

# Recent Developments Regarding Government Employers and Employees

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## Free Speech Retaliation: Elements

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Plaintiff-Employee must show:

- Spoke “as a citizen” and not in the course of official job duties
- Spoke on “a matter of public concern”
- The interest in the speech outweighs the government's interest in the efficient provision of public services
- Suffered “an adverse employment action”
- Causation: The speech “precipitated the adverse employment action.”

*Nixon v. City of Houston*, 511 F.3d 494, 497 (5th Cir. 2007)(re-ordered)

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

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- The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy. . . .
- We hold that 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.

*Garcetti v. Ceballos: Was the speech part of the plaintiff's job?*

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- “Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case” *Id.* at 421
- He “wrote his disposition memo because that is part of what he, as a calendar deputy, was employed to do” *Id.*
- Ceballos “went to work and performed the tasks he was paid to perform” *Id.* at 422.
- No protection where employee “simply performing his or her job duties.” *Id.* at 423
- The case presents a question of “First Amendment claims based on government employees’ work product.” *Id.* at 422
- “The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.” *Id.*

## *Garcetti & Job Descriptions*

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- We reject, however, the suggestion that employers can restrict employees' rights by creating excessively broad job descriptions. The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes.

*Garcetti v. Ceballos*, 547 U.S. 410, 424–25 (2006)(citations omitted).

## *Howell v. Town of Ball*, 827 F.3d 515, 524 (5th Cir. 2016)

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- “Howell's statements to the FBI were made outside the normal chain of command and without the knowledge or permission of anyone else in the police department. . . . Indeed, the confidential nature of Howell's speech alone suggests that it was not part of his “ordinary” professional duties; the FBI did not ask for any assistance from the Ball Police Department, and Howell was forbidden from telling anyone at the department that he was aiding the FBI by recording town officials' conversations, since doing so would have compromised the investigation” (citations omitted)

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