

# Freedom of Expression: Further Erosion

**F**irst Amendment freedom of expression is a cornerstone of the Bill of Rights. Yet the specific shape of this cornerstone is constantly evolving as the courts sculpt its contours in response to the changing circumstances and values in our society. This judicial sculpting process has been particularly acute in relation to public employees, warranting numerous previous updates specific to the rights of public school personnel (e.g., Zirkel, 1997; Zirkel, 2006; Zirkel & Gluckman, 1984; Zirkel & Gluckman, 1986; Zirkel & Gluckman, 1993).

In *Garcetti v. Ceballos* (2006), the U.S. Supreme Court continued its current process of shaving away the constitutional freedom of expression by ruling 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.” Thus, the Supreme Court added another hurdle to the multistep process of determining whether public employers, including school boards, have infringed on their employees’ freedom of expression.

The key at the early steps in this analytical framework is to determine whether a public employee’s expression that allegedly resulted in an employer’s adverse action was part of the employee’s official duties, or was that of a citizen concerning matters of public concern. The following case and the accompanying question-and-answer discussion provide a representative sample of published court decisions applying this threshold determination in the context of public schools.

## The Case<sup>1</sup>

During the 2002-2003 academic year, Deborah Mayer was a first-year elementary school teacher in Monroe County, Indiana. As part of the approved curriculum, she used the *Time for Kids* newsletter to teach current events each Friday in a multiaged, grades 4-6 class. In January 2003, she used a recent issue of the newsletter that discussed peace demonstrations in Washington, D.C., protesting the war in Iraq. One of the students asked her if she would ever participate in a peace march. She briefly responded that peace marches were occurring across the country, and that when she drove by such a march in near-by Bloomington, she had honked her horn in response to a sign, “Honk for Peace.”

She went on to explain that, like the training the school offered in peaceful peer mediation, it was important to seek



peaceful solutions short of fighting. Some parents complained, and after meeting with them and Mayer the principal issued a memo to all the teachers, directing them not to take sides in national foreign policy controversies. In late April 2003, the school board notified Mayer that it had not renewed her contract for the following year.

In October 2004, Mayer filed suit in federal court, contending, among other things, that the district had violated her freedom of expression under the First Amendment. In an unpublished decision in March 2006, the court granted the district’s motion for summary judgment on the First Amendment claim, concluding that although our military intervention in Iraq is a matter of public concern, her classroom expression of personal opinion went beyond the approved curriculum and that she was acting as an employee, not as a private citizen. Mayer filed an appeal with the 7th Circuit Court of Appeals, arguing that academic freedom supersedes *Garcetti* in the classroom.

## Questions and Answers

### What do you think was the 7th Circuit Court’s decision in this case?

In a decision on Jan. 24, 2007, the court affirmed the summary judgment in favor of the district defendants (*Mayer v. Monroe County Community School District*, 2007). The appellate court concluded that academic freedom does not trump *Garcetti* in the elementary or secondary school classroom for two reasons. First, school districts hire teachers’ classroom speech in exchange for salary. For example, the court reasoned that a “teacher hired to lead a social-studies class can’t use it as a platform for a revisionist perspective that Benedict Arnold really wasn’t a traitor, when the approved program calls him one.”

Second, students in public schools constitute a captive audience who “ought not be subject to teachers’ idiosyncratic perspectives.” Expressly declining to address public educators’ freedom of expression outside the classroom, the court held that “the First Amendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system.”

Mayer sought a writ of certiorari from the U.S. Supreme Court, asking it to review the 7th Circuit Court’s decision.

### What action did the Supreme Court take?

The Supreme Court denied certiorari because it was too busy to address the merits of the case, thus leaving the ruling as a binding precedent in the 7th Circuit and possibly persuasive in other jurisdictions, depending on the discretion of their respective courts.

**Does the 7th Circuit Court’s decision sound a death knell for the First Amendment freedom of expression of public school teachers with regard to political expression?**

No. First, as the 7th Circuit Court warned, its decision applies only to political expression both outside the approved curriculum and within the classroom. Second, courts in other jurisdictions may not necessarily interpret *Garcetti* so broadly and decisively.

For example, in a recent New York case where an elementary teacher expressed herself in favor of President Bush within and outside the classroom (*Caruso v. Massapequa Union Free School District*, 2007), the federal district court denied the defendants’ motion for summary judgment, thus preserving for trial underlying factual issues, such as what the teacher had said in relation to a mock presidential election at the school.

**If the expression at issue had been a team teacher’s private log of his teammate’s repeated tardiness and absences, would it have survived the *Garcetti* First Amendment analysis?**

Yes, at least according to a federal district court case in Delaware (*Wilcoxon v. Red Clay Consolidated School District*, 2006). The court concluded that the teacher kept the journal not as part of his official duties, but as a citizen in the interest of student safety—a matter of public concern. Concluding that the balance of interests favored the teacher, and not the district, the court ruled that the First Amendment protected his expression, rejecting the defendants’ dismissal motion and preserving the various steps of the applicable analysis for trial.

**Would *Garcetti* apply if the expression had been the written responses of a teacher/cheerleader coach to the principal’s questions regarding alleged improprieties in the cheerleader selection process?**

Yes, according to a recent 11th Circuit Court of Appeals decision (*Gilder-Lucas v. Elmore County Board of Education*, 2006). The court concluded that her written answers were part of her job duties, and thus unprotected in light of *Garcetti*.

**If a coach’s expression was related to, but not required by, his or her official duties, would *Garcetti* still apply?**

The answer depends not only on the specific expression but on the court’s interpretation of *Garcetti*. For example, in a recent 5th Circuit Court of Appeals decision concerning memoranda to the principal alleging administrative mishandling of athletic funds (*Williams v. Dallas Independent School District*, 2007), the court concluded that the coach, who was also the athletic director, wrote the memos in the course of his employment, and therefore the First Amendment did not protect this expression.

But in another appellate decision concerning an athletic director’s memo to the superintendent criticizing the dis-

trict’s handling of a hazing incident (*Cioffi v. Averill Park Central School District*, 2006), the 2nd Circuit Court decided that this expression on a matter of public concern “was not made strictly pursuant to his duties as a public employee” and merited First Amendment protection.

The strictness in applying *Garcetti* has varied in other cases, from mixed results (*e.g.*, *Brammer-Holter v. Twin Peaks Charter Academy*, 2007) or inconclusive outcomes (*e.g.*, *Weintraub v. City of New York*, 2007) to clear-cut defeats for the plaintiff-educator (*e.g.*, *Houlihan v. Sussex Technical School District*, 2006; *Pearson v. Board of Education*, 2007; *Ryan v. Shawnee Mission Unified School District*, 2006; *Yatzus v. Appoquinimink School District*, 2006).

**If the plaintiff was a principal, allegedly terminated for advocating conversion of his school to charter status, would *Garcetti* have similarly been fatal?**

Yes, according to an 11th Circuit Court decision (*D’Angelo v. School Board of Polk County*, 2007). The court concluded that *Garcetti* defeated his First Amendment retaliation claim because the expression was in his capacity as the principal, not as a citizen, and he had admitted that his conversion efforts were to fulfill his primary duty to “explore any and all possibilities to improve the quality of education at [his school].”

**Could *Garcetti* similarly defeat the First Amendment claim of a terminated superintendent?**


Yes, but only if the expression was pursuant to the superintendent’s duties rather than as a citizen on matters of public concern. For example, in a recent 10th Circuit Court decision (*Casey v. West Las Vegas Independent School District*, 2007), *Garcetti* defeated parts of the superintendent’s First Amendment claim concerning various communications to the school board alleging violations of state and federal law, but not the part concerning a letter to the state attorney general alleging board violation of the state’s open meetings law.

**Conclusion**

The Supreme Court’s decision in *Garcetti* adds one more refinement to First Amendment freedom of expression, narrowing but not negating this fundamental protection. The various post-*Garcetti* decisions in the public school context (*e.g.*, *Hassenpflug*, 2007; *McCarthy*, 2006) indicate that the specific effect of this latest Supreme Court decision is a rather gray area, pending further litigation.

Nevertheless, principals—whether as potential defendants or plaintiffs—need to remain legally literate as to the evolving multistep framework for applying the First Amendment to public employee expression. Specifically, if there has been an adverse action, first consider whether the employee was speaking as a citizen, rather than as an employee and, if so, whether the speech was a matter of public concern and the individual’s interests outweighed the district’s responsibility.

If the employee’s expression survives the requisite standards of this first step, the next two steps concern causation

—specifically, whether the expression was a substantial factor in the employer’s adverse action and, if so, whether the employer would have taken the action regardless of the employee’s expression. Finally, as a legal matter, the employee may have alternate bases for litigation, including state whistleblower and collective bargaining laws, as well as federal civil rights laws. 

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### Note

<sup>1</sup>Because this case arose at the pretrial stage of the defendant-district’s summary judgment motion, the “facts” herein are allegations resolved in favor of the plaintiff-teacher.

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