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LAW REVIEW

"LAND OF THE [SOMEWHAT] FREE: A LOOK AT THE 'EMPLOYEES' DUTIES' EXCEPTION UNDER THE FIRST AMENDMENT"

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Francis Scott Key described America as the "land of the free" when he crafted the Star-Spangled Banner: a patriotic jingle turned national anthem.[2] However, are Americans free when it comes to speech? For public employees, the answer is *it depends.* The First Amendment of the United States Constitution provides, "Congress shall make no law . . . abridging the freedom of speech . . ."[3] Yet, federal judiciaries have created exceptions to this freedom that narrowly defines what speech is actually protected. One example of a limitation on free speech protection is the employee duties exception. Under this exception, speech

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[2] History.com Editors, *The Star-Spangled Banner*, THE HISTORY CHANNEL (Aug. 21, 2018), https://www.history.com/topics/19th-century/the-star-spangled-banner.

[3] U.S. Const. amend. I.

that arises within the scope of an employee's duties is unprotected.. This article explores how the employee duties exception detrimentally limits the freedom of speech. More specifically, this exception often leaves public employees without critical whistleblower protections.

I. FREE SPEECH PROTECTIONS ONLY EXIST FOR PUBLIC EMPLOYEES.

It is important to note that free speech protections only exist for public employees who work for any federal, state, or local government entity. The United States Supreme Court has interpreted the Bill of Rights, including the First Amendment, to apply only to government action, not private conduct.[4] This narrow application of the First Amendment means that private employers are not typically required to guarantee free speech protections for their employees. In some situations, a private employer must guarantee free speech protections if the entity performs a task that has been traditionally and exclusively a government function.[5] In other situations, private employers must guarantee free speech protections if the government authorized the private entity to act unconstitutionally.[6] Application of these private employer exceptions are few and far between. This indicates that First Amendment speech protections are usually reserved for public employees.

II. GENERALLY, MATTERS OF PUBLIC CONCERN ARE PROTECTED SPEECH.[7]

Speech is a matter of public concern when it relates to any matter of political, social, or other concern to the community.[8] A court will look to the content, form, and context of that speech, in addition to applying a two-prong balancing test.[9] This balancing test looks to whether speech is a matter of public concern and is often referred to as the *Pickering* balancing test.[10] The two interests that are balanced under the *Pickering* test include, a public employee's interest to comment on matters of public concerns in his or her role as a citizen and the government's interest in promoting the efficiency of public services as its role as an employer.[11] Interests of the government can be measured by factors including,

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[4] United States v. Stanley, 109 U.S. 3 (1883).
[5] Terry v. Adams, 345 U.S. 461, 467 (1953) (the Constitution applied to a private political party that discriminated on the basis of race in a state where proof of party registration was required to vote); Marsh v. Alabama, 326 U.S. 501, 504 (1946) (a private company was liable for constitutional violations when the company owned the town it existed in).
[6] Shelley v. Kraemer, 334 U.S. 1, 9 (1948) (held that judicial action furthering a violation of the Constitution held a private entity liable); Norwood v. Harrison, 413 U.S. 455, 468 (1973) (held that a government subsidy, even if it was in-kind, can hold a private entity liable for a Constitutional violation).
[7] Snyder v. Phelps, 562 U.S. 443, 451 (2011).
[8] *Id.* at 453.
[9] *Id.*
[10] Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968).
[11] *Id.*

but not limited to: (1) a need for harmony in the workplace; (2) the time, place, and manner of the speech; and (3) whether the speech interfered with the employee's ability to perform work duties.[12]

Not only does the content of the speech determine whether an employee is protected but also the type of job that employee holds. A matter of public concern can become unprotected when the employee holds a public safety job. Public safety workplaces are more restricted with stronger weight given to the government's interest in promoting efficient operation.[13] For example, police officers and firefighters face stricter scrutiny for their protected speech because they are charged with safeguarding the public's opinion of them.[14] The nature of the work environment that a public employee belongs to can determine whether a matter of public concern is still protected speech.

It is important to keep in mind that there is a major distinction between public *interest* and public *concern* matters. Matters of public interest are not protected under the First Amendment. Matters of public interest may touch on topics of general importance, but they do not rise to the level of public concern within the community.[15] An example of public interest includes a general contractor complaining about the compensation rate specific to a highway project; while underpaying contractors working on a major transportation project seemed important to the public, it did not rise to a true matter of public concern.[16] Conversely, matters of public concern will take a stronger precedent in the minds of community members. Examples of public concern include a teacher criticizing the Board of Trustees for improper handling of district funds or a police officer addressing local elected officials on the failure to enforce DUI laws.[17]

Speech that primarily affect private interests are not matters of public concern. While a concern may seem public when shared among coworkers, it is only a personal grievance when the public at large is unconcerned. The private interest distinction took form in *Connick v. Meyers*, a case where a district attorney was terminated after circulating a disruptive questionnaire relating to poor workplace conditions.[18] The Supreme Court held in *Connick* that a matter of public concern must affect the community at large rather than the mere personal concerns

[12] Gordon v. City of Kan. City, Mo., 241 F.3d 997, 1002 (8th Cir. 2001).
[13] Garsparinetti v. Kerr, 568 F.2d 311, 315-16 (3d Cir. 1977) (holding that fire departments and police departments have a more significant interest in efficient operations than a typical government employer).
[14] Locurto v. Giuliani, 447 F.3d 159, 178-79 (2d Cir. 2006); Papas v. Giuliani, 290 F.3d 143, 147 (2d Cir. 2002).
[15] Fahs Const. Group, Inc. v. Gray, 725 F.3d 289, 291 (2d Cir. 2013).
[16] *Id.*
[17] Pickering v. Bd. Of Educ., 391 U.S. 563, 568 (1968); Willoby v. Mason City, IL, 449 F. Supp. 3d 806, 817 (C.D. Ill. 2020).
[18] Connick v. Meyers, 461 U.S. 138, 140-141 (1983).

of an employee.[19] Thus, the questionnaire specific to the district attorney's workplace conditions was unprotected and constituted no more than a personal grievance.

Furthermore, an employee must express the matter of public concern in the appropriate location. The government may not restrict an employee's speech in a public forum—such as sidewalks, public meetings, or parks—so long as the employee was speaking as a citizen.[20] When an employee's speech in a public forum takes the character of official communication from an employer, the speech is no longer protected.[21] However, the government can restrict speech in non-public forums where the nature of the property is inconsistent with public activity.[22] The public versus non-public distinction has been a source of contention, given that most public employees work on public property" owned by the government. Nevertheless, public employees who speak in their workplace are considered to be speaking in a non-public forum.[23]

III. IF A MATTER OF PUBLIC CONCERN IS SHARED WITHIN THE SCOPE OF THE EMPLOYEES' DUTIES, IT IS NO LONGER PROTECTED.[24]

The employees' duties exception arises under the concept that public employees must be speaking as a citizen.[25] As a citizen, public employees can express their individual views through the lens of a well-informed government employee.[26] Regardless of the desire to create civic discussion, the federal judiciary created the employees' duties limitation to "respect the needs of government employers" when performing crucial public functions.[27]

Courts have taken a practical approach in determining the scope of an employee's duties. A formal job description does not define the entirety of an employee's duties. Instead, a court will examine an employee's duties in operation.[28] That is, a day-to-day analysis of an employee's functional duties regardless of whether that employee was hired to engage in that responsibility. The ultimate consideration is whether the speech owes its existence to an employee's functional duties.

Merely speaking about information acquired by virtue of public employment does not indicate that the speech is within the scope of an employee's

[19] *Id.* at 159-65.
[20] William J. Scheiderich, *Municipal Law Deskbook*, 41 (1st ed. 2015).
[21] *Id.*
[22] Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 803 (1985).
[23] *Id.* at 804.
[24] Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).
[25] *Id.* at 417.
[26] *Id.* at 419.
[27] *Id.* at 420.
[28] Lane v. Franks, 134 S. Ct. 2369, 2379 (2014).

duties.[29] In *Matthews v. City of New York*, a police officer reported a discriminatory arrest quota policy to his captains. The officer's functional duties did not include providing opinions on department policies.[30] The police department attempted to argue that arrest quotas were directly related to an officer's duties.[31] However, the Second Circuit held that the officer's actual duties did not include policy review regardless of the fact that arrest quotas are intertwined with an officer's employment.[32]

IV. ALL SPEECH SHARED PURSUANT TO AN EMPLOYEE'S RESPONSIBILITIES IS NOT PROTECTED—NO MATTER HOW IMPORTANT THE PUBLIC CONCERN MIGHT BE.[33]

Speech that owes its existence to a public employee's duties indicates that a public employee is not speaking as a citizen.[34] Instead, speech pursuant to an employee's duties takes the form of an official communication on behalf of a government employer.[35] The Supreme Court strictly interprets the duties exception to ensure that a public employee's speech is not confused with the government's speech.[36] Consequently, the employees' duties exception discourages employees from sharing grave concerns with the public.

The Supreme Court in *Garcetti* established the dangerous precedent that prevents the expression of critical matters of public concern. In *Garcetti*, a district attorney was terminated after he discovered that local police were securing fraudulent search warrants, constituting serious department-wide misconduct.[37] When prosecution commenced despite concerns, the district attorney submitted a memorandum on behalf of the defense that challenged the warrant.[38] Because the memorandum was legal in nature, the memorandum itself owed its existence to the district attorney's duties.[39] The Supreme Court held that, although this police misconduct was serious and warranted exposure, the situational technicalities deemed this memorandum unprotected. In displeasing harmony, the majority opinion stated that these public concerns simply reflected matters that the employer had discretion to manage.[40]

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[29] *Id.*
[30] Matthews v. City of New York, 779 F.3d 167, 169 (2d Cir. 2015).
[31] *Id.* at 171.
[32] *Id.* at 174.
[33] Garcetti v. Ceballos, 547 U.S. 410, 423 (2006).
[34] *Id.* at 421.
[35] *Id.*
[36] *Id.*
[37] *Id.* at 414.
[38] *Id.* at 415.
[39] *Id.* at 420.
[40] *Id.* at 422.

In *Garcetti*'s scathing dissent, Justice Souter attacks the legal precedent supporting the concept that public employees never speak as citizens when the speech falls within their broad scope of duties.[41] Instead, Justice Souter argues that courts should utilize the *Pickering* balancing test and determine whether the public holds a stronger interest in the concern than the government's stake in efficiency of services.[42] The argument for utilizing the *Pickering* test is that speech from employees—like the district attorney's—should be protected so long as the speech concerns a significant public issue that the community would benefit from, regardless of the employee's duties. However, as the majority established, "any speech uttered 'pursuant to . . . official duties'" is not protected.[43]

Countless examples demonstrate concerned employees who were unprotected because their speech fell within the scope of their duties. In *Coomes v. Edmonds School District No. 15*, a special education teacher reported concerns to district administration, alleging that special education students were purposefully placed outside of the general classroom environment.[44] The Ninth Circuit recognized that this was a public concern pertinent to special education parents across the district, yet the teacher was unprotected because the reported concern fell within the teacher's duties.[45] The district argued that while reporting concerns within the chain of demand was not within a special education teacher's functional duty, it was within every teacher's duty to report concerns.[46]

Matters of public concern can affect the entire community at large but, if presented within the scope of an employee's duties, the speech is unprotected. In *Foley v. Town of Randolph*, a fire chief's assertion that the department was underfunded and understaffed—putting the entire town at risk—was unprotected speech.[47] The fire chief made the contested comments at a press conference following a grisly fire where two children arguably died as a result of absent manpower.[48] While the fire chief argued that this was protected speech because his functional duties did not require speaking to the media, the court determined that any activities undertaken in the course of performing other job duties still fall within the scope of this exception.[49] The First Circuit disregarded the argument that a significant matter of public concern surpasses the stringent employees' duties exception.[50]

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[41] *Id.* at 427.
[42] *Id.* at 429.
[43] *Id.* at 430.
[44] Coomes v. Edmonds Sch. Dist. No. 15, 816 F.3d 1255 (9th Cir. 2016).
[45] *Id.* at 1262.
[46] *Id.* at 1264.
[47] Foley v. Town of Randolph, 598 F.3d 1, 2 (1st Cir. 2010).
[48] *Id.* at 3.
[49] *Id.* at 7.
[50] *Id.* at 5.

V. THERE ARE ADDITIONAL, BUT NARROW, PROTECTIONS FOR EMPLOYEES SPEAKING WITHIN THE SCOPE OF THEIR DUTIES.

First Amendment anti-retaliation protection—prohibiting employers from taking adverse employment action against an employee exercising their freedom of speech—is only available for protected speech. When public employees engage in speech within the scope of their duties, the speech is unprotected, leaving the employee at risk of suit. However, a public employee may find protection under a federal or state whistleblower statute. These protections are scarce and tend to be strict in application.

Federal public employees may be protected under the Whistleblower Protection Act, a statutory protection for whistleblowers who report a violation of law, abuse of authority, or substantial and specific danger to public health and safety.[51] However, it is important to note that not every report of information is protected under the Act.[52] Rather, almost all whistleblower claims brought before the Merit Systems Protection Board in the past thirty years have been unsuccessful.[53] The most recent, notable whistleblower success occurred in *Department of Homeland Security v. MacLean* when the Supreme Court granted protection to a TSA employee who reported major funding cuts for the Air Marshal program.[54] The *MacLean* success is one of few; an estimated ninety-seven percent of appeals are denied.[55] The Act's protections have been described as illusory or—as Justice Souter described in *Garcetti*—"a legal patchwork" of protection.[56] Employees not protected under the federal act are limited to unpredictable state protections.

State and local public employees can seek protection under state whistleblower acts. Unfortunately, levels of protection vary widely among the states. In *Garcetti*, Justice Kennedy described state whistleblower statutes as a powerful network of protection—a stark contrast to Justice Souter's legal patchwork analysis.[57] Some states only provide whistleblower protections to public employees working for that state, eliminating protection for all county and municipal employees.[58] While other states only provide topic-specific protection, which limits protection to employees in certain government industries.[59] The remainder of states limit the forum of disclosure (e.g. written or oral) and the person

[51] 5 U.S.C.A. § 2302 (b)(8) (West 2021).
[52] *Francisco v. Office of Pers. Mgmt*., 295 F.3d 1310 (Fed. Cir. 2002).
[53] Peter Eisler, *Whistleblowers' Rights Get Second Look*, USA TODAY (Mar. 14, 2010), https://usatoday30.usatoday.com/news/washington/2010-03-14-whistleblowers_N.htm.
[54] Dep't of Homeland Sec. v. MacLean, 574 U.S. 383 (2015).
[55] Robert J. McCarthy, *Blowing in the Wind: Answers for Federal Whistleblowers*, 3 William & Mary Policy Review 184 (2012).
[56] Garcetti v. Ceballos, 547 U.S. at 410, 440 (2006).
[57] *Id.* at 425.
[58] COLO. REV. STAT. § 24-50.5-101; 24-50.5-103 (West 2016).
[59] LA. STAT. ANN. § 30:2027 (B)(2)(a) (West 2016).

who can receive the disclosure.[60] State whistleblower protections may fill some gaps left by the federal protections, but this is not guaranteed.

Based on current whistleblower protections, a public employee who does not qualify for First Amendment protections may or may not have an avenue of protection. Federal whistleblower protections such as the Whistleblower Protection Act is applied so strictly that employees rarely succeed in their claims. State whistleblower protections differ greatly among the states, leaving employees with no guaranteed alternative protection outside of the First Amendment. Overall, there are limited protections for public employees who speak on matters of public concern so long as it falls within the scope of their duties.

VI. THE SUPREME COURT SHOULD RECONSIDER THE STRICT APPLICATION OF THE EMPLOYEES' DUTIES EXCEPTION TO FIRST AMENDMENT PROTECTED SPEECH.

Under *Garcetti*'s stiff holding, America is the land of the almost-free and the home of twenty million brave public employees. First Amendment protections often only exist for public employees. Protected speech includes matters of public concern, not to be confused with matters of public interest or personal grievances. However, public employees sharing matters of public concern within the scope of their job duties are unprotected—regardless of how significant the concern may be to the community. The Supreme Court has posed that whistleblower protections provide an actionable alternative for unprotected employees, but this is a far cry from the truth. Public employees carry the risk of reporting a violation without any assurance that a federal or state whistleblower statute will protect them. While there is opportunity to create stronger federal and state whistleblower statutes, the current legal patchwork of protections will require lengthy and systemic correction. Accordingly, the Supreme Court should reconsider the First Amendment protection avenue for public employees speaking within their duties, especially if the concern is significant to the community. Until then, no good deed goes unpunished.

[60] LA. STAT. ANN. § 30:2027; CONN. GEN. STAT. § 4-61dd (West 2019).