Update: On Dec. 11, 2012 the Ninth Circuit agreed to rehear Dahlia en banc, during Mar. 2013. The 3-judge panel decision is no longer applicable.

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Police "Official Duties" Rule Criticized by the Ninth Circuit But it Barred a Detective's First Amendment Retaliation Claim *Dahlia v. Rodriguez*

Guest article by
Michael Stone, Muna Busailah and Robert Rabe *

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❖ Overview

Courts almost always write opinions that articulate the soundness of the rule they are applying. In *Dahlia v. Rodriguez*, #10-55978, 689 F.3d 1094 (2012) a panel of the Ninth Circuit made it clear that it did not agree with the rule it was using to decide the case.

Angelo Dahlia, a detective in the City of Burbank Police Department, alleged in a lawsuit that he was placed on administrative leave pending investigation because he cooperated with a Los Angeles Sheriff's Department investigation of police misconduct and disclosed details about abusive interrogation tactics and unlawful conduct within the Burbank Police Department.

Dahlia asserted that the action by the Department, which came four days after he cooperated with the investigation, was in retaliation for his protected speech.

The United States Court of Appeals for the Ninth Circuit determined that Dahlia could not bring a First Amendment retaliation claim based on his disclosure of misconduct within the Burbank Police Department. The Court held that the disclosures by Dahlia were made pursuant to his "official duties" as a member of law enforcement and therefore, such speech could not have First Amendment protection.

❖ ***Garcetti v. Ceballos*** **precedent**

The United States Supreme Court held in *Garcetti v. Ceballos*, #04-473, 547 U.S. 410 (2006), that public employee speech made pursuant to "official duties" does not have First Amendment protection, and cannot form the basis for a retaliation claim. The plaintiff in the case, Richard Ceballos, a Los Angeles County deputy district Attorney, was assigned as the calendar deputy, a position that entailed supervising attorneys, along with evaluating and investigating cases.

Ceballos became aware of alleged misrepresentations in a search warrant affidavit in a pending case, and organized an office meeting where he recommended that the case be dismissed. Instead of dismissing the case, the District Attorney pressed forward with the prosecution, and Ceballos claimed he was reassigned, transferred and denied a promotion. Ceballos brought a civil rights action alleging retaliation for his exercise of constitutionally protected free speech.

Under former law, a statement such as made by Ceballos, that misrepresentations were being made in search warrant affidavits, would easily be found a matter of public concern meriting the highest degree of constitutional protection. Indeed, courts would have found it praiseworthy that he spoke within official channels, rather than causing the greater disruption of going straight to the media. See, e.g., *Lytle v. City of Haysville*, #96-3197, 138 F.3d 857, 865 (10th Cir. 1998); *Paradis v. Montrose Mem. Hosp.*, #97-1161, 157 F.3d 815, 818 (10th Cir. 1998).

Ceballos would consequently have prevailed in a civil rights action based on the First Amendment if the jury believed the alleged adverse actions against him were taken in retaliation for his disclosures about the search warrant. His statements tended to expose alleged perjury and corruption by government officers.

Retaliatory employment actions taken in response to such statements could be viewed by the jury as an effort to 'silence" him, to punish him, or make an example of him to others and to intimidate him from making similar statements in the future.

Accordingly, a court that upheld the punishment would be protecting governmental cover-ups, corruption, and the so-called "code of silence".

- **The 5-4 majority opinion was written by Justice Kennedy, in which C.J. Roberts, and Justices Scalia, Thomas, and Alito joined. Justices Stevens, Souter, Ginsburg, and Breyer dissented.**

The Supreme Court majority in *Garcetti* has taken the Constitution in a new direction by seizing upon an isolated phrase in *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), where it held that a public employee could not be disciplined for writing a letter to the editor, "as a citizen, in commenting upon matters of public concern ...." Suddenly, what matters to the current Supreme Court majority is the phrase "as a citizen."

In *Garcetti* the majority observed that Ceballos made his statements pursuant to his duties as a calendar deputy. The fact that Ceballos "spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case," removed the constitutional protection against resulting discipline that would otherwise exist. Accordingly, the Court held, "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."

In other words, if the employee is speaking "pursuant to" his or her official duties, the employee is not speaking as a "citizen", and therefore, the statement does not receive any constitutional protection.

The *Garcetti* case appears to implicitly overrule many cases that protected communications made in the course of official job performance. Those cases that may be implicitly overruled include: *Cobosz v. Walsh*, #89-7524, 892 F.2d 1135 (2nd Cir. 1989) [employee cooperation with the FBI is protected]; *Paradis v. Montrose Mem. Hosp.*, #97-1161, 157 F.3d 815, (10th Cir. 1998) [speaking to the official empowered to investigate malfeasance weighs in favor of protection]; *Brawner v. City of Richardson*, #87-1653, 855 F.2d 187 (5th Cir. 1988) [disclosure of police misconduct is protected].

- **The decision was supposedly designed to keep employee grievances out of the federal courts.**

Former Justice John Paul Stevens wrote a powerful dissent, three paragraphs in length,

with a footnote identifying six federal appellate precedents within the past decade where public employees were punished for comments that amounted to no more than unwelcome truths the employers preferred to keep undiscovered.

- **None of these plaintiffs would find justice under the new rule because the statements were made in the course of performing official duties.**

The majority in *Garcetti* anticipated several potential issues that will arise in determining whether the statement is made "pursuant to" the employee's "official duties." First, was the employee required to speak on the subject, or, could the employee be disciplined for failing to speak on the subject? Secondly, are "official duties" defined by the duties listed on the written job description, or can they be taken to mean the duties the employee actually performed?

In that connection, Justice Souter in dissent, predicted that employers would insulate themselves from First Amendment liability by drafting broad, general job descriptions under which almost anything an employee might say would fall within the employee's official duties. The majority answered Justice Souter by commenting that lower courts need not be bound by written job descriptions that appear tailored to this defensive purpose.

So, why worry about a human resource manager drafting broad general job descriptions when the courts will do it on their own? For police personnel, if *Dahlia* remains the law, the scope of their "official duties", at least in California, will now include much of what usually forms the basis for a whistleblower claim.

❖ Reliance on *Huppert v. Pittsburg*

The *Dahlia* Court stated this rule was created in a prior Ninth Circuit case, *Huppert v. City of Pittsburg, #06-17362,* 574 F.3d 696 (9th Cir. 2009). The court determined that a police officer's disclosures of alleged department corruption to outside agencies (FBI) fell within "official duties", because California law imposes broad duties on the police to report illegal conduct. The *Dahlia* Court reasoned that it had no choice but to follow the expansive *Huppert* rule for what are "official duties" and bar Dahlia's claim.

In *Dahlia*, the Court made it clear that it did not agree with *Huppert*, declaring that it "appears to be incorrectly decided, conflicts with the Supreme Court's First Amendment public employee speech doctrine, and chills the speech of potential whistleblowers in a culture that is already protective of its own."

The Court added, "We feel compelled, like the district court, to follow *Huppert*, despite our conclusion that it was wrongly decided and unsupported by the sole authority it relies upon.

If Huppert, who independently cooperated with the FBI to expose and investigate corruption and memorialized that corruption against his superiors' orders, was acting 'pursuant to his professional duties', then Dahlia, who cooperated with a Los Angeles Sheriff's Department investigation of police misconduct, must also have been acting pursuant to his professional duties."

The Court's criticism of *Huppert* might be used by Dahlia to support a request for *en banc* review by a larger panel of the Ninth Circuit (which would have the authority to overrule *Huppert*), and the Supreme Court might could review this case to clarify "official duties" in the context of the police officer as a whistleblower in First Amendment retaliation claims.

* Michael P. Stone is the founding partner of Stone, Busailah in Pasadena, CA. He has practiced almost exclusively in police law and litigation for 32 years, following 13 years as a police officer, supervisor and police attorney. Muna Busailah is a partner and Robert Rabe, is an associate in the firm.

❖ **Selected law review articles** (*alphabetical*)

1. From *Pickering* to *Ceballos*: The Demise of the Public Employee Free Speech Doctrine, 11 N.Y. City L. Rev. 95 (2007).

2. *Garcetti v. Ceballos*: Public Employees Lose First Amendment Protection for Speech Within Their Job Duties, 27 Berkeley J. Emp. & Lab. L. 537 (2006).

3. *Garcetti v. Ceballos*: Misconstruing Precedent to Curtail Government Employees' First Amendment Rights, 67 Md. L. Rev. 485 (2008).

4. *Garcetti v. Ceballos*: Whether an Employee Speaks as a Citizen or as a Public Employee — Who Decides? 43 U.C. Davis L. Rev. 1675 (2010).

5. Privacy and Accountability in the 21st Century: Fading Privacy Rights of Public Employees, 6 Harv. L. & Pol'y Rev. 297 (2012).

6. Public Citizens, Public Servants: Free Speech in the Post-*Garcetti* Workplace: When are Public Employees Not Really Public Employees in the Aftermath of *Garcetti v. Ceballos?*, 7 First Amend. L. Rev. 92 (2008).

7. Public Citizens, Public Servants: Free Speech in the Post-*Garcetti* Workplace: Against Legislation: *Garcetti v. Ceballos* and the Paradox of Statutory Protection for Public Employees, 7 First Amend. L. Rev. 22 (2008).

8. Uncertainty and Loss in the Free Speech Rights of Public Employees Under *Garcetti v. Ceballos*, 83 Chi.-Kent L. Rev. 369 (2008).

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AELE Law Enforcement Legal Center
P.O. Box 75401
Chicago, IL 60675-5401 U.S.A
E-mail: info@aele.org
Tel. 1-800-763-2802

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