Whistleblowing, Public Employees, and the First Amendment

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I. Introduction

Recent revelations of extensive wrongdoing illustrate the need for both more governmental oversight and for whistleblower protection so that governmental wrongdoing is more likely to come to light. Both the federal government\(^1\) and various state legislatures\(^2\) have passed whistleblower statutes, which delimit the conditions under which those who reveal wrongdoing will be protected from retaliation. These protections vary in a number of respects.\(^3\) The focus here is not on these differing laws, however, but on the background constitutional protections for state employees who seek to expose bad behavior. Ironically, the constitutional protections for whistleblowing have decreased over the past several decades.

This article discusses the evolution of the First Amendment protections accorded to speech by state employees. What started out as fairly robust protection has become much weaker and, in a significant category of cases, nonexistent. The Court’s current interpretation regarding the

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\(^1\) See, for example, Whistleblower Protection Act of 1989, Pub L. 101-12, 103 Stat 16.


\(^3\) For example, they might specify the individual to whom the whistleblower should report. See, for example, 5 Ill. Compil. Stat 430/15-10 protecting whistleblowers who report wrongdoing to a public body. They might also specify the content of the reporting that will be protected. See, for example, Ark. Code Ann. § 21-1-603 (“(a)(1) A public employer shall not take adverse action against a public employee because the public employee or a person authorized to act on behalf of the public employee communicates in good faith to an appropriate authority: (A) The existence of waste of public funds, property, or manpower, including federal funds, property, or manpower administered or controlled by a public employer; or (B) A violation or suspected violation of a law, rule, or regulation adopted under the law of this state or a political subdivision of the state.”)
Constitution’s relatively weak protection for public employee speech has not gone unnoticed in the circuits. As far as the Constitution is concerned, an individual who fulfills her professional duties by exposing corruption or threats to public health and safety may permissibly be fired. If our recent history teaches us anything, it is that such an understanding of constitutional protections cannot help but undermine the public good.

II. Constitutional Protections for Public Employee Speech

The constitutional protections for public employee speech have greatly evolved. Initially, the protections were robust, notwithstanding the Court’s acknowledgment that the state as employer had important interests that had to be weighed in the balance. However, over the past several decades, the constitutional protections for public employee speech have decreased markedly, so that individuals who seek to contribute to public debate or, perhaps, who seek to expose public corruption or threats to public health and safety must be willing to sacrifice their jobs for the sake of the public good.

A. Robust Protection of First Amendment Rights

The seminal case involving protection for public employees is Pickering v. Board of Education, 4 which involved a teacher who wrote a letter to the editor in a local newspaper that was critical of the “allocation of school funds between educational and athletic programs.” 5 The letter was written after the electoral defeat of a proposal to increase the tax rate so that the schools might receive more funding. 6 Pickering was fired for “writing and publishing the letter.” 7

The Board of Education found that “numerous statements in the letter were false and that the

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4 391 U.S. 563 (1968)
5 Id. at 569.
6 See id. at 566.
7 Id.
publication of the statements unjustifiably impugned the ‘motives, honesty, integrity, truthfulness, responsibility and competence’ of both the Board and the school administration.’’\(^{8}\)

In addition the Board feared that the letter “would be disruptive of faculty discipline, and would tend to foment ‘controversy, conflict and dissension’ among teachers, administrators, the Board of Education, and the residents of the district.”\(^{9}\)

The *Pickering* case implicated various competing considerations. On the one hand, the Court rejected that “teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work.”\(^{10}\) On the other hand, however, the state faces special challenges when its employees are critical of its operations: “the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general.”\(^{11}\) These conflicting interests make it necessary to strike “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.”\(^{12}\) The key question involves how closely the Court should examine the state’s claims to impaired efficiency.

Although acknowledging the importance of workplace efficiency, the *Pickering* Court construed that consideration narrowly. For example, because the statements at issue were “in no way directed towards any person with whom appellant would normally be in contact in the

\(^{8}\) *Id.* at 566-67.

\(^{9}\) *Id.* at 567.

\(^{10}\) *Id.* at 568.

\(^{11}\) *Id.*

\(^{12}\) *Id.*
course of his daily work as a teacher,”¹³ there was “no question of maintaining either discipline by immediate superiors or harmony among coworkers.”¹⁴ Of course, some of Pickering’s colleagues might well have disagreed both with his priorities and with his having aired them publicly, which might have led to some disharmony in the workplace. However, the mere fact that some might disagree with Pickering would not suffice to justify the suppression of his speech; else, the workplace might be a very quiet place, indeed.

While the Board of Education and the superintendent might not have been able to maintain a close working relationship with Pickering, those relationships were “not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning.”¹⁵ The Court unequivocally rejected that “comments on matters of public concern that are substantially correct … may furnish grounds for dismissal if they are sufficiently critical in tone.”¹⁶ But such a position is much more robust than commonly appreciated. Basically, it suggests that accurate, critical comments cannot be the basis for a firing even if they impair workplace efficiency.

Comments that are not substantially correct are treated differently, however, and a separate question was whether Pickering’s false statements justified his dismissal.¹⁷ The Court considered whether the comments “would foment controversy and conflict among the Board, teachers, administrators, and the residents of the district.”¹⁸ However, the Court concluded that not only was there “no evidence to support these allegations,”¹⁹ but that Pickering’s letter seemed to have

¹³ Id. at 569-70.
¹⁴ Id. at 570.
¹⁵ Id.
¹⁶ Id.
¹⁷ Id. (“We next consider the statements in appellant’s letter which we agree to be false.”).
¹⁸ Id.
¹⁹ Id.
been “greeted by everyone but its main target, the Board, with massive apathy and total disbelief.”

Pickering’s letter involved “a matter of legitimate public concern”—whether schools should receive more tax dollars is an important issue. “On such a question free and open debate is vital to informed decision-making by the electorate.” Further, teachers as a class were “likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent.” Precisely because they had such a good vantage point, the Court explained that “it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.” It was thus a matter of great importance for society as a whole that teachers feel free to express their views on how funds were used in the schools.

Pickering seems to provide strong protection for comments by state employees on matters of public concern. The Pickering Court likened the protections at issue to those afforded in the defamation context, noting:

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.

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20 Id.
21 Id. at 571.
22 Id. at 571-72.
23 Id. at 572.
24 Id.
25 See id. at 573 (“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 … great”).
26 Id. (citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964)).
But this is important because it suggests that robust protection should be afforded to those statements on matters of public concern that are not false. Indeed, it further suggests that a public employee making comments on a matter of public concern will be protected even if his comments are not accurate, as long as his misstatements are the product of mere negligence.

The Pickering Court also pointed out that “statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors,”27 citing Garrison v. Louisiana,28 which the Court described in the following way: “In Garrison, the New York Times test was specifically applied to a case involving a criminal defamation conviction stemming from statements made by a district attorney about the judges before whom he regularly appeared.”29 But it is of course true that an individual who make disparaging comments about someone with whom he works may thereby impair workplace efficiency, and the Court was suggesting that impaired workplace efficiency would not alone justify adverse employment actions.

The Pickering Court understood that criminal punishment and defamation damages are distinguishable from loss of employment, but nonetheless suggested that they were relevantly similar in that they all were effective tools that might be used to chill speech on important issues: “While criminal sanctions and damage awards have a somewhat different impact on the exercise of the right to freedom of speech from dismissal from employment, it is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech.”30 Because (not knowingly or recklessly false) speech on matters of public concern promotes important societal interests, it should not be chilled.

27 Id. (citing Garrison v. State of Louisiana, 379 U.S. 64 (1964)).
28 379 U.S. 64 (1964).
29 Pickering, 391 U.S. at 574.
30 Id.
Likening the conditions under which state employees could be dismissed for speaking on matters of public concern to the test used in defamation—actual malice—is to use a very protective test. If that test is used, then a state employee can only be fired for commenting on matters of public concern if her comments are knowingly false or, at least, she has a reckless disregard for their truth.

*Perry v. Sindermann* also provided protection for an educator, although this time the instructor taught on the college level. Robert Sindermann had a series of one-year contracts at Odessa Junior College and “was successful enough to be appointed, for a time, the cochairman of his department.” However, Sindermann became President of the Texas Junior College Teachers Association and was sometimes unable to teach class because he in that capacity had to testify before legislative committees. Further, he aligned himself with a group that sought to elevate the status of his institution to make it a four-year college, a position with which the Board of Regents disagreed.

The Board of Regents declined to renew Sindermann’s contract, alleging insubordination but providing no official explanation for his nonrenewal. Sindermann brought suit, alleging that his contract had not been renewed because of his public criticism of the administration’s policies. The *Perry* Court noted that Sindermann’s “lack of a contractual or tenure ‘right’ to re-

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31 See *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964) (“The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with ‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”). *Robert O’Neil discusses Pickering’s appropriation of the actual malice standard. See Robert M. O’Neil, Academic Speech in the Post-*Garcetti* Environment, *7 First Amend. L. Rev.* 1, 7 (2008).*

32 *408 U.S. 593* (1972).

33 *Id.* at 594.

34 *Id.*

35 *Id.* at 595.

36 *Id.*

37 See *id.* at 595.
employment for the 1969-1970 academic year is immaterial to his free speech claim." Thus, “even though a person has no ‘right’ to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely.” Even an individual without a reasonable expectation that his contract would be renewed could not be denied a contract continuation because he had exercised his First Amendment rights.

Both Pickering and Sindermann offer robust protection for state employees exercising their First Amendment rights. In both cases, the Court emphasized the importance of protecting contributions to the debate on matters of public concern, even when the state employees were adopting positions that ran counter to the desires and, possibly, interests of their employers.

B. Reduced Protection for First Amendment Rights

Mt. Healthy City School District Board of Education v. Doyle modified the prevailing test in a way that signaled that the constitutional commitment to robust debate might be less robust than might have been inferred from Pickering and Sindermann. Doyle involved actions taken by a high school teacher that were a source of concern for a school board. Fred Doyle was a past president of the Teachers’ Association and a member of its executive board. During the period that he was an officer, Doyle “worked to expand the subjects of direct negotiation between the Association and the Board of Education,” which may have resulted in “some tension in relations between the Board and the Association.” However, some of the tensions arising from

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38 Id. at 597-98.
39 Id. at 597.
40 A separate issue was whether Sindermann had a reasonable expectation that his contract would be renewed. See id. at 599 (“He alleged that this interest, though not secured by a formal contractual tenure provision, was secured by a no less binding understanding fostered by the college administration.”).
42 Id. at 281.
43 Id.
Doyle’s behavior had nothing to do with his labor activities but, instead, with other incidents that had occurred at the school. The Court mentioned a few of them:

1. Doyle got into an argument with another teacher, and eventually the other teacher slapped him. He refused to accept an apology from that teacher, instead demanding that the teacher be punished.\textsuperscript{44} His “persistence in the matter”\textsuperscript{45} resulted in both teachers being suspended, which led to a walkout and the lifting of the suspensions.\textsuperscript{46}

2. Doyle got into an argument with cafeteria workers over how much spaghetti he had received.\textsuperscript{47}

3. In connection with a disciplinary complaint, Doyle referred to students as “sons of bitches.”\textsuperscript{48}

4. Doyle made an “obscene gesture” to two girls who did not respond appropriately when he, as “cafeteria supervisor,”\textsuperscript{49} asked them to do something.

The incident that was closest in time to the decision not to renew Doyle’s contract involved something that was a source of embarrassment for the Board of Education.\textsuperscript{50} Apparently, some in the administration believed that there was a “relationship between teacher appearance and public support for bond issues.”\textsuperscript{51} The principal of Doyle’s school circulated a memo “relating to teacher dress and appearance.”\textsuperscript{52} Although Doyle knew that the subject matter of the memo was

\textsuperscript{44} \textsuperscript{Id.}
\textsuperscript{45} \textsuperscript{Id.}
\textsuperscript{46} \textsuperscript{Id.}
\textsuperscript{47} \textsuperscript{Id.}
\textsuperscript{48} \textsuperscript{Id. at 282.}
\textsuperscript{49} \textsuperscript{Id.}
\textsuperscript{50} \textsuperscript{Id. (“Chronologically the last in the series of incidents which respondent was involved in during his employment by the Board was a telephone call by him to a local radio station.”).}
\textsuperscript{51} \textsuperscript{Id.}
\textsuperscript{52} \textsuperscript{Id.}
ultimately going to be settled by “joint teacher-administration action,” Doyle nonetheless decided to “convey the substance of the memorandum to a disc jockey at WSAI, a Cincinnati radio station, who promptly announced the adoption of the dress code as a news item.”

The radio announcement was a source of some concern for members of the administration among others. Doyle subsequently issued an apology to the principal, admitting that his criticisms of policy should first have gone to the administration. However, that did not end matters. One month later, in the course of “his customary annual recommendations to the Board as to the rehiring of nontenured teachers,” the superintendent recommended that Doyle not be rehired, a recommendation that was adopted by the Board.

Doyle asked why he was not being rehired, and was told that he had “a notable lack of tact in handling professional matters which leaves much doubt as to your sincerity in establishing good school relationships.” Two examples were offered to support that evaluation: the incident involving the obscene gesture and his call to the radio station.

The district court found that because the call to the radio station was protected First Amendment activity and because that activity played a “substantial part” in his not being rehired, he was entitled to reinstatement. The district court also found that although the

53 Id.
54 Id.
55 See id. at 283 n.1 (Doyle’s notifying the radio station about the suggested dress code “raised much concern not only within this community, but also in neighboring communities”).
56 Id. at 282.
57 Id.
58 Id.
59 Id.
60 Id.
61 Id.
62 Id. at 283.
63 Id.
64 Id.
Superintendent did in fact have “reason” to refuse to extend the contract that were not based on Doyle’s exercise of First Amendment rights, it was Doyle’s call to the radio station that played a substantial role in the decision not to extend the contract. It might be noted, for example, that Doyle was not punished for his inappropriate language about students or for his directing inappropriate gestures at students or even for his argument with the cafeteria personnel. The only incident triggering punishment was Doyle’s persistence in seeking the imposition of some sort of official sanction against someone else who had slapped him. Notwithstanding the finding below that the exercise of First Amendment rights had played a substantial role in the decision not to renew Doyle’s contract, the Supreme Court remanded the case for a determination of whether the Board “would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.”

One can understand the Court’s fear that in a particular case “a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in that decision even if the same decision would have been reached had the incident not occurred.” But in that event, it would be false that the exercise of First Amendment rights had played a “substantial part” in the employment decision. At most, the incident would have been one of the precipitating factors.

On remand, the district court found that Doyle would not have been renewed, even had he not exercised his First Amendment rights. “Substantial factor” had apparently been understood

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65 See id. at 285.
66 Id. at 287.
67 Id. at 285.
68 Doyle v. Mt. Healthy City School Dist. Bd. of Ed., 670 F.2d 59, 61 (6th Cir. 1982) (“The District Judge then determined from the original record that ‘the Board has established by a preponderance of the evidence that Doyle would not have been renewed because of the incidents-exclusive of the radio incident-which had occurred during the year or so prior to the nonrenewal.’”).
to be the equivalent of “motivating factor,” and the district court found that even without the particular motivating factor involving the call to the radio station the Board would nonetheless have refused to extend Doyle’s contract because of the incidents involving the obscene gesture and his called certain students “sons of bitches.”

It is possible that the “sons of bitches” incident played a role in Doyle’s contract not being renewed, even though it was not even cited in the official explanation to Doyle about why his connection to the school was being severed. By the same token, it is possible that Doyle’s role as President and member of the executive board of the Teacher’s Association played no role in his not having his contract extended, notwithstanding that his attempt to expand the areas subject to negotiation caused some tension with the Board. Yet, one would think that a Court committed to protecting the exercise of First Amendment rights would not have remanded a case when there had already been a finding that Doyle’s speech had played a substantial role in the contract nonrenewal. While it is somewhat difficult to tell which stated or unstated factors together sufficed to bring about the nonrenewal of Doyle’s contract, his fine teaching qualities notwithstanding, Doyle may well represent the Court’s lessening its commitment to protect the First Amendment rights of public employees.

Givhan v. Western Consolidated School District involved another instance in which a teacher contract was not renewed. Bessie Givhan claimed that the non-renewal was due to her having exercised her First Amendment rights. On several occasions, she had complained in

69 See id.
70 Id.
71 See supra note 40 and accompanying text.
72 See Doyle, 670 F.2d at 61 (“appellant Doyle had some fine qualities as a teacher”).
73 See Paul M. Secunda, Neoformalism and the Reemergence of the Right-Privilege Distinction in Public Employment Law, 48 San Diego L. Rev. 907, 939 (2011) (“the Court in Mount Healthy Board of Education v. Doyle made it easier for employers to defend against these First Amendment claims”).
private to the principal of her school that the school’s “employment policies and practices … [were] racially discriminatory in purpose or effect.” 75 The school district had said that she was not renewed because of her manner, which was “described by the principal as ‘insulting,’ ‘hostile,’ ‘loud,’ and ‘arrogant.’” 76

The Supreme Court explained that “private expression of one's views is [not] beyond constitutional protection,” 77 and remanded the case. The Court noted that while the district court had “found that petitioner's ‘criticism’ was the ‘primary’ reason for the School District's failure to rehire her, it did not find that she would have been rehired but for her criticism.” 78 On remand, the district court again found that the nonrenewal was based on the exercise of First Amendment rights and that the other reasons proffered were pretextual. 79

Yet, Givhan should not be understood to provide robust protection of First Amendment rights. Here, too, the school board had an opportunity on remand to establish that Givhan’s contract would not have been renewed even had she not engaged in First Amendment expression. For example, the principal had testified that Givhan “on many occasions … has taken an insulting and hostile attitude towards me and other administrators,” 80 and that Givhan was “overly critical for a reasonable working relationship to exist between us.” 81 It would not have been difficult for a district court to have found that the relationship had been too impaired to warrant reinstatement. That said, the district court on remand in fact found that the alleged difficulties in maintaining a good working relationship had not been the actual reason that

75 Id. at 413.
76 Id. at 412.
77 Id. at 413.
78 Id. at 417.
79 See Ayers v. Western Line Consol. School Dist., 691 F.2d 766, 769 (5th Cir. 1982) (“The district court thus concluded that the sole reason why Ms. Givhan was not rehired was because of her critical expressions that were protected by the First Amendment.”).
80 Ayers v. Western Line Consol. School Dist., 555 F.2d 1309, 1312 (5th Cir. 1977).
81 Id.
Givhan, who admittedly was “a competent teacher,” did not have her contract renewed. Rather, the “school district's primary motivation in failing to renew her teaching contract was to rid itself of a vocal critic of the district's policies and practices that were capable of interpretation as embodying racial discrimination.”

The difficulty with the Court’s but-for test is not that it will inevitably result in a finding against the plaintiff who challenges the nonrenewal of her contract, as the outcome in Givhan demonstrates. Nonetheless, individuals will know prospectively that their exercising their First Amendment rights to offer an accurate but critical assessment of workplace conditions or practices will put their jobs at risk, which may mean that valuable insights simply will not be offered.

C. On Matters of Public Concern

The Court undermined First Amendment protections for public employees in yet another way in Connick v. Myers. Sheila Myers was an Assistant District Attorney in New Orleans, who had been told that she was being transferred. She talked to a first assistant district attorney, Dennis Waldron, “expressing her reluctance to accept the transfer” among other matters. Some of those other matters involved her dissatisfaction with certain office practices. Waldron told her that “her concerns were not shared by others in the office,” and Myers decided to see whether she or Waldron had a better understanding of their colleagues’ views. She composed and distributed a questionnaire “concerning office transfer policy, office morale, the need for a

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82 Id.
83 Ayers, 691 F.2d at 769.
85 See id. at 140.
86 Id. at 141.
87 Id.
88 Id. (“she informed him that she would do some research on the matter”).
grievance committee, the level of confidence in supervisors, and whether employees felt
pressured to work in political campaigns.” 89

When Waldron learned that Myers had distributed the questionnaire, he called District
Attorney Harry Connick and told him that “Myers was creating a ‘mini-insurrection’ within the
office.” 90 Connick returned to the office and fired Myers, telling her that “she was being
terminated because of her refusal to accept the transfer … [and] that her distribution of the
questionnaire was considered an act of insubordination.” 91

Myers filed suit, claiming that she had been fired for exercising her First Amendment
eights. 92 The district court found that she had not been fired for her refusal to accept a transfer
but, instead, for composing and distributing the questionnaire. 93 That court also found that the
questionnaire involved matters of public concern. 94

The Supreme Court rejected that the questionnaire predominantly involved matters of public
concern. 95 The Court explained, “Whether an employee’s speech addresses a matter of public
concern must be determined by the content, form, and context of a given statement, as revealed
by the whole record.” 96 After considering the context in which the questionnaire was written and
distributed, the Court concluded that “the questions pertaining to the confidence and trust that
Myers' coworkers possess in various supervisors, the level of office morale, and the need for a
grievance committee as mere extensions of Myers' dispute over her transfer to another section of

89 Id.
90 Id.
91 Id.
92 See id. at 141.
93 See id. at 142.
94 Id.
95 See id. at 148 (“In this case, with but one exception, the questions posed by Myers to her coworkers do not fall
under the rubric of matters of ‘public concern.’”)
96 Id. at 147-48.
Indeed, the Court believed that “the questionnaire, if released to the public, would convey no information at all other than the fact that a single employee is upset with the status quo.”

In the Court’s view, the only question involving a matter of public interest was whether “assistant district attorneys ‘ever feel pressured to work in political campaigns on behalf of office supported candidates.’” Because her questionnaire did include at least one matter of public concern, the Court examined whether the firing was justifiable. While agreeing with the district court that there was “no demonstration here that the questionnaire impeded Myers' ability to perform her responsibilities,” the Court saw no “necessity for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action.” Thus, the Court seemed to take seriously that the questionnaire rather than the office practices themselves might impair office efficiency.

The Connick Court’s analysis is disappointing in a number of respects. Consider why Connick thought the questionnaire threatening. Connick had testified that he “particularly objected to the question which inquired whether employees ‘had confidence in and would rely on the word’ of various superiors in the office, and to a question concerning pressure to work in political campaigns which he felt would be damaging if discovered by the press.” Apparently, Connick did not agree with the Court that the questionnaire, if leaked to the press, would only lead the public to conclude that a disgruntled employee was complaining. On the contrary, he seemed to worry about the public reaction to the suggestion that there was political pressure to

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97 Id. at 148.
98 Id.
99 Id. at 149.
100 Id. at 151.
101 Id. at 152.
102 Id. at 141.
work in campaigns. Presumably, he might in addition have worried that if the public were informed that those working for the District Attorney had no confidence or trust in those running the office, then the public might demand that something be done. As Justice Brennan pointed out in dissent, “speech about ‘the manner in which government is operated or should be operated’ is an essential part of the communications necessary for self-governance the protection of which was a central purpose of the First Amendment.”

If the Court really believed that release of the questionnaire to the public would convey nothing other than that an employee was dissatisfied, one wonders why its release to other office workers would create a mini-insurrection rather than merely convey that one employee was upset. If, indeed, there was reason to fear release of the questionnaire (or perhaps, its results), that would suggest that the questions were highlighting some of the problems in the office, which might well be of concern both to those working in the office and to the public more generally.

Suppose that Myers had not been told that she was being transferred and had nonetheless written and distributed the survey. In that event, “the questions pertaining to the confidence and trust that Myers' coworkers possess in various supervisors, the level of office morale, and the need for a grievance committee” might all have been viewed as a matter of public concern, because the District Attorney’s office handles matters that affect the public greatly and because the Court could not have so readily dismissed the concerns as merely reflecting the frustrations of a disgruntled employee. But this means that whether a topic is a matter of public concern depends upon who is being treated adversely—if the victim herself complains, then the Court

103 Id. at 156 (Brennan, J., dissenting) (citing Mills v. Alabama, 384 U.S. 214, 218 (1966)).
104 Id. at 141.
105 Id. at 148.
106 Id.
may well treat the comments as involving “matters only of personal interest.” But it is difficult to understand why, for example, one employee’s complaining about racial discrimination against another employee would involve a matter of public concern, whereas that same employee’s complaining about the racial discrimination that she herself had suffered would merely be of personal interest. Had Bessie Givhan been complaining about how she herself had been treated rather than how others had been treated, one infers that the Court might have classified her complaints as merely of private interest.

Rankin v. McPherson involved the firing of a clerical employee in the office of the Constable of Harris County, Texas, for her comments after hearing about an unsuccessful attempt to assassinate the President. Upon hearing of an attempt on President Reagan’s life, Ardith McPherson said, “[S]hoot, if they go for him again, I hope they get him.” Her comment was overheard by someone else in the office, who reported the comment to Constable Rankin. After confirming that McPherson had indeed made the remark, Rankin fired her.

The Court noted that McPherson’s comment “dealt with a matter of public concern … [and] was made in the course of a conversation addressing the policies of the President's administration.” Presumably, had she said that she was shocked and dismayed by the attempted assassination, she would not have been fired, and the Court noted that the

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107. Id. at 147.
108. See Avers, 555 F.2d at 1313 (“She ‘requested,’ among other things: (1) that black people be placed in the cafeteria to take up tickets, jobs Givhan considered ‘choice’; (2) that the administrative staff be better integrated; and (3) that black Neighborhood Youth Corps (‘NYC’) workers be assigned semi-clerical office tasks instead of only janitorial-type work.”).
110. See id. at 380.
111. See McPherson v. Rankin, 786 F.2d 1233, 1234 (5th Cir. 1986) (“On March 30, 1981, President Reagan was shot.”).
112. Rankin, 483 U.S. at 381.
113. Id.
114. See id. at 382.
115. Id. at 386.
“inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.” 116

Because McPherson’s comment involved a matter of public concern, the Court employed the Pickering analysis, seeking to determine whether her comments had interfered with workplace efficiency. Not only was there “no evidence that [her statement] interfered with the efficient functioning of the office,” 117 but Rankin had not even considered whether her comment would disrupt the workplace when he fired her. 118

The Rankin Court noted, “Where, as here, an employee serves no confidential, policymaking, or public contact role, the danger to the agency's successful functioning from that employee's private speech is minimal.” 119 Indeed, Justice Powell expressed surprise in his concurrence that the case had “assumed constitutional dimensions and reached the Supreme Court of the United States.” 120 McPherson had made the remark to another worker who was her boyfriend, 121 and there was no realistic chance that her “single, offhand comment directed to only one other worker … [would] lower morale, disrupt the work force, or otherwise undermine the mission of the office.” 122 But at least one issue implicitly raised involves the degree of disruption required before a firing would be upheld. Suppose, for example, that McPherson had occasionally dealt with the public. Would her firing have been justified in that event even if her comment had only been overheard by one other person working in the office?

Rankin is not problematic because of its holding, but merely because of how it might be used in future cases. Thus, because the remark was made in a private conversation and was only

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116 Id. at 387.
117 Id. at 389.
118 Id.
119 Id. at 390-91.
120 Id. at 392 (Powell, J., concurring).
121 Id. at 393 (Powell, J., concurring).
122 Id. (Powell, J., concurring).
overheard by one of the people working in the room,\textsuperscript{123} and because the claim that the remark would impair office efficiency “border[ed] on the fanciful,”\textsuperscript{124} McPherson’s firing could not be sustained. But with so many factors militating in favor of the fired employee, the Court provided no guidance with respect to what would have sufficed for the Court to have upheld the firing.

Consider Waters v. Churchill,\textsuperscript{125} which involved comments made by Cheryl Churchill to Melanie Perkins-Graham.\textsuperscript{126} Both were nurses working in the same hospital, and Perkins-Graham was considering transferring to the department in which Churchill worked.\textsuperscript{127} The conversation at issue took place during a dinner break,\textsuperscript{128} and there was some dispute about what was actually said.\textsuperscript{129} One nurse who overheard the conversation, Mary Lou Ballew, reported that Churchill was pretty negative about the department and that the conversation had convinced Perkins-Graham to lose her interest in transferring.\textsuperscript{130} However, Churchill reported that she had been expressing her concerns about “the hospital’s ‘cross-training’ policy,”\textsuperscript{131} which she believed “threatened patient care.”\textsuperscript{132} Churchill’s version of the conversation was corroborated by two other individuals who had overheard the conversation, nurse Jean Welty and Dr. Thomas Koch.\textsuperscript{133}

The question before the Court was whether the Connick test should be applied “to the speech as the government employer found it to be”\textsuperscript{134} or whether instead the jury should be asked “to

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\textsuperscript{123} See id. at 389.  
\textsuperscript{124} See id. at 393 (Powell, J., concurring)  
\textsuperscript{125} 511 U.S. 661 (1994).  
\textsuperscript{126} Id. at 664.  
\textsuperscript{127} Id.  
\textsuperscript{128} Id.  
\textsuperscript{129} Id. (“There is, however, a dispute about what Churchill actually said.”).  
\textsuperscript{130} Id. at 665.  
\textsuperscript{131} Id. at 666.  
\textsuperscript{132} Id.  
\textsuperscript{133} See id. at 666 (“Koch's and Welty's recollections of the conversation match Churchill's.”).  
\textsuperscript{134} Id. at 668.
determine the facts for itself"\textsuperscript{135} and then apply the \textit{Connick} test to those facts. The difference might well be important.

On one view of the facts, Churchill was venting because of her own frustrations working in the department.\textsuperscript{136} But if this were accurate, then Churchill would merely have been discussing matters of private interest and, under \textit{Connick}, her speech would not have triggered First Amendment protection. On a different view, however, Churchill was discussing matters of public concern (patient safety) and thus would have triggered First Amendment protections.

The Court seemed to strike a middle ground between choosing the speech actually articulated and the speech the government sincerely attributed to the employee. The plurality made clear that on some occasions the government will violate First Amendment guarantees even if it sincerely believes that it is punishing speech of merely private interest: “Government action based on protected speech may under some circumstances violate the First Amendment even if the government actor honestly believes the speech is unprotected.”\textsuperscript{137} However, the determination of whether the government’s sincere belief justifies a firing will not simply involve whether the jury finds that the government was mistaken. Rather, the question will be whether the government’s assessment that the speech was unprotected was reasonable.\textsuperscript{138}

The Court’s splitting the difference might make public employees’ First Amendment rights somewhat more precarious—that will depend upon what counts as a reasonable but mistaken view about what the employee said. For example, if the standard is merely that the government

\textsuperscript{135} \textit{Id.}
\textsuperscript{136} \textit{See id.} at 665 (“Ballew said that Churchill ‘was knocking the department’ and that ‘in general [Churchill] was saying what a bad place [obstetrics] is to work.’ Ballew said she heard Churchill say Waters ‘was trying to find reasons to fire her.’ Ballew also said Churchill described a patient complaint for which Waters had supposedly wrongly blamed Churchill.”).
\textsuperscript{137} \textit{Id.} at 669.
\textsuperscript{138} \textit{See id.} at 677 (“We think employer decisionmaking will not be unduly burdened by having courts look to the facts as the employer \textit{reasonably} found them to be.”) (emphasis in original).
cannot fire someone for her comments when it had “come to a conclusion based on no evidence at all”\textsuperscript{139} or “based on extremely weak evidence when strong evidence is clearly available,”\textsuperscript{140} then the Court will not have a sufficiently robust reasonableness test. Further, if the First Amendment is triggered only when “a reasonable supervisor would recognize that there is a substantial likelihood that what was actually said was protected,”\textsuperscript{141} then the protection may not be adequate. Perhaps the standard of “care that a reasonable manager would use before making an employment decision-discharge, suspension, reprimand, or whatever else-of the sort involved in the particular case”\textsuperscript{142} would suffice, although that would depend upon how that standard was actually being applied.

What is of at least as much concern in \textit{Waters}, however, is the Court-endorsed standard to be employed when employees are addressing matters of public concern. The \textit{Waters} plurality followed the example provided in \textit{Pickering} by looking to the defamation cases, but offered a much different perspective: “the possibility that defamation liability would chill even true speech has not led us to require an actual malice standard in all libel cases.”\textsuperscript{143} Rather than emphasize the importance of not chilling public debate, the \textit{Waters} plurality noted instead, “We have never, for instance, required proof beyond a reasonable doubt in civil cases where First Amendment interests are at stake, though such a requirement would protect speech more than the alternative standards would.”\textsuperscript{144} \textit{Pickering} suggested that accurate but critical comments about matters of public concern could not be the basis of adverse employment action, whereas the \textit{Waters} plurality suggests that even accurate criticism can be the basis for a demotion or firing.

\textsuperscript{139} Id.
\textsuperscript{140} Id.
\textsuperscript{141} Id.
\textsuperscript{142} Id. at 678.
\textsuperscript{143} Id. at 670 (citing Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 761 (1985)).
\textsuperscript{144} Id.
Pickering is a helpful contrast to Waters in another respect. In Pickering, the Court closely examined the claim that Pickering’s letter to the editor would impair workplace efficiency, concluding that it would not, protestations by the school board to the contrary. In contrast, the Waters plurality noted that the Court had “given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern,” thereby setting a much different tone with respect to the deference to be given to government claims of disruption. For example, the Waters plurality suggested that “[e]ven if Churchill's criticism of cross-training reported by Perkins-Graham and Ballew was speech on a matter of public concern—something we need not decide—the potential disruptiveness of the speech as reported was enough to outweigh whatever First Amendment value it might have had.” Thus, because Perkins-Graham may have decided in light of the comments that she no longer was interested in transferring to the obstetrics department, Churchill’s comments provided a permissible basis for her being fired, even if those comments were accurate and on a matter of public interest. But this is exactly the kind of result that is not consistent with Pickering, where the Court expressly distinguished between those comments on matters of public concern that were accurate and those that were not.

D. Additional Undermining of First Amendment Rights by the Court

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145 Id. at 673.
146 Id. at 680.
147 Id. (‘Discouraging people from coming to work for a department certainly qualifies as disruption.’).
148 Id. at 681 (“As a matter of law, this potential disruptiveness was enough to outweigh whatever First Amendment value the speech might have had.”).
149 See supra notes 13-28 and accompanying text.
Waters provides a stark contrast to Pickering with respect to the kind of protection that the Constitution offers to public employees when discussing matters of public concern. But the Court went even farther in Garcetti v. Ceballos.\footnote{547 U.S. 410 (2006)}

At issue in Garcetti were the comments of Richard Ceballos, who was “a deputy district attorney for the Los Angeles County District Attorney’s Office.”\footnote{Id. at 413.} A defense attorney had asked Ceballos to review a case, a not uncommon practice.\footnote{Id. at 414 (“According to Ceballos, it was not unusual for defense attorneys to ask calendar deputies to investigate aspects of pending cases.”).} After looking over the affidavit and doing some on-site investigation,\footnote{See id.} Ceballos concluded that “the affidavit contained serious misrepresentations.”\footnote{Id.} Ceballos recommended to his supervisors, Carol Najera and Frank Sunstedt, that the case be dismissed.\footnote{Id.}

Ceballos, Najera and Sunstedt all attended a meeting with some members of the Sheriff’s department to discuss the affidavit.\footnote{Id.} After a heated meeting,\footnote{See id.} Sunstedt decided to proceed with the prosecution. Ceballos testified for the defense at the hearing challenging the warrant,\footnote{See id. at 415.} but the trial court found for the prosecution.\footnote{See id. at 415.}

Ceballos claimed that he was then subjected to retaliatory treatment including “reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion,”\footnote{Id.} although the allegation of retaliatory treatment was denied.\footnote{Id. (“Petitioners responded that no retaliatory actions were taken against Ceballos and that all the actions of which he complained were explained by legitimate reasons such as staffing needs.”).} The merits of the retaliatory treatment allegation were not addressed, however, because the Court
held that Ceballos’s speech was not entitled to First Amendment protection: “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.” For example, the Court noted, “If Ceballos' superiors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action.” Of course, the Court’s holding was not limited to employee speech that involved poor judgment about word choice—it was much broader than that. Basically, the Court’s holding disincentivizes whistle-blowing, because individuals tempted to reveal wrongdoing as part of their jobs would know that their paychecks might hang in the balance.

Justice Souter discussed in his dissent the “private and public interests in addressing official wrongdoing and threats to health and safety,” arguing that “public employees who speak on these matters in the course of their duties should be eligible to claim First Amendment protection.” For example, Justice Souter suggested that Ceballos could claim the First Amendment protection due any citizen when “speaking out against a rogue law enforcement officer, … [even when] his job requires him to express a judgment about the officer's performance.” However, according to the majority view “the First Amendment gives Ceballos no protection, even if his judgment in this case was sound and appropriately expressed.”

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162 Id. at 421.
163 Id. at 423.
164 But see id. at 446 (Breyer, J., dissenting) (“[T]he speech at issue is professional speech—the speech of a lawyer. Such speech is subject to independent regulation by canons of the profession. Those canons provide an obligation to speak in certain instances. And where that is so, the government's own interest in forbidding that speech is diminished.”) (citing Legal Services Corporation v. Velazquez, 531 U.S. 533, 544 (2001)).
165 See id. (Stevens, J., dissenting) (“Of course a supervisor may take corrective action when such speech is ‘inflammatory or misguided.’ But what if it is just unwelcome speech because it reveals facts that the supervisor would rather not have anyone else discover?”).
166 Id. at 428 (Souter, J., dissenting).
167 Id. (Souter, J., dissenting).
168 Id. at 432 (Souter, J., dissenting).
169 Id. (Souter, J., dissenting).
The Garcetti Court read Pickering to require, first, that “the employee spoke as a citizen on a matter of public concern.”\textsuperscript{170} The Court continued its analysis by stating that if the employee is not speaking as a private citizen, then “the employee has no First Amendment cause of action based on his or her employer's reaction to the speech.”\textsuperscript{171}

Suppose that the individual is speaking as a private citizen. In that event, a “government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.”\textsuperscript{172}

Garcetti has important implications for state employee speech. First, by suggesting that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes,” the Court exempts a great deal of speech from First Amendment protection. Indeed, if the individual is a member of a profession and if that profession imposes duties upon her, then she may well not be viewed as speaking as a private citizen when fulfilling her professional duty. Further, even were the Court’s discussion of “official duties” to be referring only to those imposed by the employer, many employers might implicitly or explicitly require any employed professionals to live up to their professional obligations.\textsuperscript{173} But in that case, whistleblowing might be considered part of one’s official duty.

While recognizing that “[e]xposing governmental inefficiency and misconduct is a matter of considerable significance,”\textsuperscript{174} the Court made it less likely that such expositions will be made.

\textsuperscript{170}Id. at 418.
\textsuperscript{171}Id.
\textsuperscript{172}Id.
\textsuperscript{173}Cf. id. at 421-22 (“Restricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen.”). See also id. at 426 (“We reject, however, the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties.”).
\textsuperscript{174}Id. at 425.
Individuals who have a professional obligation to expose government wrongdoing have great incentive to turn a blind eye to objectionable practices, because the First Amendment will provide them no protection. Even those who comment as private citizens may be fired if their comments have the potential to disrupt the workplace. But it is of course true that the exposure of governmental wrongdoing can be very disruptive, and thus individuals who might be tempted as private citizens to expose governmental wrongdoing have great incentive to refrain from doing so.

E. Garcetti in the Circuits

Regrettably, the lessons of Garcetti have been learned quite well. Numerous individuals have suffered adverse employment actions when seeking to expose the kinds of practices that whistleblower protections are designed to bring to light. Such reports have allegedly been subjected to a variety of retaliatory responses, and various circuits have held that the First Amendment affords these individuals no protection.

Consider Callahan v. Fermon, in which Michale Callahan, a police lieutenant, alleged that he had been transferred because of various statements that he had made about the possible misconduct of superior officers. A jury awarded him damages, and that decision was appealed. The 7th Circuit held that because these comments were made pursuant to his official duties, the award could not be sustained. When explaining that the applicable “rules of conduct require … officers to report misconduct of fellow employees” and that the

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175 526 F.3d 1040 (7th Cir. 2008)
176 Id. at 1043.
177 Id. (“At trial, a jury found in favor of Mr. Callahan as to his claims against Cdr. Carper and Cpt. Fermon and awarded him $210,000 in compensatory damages. The jury additionally awarded him $276,700 in punitive damages against Cpt. Fermon and $195,600 in punitive damages against Cdr. Carper.”)
178 See id. at 1045.
179 Id.
“requirement was part of his official responsibility as a police lieutenant,” the Callahan court specifically cited to Garcetti. Callahan’s fulfilling his professional obligation to report suspected wrongdoing earned him an undesired transfer.

Consider as well Boyce v. Andrew, which involved complaints by Clarinda Boyce and Katina Robinson that they had suffered retaliation for exercising their First Amendment rights. They had expressed concerns that child safety was being sacrificed because of the high caseloads at the DeKalb Department of Family and Child Services. The district court had found that the issues raised by Boyce and Robinson were matters of public concern, and that they had indeed been the victims of retaliation for expressing those concerns. However, because “Boyce and Robinson were complaining to their superiors as employees about their workloads,” the 11th Circuit applied Garcetti and found that First Amendment protections were not triggered and that there was no need to apply the Pickering test.

At issue in Haynes v. City of Circleville was a claim by David Haynes, a former police officer, that he had suffered retaliation for the exercise of his First Amendment rights. Haynes had worked with the canine unit. He had objected to a cost-containment measure instituted by the Chief of Police that reduced the amount of training time for handlers and their dogs.

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180 Id.
181 See id. (citing Garcetti, 547 U.S. at 424).
182 See also Casey v. West Las Vegas Independent School District, 473 F.3d 1323 (10th Cir. 2007) (school superintendent who reported district’s failure to follow federal guidelines had an obligation to do so and thus was not speaking as a private citizen).
183 510 F.3d 1333 (11th Cir. 2007).
184 Id. at 1340.
185 Id.
186 Id.
187 Id. at 1340-41.
188 Id. at 1346.
189 See id. at 1346-47.
190 474 F.3d 357 (6th Cir. 2007).
191 Id. at 359.
192 See id. at 359-60.
Haynes had sent an email suggesting that reducing the amount of training time might have negative effects. However, following Garcetti, the 6th Circuit suggested that his comments about the potential deleterious effects of changing the training schedule were made pursuant to his job rather than as a private citizen and hence did not trigger First Amendment protection.193

At issue in McGee v. Public Water Supply194 was a claim that a District Manager’s employment had been terminated because of his exercise of his First Amendment rights.195 Mark McGee claimed that he had suffered adverse employment action because he had “asserted that raw sewage was continuing to contaminate [an] area because the tank was not properly repaired.”196 On a different project, McGee had complained about what he perceived to be inadequate water testing.197 Because these comments were made pursuant to his job responsibilities,198 the 8th Circuit citing Garcetti held that his statements were not protected by the First Amendment.199

Perhaps McGee’s employment was terminated for reasons having nothing to do with his worries about public safety.200 The difficulty pointed to here is that McGee suggests that an individual who speaks out to protect the public from environmental contamination may lose her job as a price of protecting the public.

193 See id. at 364 (“In lodging his protests to Chief Gray against the training cutbacks, Haynes was acting as a public employee carrying out his professional responsibilities.”) (citing Garcetti, 547 U.S. at 422).
194 471 F.3d 918 (8th Cir. 2006).
195 Id. at 919 (“McGee argues on appeal that the First Amendment protected his statements to Board members regarding controversies over the manner in which to complete two District projects.”).
196 Id.
197 See id. at 920.
198 See id. at 921 (“the projects clearly fell within both McGee's overall supervisory duties as District Manager and his admitted duty to advise the Board regarding regulatory and legal requirements”).
199 See id. (“A public employee's speech is not protected by the First Amendment if it “owes its existence” to his professional responsibilities.”) (citing Garcetti, 547 U.S. at 421).
200 See id. at 919 (discussing McGee’s difficulties in getting along with other employees).
Consider one more case. At issue in Foley v. Town of Randolph\(^{201}\) were the comments of the town fire chief at the scene of a fire where two children had been trapped on a second floor and died.\(^{202}\) Chief Foley noted that the department had lost positions for each of the past several years, and that the Department’s response times were not as good as they had been.\(^{203}\) While Foley did not say that the children’s lives would have been saved had the funding not been cut, he did suggest that “the operation would have gone more professionally and more according to standard if the Department had more manpower.”\(^{204}\) Foley claimed that he was suspended for 15 days for having made these comments.\(^{205}\)

The First Circuit noted that nothing “specifically authorized or required Foley to make public statements on matters affecting the Fire Department as part of his official duties as Chief,”\(^{206}\) although it was also true that “nothing in the contract or the statute prohibited Foley from doing so.”\(^{207}\) Foley was addressing a matter of public concern,\(^{208}\) and his “opinion on the effect of diminished resources on the Department’s ability to fight fires is an example of the ‘well-informed views’ which the public has an interest in receiving.”\(^{209}\) However, because “he would naturally be regarded as the public face of the Department when speaking about matters involving the Department”\(^{210}\) and because he “addressed the media in his official capacity, as

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\(^{201}\) 598 F.3d 1 (1st Cir. 2010).

\(^{202}\) See id. at 2.

\(^{203}\) Id. at 3.

\(^{204}\) Id.

\(^{205}\) Id. at 2.

\(^{206}\) Id. at 4.

\(^{207}\) Id.

\(^{208}\) See id. at 5.

\(^{209}\) Id. at 5-6.

\(^{210}\) Id. at 7.
Chief of the Fire Department, at a forum to which he had access because of his position,” 211
Garcetti controlled. 212

Foley had made his remarks to the public at large and was not merely making comments to
others with whom he worked. However, “the fact that Foley expressed his views to the public
rather than within the workplace is not dispositive.” 213 Had Foley articulated his views at a
different time in a different forum, say, a letter to the editor, the result might have been
different. 214 However, in this case, his comments were not afforded First Amendment
protection. 215

The lessons provided by these cases are clear. Individuals who believe that they have
uncovered corruption or threats to public health or safety should think twice before revealing
what they know. If these revelations would be made pursuant to their professional obligations
then they would not be protected by the First Amendment. Individuals who could plausibly deny
having uncovered wrongdoing might be well-advised to do so. Even individuals acting as private
citizens might risk demotion or job termination if their revelations caused disruption. From a
First Amendment perspective, individuals might be well-advised to let others report
governmental wrongdoing.

III. Conclusion

In Pickering, the Court afforded robust protection to state employee speech on matters of
public concern. While recognizing that the state has special interests implicated when it is the

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211 Id.
212 See id. (”there is no relevant analogue to speech by citizens.”) (citing Garcetti, 547 U.S. at 424).
213 Id. at 8.
214 See id. at 9.
215 See id. at 9-10 (“We hold that when the circumstances surrounding a government employee's speech indicate that
the employee is speaking in his official capacity, Garcetti dictates that we strike the balance in favor of the
government employer.”).
employer, the Court nonetheless recognized that the Constitution affords First Amendment protection to accurate speech on matters of public concern. It was only disruptive, inaccurate speech that could be the basis for adverse employment action, and a showing might be required that the inaccurate reporting was not due to mere negligence on the part of the employee.

Yet, starting with Doyle, the Court has been interpreting the Constitution to afford less and less First Amendment protection to public employee speech, culminating in Garcetti in which the Court suggested that public employees speaking in their job capacities are not protected by the First Amendment and that public employees speaking as citizens can nonetheless suffer adverse employment action if their comments are potentially disruptive.

The circuit courts have understood Garcetti’s message. State employees who express concerns about public health or safety or, perhaps, wish to expose official corruption are afforded no First amendment protection if those messages are communicated as part of an individual’s job.

Some of the lessons to be learned from recent revelations of massive wrongdoing are that government oversight is essential and that whistleblowers have an essential role to play in informing the public about governmental wrongdoing. Regrettably, the constitutional commitment to protecting whistleblowers has decreased over the past several decades, which may mean that individuals will have great incentive to turn a blind eye to the kinds of abuses about which the public needs to know. The commitment to having an informed public monitor and debate government practices has been transformed into a commitment to non-disrupted governmental services, even if public health and safety have to be sacrificed in the interests of efficiency. Such an approach is difficult to justify either as a matter of constitutional law or as a matter of good public policy.