified immunity. The circuit court addressed this assertion, stating:

It has long been established law in this circuit that when a public employee speaks as a citizen on matters of public concern to outside entities despite the absence of any job-related reason to do so, the employer may not take retaliatory action. (*Casey v. West Las Vegas Independent School District*, 2007, pp. 1333-1334 citing *Paradis v. Montrose Mem'l Hosp.*, 1998)

The circuit court remanded the district court decision awarding summary judgment to the school district pertaining Casey's First Amendment retaliation claim regarding her complaint to the AG's office about the school district's compliance with the Open Meeting Act. The circuit court reached this decision because under *Garcetti*, "So long as public 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" (*Garcetti v. Ceballos*, 2006, p. 411 citing *Connick v. Myers*, 1983, p. 147). The court determined that Casey spoke as a citizen when she filed a complaint with the AG's office, and under *Pickering*, the school district failed to show a disturbance occurred because of Casey's speech (*Casey v. West Las Vegas Independent School District*, 2007). The circuit court concluded that after *Garcetti*, Casey's claim was legally viable and remanded the case for further proceedings (*Casey v. West Las Vegas Independent School District*, 2007). However, no further case law exists regarding *Casey v. West Las Vegas Independent School District* (2007). Presumably, if the school district could prove a Casey's comments caused a disruption under the *Picking* balancing test, then her nonrenewal was likely constitutional; however, absent the proof of disruption, her nonrenewal for filing a complaint with the AG's office violated her First Amendment speech rights.

In *Casey v. West Las Vegas Independent School District* (2007), the circuit court granted summary judgment for the school district against all of Casey's speech claims that were pursuant to her duty. However, the circuit court specified that the *Pickering* Balancing test must be applied to her report to the AG's office because she spoke as a citizen when she filed a complaint. The circuit court stated:

Ms. Casey was not seeking to fulfill her responsibility of advising the Board when she went to the Attorney General's office. Just the opposite: she had lost faith that the Board would listen to her advice so she took her grievance elsewhere. Of course, Ms. Casey also took her complaints about the Head Start program to outside authorities. But, very much unlike the administration of the Head Start program that the Board committed to her care and pursuant to which she had independent responsibilities to the federal government, we have no evidence in the summary judgment record before us suggesting that the Board or any other legal authority ever assigned Ms. Casey responsibility for the Board's meeting practices. Rather, the evidence before us suggests that the Board members alone were responsible for making certain their meetings complied with New Mexico law at the time. (*Casey v. West Las Vegas Independent School District*, 2007, p. 1332)

However, the circuit court stated that the school district could try to establish that Casey's comments were pursuant to duty at trial and "express[ed] no opinion, one way or the other, on their ability to do so" (*Casey v. West Las Vegas Independent School District*, 2007, p. 1333). This case asserts the notion that the reporting of wrongdoing to external agencies, outside of a public employee's official job duties might constitute First Amendment protected speech, as long as it does not disrupt the efficiency and effectiveness of the public employer. However, this notion remains unsettled, as no subsequent legal history exists for *Casey v. West Las Vegas Independent School District* (2007).

***Houston v. Independent School District No. 89 of Oklahoma County, 949***

**F.Supp.2d 1104 (W.D. Okla. 2013).** Arthur Houston, an African American male, was an elementary school principal in the Independent School District No. 89 of Oklahoma County in Oklahoma City, Oklahoma from 2003 to 2011. DeAnn Davis was the director of elementary schools in the school district starting in 2010. Houston claimed that Davis engaged in racial discrimination and First Amendment retaliation against him by disciplining him and removing him from his position. Houston filed suit against Davis and the school district claiming First Amendment speech violations (*Houston v. Independent City School District No. 89 of Oklahoma County, 2013*).

Houston claimed that Davis needlessly disciplined him and placed him on improvement plans for the 2010-2011 and 2011-2012 school years, which resulted in his demotion from principal to teacher. According to Houston, Davis replaced him with a Caucasian female principal. Additionally, Houston claimed that Davis treated him differently than other principals because of his race. Houston furthermore claimed that Davis's reassignment of him was pretextual, that is, she reassigned him and disciplined him unwarrantedly in response to Houston's and his wife's complaints of racial discrimination and retaliation. Lastly, Houston claimed that Davis and the school district refused to hire him for several open administrative positions for which he was qualified, oftentimes more so than the individuals hired (*Houston v. Independent City School District No. 89 of Oklahoma County, 2013*).

Among the claims Houston filed against Davis included a First Amendment retaliation claim for protected speech. In early May 2001, Houston sent a letter to the school district superintendent, Springer, a Caucasian male, addressing his concerns about



race discrimination within the school district. Houston stated that he felt that Caucasian administrators received favorable assignments, that the district administrators employed in the district lacked racial diversity, and that he felt African American male administrators were being targeted by school district personnel. Additionally, the letter stated that the school district's racial discrimination negatively affected African American families in the school district and the children in its schools. After Houston sent the letter to Springer, Davis informed Houston that he would not be employed in the 2011-2012 school year as an administrator and that he could accept a teaching position or be terminated. Houston filed suit in the district court claiming First Amendment retaliation, among other claims, and Davis and the school district moved to dismiss Houston's claims. The district court denied the motion to dismiss because it determined that Houston's letter concerning racial discrimination created a plausible First Amendment claim (*Houston v. Independent City School District No. 89 of Oklahoma County*, 2013).

The district court stated, "A retaliation claim brought by a public employee based on constitutionally protected speech is governed by a five-prong *Garcetti/Pickering* test (*Houston v. Independent City School District No. 89 of Oklahoma County*, 2013, p. 1112). Specifically in Houston's claim, he needed to demonstrate that his speech was not pursuant to his job duties and addressed a matter of public concern, which the court reiterated are questions of law to be decided by the court (*Houston v. Independent City School District No. 89 of Oklahoma County*, 2013). The district court explained that in the 10th Circuit, the *Garcetti/Pickering* analysis was broad when determining whether an employee's speech was pursuant to duty; however:

the court of appeals has not announced bright line rules, but ‘has taken a case-by-case approach, looking both to the content of the speech, as well as the employee's chosen audience, to determine whether the speech is made pursuant to an employee's official duties.’ (*Houston v. Independent City School District No. 89 of Oklahoma County*, 2013, p. 1112 citing *Rohrbough v. University of Colo. Hosp. Auth.*, 2010, p. 746)

The court further clarified that public employee speech was considered pursuant to duty if it was speech for which the employee was paid to perform (*Houston v. Independent City School District No. 89 of Oklahoma County*, 2013).

Citing *Connick v. Myers* (1983), the district court explained that in order for Houston speech to qualify for First Amendment protection, his speech needed to address a matter of public concern given its content, form, and context (*Houston v. Independent City School District No. 89 of Oklahoma County*, 2013). The court noted that a matter of public concern “is something of legitimate news interest” (*Houston v. Independent City School District No. 89 of Oklahoma County*, 2013, p. 1113). The court also stated that Houston’s motivation for the speech (e.g. individual employment concern or a public concern) also contributed to the analysis (*Houston v. Independent City School District No. 89 of Oklahoma County*, 2013).

Davis and the school district claimed that Houston’s speech was pursuant to his duties. Houston claimed that his letter addressing racial discrimination in the school district was not a private employment complaint because he did not submit it in accordance with the school district’s grievance policy and that the letter addressed district-wide issues that exceeded the scope of his employment similar to the complaint

filed by Givhan in *Givhan v. Western Line Consolidated School District* (1979). The district court supported Houston's claim and justification (*Houston v. Independent City School District No. 89 of Oklahoma County*, 2013).

According to the court, Houston did not establish a First Amendment speech prima facie case. However, the court stated, "that an employment discrimination plaintiff need not establish a prima facie case in the complaint but 'the elements of each alleged cause of action help to determine whether Plaintiff has set forth a plausible claim'" (*Houston v. Independent City School District No. 89 of Oklahoma County*, 2013, p. 1113 citing *Khalik v. United Air Lines*, 2012, p. 1192) in defeating a motion for summary judgment. Furthermore, the court explicated:

The letter reflects that copies would be sent to the board of education, the Oklahoma City Chapter of the National Alliance of Black School Educators, and the NAACP. Although several concerns appear related to Plaintiff's circumstances, the Court cannot say as a matter of law on the present record that Plaintiff was speaking pursuant to his official duties or speaking solely about private concerns. (*Houston v. Independent City School District No. 89 of Oklahoma County*, 2013, pp. 1113-1114)

The district court denied the motion to dismiss because, based on the evidence present by Davis and the school district, the court could not support their claim that Houston was speaking pursuant to his duties or only about his personal employment situation. That is, the court ruled that Houston's First Amendment claim was viable because Davis and the school district failed, as a matter of law, to prove that his speech was pursuant to duty or

related only to a private employment grievance (*Houston v. Independent City School District No. 89 of Oklahoma County*, 2013).

In *Houston v. Independent City School District No. 89 of Oklahoma County* (2013), the district court applied the *Garcetti/Pickering* test to determine whether Houston's speech qualified for First Amendment protection. According to the court, his letter concerning racial discrimination constituted a plausible First Amendment claim, which was enough to deny the school district's motion to dismiss. However, the denied motion simply meant that the case could proceed to trial. No case record was included in Westlaw regarding *Houston v. Independent City School District No. 89 of Oklahoma County* (2013) other than the one discussed herein. The LexisNexis Shepard© citation system contained one entry of subsequent case history. However, this entry merely addressed the school district's motion to seal the entire summary judgment record, which the Federal District Court for the Western District of Oklahoma denied (*Houston v. Independent City School District No. 89 of Oklahoma County*, 2014).

Based on the district court decision in *Houston v. Independent City School District No. 89 of Oklahoma County* (2013), Houston's speech (i.e. letter addressing racial discrimination) was protected speech under the First Amendment as long as the district could not prove that the speech was pursuant to his duty or that his speech only addressed a personal employment matter. However, the school district also had provided a plausible claim that it could refute Houston's retaliation claims with evidence supporting the adverse employment action in the absence of his protected speech. Nonetheless, the district court only addressed the first two prongs of the five-prong *Garcetti/Pickering* test, which includes:

- (1) whether the speech was made pursuant to an employee's official duties,
- (2) whether the speech was on a matter of public concern,
- (3) whether the government's interests, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interests,
- (4) whether the protected speech was a motivating factor in the adverse employment action, and
- (5) whether the defendant would have reached the same employment decision in the absence of the protected conduct. (*Houston v. Independent City School District No. 89 of Oklahoma County*, 2013, p. 1112 citing *Morris v. City of Colorado Springs*, 2012)

Presumably, Houston's speech would have to survive the full analysis of this test in order to prevail on a First Amendment speech retaliation claim in the 10th circuit. Whether Houston's speech was protected by the First Amendment is unclear because no subsequent legal history, other than the 2014 decision denying the sealing of the summary judgment record, exists regarding *Houston v. Independent City School District No. 89 of Oklahoma County* (2013).

### **Eleventh Circuit**

Since the *Garcetti v. Ceballos* (2006) decision by the Supreme Court, the 11th circuit has had two cases involving the First Amendment speech rights of PK-12 public school administrators. One case was heard in the circuit court, while the other case was heard in the district court. The two cases appear below in chronological order.

***D'Angelo v. School Board of Polk County, Florida*, 497 F.3d 1203 (11th Cir. 2007).** Michael D'Angelo was the principal at Kathleen High School in Polk County,

Florida. In the spring of 2003, D'Angelo began the process of converting the school to a charter school, which was permissible by law and justified because the school did not have enough personnel or financial resources. D'Angelo met with his staff, directed them to investigate converting to a charter school, and met with other administrators to discuss the merits of converting to a charter school (*D'Angelo v. School Board of Polk County, Florida*, 2007).

In April 2004, the teachers voted against converting the school to a charter school. D'Angelo called a meeting with the faculty to garner support for converting part of the school to a charter school, but the superintendent stopped the meeting from occurring and expressed his disapproval that D'Angelo was still pursuing charter conversion. On May 3, 2004, the school district terminated D'Angelo. D'Angelo filed a complaint with the Florida Department of Education (DOE), claiming that the school district violated a Florida law that prohibited the discipline of a public school employee for attempting to establish a charter school. The DOE investigation concluded that no causal connection existed between D'Angelo's charter-related activities and the nonrenewal of his contract (*D'Angelo v. School Board of Polk County, Florida*, 2007).

D'Angelo filed a complaint in the federal district court claiming First Amendment retaliation. Specifically, D'Angelo claimed that his speech pertaining to charter school conversion was protected under the First Amendment. The case went to trial and after D'Angelo finished presenting his case, the school district moved for a judgment as a matter of law, which the district court granted because of the Supreme Court decision in *Garcetti v. Ceballos* (2006) a few weeks before the trial. The district court determined that under *Garcetti*, D'Angelo's speech was pursuant to duty and was not protected

speech for First Amendment purposes (*D'Angelo v. School Board of Polk County, Florida*, 2007).

D'Angelo appealed to the circuit court, which affirmed the district court decision. The circuit court concluded that D'Angelo's speech was pursuant to his duties and under *Garcetti* was not protected speech. In his testimony, D'Angelo admitted that pursuing a charter conversion was part of his duty to ensure the best learning opportunities for the students at the school and that, although converting to a charter school was not part of his assigned duties, he had to investigate the conversion process in the best interest of his students. D'Angelo's testimony in the district court trial indicated that he felt pursuing a charter conversion was part of his duties in executing the directives of the school district to:

provide the vision and leadership necessary to develop and administer educational programs that optimize the human and material resources available for a safe and successful school for students, staff, parents, and community while emphasizing the learning process for all students leading to enhanced student achievement.

(*D'Angelo v. School Board of Polk County, Florida*, 2007, p. 1207)

The circuit court explained its decision relying upon the Supreme Court decisions in *Garcetti*, *Pickering*, and *Connick*. The court explained that prior to *Garcetti*, in order to trigger the balancing test to determine whether a public employee's speech was protected, the speech must address a matter of public concern. However, after *Garcetti*, the circuit court explained that the Supreme Court refined the balancing test trigger in that a public employee's speech about an issue of public concern is only considered protected if the speech was made as a citizen and not as an employee (*D'Angelo v. School*

*Board of Polk County, Florida, 2007*). Thus, if the speech is made as an employee, the First Amendment does not provide any protection; it does not matter if the speech addresses a matter of public concern (*D'Angelo v. School Board of Polk County, Florida, 2007*).

Citing *Casey v. West Las Vegas Independent School District* (2007), a 10th Circuit case, the circuit court categorized the effect of *Garcetti* as a significant modification of the first prong of the *Pickering* balancing test. Namely, the determination of whether the employee's speech was made as a citizen, or pursuant to duty, is crucial in establishing if the speech constituted speech for First Amendment purposes (*D'Angelo v. School Board of Polk County, Florida, 2007*). The circuit court agreed with the district court determination that D'Angelo did not engage in protected speech because he did not speak as a citizen when attempting to convert his school to a charter school (*D'Angelo v. School Board of Polk County, Florida, 2007*).

The circuit court determined that D'Angelo did not speak as a citizen for two reasons: (a) D'Angelo sought to convert his school to a charter school in his capacity of principal and (b) "D'Angelo admitted that his efforts to convert his school to charter status were to fulfill his professional duties" (*D'Angelo v. School Board of Polk County, Florida, 2007*, p. 1210). D'Angelo claimed that his motivation to seek charter school conversion was because it was the "right thing to do", which he was morally obligated to do (*D'Angelo v. School Board of Polk County, Florida, 2007*, p. 1210). However, the court found this inconsequential to its decision. D'Angelo claimed seeking charter conversion was part of his duties, thus his speech relating to the process was not



protected by the First Amendment (*D'Angelo v. School Board of Polk County, Florida*, 2007).

D'Angelo also claimed that the school district violated his freedom of association under the First Amendment. The circuit court affirmed the district court decision finding for the school district as a matter of law because D'Angelo's claimed association was "not undertaken as a citizen" (*D'Angelo v. School Board of Polk County, Florida*, 2007, p. 1213). Referencing the *Garcetti v. Ceballos* (2006) decision and its emphasis on speech as citizen, the circuit court stated:

Because "[n]one of the great liberties insured by the First (Amendment) can be given higher place than the others, the requirement of *Garcetti* applies to the right of a public employee to associate as it applies to the rights of a public employee to speak and to petition the government. (*D'Angelo v. School Board of Polk County, Florida*, 2007, p. 1213 internal citations omitted)

That is, the circuit court stated that *Garcetti* applied to all public employee's First Amendment rights. The circuit court determined that D'Angelo's association related to the charter school conversion process as association as an employee and not a citizen. Thus, the school district did not violate his First Amendment association rights as a matter of law (*D'Angelo v. School Board of Polk County, Florida*, 2007).

In *D'Angelo v. School Board of Polk County, Florida* (2007), the circuit court determined that as a matter of law, D'Angelo's speech was not protected by the First Amendment. D'Angelo's speech was pursuant to his official job duties under *Garcetti*. Furthermore, the circuit court explained that *Garcetti* also applied in First Amendment association cases, indicating that association pursuant to duty (i.e. not as a citizen) was

not protected by the First Amendment. The circuit court applied *Garcetti*'s pursuant to duty test as a heightened threshold of the first prong of the *Pickering* balance test. The school district did not violate D'Angelo's First Amendment rights as a matter of law because his speech and association were pursuant to his duty. *D'Angelo v. School Board of Polk County, Florida* (2007) has no subsequent legal history.

***White v. School Board of Hillsborough County, 2008 WL 227990 (M.D. Fla. 2008)***. Mary White was the director at Wilbesan Charter School in Hillsborough County, Florida. In 2003, White asked the school district to waive the certification requirements for Michael Nelson, "a black military man" (*White v. School Board of Hillsborough County, 2008*, p. 1), necessary to be the school's vocational teacher. The chief academic officer for the district, Donnie Evans, refused the request, which White claimed was because one of the district employees was angered by Nelson's appearance, his military appearance (*White v. School Board of Hillsborough County, 2008*). Shortly after, White claimed that school district employees defamed her claiming that White demonstrated poor fiscal management. The school district hired an accounting firm to audit the school financial records. The report indicated that the records showed nothing improper or improper; however, the school had a \$21,000 deficit. White disputed this finding. Additionally, White claimed that another district employee, a social worker for charter schools in the district, reported that White suffered from mental instability (*White v. School Board of Hillsborough County, 2008*).

In March 2004, the school board voted to place the school on probationary status and required the school to take corrective action to address issues within the school. The school board lifted the probationary status in July 2004; however, in March 2005, White

received a letter from the school district informing her that the district was going to terminate the school's charter citing the school's performance, White's behavior, and insufficient reporting. Again, the school district placed the school on probation, in lieu of terminating its charter in July 2005 (*White v. School Board of Hillsborough County*, 2008).

In June of 2005, White claimed that the school district falsified a fire inspection report because the fire inspection never occurred. Another fire inspection occurred on August 3, 2005 and the county fire inspector informed White that she could not open the school to students until she addressed the deficiencies noted in the report. White opened the school the next day and the County Fire Marshall issued an order to cease operations. The superintendent informed White that the school was "closed as an emergency measure" (*White v. School Board of Hillsborough County*, 2008, p. 2) and then recommended immediate termination of the charter citing safety concerns. White claimed that the termination of the charter was in retaliation for her reporting the previous falsified fire inspection report (*White v. School Board of Hillsborough County*, 2008).

White filed a complaint in the federal district court claiming First Amendment retaliation for reporting the falsified report and for requesting the waiver for Nelson's certification. Her complaint also included claims of defamation based on the school district employee alleging poor fiscal management and her mental instability. The school district moved for summary judgment against all of White's claims, which the district court granted (*White v. School Board of Hillsborough County*, 2008).

Specific to White's First Amendment retaliation claim, the district court determined that her speech was not protected. In Florida, charter schools are public

schools; however, “individuals who contract their services to charter schools are not public employees” (*White v. School Board of Hillsborough County*, 2008, p. 4 citing Florida state law). Nevertheless, the district court, citing *Board of County Commissioners, Wabaunsee County v. Umbehr* (1996), stated that, as a public sector independent contractor, White’s speech was subject to the same restrictions as other public employees. Accordingly, the district court stated that in order for White to prevail on her First Amendment retaliation claim she must substantiate a prima facie case (*White v. School Board of Hillsborough County*, 2008).

White contended that both her request to waive Nelson’s certification requirements and her report alleging a falsified fire inspection were protected speech under the First Amendment. Citing *Garcetti v. Ceballos* (2006) and *D’Angelo v. School Board of Polk County, Florida* (2007), the district court stated that the initial inquiry into White’s speech must determine if she spoke as a citizen, before determining whether the speech addressed a matter of public concern. The district court concluded that both the request for the waiver and her letter regarding the fire inspection were pursuant to her duties as the director of the charter school, and thus were not protected speech under the First Amendment. Based on the facts presented in the case and White’s inability to prove otherwise, the court decided that White did not engage in protected speech and therefore, her First Amendment speech rights were not violated when the school district terminated the school’s charter, which in effect, terminated White’s employment. The district court granted summary judgment for the school district on White’s First Amendment retaliation claim (*White v. School Board of Hillsborough County*, 2008).

Westlaw did not report the subsequent legal history of *White v. School Board of Hillsborough County* (2008); however, the Shepard© citation system included one subsequent case. White appealed the district court's decision granting summary judgment for the school board to the 11th Circuit Court of Appeals. In *White v. School Board of Hillsborough County* (2009), the circuit court affirmed the district court's decision. White's appeal claim stated:

- (1) there were multiple procedural errors committed by the School Board and the district court during the summary judgment stage of the case;
- (2) there were conflicting facts as to whether White was an independent contractor for purposes of determining whether White engaged in protected speech, an element of her First Amendment retaliation claim; and
- (3) the district court erroneously found that the statements at issue were subject to a qualified privilege, a defense to her defamation claim. (*White v. School Board of Hillsborough County*, 2009, p. 1)

The circuit court affirmed the district court's decision, finding that the school board did not violate White's First Amendment speech rights, answering each of her claims as follows:

- (1) and (2) The contractor's First Amendment retaliation claims failed because her letter requesting the waiver of certification requirements for the vocational teacher and her letter stating that the fire inspector's report was false were made in her capacity as a government contractor, not as a concerned member to the public; thus, the First Amendment did not come into play.

- (3) The allegedly defamatory statements by the social worker were qualifiedly privileged as a matter of Florida law. (*White v. School Board of Hillsborough County*, 2009, p. 1)

In reaching its decision, the circuit court cited the pursuant to duty test from *Garcetti* and *D'Angelo v. School Board of Polk County, Florida* (2007). The circuit court concluded that White's speech was made pursuant to her duty and the school district revoking the school's charter, which resulted in her losing her job, did not constitute a violation of her First Amendment speech rights (*White v. School Board of Hillsborough County*, 2009).

In *White v. School Board of Hillsborough County* (2008), the district court determined that White's speech was pursuant to duty, which the circuit court affirmed in *White v. School Board of Hillsborough County* (2009). This determination resulted in White failing to meet the first prong of a prima facie case; that is, she did not engage in protected speech. Because she did not engage in protected speech, the closing of the school that resulted in termination of her employment did not constitute a retaliatory action in violation of the First Amendment. Whether her speech addressed a matter of public concern was moot under the "pursuant to official duties" test under *Garcetti v. Ceballos* (2006).

### **Chapter Summary**

This chapter presented the 25 federal court decisions involving the First Amendment speech rights of PK-12 public school administrators since the Supreme Court decision in *Garcetti v. Ceballos* (2006). Using an "intra-circuit" analytical framework, each case was briefed using the case brief method presented by Statsky and Wernet (1989), in which the issues, key facts, and reasons for the decision reached by

each court were presented. Specifically, each case was examined to determine if the federal courts applied the *Garcetti v. Ceballos* (2006) “pursuant to official duties” test in determining whether the administrators’ speech was protected under the First Amendment. Some of the cases did not apply the *Garcetti* test and in those cases, the analysis used by the courts was described.

Chapter V summarizes the results from this chapter in the form of “inter-circuit” analysis and provides conclusions about and implications of those findings. Additionally, Chapter V provides some guidelines for practicing public school administrators and the systems that employ and train them. Furthermore, Chapter V discusses the potential effect the *Garcetti* (2006) decision could have on public school administrators and suggests the need for further research pertaining to the free speech rights of public school administrators.

## CHAPTER V

### Analysis, Discussion, and Guidelines

The previous chapter of this study presented the 25 federal court cases involving the speech rights K-12 public school administrators since the Supreme Court decision in *Garcetti v. Ceballos* (2006) through December 2013. Since *Pickering v. Board of Education* (1968), the Supreme Court and the lower federal courts have refined the analysis applied in determining whether public employee speech enjoys the protection of the First Amendment. Most recently, the Supreme Court establish the pursuant to duty test in *Garcetti v. Ceballos* (2006). This threshold test requires public employees to demonstrate clearly that their speech was made as a citizen and not pursuant to their official job duties in order to meet the first prong of a prima facie case (i.e. the employee engaged in protected speech), which the employee must establish before a court can apply the *Pickering* balancing test. This chapter provides an inter-circuit analysis of the federal court decisions regarding PK-12 public school administrators since *Garcetti* (2006). The inter-circuit analysis is justified because each of the cases was presented within their respective circuits; however, some of the circuits interpret the First Amendment speech rights of PK-12 public school administrators differently. That is, although the cases address the same question of law, the First Amendment speech rights of PK-12 administrators, some circuits apply different legal analyses even in cases that appear to have similar facts. In addition to this analysis, this chapter provides conclusions and implications of the court decisions on PK-12 public school administrators and the systems that employ and prepare them. Finally, this chapter

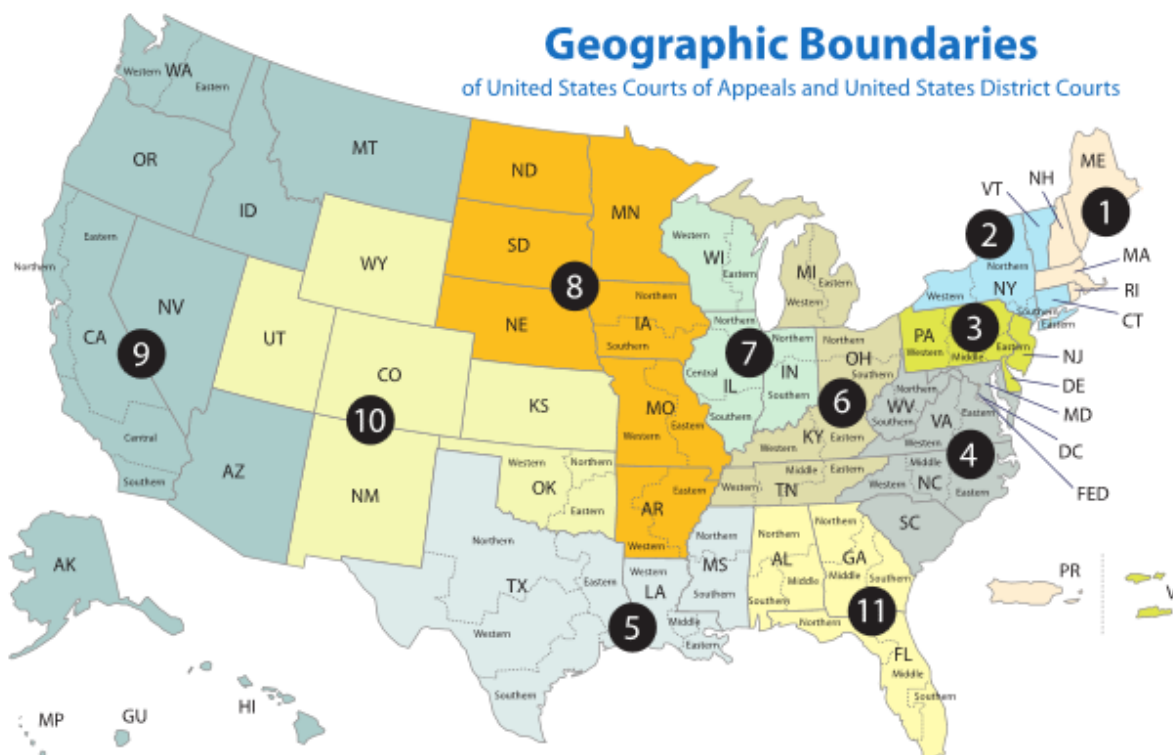


suggests veins of other research related to the speech rights of K-12 public school administrators.

### **United States Circuit Courts of Appeals**

The United States has 12 appellate court jurisdictions. Each of these circuits has within it many federal district courts, with at least one federal district court in each state. The circuit court boundaries are presented in Figure 2 to assist the reader in understanding where approximately in the country each federal court decision was made and is binding. The 12th Circuit is not in Figure 2 because it is a court of special jurisdiction, known as the United States Court of Appeals for the Federal Circuit, which is located in Washington, DC.

**Figure 2. United States Courts of Appeals Geographic Boundaries**



*Figure 2.* This figure displays the geographical boundaries for the 11 circuit courts of appeals in the United States (adapted from [http://upload.wikimedia.org/wikipedia/commons/d/df/US\\_Court\\_of\\_Appeals\\_and\\_District\\_Court\\_map.svg](http://upload.wikimedia.org/wikipedia/commons/d/df/US_Court_of_Appeals_and_District_Court_map.svg), 2014).

### Research Questions

This study included two research questions:

1. Since the Supreme Court decision in *Garcetti* (2006), how have various federal courts ruled in cases involving adverse employment actions against public school administrators citing First Amendment protected speech in their complaints, including application of the accepted judicial precedents and the factors that led the courts to apply them?

2. Have the courts applied the *Garcetti* (2006) precedent consistently in cases regarding public school administrator speech? If yes, what was the rationale behind the application of the *Garcetti* (2006) pursuant to duty test? If not, which precedents did the courts apply and why?

Chapter IV presented the decisions of the federal courts in cases involving PK-12 public school administrator First Amendment speech claims since the *Garcetti v. Ceballos* (2006) Supreme Court decision. Based on the analysis, some of the federal courts applied the Supreme Court public employee First Amendment speech progeny of cases (e.g. *Garcetti v. Ceballos*, 2006; *Waters v. Churchill*, 1994; *Connick v. Myers*, 1983; *Givhan v. Western Line Consolidated School District*, 1979; *Mt. Healthy School District v. Doyle*, 1977; *Pickering v. Board of Education*, 1968), while others applied a prima facie analysis (i.e. engaged in protected speech, which resulted in a negative employment action in close proximity to the occurrence of the speech).

Additionally, Chapter IV indicated that the various federal courts applied the *Garcetti* pursuant to duty test differently in cases involving the First Amendment speech rights of PK-12 public school administrators. Specifically, the federal courts had different interpretations of the meaning of “pursuant to duty”, which resulted in some courts applying further speech analyses (e.g. *Pickering/Connick* balance test; *Mt. Healthy School District v. Doyle*, 1977) while others ended their inquiry after determining that the PK-12 public school administrator’s speech was pursuant to duty, thus precluding First Amendment protection under *Garcetti*.

### **Inter-Circuit Analysis**

The federal courts (i.e. circuit courts of appeals or district courts) applied various precedents and speech analyses in the 25 cases presented in this study when determining whether the First Amendment protected the K-12 public school administrators' speech. In 14 of the 25 cases, the federal courts explicitly applied the *Garcetti* pursuant to duty test. In three of the cases, the federal courts partially applied *Garcetti*; however, these courts also based their decisions on other Supreme Court precedents. As for the eight other cases, the federal courts applied other Supreme Court precedents (i.e. *Pickering*, *Connick*, and/or *Mt. Healthy*) in four of them. In the other four of these eight cases, the courts applied only the elements needed to establish a prima facie case. The following inter-circuit analysis is grouped by the courts' legal standard applied in each case.

#### **Failure to State a Claim**

In order to establish a First Amendment retaliation claim, a plaintiff has to substantiate a prima facie claim, which requires the following elements:

1. The plaintiff engaged in constitutionally protected speech or conduct
2. An adverse employment action was taken against him that would deter a person of ordinary firmness from continuing to engage in that conduct
3. A causal connection exists between the first two elements, that is, the adverse action was motivated at least in part by the employee's protected speech.

(*Massey v. Johnson*, 2006, pp. 716-717)

After a public employee successfully establishes a prima facie case, the burden shifts to the public employer to prove, by a preponderance of the evidence, that the same adverse employment action would have occurred in the absence of the public employee's

protected speech. This framework for First Amendment retaliation cases was first established in *Mt. Healthy School District v. Dolye* (1977) drawing from Supreme Court precedent in Title VII employment discrimination cases. In four of the cases involving the First Amendment speech rights of K-12 public school administrators since the Supreme Court decision in *Garcetti v. Ceballos* (2006), the federal courts based their decisions on the elements required by a prima facie case. In three of the four cases, the courts ruled against the K-12 public school administrator claiming First Amendment retaliation for failing to meet one or more the three prongs (*Woods v. Enlarged City School District of Newburgh*, 2007; *Mieczkowski v. York City School District*, 2011; & *Flores v. Von Kleist*, 2010). In *Woods*, a New York district court determined that the assistant principal's speech was not protected speech under the First Amendment because the speech addressed a personal employment grievance, not a matter of public concern (*Woods v. Enlarged City School District of Newburgh*, 2007). In *Mieczkowski*, the Third Circuit Court of Appeals concluded that the assistant superintendent did not meet the second prong of a prima facie case because she did not experience an adverse employment action in retaliation for her speech (*Mieczkowski v. York City School District*, 2011). The principal in *Flores* was unable to support his prima facie claim because a California district court found no connection between his nonrenewal and his speech (*Flores v. Von Kleist*, 2010). In *Pribula v. Wyoming Area School District* (2010), a Pennsylvania district court ordered a new trial because of the lack of clarity regarding the applicability of First Amendment protections to a casual friendship, as a form of alleged protected association, between an assistant superintendent and an assistant principal. The district court had used a prima facie analysis; however, granting a new

trial and the absence of a record whether a trial actually occurred leave the question unanswered whether the plaintiff successfully stated a First Amendment retaliation claim.

The federal courts in these cases based their decision solely on the elements necessary to succeed on a prima facie First Amendment free speech retaliation claim. These cases emanated from the second, third, and ninth circuits. All of the cases resulted in the courts deciding against the public school administrators, except for *Pribula*, which remains undecided. That is, the PK-12 public school administrators' failure to state a prima facie claim resulted in the courts' determination that they failed to state a First Amendment claim to justify a trial. If the administrators had been able to state a prima facie claim, this does not mean that the PK-12 public school administrators' speech was protected under the First Amendment. Successfully stating a prima facie claim means only that the burden would have then shifted to the school districts to meet the burden of proof, based on the preponderance of the evidence, that the same adverse employment action would have occurred in the absence of the protected speech.

**Cases Reliant upon Supreme Court Precedents Other than *Garcetti v. Ceballos* (2006)**

Federal courts relied upon Supreme Court public employee speech cases other than *Garcetti v. Ceballos* (2006) in four cases since the *Garcetti* decision. In three of the cases, the courts determined that it was unclear whether violations of K-12 public school administrator First Amendment speech rights occurred (*Scarborough v. Morgan County Board of Education*, 2006; *Spang v. Katonah-Lewisboro Union Free School District*, 2009; & *Mooney v. Lafayette County School District*, 2013). However, in *King v. Charleston County School District* (2009), the district court determined that no First

Amendment violation had occurred. In *Scarborough*, the Sixth Circuit Court of Appeals applied *Connick v. Myers* (1983), *Givhan v. Western Line Consolidated School District* (1979), *Mt. Healthy School District v. Doyle*, (1977), and *Pickering v. Board of Education* (1968) and determined that the superintendent's speech, regarding his personal religious beliefs was protected. Thus, the speech needed to be addressed utilizing the *Pickering* balance test, and the school district needed to prove that they would have not hired Scarborough in the absence of his speech under *Mt. Healthy v. Doyle* (1977).

In *Spang*, a New York district court determined that although the school district might have had enough evidence to terminate the assistant superintendent in the absence of his protected speech under *Mt. Healthy School District v. Doyle* (1977), material issues of fact existed about their motivation for his termination, precluding summary judgment (*Spang v. Katonah-Lewisboro Union Free School District*, 2009). The assistant principal involved in *Mooney*, claimed her termination resulted from her protected political activity (speech) (*Mooney v. Lafayette County School District*, 2013). The Fifth Circuit Court of Appeals ruled that summary judgment was unwarranted because Mooney engaged in protected speech under *Pickering* and *Connick*, and provided enough evidence that the legitimate reasons for her dismissal could have been pretext for the school district to non-renew her contract in retaliation for her First Amendment protected speech. In *King*, the principal was able to establish a prima facie First Amendment retaliation claim; however, under *Mt. Healthy*, the school district provided enough evidence indicating they would have terminated him in the absence of his protected speech. Thus, the South Carolina district court decided that his termination did not violate King's First Amendment speech rights (*King v. Charleston County School District*, 2009).

These four cases are from the sixth, second, fifth, and fourth circuits, respectively. None of these cases applied *Garcetti*, and each determined that the K-12 public school administrators involved had engaged in First Amendment protected speech. In *Scarborough v. Morgan County Board of Education* (2006), *Spang v. Katonah-Lewisboro Union Free School District* (2009), and *Mooney v. Lafayette County School District* (2013), the courts remanded the cases for further proceedings to determine if the adverse employment actions would have occurred in the absence of the employees' protected speech, consistent with *Mt. Healthy*. In *King v. Charleston County School District* (2009), the district court determined that the school district would have terminated the principal in the absence of his protected conduct. Although federal courts did not apply *Garcetti* in these cases, they seem to have applied the previous Supreme Court precedents (e.g. *Connick v. Myers*, 1983; *Givhan v. Western Line Consolidated School District* 1979; *Mt. Healthy School District v. Doyle*, 1977; *Pickering v. Board of Education*, 1968) consistently. However, because these cases involved public employees' speech rights after the decision in *Garcetti*, a reasonable person might find the courts' omission of *Garcetti* in its entirety peculiar.

#### **Cases Citing *Garcetti v. Ceballos* (2006)**

Of the 25 federal court cases involving the First Amendment speech rights of K-12 public school administrators since *Garcetti v. Ceballos* (2006), 17 of them applied *Garcetti*. Of these 17 cases, three cited *Garcetti* in the court decision but applied previous Supreme Court precedents as the controlling factors in the case and determined that no First Amendment violations occurred in the cases. The other 14 cases directly



applied *Garcetti*; however, these cases had mixed results, as the courts determined no speech violations occurred in some cases but not in others.

*Cases citing Garcetti in part, but not controlling.* In *Baker v. McCall* (2012), *Hara v. Pennsylvania* (2012) and *Harris v. Detroit Public Schools* (2007), the federal courts both noted in their decisions that the K-12 public school administrators' speech in each case was pursuant to duty. However, in each case, the federal courts reached their decisions citing Supreme Court precedents other than *Garcetti v. Ceballos* (2006). In *Baker*, the principal's speech, regarding his desire to marry a subordinate employee, was pursuant to his duty; however, a Virginia district court decided that under the *Pickering/Connick* standard, his speech was not protected under the First Amendment and his eventual nonrenewal did not violate his speech rights. In *Hara*, the superintendent's speech undoubtedly was pursuant to her duty; however, the circuit court reached its decision against her based on the *Pickering* balancing test. That is, the Third Circuit Court of Appeals determined that Hara's speech disrupted the efficiency and effectiveness of the workplace (*Hara v. Pennsylvania*, 2012). The circuit court determined in *Harris* that the principal's speech was pursuant to duty; however, the Sixth Circuit Court of Appeals reached its decision after determining that Harris failed to establish a prima facie case. That is, the circuit court stated that Harris suffered no adverse employment actions, which defeated his First Amendment retaliation claim (*Harris v. Detroit Public Schools*, 2007).

In these three cases, from the fourth, third, and sixth circuits respectively, the federal courts indicated that the K-12 public school administrators' speech was pursuant to duty under *Garcetti*. However, the courts used previous Supreme Court public

employee speech precedents to determine that each of the employees had not experienced retaliation for protected speech. The question remains, however, why the courts' mentioned *Garcetti's* pursuant to official duties element, but couched their decisions in other precedents. Their rationale for doing so was not explicit in their judicial opinions.

***Garcetti controlling in part, other precedents cited.*** In eight of the 17 federal court cases involving the speech rights of K-12 public school administrators since *Garcetti v. Ceballos* (2006), the courts have applied *Garcetti* and other Supreme Court free speech precedents to determine whether First Amendment speech violations occurred. These federal court cases resulted in different outcomes. In *Brown-Criscuolo v. Wolfe* (2009), the Connecticut district court determined that a principal's speech was pursuant to her official duties under *Garcetti v. Ceballos* (2006) and that she failed to establish the last two prongs of a prima facie case (i.e. adverse employment action and a causal connection). Six of the eight other cases involved the application of *Garcetti* and the *Pickering/Connick* test.

In three of these cases (*Almontaser v. New York City Department of Education*, 2008; *Sanders v. Leake County School District*, 2008; *D'Angelo v. School Board of Polk County, Florida*, 2007), the federal courts determined that First Amendment speech violations occurred, applying *Garcetti* and *Pickering/Connick* in each case. In *Almontaser*, the Second Circuit Court of Appeals determined that the principal's speech was pursuant to duty and thus not protected, precluding the *Pickering/Connick* analysis, which the district court had applied (*Almontaser v. New York City Department of Education*, 2008). The principal's speech in *Sanders* was not pursuant to duty; it constituted a private employment grievance under *Connick*. Additionally in *Sanders*, a

Mississippi district court also determined that her speech was not a motivating factor in the decision to non-renew her contract, echoing *Mt. Healthy (Sanders v. Leake County School District, 2008)*. The 11th Circuit Court of Appeals determined that the principal's speech in *D'Angelo* was pursuant to duty under *Garcetti*, which preempted the *Pickering/Connick* analysis, which the district court had applied (*D'Angelo v. School Board of Polk County, Florida, 2007*).

In the other three federal court cases (*Corbett v. Duerring, 2012; Casey v. West Las Vegas Independent School District, 2007; & Houston v. Independent City School District No. 89 of Oklahoma County, 2013*) that applied the pursuant to duty test from *Garcetti* in combination with the *Pickering/Connick* analysis, the question whether First Amendment retaliation occurred remained unanswered. In *Corbett*, a vice principal was dismissed for a protest, which a West Virginia Federal District Court concluded was outside of his official duties and was speech addressing a matter of public concern, thus requiring the *Pickering/Connick* analysis. The district court stated that Corbett met the burden of a prima facie case and that the school district failed to demonstrate by a preponderance of the evidence that his dismissal would have occurred in the absence of his protected speech, precluding summary judgment (*Corbett v. Duerring, 2012*).

In *Casey*, the Tenth Circuit Court of Appeals determined that the superintendent's speech to her school board regarding unlawful practices was pursuant to duty under *Garcetti* and not protected under the First Amendment. However, her complaint to the attorney general was protected speech outside of her official job duties, for which the court required the *Pickering/Connick* analysis because the school district presented no evidence of a disruption resulting from her protected speech (*Casey v. West Las Vegas*

*Independent School District*, 2007). An Oklahoma district court determined that the principal's concerns of racial discrimination in *Houston* were not pursuant to his duty and that they addressed a matter of public concern under *Pickering/Connick* analysis. The district court denied the school district motion to dismiss Houston's claims because of their inability to prove that under the *Pickering/Connick* analysis Houston's speech only addressed a private employment grievance, which was unrelated to his adverse employment action, or disruptive (*Houston v. Independent City School District No. 89 of Oklahoma County*, 2013).

In the eighth federal court cases involving K-12 public school administrators, the district court applied the pursuant to duty test from *Garcetti v. Ceballos* (2006), as well as the standards set forth in *Connick v. Myers* (1983), *Givhan v. Western Line Consolidated School District* (1979), *Mt. Healthy School District v. Doyle*, (1977), and *Pickering v. Board of Education* (1968). *Whitfield v. Chartiers Valley School District* (2010) involved an assistant superintendent who testified in a district employment dispute proceeding. A Pennsylvania district court determined that Whitfield's testimony was pursuant to duty under *Garcetti*; however, the court stated that in the third circuit, testimony, even if pursuant to duty, was protected speech under the First Amendment. Furthermore, in light of this determination, her speech met the other speech requirements necessary to garner First Amendment protection (e.g. addressed a matter of public concern, was not disruptive), thus the school district violated her speech rights by retaliating against her for her by the nonrenewal of her contract (*Whitfield v. Chartiers Valley School District*, 2010).

These eight cases that applied *Garcetti* and other Supreme Court public employee First Amendment speech precedents occurred in several circuits (1st, 2nd, 3rd, 4th, 5th, 10th, and 11th). However, the results were mixed. Specifically, the Third Circuit stated that *Garcetti* did not apply to testimony, even if pursuant to duty. In the other seven cases, the federal courts determined that the K-12 public school administrators' speech was pursuant to duty, but only in four of them did the courts determine that no First Amendment violation occurred. In the other three, the courts used the *Pickering/Connick* analysis to require further proceedings.

***Garcetti controlling, no other precedents cited.*** Since the Supreme Court decision in *Garcetti v. Ceballos* (2006), the federal courts have decided six cases involving the speech rights of K-12 public school administrators relying solely on the pursuant to official duty threshold from *Garcetti*. In one of the six cases, *Fierro v. City of New York Department of Education* (2009), the Second Circuit Court of Appeals determined that it was unclear whether an assistant principal's refusal to engage in misconduct was protected speech under *Garcetti* because the speech was pursuant to his duty. In the other five cases (*Homel v. Centennial School District*, 2011; *Cavazos v. Edgewood Independent School District*, 2006; *White v. School Board of Hillsborough County*, 2008; *Alexander v. Brookhaven School District*, 2011; *McArdle v. Peoria*, 2011), each court determined that the K-12 public school administrator's speech was pursuant to duty, thus not protected by the First Amendment.

In *Homel*, a Pennsylvania district court determined that the assistant superintendent spoke only pursuant to her duty when she reported a suspicious purchase, thus ending the inquiry to determine if the First Amendment protected her speech.

Homel failed to demonstrate that she was speaking as a citizen, which was required to further any constitutional analysis of her speech (*Homel v. Centennial School District*, 2011). The superintendent in *Cavazos* claimed that reporting a crime (possession of marijuana) constituted protected speech under the First Amendment; however, the Fifth Circuit Court of Appeals determined that her speech was made pursuant to her duty, not as a citizen on an issue of public concern, thus precluding further analysis of her speech under *Garcetti* (*Cavazos v. Edgewood Independent School District*, 2006). In *White*, a Florida district court determined that a public charter school administrator's (principal/director) speech regarding a waiver for an employee's certification and an allegedly falsified fire inspection was pursuant to her duty and that any adverse employment action resulting from that speech did not violate the First Amendment (*White v. School Board of Hillsborough County*, 2008).

The Fifth Circuit Court of Appeals decided in *Alexander* that an assistant superintendent's testimony was pursuant to her duty and not protected by the First Amendment. Thus, her nonrenewal did not violate her First Amendment speech rights (*Alexander v. Brookhaven School District*, 2011). Finally, the Seventh Circuit Court of Appeals, in *McArdle*, determined that the First Amendment did not protect a principal's reports of misconduct and her termination did not constitute First Amendment retaliation (*McArdle v. Peoria*, 2011).

In all but one of these six cases that exclusively applied the *Garcetti* pursuant to duty threshold test, the federal courts found no First Amendment violations. These cases were heard in the third, fifth, seventh, and eleventh circuits. The one case that, speculatively, could have resulted in a speech violation, *Fierro v. City of New York*

*Department of Education* (2009), was heard in the second circuit and was settled after a New York district court remanded that case for further proceedings.

### **Discussion of *Garcetti's* Effect Based on Trends and Themes**

The 25 federal court cases presented in Chapter IV comprised the population of cases pertaining to the First Amendment speech rights of K-12 public school administrators since the Supreme Court decision in *Garcetti v. Ceballos* (2006). The inductive analysis (Hatch, 2002; Lincoln & Guba, 1985) conducted on these cases resulted in the emergence of several trends and themes. This section addresses each of the emerging trends and themes that have emerged from the analysis, as I have interpreted them (Gall et al., 2007).

### **No Application of *Garcetti***

Although *Garcetti v. Ceballos* (2006) is the most recent Supreme Court decision in the progeny of public employee First Amendment speech retaliation cases, several federal district and circuit courts did not apply its pursuant to duty test in their decisions in cases after *Garcetti*. Instead, these courts applied the previous Supreme Court precedents (e.g. *Connick v. Myers*, 1983; *Givhan v. Western Line Consolidated School District* 1979; *Mt. Healthy School District v. Doyle*, 1977; *Pickering v. Board of Education*, 1968) or applied a prima facie analysis to the PK-12 public school administrators' speech. In these cases, similar to other pre-*Garcetti* cases these courts applied a balancing test to determine whether the speech was protected under the First Amendment. In some of these cases, the courts determined that unconstitutional First Amendment retaliation might have occurred (e.g. *Scarborough v. Morgan County Board of Education*, 2006; *Spang v. Katonah-Lewisboro Union Free School District*, 2009;

*Mooney v. Lafayette County School District*, 2013; *Pribula v. Wyoming Area School District*, 2010). However, in other cases the courts determined that no First Amendment speech violations occurred applying the pre-*Garcetti* precedents (e.g. *King v. Charleston County School District*, 2009; *Woods v. Enlarged City School District of Newburgh*, 2007; *Mieczkowski v. York City School District*, 2011; *Flores v. Von Kleist*, 2010).

### **Pursuant to Duty**

The cases in this study that included the application of the pursuant to official duties threshold test (*Garcetti v. Ceballos*, 2006) to determine whether a public employee's speech was made as a citizen or an employee ended with mixed results as to whether the speech was protected. The trends emerging from the application of the pursuant to duty test are:

- (1) Speech made as a citizen requires further speech analysis under *Pickering* in order to determine the constitutionality of the speech,
- (2) Speech made pursuant to duty did not matter because the speech failed to sustain the *Pickering/Connick* test or a prima facie analysis, this is, the balancing test tipped in favor of the school districts or the PK-12 public school administrator failed to establish a prima facie case
- (3) Speech made pursuant to duty precluded further speech analysis by the courts under *Garcetti*, and
- (4) Speech made pursuant to duty under *Garcetti* may not preclude further analysis because of its content (e.g. testimony, reporting misconduct or wrongdoing to an outside agency outside of the scope of employment).



One of the most intriguing results of the courts' application of the pursuant to duty test from *Garcetti* was seen in bullet 4 above—the courts' determination that the PK-12 public school administrators' speech was pursuant to duty but that the speech might still be protected by the First Amendment in some cases. Specifically, some courts determined that speech pursuant to duty regarding alleged misconduct (*Fierro v. City of New York*, 2009) might be protected. Additionally, speech in the form of a protest outside of the assigned duties of an assistant principal (*Corbett v. Duerring*, 2012) might be protected under the First Amendment, as well. Furthermore, the reporting of unlawful conduct to a state attorney general (*Casey v. West Las Vegas Independent School District*, 2007) and reporting of district-wide racial discrimination (*Houston v. Independent School District No. 89 of Oklahoma County*, 2013) might qualify as protected speech for First Amendment purposes. Lastly, speech in the form of testimony in a district employment hearing (*Whitfield v. Chartiers Valley School District*, 2010) qualified for First Amendment protection. These federal court decisions were based on the Supreme Court's public employee free speech progeny prior to *Garcetti*. That is, they did not end their First Amendment speech analysis once they determined that the PK-12 public administrators' speech was pursuant to duty, as *Garcetti* seems to require.

In these cases, each of the courts determined that although the speech was pursuant to the duties of the PK-12 public school administrators, the content of their speech seemed to trump the fact that it was pursuant to duty, which *Garcetti* in essence seemed to have precluded as a form of protected speech all together. These cases addressed issues of public concern including misconduct, unlawful conduct, testimony, and racial discrimination, which the courts in the cases seem to have interpreted as more important

than the fact that the speech occurred as part of the PK-12 public school administrators' official duties. If the courts had precluded further analysis of their speech in these cases simply because the speech was pursuant to duty under *Garcetti*, a reasonable person might conclude that the United States Federal Court system condoned public school systems chilling the First Amendment speech rights of PK-12 public school administrators in cases involving what would appear to be serious issues of public concern.

PK-12 public school administrators are in positions within public education systems in which they might be in an advantageous position to observe misconduct and unlawful activities and practices that an *ordinary* citizen might otherwise not, as the Supreme Court stated in *Pickering*, regarding public school teachers, which is as true for PK-12 public school administrators. Chilling their speech regarding issues such as these, through retaliatory or adverse employment actions, could have the negative consequence of the general public losing faith in the public school system, as it would appear that the systems could discipline, in accordance with the judiciary's interpretation of the First Amendment, its employees whom report unlawful conduct. A legal context such as this is contraindicative to the civic duty inherent in public employment. Thus, even if a PK-12 public school administrator's speech is pursuant to duty, in some cases, analysis beyond the scope of *Garcetti's* pursuant to duty threshold is more than reasonable in determining whether the First Amendment should provide protection for the speech.

#### **Title VII Retaliation Claim in Lieu of First Amendment Retaliation Claim**

In *Woods v. Enlarged City School District of Newburgh* (2007) and *Mooney v. Lafayette County School District* (2013), the PK-12 public school administrators claimed

employment discrimination in addition to First Amendment retaliation. In *Woods*, the assistant principal's First Amendment and Title VII employment claims failed. However, in *Mooney*, the assistant principal's Title VII claim failed, but her First Amendment claim required further speech analysis and the Fifth Circuit Court of Appeals remanded her case for further proceedings. Both Title VII and First Amendment retaliation claims require the plaintiff to establish a prima facie case. In cases in which plaintiffs claim both forms of retaliation in their complaints, they must substantiate each claim independently. That is, the plaintiffs may prevail on one, both, or neither of their claims. This fact warrants further research dedicated solely to cases involving PK-12 public school administrators claiming both Title VII and First Amendment retaliation pre- and post-*Garcetti* in order to determine if the *Garcetti* decision has changed how different federal courts have decided these cases.

### **Racial Discrimination**

Two cases in this study involving the First Amendment speech rights of PK-12 public school administrators included allegations of racial discrimination (*Sanders v. Leake County School District*, 2008; *Houston v. Independent School District No. 89 of Oklahoma County*, 2013). However, the courts ruled differently as to whether the speech was protected. In *Sanders*, a Mississippi district court determined that the principal's claims of racial discrimination were in the form of a personal employment grievance under *Connick v. Myers* (1983). However, in *Houston*, a district court in Oklahoma determined that the principal's speech addressed a district-wide racial discrimination issue and by applying the *Connick* content, form, and context analysis determined that his speech might qualify for First Amendment protection. The distinction between *Sanders*

and *Houston* is the courts' determination of the content, form, and context of the speech under *Connick*. That is, if the speech addresses a personal employment grievance it does not constitute protected speech under the First Amendment; however, if the speech addresses an issue of public concern (i.e. systemic racial discrimination) it might constitute protected speech providing it survives the *Pickering/Connick* balancing test.

### **First Amendment Protected Association**

In three cases involving the speech rights of PK-12 public school administrators in this study, the federal courts addressed the implied right of association included within the First Amendment. In *Pribula v. Wyoming Area School District* (2009), a district court ordered a retrial because the casual friendship of an assistant superintendent and an assistant principal muddled the First Amendment speech analysis pertaining to their protected political speech. The Sixth Circuit Court of Appeals determined that a superintendent's association (albeit tangential) with a church with a predominately homosexual congregation required the same analysis as his First Amendment free speech claim in *Scarborough v. Morgan County Board of Education* (2006). In this case, the circuit court remanded the case for further proceedings to determine if the school board would have taken the same adverse employment action against Scarborough in the absence of his speech or association under *Mt. Healthy School District v. Doyle* (1977). However, in *D'Angelo v. School Board of Polk County, Florida* (2007), the Eleventh Circuit Court of Appeals determined that the principal's association (i.e. meetings with educators pertaining to converting his school to a charter school) was pursuant to his duty and under *Garcetti v. Ceballos* (2006) did not qualify as First Amendment protected association.

Specifically, the circuit court stated

Because “[n]one of the great liberties insured by the First (Amendment) can be given higher place than the others, the requirement of *Garcetti* applies to the right of a public employee to associate as it applies to the rights of a public employee to speak and to petition the government. (*D’Angelo v. School Board of Polk County, Florida*, 2007, p. 1213, internal citations omitted)

Presumably, based on the federal court decisions above, the “five-prong *Garcetti/Pickering* test” (*Houston v. Independent School Dist. No. 89 of Oklahoma County*, 2013, p. 1112; see also e.g. *Morris v. City of Colorado Springs*, 2012; *Couch v. Board of Trustees*, 2009) applies to the First Amendment right of association.

### **Charter Schools**

The two cases from the federal court in the 11th circuit, *D’Angelo v. School Board of Polk County, Florida* (2007) and *White v. School Board of Hillsborough County* (2008) regarding the First Amendment speech rights of PK-12 public school administrators involved public charter schools. Neither case resulted in the federal courts determining that First Amendment retaliation occurred. This theme invites further research pertaining to First Amendment speech claims in the 11th circuit involving public school employees and public charter school employees nationwide.

### **Testimony**

In *Whitfield v. Chartiers Valley School District* (2010), a district court determined that an assistant superintendent’s testimony was protected speech under the First Amendment even though the testimony was pursuant to her official job duties. However, in *Alexander v. Brookhaven School District* (2009), the Fifth Circuit Court of Appeals

determined that the testimony of an assistant superintendent was pursuant to duty and thus not protected speech under the First Amendment. The United States Supreme Court recently settled the different interpretation by the circuit courts. In *Lane v. Franks* (2014), the Supreme Court ruled that a public employee's "sworn testimony at former program employee's corruption trials was citizen speech eligible for First Amendment protection, not unprotected employee speech" (p. 1).

The Supreme Court decision in *Lane* is very narrow. Specifically, the Supreme Court opinion noted that *Lane* only addressed "truthful sworn testimony, compelled by subpoena, *outside the course of his ordinary job responsibilities*" (*Lane v. Franks*, 2014, p. 9 emphasis added). The Supreme Court opinion further clarified, "We accordingly need not address in this case whether truthful sworn testimony would constitute citizen speech under *Garcetti* when given as part of a public employee's ordinary job duties, and express no opinion on the matter today" (*Lane v. Franks*, 2014, p. 12). The concurring opinion echoed the majority opinion, stating, "The Court properly leaves the constitutional questions raised by these scenarios for another day" (*Lane v. Franks*, 2014, p. 17).

### **Reports to Outside Agencies**

In *Casey v. West Las Vegas Independent School District* (2007), a superintendent made a complaint to the state attorney general office (AG) regarding New Mexico's open meeting act and to the Health and Human Services Department (HHS) regarding misconduct in the school district's Head Start program. The Tenth Circuit Court of Appeals determined that the HHS complaint was pursuant to her duties as the program director, thus it did not constitute speech for First Amendment purposes. However, the

circuit court determined that the complaint to the AG was protected speech because it “fell sufficiently outside the scope of her office to survive even the force of the Supreme Court's decision in *Garcetti*” (*Casey v. West Las Vegas Independent School District*, 2007, pp. 1332-1333), as it was the school board’s responsibility to comply with New Mexico’s open meeting law (see more complete analysis in Chapter IV).

In *Sanders v. Leake County School District* (2008), a Mississippi district court concluded that a principal’s EEOC complaint was not pursuant to her duty and might constitute protected speech; however, it was inconsequential to their determination that her speech was not protected under their *Pickering/Connick* speech analysis. Nevertheless, these two cases indicate that complaints made to outside agencies addressing matters of public concern might be afforded First Amendment speech protection. The courts indicated that speech similar in nature to this is outside of the chain of command (i.e. not a private employment grievance to a supervisor) and could be protected by the First Amendment depending on the facts of the specific case. This legal framework invites further research specific to the speech rights of PK-12 public school administrators who claim First Amendment retaliation for speech made to an outside agency claiming unlawful conduct within the public employment agency.

### **Whistleblowers**

Cases involving whistleblowing were not included in the cases analyzed in this dissertation. However, in *McArdle v. Peoria* (2013), the principal’s original complaint filed in a federal district court included retaliation in violation of both the First Amendment and the Illinois Whistleblower Act. McArdle voluntarily dropped her whistleblower claim prior to the district court decision. In the circuit court opinion, the

court stated, “The Supreme Court has noted that protection of a government employee's exposure of misconduct involving his workplace is more properly provided by whistleblower protection laws and labor codes” (*McArdle v. Peoria*, 2013, p. 754 citing *Garcetti v. Ceballos*, 2006). In light of the Seventh Circuit Court of Appeals opinion, a PK-12 public school administrator might have a better chance of prevailing on a whistleblower claim regarding misconduct than in a First Amendment speech retaliation claim. However, whistleblower claims exceeded the scope of this dissertation. Nevertheless, more research is necessary involving the whistleblower retaliation claims of PK-12 public school administrators.

### **Policy Makers**

This study excluded cases involving PK-12 public school administrators deemed to hold policymaking positions because in cases involving claims of First Amendment speech violations by policymakers, courts have recognized that employees in these role relinquish some free speech rights (McCarthy, 2008; see e.g. *Sharp v. Lindsey*, 2002; *Vargas-Harrison v. Racine Unified School District*, 2001; *Pahmeier v. Marion County Schools*, 2006). However, in the analysis of the cases addressing the First Amendment speech rights of PK-12 public school administrators, one case emerged that applied both *Garcetti v. Ceballos* (2006) and the policymaker analysis. In *Aleman v. Edcouch Elsa Independent School District* (2013), a district court in Texas determined that the superintendent’s speech did not constitute speech for First Amendment purposes because it was pursuant to his duty and he was employed in a policymaking position (citing *Kinsey v. Salado Independent School District*, 1992).



As of June 2014, the Supreme Court has not heard or ruled on any cases regarding PK-12 public school employees or administrators in their capacity as policymakers. However, in the post-*Garcetti* era of PK-12 First Amendment speech-related cases, more research is necessary in the application of the policymaker analysis in tandem with the *Garcetti/Pickering* test. Both the *Garcetti* and policymaker speech analyses seem to be threshold tests. That is, if a PK-12 public school administrator is considered to be employed in a policymaking capacity *or* his or her speech is pursuant to his or her duty, it seems unlikely that the First Amendment will provide protection.

### **Guidelines**

In light of the findings presented and discussed above, the legal framework governing the First Amendment speech rights of PK-12 public school administrators is far from solid. Some federal courts apply the pursuant to official duties threshold test emanating from *Garcetti v. Ceballos* (2006), while other federal courts apply previous Supreme Court First Amendment speech precedents (e.g. *Connick v. Myers*, 1983; *Givhan v. Western Line Consolidated School District* 1979; *Mt. Healthy School District v. Doyle*, 1977; *Pickering v. Board of Education*, 1968). Further complicating the analysis of the First Amendment Speech rights of PK-12 public school administrators is that some federal courts apply *Garcetti* and the previous precedents in tandem. Because of the evolving legal framework governing the First Amendment Speech rights of PK-12 public school administrators, establishing steadfast guidelines for practicing administrators and the systems that employ and prepare them is very difficult. Nevertheless, this researcher offer these guidelines based on the research, findings, and

analysis included in this dissertation, which are believed to be applicable at the time of the completion of this dissertation.

### **Practicing PK-12 Public School Administrators**

Primarily, practicing PK-12 public school administrators need to know the current interpretation of their First Amendment speech rights within the circuit in which their school system is located. The cases analyzed within this dissertation indicated that some circuits apply *Garcetti* solely, while others apply *Garcetti* and the previous Supreme Court speech precedents. Additionally, PK-12 public school administrators need to be mindful of their speech as it relates to their official job duties, as the First Amendment may not shield them from retaliatory or adverse employment actions. PK-12 public school administrators must also consider their speech and the effect it might have on tipping the *Pickering/Connick* balance in the school district's favor. Specifically, they need to consider whether their speech addresses a matter of public concern or whether it addresses a private employment grievance. Furthermore, even if they believe that their speech addresses a matter of public concern (i.e. systemic racial discrimination, reporting misconduct, etc.), their regional circuit's interpretation of their speech may deem it pursuant to their duties, possibly barring it from First Amendment protection. They also need to know the requirements to establish a prima facie First Amendment retaliation claim. For example, they need to know that speech pursuant to duty and speech addressing a matter of public concern are matters of law, while adverse employment actions and their proximity to the speech are matters of fact.

With the recent Supreme Court decision in *Lane v. Franks* (2014), PK-12 public school administrators can be reasonably confident that their sworn testimony when

subpoenaed will be protected by the First Amendment, if the court determines that the testimony falls outside of their official job duties. However, this is the only exception to the *Garcetti/Pickering* balancing test with national application. That is, other speech pursuant to duty (such as reporting alleged misconduct), or possibly testimony pursuant to their duties (i.e. implicit in their job duties as determined by the court), as this has yet to be tested (*Lane v. Franks*, 2014), might not be protected by the First Amendment. Furthermore, PK-12 public school administrators need to exercise caution when speaking on an issue of public concern because while their speech might meet the citizen threshold in *Garcetti v. Ceballos* (2006) it does not mean that the speech will survive the remaining prongs of the *Garcetti/Pickering* or *Pickering/Connick* tests. Finally, when pursuing claims of misconduct within the public education system, PK-12 public school administrators need to consider filing a claim under their state's whistleblower protection act, if applicable, because the case history supports the notion that this speech will not garner First Amendment protection if it is considered pursuant to duty by the court.

### **PK-12 Public School Systems**

Similar to the guidelines for PK-12 public school administrators, PK-12 public school systems (i.e. districts, school boards, senior administrators/superintendents) must be aware of the First Amendment speech framework applicable in their circuit. PK-12 public school systems need to understand what types of speech their circuit considers pursuant to official job duties under *Garcetti v. Ceballos* (2006) based on the fact-based practical inquiries utilized by the courts in their circuit. These systems also need to be aware of effective defenses to First Amendment retaliation claims (i.e. the adverse

employment action would have occurred in the absence of the protected speech under *Mt. Healthy School District v. Doyle*, 1977).

As for PK-12 public school administrator testimony, *Lane v. Franks* (2014) only addresses testimony outside of the purview of the administrator's official duties (e.g. "truthful sworn testimony, compelled by subpoena, *outside the course of his ordinary job responsibilities*" (*Lane v. Franks*, 2014, p. 9 emphasis added)). That is, testimony perceived as part of their duties may not constitute protected speech under the First Amendment. Until the Supreme Court rules on testimony as part of official job duties, PK-12 public school systems could add this function to each of their employees' job duties. Although *Garcetti v. Ceballos* (2006) stated that official job descriptions and official duties are not often entirely synchronous, including this function might entice a federal court to interpret testimony as pursuant to an employee's official duties, which could bar it from First Amendment protection.

Regarding unlawful conduct such as claims of racial discrimination and reports of misconduct, PK-12 public school systems need to be aware of how their circuit interprets these claims under the *Garcetti/Pickering* five-prong test. Furthermore, PK-12 public school systems need to monitor the evolving PK-12 public administrator speech analysis framework specifically related to whistleblower protection and policymaking positions. While whistleblower protection may protect PK-12 public school administrators from retaliation for reporting wrongdoing, the First Amendment might not shield PK-12 public school administrators in policymaking positions (e.g. confidential positions that require a close-working relationships in order to ensure the efficient operation of the public

employer, see *Kinsey v. Salado Independent School District*, 1992) from adverse employment actions related to their speech.

### **PK-12 Public School Administrator Preparation Programs**

The programs that educate and prepare PK-12 public school administrators need to provide in-depth instruction pertaining to the evolving First Amendment speech framework. These programs need to be sure that the PK-12 public school administrators they prepare fully understand the major landmark Supreme Court public employee free speech cases that occurred before *Garcetti* because they still apply in the federal courts' analysis of First Amendment protected speech. Additionally, these programs need to follow the progeny of *Garcetti v. Ceballos* (2006) both within their circuit and on the national level. PK-12 public school administrator preparation programs need to make sure that their students understand both the history of and current legal framework governing their First Amendment speech rights, precisely the current application of the *Garcetti/Pickering* five-prong test.

PK-12 public school administrator preparation programs also need to follow the progeny of *Lane v. Franks* (2014), whistleblower cases, and cases involving PK-12 public school administrators in policymaking positions within their circuits and on the national level. These programs need to provide robust school law-related course work that addresses both the First Amendment speech rights of PK-12 public school administrators and the rights of school systems to operate efficiently and effectively under the *Garcetti/Pickering* test. Furthermore, PK-12 public school administrator preparation programs need to continue to produce research and literature related to the emerging First Amendment speech rights of the PK-12 public school administrators for both

administrators employed in PK-12 public school systems and for those in positions to educate and prepare future PK-12 public school administrators (i.e. educational leadership professors).

### **Further Research**

This dissertation addressed the First Amendment speech rights of PK-12 public school administrators. However, cases involving whistleblower retaliation and policymakers analyses were excluded from the study. Further research pertaining to both the policymaker speech analysis and whistleblower protection acts is necessary. Additionally, more research on the progeny of *Garcetti v. Ceballos* (2006) is necessary because some of the circuit apply its precedents differently. Specifically, research regarding the pursuant to duty “carve-outs” (e.g. testimony, reporting alleged misconduct to outside agencies) is needed to further the understanding of First Amendment protected speech that is pursuant to duty in direct opposition of *Garcetti’s* preclusionary threshold. Furthermore, research relating to PK-12 public school administrator speech in the form of “testimony” is warranted in light of the Supreme Court’s recent decision in *Lane v. Frank* (2014). Finally, a more focused study on the cases that apply only a prima facie analysis to First Amendment retaliation claims is necessary to help explain why some federal courts fail to apply any of the Supreme Court’s First Amendment speech precedents (e.g. *Garcetti v. Ceballos*, 2006; *Waters v. Churchill*, 1994; *Connick v. Myers*, 1983; *Givhan v. Western Line Consolidated School District* 1979; *Mt. Healthy School District v. Doyle*, 1977; *Pickering v. Board of Education*, 1968).

## Conclusion

The PK-12 public employee speech framework has evolved since *Pickering v. Board of Education* (1968) (see *Lane v. Frank*, 2014; *Garcetti v. Ceballos*, 2006; *Waters v. Churchill*, 1994; *Connick v. Myers*, 1983; *Givhan v. Western Line Consolidated School District* 1979; *Mt. Healthy School District v. Doyle*, 1977; *Pickering v. Board of Education*, 1968). This evolution has resulted in the *Garcetti/Pickering* five-prong (*Houston v. Independent School Dist. No. 89 of Oklahoma County*, 2013, p. 1112; see also e.g. *Morris v. City of Colorado Springs*, 2012; *Couch v. Board of Trustees*, 2009) test to determine whether a public employee's speech receives First Amendment protection. The five-prong *Garcetti/Pickering* test considers:

- (1) whether the speech was made pursuant to an employee's official duties,
- (2) whether the speech was on a matter of public concern,
- (3) whether the government's interests, as employer, in promoting the efficiency of the public service are sufficient to outweigh the plaintiff's free speech interests,
- (4) whether the protected speech was a motivating factor in the adverse employment action, and
- (5) whether the defendant would have reached the same employment decision in the absence of the protected conduct. (*Houston v. Independent City School District No. 89 of Oklahoma County*, 2013, p. 1112 citing *Morris v. City of Colorado Springs*, 2012)

Typically, federal district and circuit courts apply Supreme Court precedents in their analyses and decisions; however, in PK-12 public school administrator First Amendment

speech cases, some federal courts appear to be making decisions in opposition to, or only partially based upon, the Supreme Court decision in *Garcetti v. Ceballos* (2006).

This dissertation examined the 25 cases involving the First Amendment speech rights of PK-12 public school administrators since the Supreme Court decision in *Garcetti v. Ceballos* (2006). Extending Dagley's (2012) research on the speech rights of public school employees since *Garcetti*, this study narrowed the focus to include only PK-12 public school administrators. This study indicates that the nation's federal courts are developing more nuanced interpretations of the pursuant to duty test established in the Supreme Court decision in *Garcetti v. Ceballos* (2006). Specifically, the courts have various interpretations of which speech is pursuant to duty and which is not, which the Supreme Court left open as it stated that a public employee could engage in speech, as a citizen, related to matters of public concern (*Garcetti v. Ceballos*, 2006). Additionally, this study suggests that the application of the pursuant to duty test in tandem with the policymaker analysis, precluding First Amendment protection, may significantly narrow the types of PK-12 public school administrator speech that qualify for First Amendment protection, which might have a chilling effect on their speech.

In *Pickering v. Board of Education* (1968), Thurgood Marshall stated:

The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. (p. 5)

The PK-12 public school administrator speech cases after *Garcetti* attempt, it appears, to refine the balancing test applied to their First Amendment speech rights. However,



except for a few specific and narrow exemptions (i.e. testimony, racial discrimination, reporting wrongdoing to an external agency), in some cases based on the facts of the specific case, *Garcetti* appears to have tipped the scale in favor of PK-12 public school systems as public employers. Nevertheless, the First Amendment speech framework governing the speech rights of PK-12 public school administrators continues to evolve. Whether the First Amendment protects the speech of PK-12 public school administrators can be summed up with one phrase—*it depends*.

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