

## DAHLIA V. RODRIGUEZ: A CHANCE TO OVERTURN A DANGEROUS PRECEDENT

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In December 2007, Angelo Dahlia, a detective for the City of Burbank, California, allegedly witnessed his fellow police officers using unlawful interrogation tactics. According to Dahlia, these officers beat multiple suspects, squeezed the throat of one suspect, and placed a gun directly under that suspect's eye. The Burbank Chief of Police seemed to encourage this behavior: after learning that certain suspects were not yet under arrest, he allegedly urged his employees to "beat another [suspect] until they are all in custody."<sup>1</sup>

After some delay, Dahlia reported his colleagues' conduct to the Los Angeles Sheriff's Department. Four days later, Burbank's Chief of Police placed Dahlia on administrative leave. Dahlia subsequently filed a 42 U.S.C. § 1983 action against the Chief and other members of the Burbank Police Department, alleging that his placement on administrative leave was unconstitutional retaliation for the exercise of his First Amendment rights.

The district court rejected Dahlia's claim, holding that his First Amendment rights had not been violated because police officers' reports of other officers' misconduct are, as a matter of California law, part of their official duties. Consequently, officers like Dahlia cannot obtain relief from retaliatory actions taken against them for making such reports. A three-judge panel of the Ninth Circuit affirmed because precedent required it to do so.<sup>2</sup> The panel took care to note, though, that it believed the relevant precedent—

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1. Dahlia v. Rodriguez, 689 F.3d 1094, 1097-99 (9th Cir. 2012) (quoting Dahlia v. City of Burbank, No. CV 09-08453 MMM (JEMx), slip op. at 4 (C.D. Cal. June 18, 2010)).

2. See *id.* at 1104. Three-judge panels of the Ninth Circuit cannot overturn previous decisions of Ninth Circuit panels; those decisions can only be overruled by the court sitting en banc or by the Supreme Court. See, e.g., Hart v. Massanari, 266 F.3d 1155, 1171-72 (9th Cir. 2001). However, because Ninth Circuit is considering a question of California law, a binding decision by a California court could also undermine a Ninth Circuit decision predicated on state-law grounds. See Kokins v. Teleflex, Inc., 621 F.3d 1290, 1295 (10th Cir. 2010).

*Huppert v. City of Pittsburg*—was “wrongly decided and unsupported by the sole authority it relies upon.”<sup>3</sup>

*Huppert* is a dangerous precedent that the Ninth Circuit should overturn by rehearing *Dahlia* en banc.<sup>4</sup> Certain forms of government employees’ speech should not be categorically unprotected; rather, whenever there is a legitimate question regarding the scope of an employee’s duties, that question should be one of fact rather than one of law. This Note explains why, and suggests alternative approaches to analyzing the First Amendment rights of employees who speak pursuant to their official duties.

#### LIMITED PROTECTIONS FOR PUBLIC EMPLOYEES’ FIRST AMENDMENT RIGHTS

The Supreme Court has held—most recently in *Garcetti v. Ceballos*—that when public employees speak pursuant to their official duties, they are not constitutionally protected from employer discipline. In *Garcetti*, a deputy district attorney for the Los Angeles County District Office, Richard Ceballos, determined that an affidavit used to obtain a critical search warrant contained significant inaccuracies. He conveyed his findings to his supervisors and recommended dismissing the case. Shortly thereafter, Ceballos was subjected to a variety of retaliatory measures: he was reassigned, transferred to another courthouse, and denied a promotion. He then filed a petition under § 1983, alleging violations of his First and Fourteenth Amendment rights.

The Court deemed Ceballos’s speech unprotected by the First Amendment. Although the First Amendment does “protect[] a public employee’s right, in certain circumstances, to speak as a citizen addressing matters of public concern,” it does not offer them this protection when they “make statements pursuant to their official duties.”<sup>5</sup> By contrast, employees who make public statements outside the course of their official duties—for example, schoolteachers who write letters to a newspaper<sup>6</sup>—remain protected.

The Court’s holding reflects an effort to resolve the tension between, on the one hand, an individual employee’s and the public’s interest in that employee’s speech and, on the other hand, the government’s interest in efficient operations. Although the Court had previously espoused a balancing test to determine which interest prevails,<sup>7</sup> here it sought to announce a straightforward rule—something that judges could more easily apply and that employees could more easily plan around.

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3. *Dahlia*, 689 F.3d at 1104 (discussing *Huppert*, 574 F.3d 696, 707 (9th Cir. 2009)).

<sup>4</sup> A petition for rehearing en banc was filed on August 17, 2012. Petition for Rehearing En Banc, *Dahlia*, 689 F.3d 1094 (No. 10-55978).

5. *Garcetti v. Ceballos*, 547 U.S. 410, 417, 421 (2006).

6. See *Pickering v. Bd. of Educ.*, 391 U.S. 563, 564, 574 (1968).

7. See, e.g., *id.*

While *Garcetti*'s test was intended to be (relatively) straightforward to apply, it was not intended to be formalistic. As the Court explained, the "proper inquiry" as to whether speech was made pursuant to an employee's official duties

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.<sup>8</sup>

Additionally, speaking in the workplace does not necessarily mean that the speech is made pursuant to official duties; nor does the fact that the speech concerns "the subject matter of [the speaker's] employment."<sup>9</sup>

#### PUBLIC EMPLOYEES' DUTIES: A QUESTION OF FACT OR A QUESTION OF LAW?

Following *Garcetti*, some federal courts of appeals have treated the scope of an employee's job duties as a mixed question of fact and law to be determined on a case-by-case basis.<sup>10</sup> For example, in *Andrew v. Clark*, an officer was ordered to retire after he expressed concern that his fellow officers' shooting of a suspect might have been unjustified. The district court dismissed the officer's First Amendment retaliation claim on the grounds that his internal report of his concerns was, as a matter of law, within his official duties and thus constituted unprotected speech. But the Fourth Circuit reversed, noting that whether the officer's report fell within his official duties was an open question that could not be resolved without further factfinding.<sup>11</sup>

By contrast, in *Huppert* the Ninth Circuit held that reporting wrongdoing is per se part of the job of every California police officer, such that these reports are always unprotected under the First Amendment. Officer Huppert suffered retaliation after informing the district attorney, the FBI, and a grand jury of corruption within his department. When Huppert filed a § 1983 action, the district court did not engage in *Garcetti*'s practical analysis to determine whether the communications at issue fell within Huppert's job duties. Rather, the court treated the scope of public employees' responsibilities as fixed by law. Because a seventy-year-old case had classified all reporting of criminal

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8. *Id.* at 424-25.

9. *Id.* at 420-21.

10. See Sarah L. Fabian, Comment, *Garcetti v. Ceballos: Whether an Employee Speaks as a Citizen or as a Public Employee—Who Decides?*, 43 U.C. DAVIS L. REV. 1675, 1706 & n.239 (2010) (citing cases). Some courts of appeals describe the job-duty inquiry as a question of law, but "undertake a tailored, fact-specific assessment of a plaintiff's professional circumstances." *Dahlia v. Rodriguez*, 689 F.3d 1094, 1105 n.6 (9th Cir. 2012) (citing *Charles v. Grief*, 522 F.3d 508, 512-13 (5th Cir. 2008); *Wilburn v. Robinson*, 480 F.3d 1140, 1150-51 (D.C. Cir. 2007)).

11. 561 F.3d 261, 263-65, 268. (4th Cir. 2009).

activity to anyone at any time as inherently part of a police officer's job, the court ruled that Huppert's disclosures to the FBI and the grand jury were unprotected.<sup>12</sup>

In *Dahlia*, the Ninth Circuit quoted the same language from the same old case to determine that Dahlia's actions were equally unprotected. It noted, however, that the decades-old decision "was barely apposite to the facts presented in *Huppert*, and is even less so" to those presented in *Dahlia*.<sup>13</sup> The court also observed the irony of the fact that, had Dahlia reported his colleague's misconduct to third parties rather than his fellow officers, his speech would have been protected. But because Dahlia reported the misconduct to his fellow officers, his action was a core professional duty and Dahlia had no recourse against the Police Department.

#### THE DANGERS OF *HUPPERT*

*Huppert's* approach—begrudgingly adopted by *Dahlia*—is misguided: certain forms of public employees' speech should not be categorically unprotected. Rather, where the scope of an employee's duties are disputed, this dispute must be resolved as a matter of fact. Requiring factual determinations by a jury or judge where there is a factual dispute makes sense in terms of institutional competence and public policy.

As to institutional competence, most judges will have a limited understanding (before the factfinding process) of other public officials' duties. Even if a judge were familiar with the scope of local officials' duties, these duties vary for different individuals with the same position in different locations, and they also vary over time. Moreover, the duties a public official is actually expected to perform often differ substantially from the duties listed in his formal job description. Consequently, it is dangerous—and incorrect—for a judge to assume she knows, as a matter of law, what tasks are and are not part of an official's responsibilities.

There are also compelling policy reasons to avoid holding that police officers' official duties require them to testify about or report corruption by their fellow officers. This holding would place officers in an intractable double bind: they could report or testify regarding misconduct and be lawfully fired for doing so, or they could refuse to report or testify and face being fired, held in

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12. *See id.* at 706-08 ("Among the duties of police officers are those of preventing the commission of crime, of assisting in its detection, and of disclosing all information known to them which may lead to the apprehension and punishment of those who have transgressed our laws. When police officers acquire knowledge of facts which will tend to incriminate any person, it is their duty to disclose such facts to their superiors and to testify freely concerning such facts when called upon to do so before any duly constituted court or grand jury.") (quoting *Christal v. Police Comm'n*, 92 P.2d 416, 419 (Cal. Ct. App. 1939)).

13. *Dahlia*, 689 F.3d at 1103 (9th Cir. 2012).

contempt of court, or found to have violated the law. This catch-22 “chills the speech of potential whistleblowers in a culture that is already protective of its own.”<sup>14</sup>

Line-level officers are often the public’s best—or only—potential source of information about police corruption and misconduct. *Huppert* deters these officers from reporting on matters of serious public concern because doing so will be considered per se unprotected speech. Consequently, *Huppert* should be overturned: public employees’ duties must be treated as questions of fact to ensure adequate protection of those employees’ First Amendment rights.

#### A PROPOSAL: UNDERSTANDING *GARCETTI* NARROWLY

Of course, the fundamental problem may be with *Garcetti* itself rather than *Huppert*. Speaking pursuant to official duties should not be a dispositive factor in First Amendment analysis; this approach accords too little weight to private and public interests in addressing official wrongdoing. Moreover, the line *Garcetti* draws is arbitrary, and its proposed safeguards are inadequate.

As noted earlier, the qualified speech protection afforded public employees under *Garcetti* seeks to resolve the tension between the individual’s and the public’s interest in an employee’s speech and the government’s interest in efficiency. The need to balance these interests hardly disappears when an employee speaks on a matter that his job requires him to address; indeed, the public value of that speech—for example, reporting illegal interrogation tactics—may be even greater than the public value of speech his job does not require. But the value of a public employee’s speech *to his employer* does change when it is uttered pursuant to official duties: the government has an interest in avoiding the disruptions that can flow from its employee’s free speech and in limiting judicial interference with employer operations.

While these concerns are meritorious, the line *Garcetti* draws—categorically excluding statements uttered on the job from First Amendment protection—makes little sense. If a janitor cleaning Dahlia’s station had noted the same illegal interrogation tactics, he could presumably enjoy First Amendment protection while reporting them because his job did not require him to expose illegal activity. But the janitor’s ability to observe this misconduct flows—like Dahlia’s—from his employment with the Police Department, and the janitor is acting “as a citizen” just as much as Dahlia was.

The *Garcetti* line is also a strange one to draw because it would have afforded Dahlia protection if he had reported misconduct to a newspaper, but it denied him protection for reporting the same misconduct internally. Airing the

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14. *Id.* at 1104; see also *Huppert*, 574 F.3d at 722 (W. Fletcher, J., dissenting) (describing the catch-22).

government's dirty laundry in print surely has a greater potential to interfere with efficient government operations than internal complaints do.

The safeguards that *Garcetti* suggested might help protect employees' First Amendment rights despite this arbitrary line-drawing are insufficient. The Court suggested that employees could use whistleblowing and labor laws as an alternative to constitutional claims. But there are many problems with this solution: First, a majority of states do not protect internal whistleblowers who blow the whistle pursuant to their official duties; of those states that do offer protection, all but two of them afford less protection than the First Amendment did pre-*Garcetti*.<sup>15</sup> Second, the remedies available for § 1983 claims are not necessarily available under the whistleblower statutes currently in place.

The Court also suggested that public employers troubled by *Garcetti* could write "internal policies and procedures that are receptive to employee criticism."<sup>16</sup> This suggestion is unrealistic. A public employer that is willing to revise its internal policies to make its workplace more amenable to employee criticism will probably not take retaliatory action against employees for speaking their minds. And an employee of a public employer that is unwilling to revise its policies will have no recourse under *Garcetti*.

Because of the serious problems with *Garcetti* in theory and application, the doctrine should be refined. While lower courts are of course not free to ignore *Garcetti*, they are free to—and should—take a narrow view of what constitutes an employee's "official duties." In particular, where there is an independent legal duty to speak—for example, to respond to a grand jury subpoena—an employee's speech should generally receive First Amendment protection. The fact that an employer may require its employees to obey a law that exists independent of the employment relationship should not allow the employer to retaliate against the employee for obeying that law. Rather, an employee's speech should only fall outside the scope of First Amendment protection if it is made pursuant to an official's routine or core duties. When a public official goes "beyond his normal job responsibilities by acting as a concerned citizen"<sup>17</sup>—as Dahlia did—his employer should not be able to retaliate against him.

Of course, determining whether an employee spoke pursuant to his "routine duties" or as a "concerned citizen" will require a factual determination. But this fact-finding is a small extra step for the courts to take to ensure adequate protection for employees' First Amendment rights.

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15. *What Price Free Speech?: Whistleblowers and the Garcetti v. Ceballos Decision Before the H. Comm. On Govt. Reform*, 109th Cong. 1, 5-6 (2006) (statement of Stephen M. Kohn, National Whistleblower Center).

16. *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006).

17. *Schad v. Jones*, 415 F.3d 671, 677 (7th Cir. 2005); *see also Delgado v. Jones*, 282 F.3d 511, 519 (7th Cir. 2002).

## CONCLUSION

*Dahlia* offers the Ninth Circuit an opportunity to overturn *Huppert* and articulate a narrow understanding of *Garcetti*. This narrow understanding accords with the reality of public employees' duties—for the duties they are actually expected to perform may differ significantly from the responsibilities listed in their job descriptions. A narrow reading of *Garcetti* is also essential to ensuring adequate protection of free speech: The answer to the question of when the First Amendment protects a public employee's statements made pursuant to his official duties may not be "always," but it cannot be "never."<sup>18</sup>

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18. Cf. *Garcetti*, 547 U.S. at 426-27 (Stevens, J., dissenting) (arguing that the *Garcetti* test runs against established Court precedent).