07-2376-cv Weintraub v. Board of Education of the City School District of the City of New York

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 2008

(Argued: November 25, 2008 Decided: January 27, 2010)

Docket No. 07-2376-cv

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DAVID H. WEINTRAUB,

Petitioner-Appellant,

-- v. --

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, COMMUNITY SCHOOL DISTRICT 32, CITY OF NEW YORK, DOUGLAS GOODMAN, DAISY O'GORMAN, FELIX VAZQUEZ, FRANK MILLER, AIDA SERRANO, LAWRENCE BECKER, JERRY CIOFFI,

<u>Respondents-Appellees</u>.*

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B e f o r e : JACOBS, <u>Chief Judge</u>, WALKER, and CALABRESI, <u>Circuit Judges</u>.

1 Petitioner-Appellant David H. Weintraub, a former New York

2 City public school teacher, appeals from an order of the United

3 States District Court for the Eastern District of New York (I.

4 Leo Glasser, <u>Judge</u>), <u>inter alia</u>, dismissing his claim that

5 Respondents-Appellees violated his First Amendment rights by

6 retaliating against him based on his filing of a formal grievance

* The Clerk of Court is directed to amend the caption as noted.

1	with his union. Weintraub filed the grievance to challenge the
2	school administration's refusal to discipline a student who threw
3	books at Weintraub during class. The district court dismissed
4	Weintraub's claim in light of <u>Garcetti v. Ceballos</u> , 547 U.S. 410
5	(2006), which held that the First Amendment does not protect
6	speech made pursuant to a public employee's official duties. We
7	find that Weintraub filed his grievance pursuant to his official
8	duties because the grievance was in furtherance of one of his
9	core duties as a public school teacher, maintaining class
10	discipline, and had no relevant analogue to citizen speech.
11	Accordingly, we hold that, under Garcetti, the First Amendment
12	does not protect Weintraub's filing of a grievance and conclude
13	that the district court properly dismissed his claim of
14	retaliation. We AFFIRM the district court's order.
15	Judge Calabresi dissents in a separate opinion.
16 17 18 19 20 21 22	RICHARD A. ENGELBERG, Kreines & Engelberg, Mineola, NY, <u>for</u> <u>Petitioner-Appellant</u> . EDWARD F.X. HART (Leonard Koerner, on the brief), of Counsel, for
23 24 25 26 27	Michael A. Cardozo, Corporation Counsel of the City of New York, New York, NY, <u>for Respondents-</u> <u>Appellees</u> .
28	JOHN M. WALKER, JR., <u>Circuit Judge</u> :
29	Petitioner-Appellant David H. Weintraub, a former New York
30	City public school teacher, appeals from an order of the United

31 States District Court for the Eastern District of New York (I.

Leo Glasser, Judge), inter alia, dismissing his First Amendment 1 employment retaliation claim against Respondents-Appellees the 2 Board of Education of the City School District of the City of New 3 York, Community School District 32, the City of New York, Douglas 4 5 Goodman, Daisy O'Gorman, Felix Vazquez, Frank Miller, Aida 6 Serrano, Lawrence Becker, and Jerry Cioffi (collectively, 7 "Defendants"). Weintraub alleged that Defendants violated his 8 First Amendment rights by retaliating against him for filing a 9 formal grievance with his union that challenged the school assistant principal's decision not to discipline a student who 10 11 had thrown books at Weintraub during class. The district court 12 dismissed Weintraub's claim in light of Garcetti v. Ceballos, 547 13 U.S. 410 (2006), which held that the First Amendment does not protect speech made pursuant to a public employee's official 14 15 duties.

16 We find that Weintraub's filing of the grievance was in 17 furtherance of one of his core duties as a public school teacher, 18 maintaining class discipline, and had no relevant analogue to citizen speech. Accordingly, we conclude that, under Garcetti, 19 20 547 U.S. at 421-24, Weintraub filed the grievance "pursuant to [his] official duties," and thus, not as a citizen for purposes 21 22 of the First Amendment. The grievance, therefore, is not 23 protected speech, and we affirm the district court's dismissal of 24 Weintraub's retaliation claim.

25

BACKGROUND

1 The underlying facts and procedural history of this case are 2 detailed in the district court's April 28, 2006 opinion that 3 granted in part and denied in part Defendants' motion for summary 4 judgment. <u>See Weintraub v. Bd. of Educ. of City of N.Y.</u>, 423 F. 5 Supp. 2d 38, 42-48 (E.D.N.Y. 2006) ("<u>Weintraub I</u>"). We set forth 6 below only such facts as are relevant to this appeal.

7

I. Underlying Events

8 In September 1998, Weintraub began teaching fifth grade at 9 P.S. 274, a public school in Brooklyn, New York. During his 10 first two months, there were no apparent problems in his class, 11 with his performance, or between Weintraub and school 12 administrators.

On Friday, November 6, 1998, after a student threw a book at 13 14 him during class, Weintraub referred the student to his immediate 15 supervisor, Assistant Principal Douglas Goodman. Shortly 16 thereafter, Goodman returned the student to Weintraub's 17 classroom. The next school day, the same student threw 18 additional books at Weintraub. Weintraub again referred the student to Goodman, who returned the student to Weintraub's 19 20 class.

Weintraub was "upset" by Goodman's decision not to discipline the student and concerned that "if this child could do this to [Weintraub], . . . it would put the . . . other students at risk." (Pl.'s Dep. 51:17-19, Jul. 19, 2002.) Weintraub subsequently learned that the same student "put a kid in the

hospital later in the year." (Pl.'s Dep. 51:20-21, 23-25.) 1 2 After the second book-throwing incident, Weintraub told Goodman, "If nothing is going to be done, I [will] have to file a 3 grievance with the union to have something done about this 4 5 because [the student] should be suspended for this," (Pl.'s Dep. 6 43:3-6), and "it is not an environment a teacher would want to go 7 to where a child is allowed to throw a book at teachers," (Pl.'s Dep. 47:10-12). Weintraub also "underst[oo]d" that under 8 9 "citywide Board of Education policy . . . a student assaulting the teacher in 5th grade . . . should have been suspended." 10 (Pl.'s Dep. 44:3-6.) Weintraub told other teachers at P.S. 274 11 12 about the incidents and his intention to file a grievance, and 13 then filed the grievance with his union representative.

14 Weintraub alleges that because of his complaints, including 15 his grievance, Goodman and other school officials retaliated against him through "acts of intimidation, harassment, workplace 16 abuse, and deliberate attempts to undermine [his] authority." 17 Weintraub I, 423 F. Supp. 2d at 42. Specifically, Weintraub 18 19 avers that he received unfounded negative classroom evaluations, 20 performance reviews, and disciplinary reports; was wrongfully 21 accused of sexually abusing a student and abandoning his class; 22 was arrested for misdemeanor attempted assault of another teacher 23 at P.S. 274 on allegedly false grounds; and was ultimately 24 terminated. After the criminal charges against him were dropped, 25 Weintraub was denied reinstatement to teach and unsuccessfully

1 sought review of his dismissal in state court.

2 II. District Court Proceedings

In July 2000, Weintraub commenced this action in the Eastern District of New York asserting several claims against Defendants, including adverse employment retaliation in violation of the First Amendment. Defendants moved for summary judgment on all of Weintraub's claims.

On April 28, 2006, the district court denied Defendants' 8 9 motion with respect to Weintraub's First Amendment claim, 10 reasoning that "the content of speech questioning an administrative response, or lack thereof, to discipline problems 11 12 in the classroom relates to a matter of public concern, 13 regardless of whether that speech comes from a[n] elected official, citizen, or teacher." Id. at 52. Finding that the 14 15 "form and context of Weintraub's statements" did not warrant a 16 finding to the contrary, and that Weintraub's "primary motivation was a general concern for safety in the classroom and school," 17 18 rather than "a desire for some personal gain," the district court 19 held that "Weintraub's complaint to Goodman and subsequent grievance were protected by the First Amendment." Id. 20

21 On May 29, 2007, after Defendants moved for reconsideration 22 in light of the Supreme Court's subsequent decision in <u>Garcetti</u>, 23 547 U.S. at 421-24, the district court granted in part and denied 24 in part Defendants' motion for summary judgment with respect to 25 Weintraub's First Amendment claim. The district court identified

1 three categories of speech for which Weintraub could "plausibly 2 claim retaliation":

3 (1) [his] private conversation with Goodman in which 4 he expressed his dissatisfaction with Goodman's 5 handling of the book-throwing incidents and threatened 6 file a grievance if the situation was not to 7 rectified; (2) Weintraub's conversations with other teachers about the incidents and Goodman's failure to 8 9 impose adequate discipline; and (3) the formal 10 grievance itself.

12 <u>Weintraub v. Bd. of Educ. of City of N.Y.</u>, 489 F. Supp. 2d 209,

13 214 (E.D.N.Y. 2007) ("<u>Weintraub II</u>").

11

The district court denied summary judgment with respect to the second category, because "Weintraub's conversations with other teachers about his conflict with Goodman . . . [we]re clearly not within the scope of his employment duties." <u>Id.</u> at 220.

19 In contrast, the district court concluded that under 20 Garcetti and in light of cases from other circuits applying 21 Garcetti in similar situations, the First Amendment does not 22 protect the first and third categories of speech: "In both 23 instances, Weintraub was speaking as an employee, proceeding 24 through official channels to complain about unsatisfactory 25 working conditions." Id. at 219-20. The district court, 26 however, believed that "a substantial ground for difference of 27 opinion may exist on" the precise issue of "whether a public employee acts as an 'employee,' and not as a 'citizen,' when he 28 29 notifies his supervisors, either formally or informally, of an

issue regarding the safety of his workplace that touches upon a 1 2 matter of public concern, as well as on the employee's own private interests." Id. at 221-22. The district court noted 3 4 that the issue was one of first impression in this circuit. The 5 district court then dismissed Weintraub's First Amendment claims 6 based on his conversation with Goodman and his filing of a 7 grievance. The district court encouraged Weintraub to file an 8 interlocutory appeal on the basis that the case involves a 9 controlling question of law for which there is substantial ground 10 for difference of opinion, and stated its intent to stay the 11 action pending the outcome of any such appeal.

Pursuant to 28 U.S.C. § 1292(b), we accepted Weintraub's interlocutory appeal, which is limited to the question of whether the First Amendment protects his filing of a grievance. We now examine his claim.

16

DISCUSSION

17 We review de novo the district court's partial grant of 18 summary judgment, construing the evidence in the light most favorable to the non-moving party. See Tenenbaum v. Williams, 19 193 F.3d 581, 593 (2d Cir. 1999). Summary judgment is 20 21 appropriate when "there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of 22 23 law," Fed. R. Civ. P. 56(c), and accordingly, when "the record 24 taken as a whole could not lead a rational trier of fact to find 25 for the non-moving party," Matsushita Elec. Indus. Co. v. Zenith

1 Radio Corp., 475 U.S. 574, 587 (1986).

2 "Regardless of the factual context, we have required a plaintiff alleging retaliation to establish speech protected by 3 the First Amendment." Williams v. Town of Greenburgh, 535 F.3d 4 5 71, 76 (2d Cir. 2008). Under the First Amendment, "a state cannot condition public employment on a basis that infringes the 6 7 employee's constitutionally protected interest in freedom of 8 expression." Connick v. Myers, 461 U.S. 138, 142 (1983). 9 "Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing 10 11 matters of public concern." Garcetti, 547 U.S. at 417; see also 12 Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 13 563, 568 (1968); Connick, 461 U.S. at 147. A public employee, 14 however, must "by necessity . . . accept certain limitations on his or her freedom," because, his or her speech can "contravene 15 governmental policies or impair the proper performance of 16 17 governmental functions." Garcetti, 547 U.S. at 418-19. The Supreme Court's employee-speech jurisprudence reflects "the 18 19 common sense realization[s] that government offices could not 20 function if every employment decision became a constitutional matter," and that "government officials should enjoy wide 21 22 latitude in managing their offices, without intrusive oversight 23 by the judiciary in the name of the First Amendment." Connick, 24 461 U.S. at 143, 146. Accordingly, the Supreme Court has strived 25 "to arrive at a balance between the interests of the teacher, as

a citizen, in commenting upon matters of public concern and the
interest of the State, as an employer, in promoting the
efficiency of the public services it performs through its
employees." Pickering, 391 U.S. at 568.

5 In Garcetti, the Supreme Court, while keeping "these 6 principles in mind, " 547 U.S. at 420, "'narrowed the Court's 7 jurisprudence in the area of employee speech' by further 8 restricting the speech activity that is protected." Reilly v. 9 City of Atl. City, 532 F.3d 216, 228 (3d Cir. 2008) (quoting Foraker v. Chaffinch, 501 F.3d 231, 241 (3d Cir. 2007)). 10 11 Garcetti involved a deputy district attorney's memorandum to his 12 supervisor expressing his view that an affidavit used to obtain a 13 search warrant contained serious misrepresentations. 547 U.S. at 14 414. <u>Garcetti</u> explained that "[u]nderlying [the Supreme Court's 15 employee-speech jurisprudence] has been the premise that while the First Amendment invests public employees with certain rights, 16 17 it does not empower them to 'constitutionalize the employee grievance."" Id. at 420 (quoting Connick, 461 U.S. at 154). 18 19 Specifically, Garcetti "h[e]ld that when public employees make 20 statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the 21 22 Constitution does not insulate their communications from employer 23 discipline." Id. at 421.

24 "If [we] determine[] that [Weintraub] either did not speak25 as a citizen or did not speak on a matter of public concern,

'[he] has no First Amendment cause of action based on his . . . 1 2 employer's reaction to the speech." Sousa v. Roque, 578 F.3d 164, 170 (2d Cir. 2009) (quoting Garcetti, 547 U.S. at 418). We 3 hold that Weintraub, by filing a grievance with his union to 4 5 complain about his supervisor's failure to discipline a child in 6 his classroom, was speaking pursuant to his official duties and 7 thus not as a citizen. Accordingly, Weintraub's speech was not 8 protected by the First Amendment, and there is no cause for us to 9 address whether it related to a "matter of public concern." See id.; see also Garcetti, 547 U.S. at 421 (finding "the controlling 10 11 factor" to be whether the employee-speech at issue was made 12 pursuant to official duties and declining to examine whether it 13 related to an issue of public concern).

14 The Garcetti Court defined speech made "pursuant to" a public employee's job duties as "speech that owes its existence 15 to a public employee's professional responsibilities." 547 U.S. 16 17 at 421. In Garcetti, this inquiry was straightforward because 18 the plaintiff admitted that his speech was part of his official 19 job duties. See id. at 424. In the instant case, Weintraub 20 asserts that he did not file his grievance pursuant to his official duties. Instead, he contends that "[t]he key" to the 21 22 First Amendment inquiry provided by Garcetti is whether he was 23 "required, as part of his employment duties to initiate grievance 24 procedures against . . . Goodman." (Appellant's Br. at 11 25 (emphasis in original).) Weintraub further alleges that

Defendants have pointed to no "rule or regulation of the Board of Education, federal or state statute, job handbook or other job description, [that] state[s] unequivocally that the speech for which [Weintraub] claims he was retaliated against" was made pursuant to his official duties as a public school teacher. (Appellant's Reply Br. at 8.)

7 We are unpersuaded. The objective inquiry into whether a 8 public employee spoke "pursuant to" his or her official duties is 9 "a practical one." <u>Garcetti</u>, 547 U.S. at 424. The <u>Garcetti</u> 10 Court cautioned courts against construing a government employee's 11 official duties too narrowly, underscoring that

12 descriptions often [f]ormal job bear little 13 resemblance to the duties an employee actually is 14 expected to perform, and the listing of a given task 15 in an employee's written job description is neither 16 necessary nor sufficient to demonstrate that 17 conducting the task is within the scope of the employee's professional duties for First Amendment 18 19 purposes.

20

Id. at 424-25. In light of <u>Garcetti</u>, other circuit courts have concluded that speech that government employers have not expressly required may still be "pursuant to official duties," so long as the speech is in furtherance of such duties, <u>e.g.</u>, <u>Williams v. Dallas Indep. Sch. Dist.</u>, 480 F.3d 689, 694 (5th Cir. 2007).

In <u>Williams</u>, the Fifth Circuit concluded that the plaintiff, an Athletic Director, wrote memoranda to his school principal and office manager requesting information about the use of funds

collected at athletic events in order to perform his duties of 1 2 buying sports equipment, taking students to tournaments, and paying their entry fees. 480 F.3d at 693-94. The Williams court 3 explained that "[s]imply because [the plaintiff] wrote memoranda, 4 5 which were not demanded of him, does not mean he was not acting within the course of performing his job"; instead, "[a]ctivities 6 7 undertaken in the course of performing one's job are activities 8 pursuant to official duties." Id.

Similarly, in <u>Renken v. Gregory</u>, 541 F.3d 769 (7th Cir. 9 2008), the Seventh Circuit held that when a professor complained 10 11 to university officials about the difficulties he encountered in 12 administering an educational grant he had been awarded, he was 13 speaking as a faculty employee because the grant, though not 14 necessarily a formal requirement of his job, was "for the benefit of students" and therefore "aided in the fulfillment of his 15 teaching responsibilities." Id. at 773. See also Mills v. City 16 17 of Evansville, 452 F.3d 646, 648 (7th Cir. 2006) (same for a public officer's negative remarks following an official meeting 18 19 to discuss plans for department reorganization, because the 20 comments were made "in her capacity as a public employee contributing to the formation and execution of official policy"). 21 22 The Ninth, Tenth, and Eleventh Circuits have drawn similar 23 conclusions, finding that "a public employee's duties are not 24 limited only to those tasks that are specifically designated," 25 Phillips v. City of Dawsonville, 499 F.3d 1239, 1242 (11th Cir.

1 2007). See, e.g., Brammer-Hoelter v. Twin Peaks Charter Acad., 2 492 F.3d 1192, 1204 (10th Cir. 2007) (holding that teachers spoke pursuant to their job duties when they discussed the school 3 4 academy's expectations regarding student behavior, curriculum, 5 pedagogy, and classroom-related expenditures); Freitag v. Ayers, 6 468 F.3d 528, 546 (9th Cir. 2006) (same for a prison guard's internal complaints documenting her superior's failure to respond 7 8 to inmates' sexually explicit behavior towards her); Battle v. 9 Bd. of Regents, 468 F.3d 755, 761 (11th Cir. 2006) (same for university employee's report alleging improprieties in her 10 11 supervisor's handling and management of federal financial aid 12 funds).

13 We join these circuits and conclude that, under the First 14 Amendment, speech can be "pursuant to" a public employee's 15 official job duties even though it is not required by, or included in, the employee's job description, or in response to a 16 17 request by the employer. In particular, we conclude that Weintraub's grievance was "pursuant to" his official duties 18 19 because it was "part-and-parcel of his concerns" about his 20 ability to "properly execute his duties," <u>Williams</u>, 480 F.3d at 21 694, as a public school teacher -- namely, to maintain classroom 22 discipline, which is an indispensable prerequisite to effective 23 teaching and classroom learning. See, e.g., Brammer-Hoelter, 492 24 F.3d at 1204 ("[A]s teachers, Plaintiffs were expected to 25 regulate the behavior of their students."). As in Renken and

<u>Williams</u>, Weintraub's speech challenging the school administration's decision to not discipline a student in his class was a "means to fulfill," 541 F.3d at 774, and "undertaken in the course of performing," 480 F.3d at 693, his primary employment responsibility of teaching.

6 Judge Calabresi's dissent questions whether our decision 7 today conflicts with the result in Givhan v. Western Line 8 Consolidated School District, 439 U.S. 410 (1979). Dissent of J. 9 Calabresi at [5]. It does not. In Givhan, a junior-high English 10 teacher was dismissed primarily because she internally aired her grievances regarding the placement of black people working in the 11 12 cafeteria, the integration of the administrative staff, and the 13 placement of black Neighborhood Youth Corps workers in semi-14 clerical positions. See id. at 411; Ayers v. W. Line Consol. 15 Sch. Dist., 555 F.2d 1309, 1313 (5th Cir. 1977). Givhan 16 expressed concern with the impression that the "respective roles 17 of whites and blacks" in these positions would leave on black 18 students. Ayers, 555 F.2d at 1313. From our brief recitation of the facts of Givhan, it is plain that, unlike here, the grievance 19 20 she aired was not in furtherance of the execution of one of her 21 core duties as an English teacher. Givhan's grievance concerned 22 the general impression that blacks students might take away from 23 the staffing of non-teaching positions; Weintraub's grievance, in 24 contrast, concerns the administration's refusal to discipline a student who threw books at Weintraub during class. 25

Our conclusion that Weintraub spoke pursuant to his job 1 2 duties is supported by the fact that his speech ultimately took the form of an employee grievance, for which there is no relevant 3 4 citizen analoque. The Garcetti Court drew a distinction between 5 the unprotected speech at issue in that case, and "public 6 statements outside the course of performing [an employee's] 7 official duties" which "retain some possibility of First 8 Amendment protection." 547 U.S. at 423. While "[t]he First 9 Amendment protects some expressions related to the speaker's job, " id. at 421, "[w]hen a public employee speaks pursuant to 10 employment responsibilities, . . . there is no relevant analogue 11 12 to speech by citizens who are not government employees," id. at 13 424. Garcetti provided two examples of speech with a citizen 14 analogue: (1) a schoolteacher's "letter to a local newspaper," 15 which the Supreme Court held to be protected in Pickering, because it had "no official significance and bore similarities to 16 17 letters submitted by numerous citizens every day," and (2) "discussi[ons of] politics with a co-worker." Id. at 422-23. 18 19 Although the lack of a citizen analogue is "not dispositive" in 20 this case, id. at 420, it does bear on the perspective of the speaker -- whether the public employee is speaking as a citizen -21 22 - which is the central issue after Garcetti, see Williams, 480 23 F.3d at 692 (stating that "[u]nder Garcetti, we must shift our 24 focus from the content of the speech to the role the speaker 25 occupied when he said it" to determine whether the speaker was

1 "acting in her role as 'citizen'").

2 In Freitag v. Ayers, 468 F.3d 528 (9th Cir. 2006), the Ninth Circuit shed light on when a relevant analogue to citizen speech 3 The Freitag court focused on a former prison guard's 4 exists. 5 "responsibility as a citizen to expose . . . official 6 malfeasance" in holding that the First Amendment protected her 7 complaints to a state senator and the Inspector General's office 8 about her superior's failure to respond to inmates' sexually 9 explicit behavior towards female guards. Id. at 545 (emphasis in original). The Freitag court emphasized that there was a 10 11 relevant citizen analogue to the employee's speech, because the 12 "right to complain both to an elected public official and to an 13 independent state agency is guaranteed to any citizen in a 14 democratic society regardless of his status as a public employee." Id. 15

16 The lodging of a union grievance is not a form or channel of 17 discourse available to non-employee citizens, as would be a letter to the editor or a complaint to an elected representative 18 19 or inspector general. Rather than voicing his grievance through 20 channels available to citizens generally, Weintraub made an 21 internal communication made pursuant to an existing dispute-22 resolution policy established by his employer, the Board of 23 Education. Cf. Boyce v. Andrew, 510 F.3d 1333, 1343-44 (11th 24 Cir. 2007) (finding that the "form and context" of the employees' 25 complaints, which were made directly to supervisors and were not

"sent to an outside entity," weighed against First Amendment 1 2 protection). As with the speech at issue in Garcetti, Weintraub could only speak in the manner that he did by filing a grievance 3 with his teacher's union as a public employee. Cf. Davis v. 4 5 McKinney, 518 F.3d 304, 313 (5th Cir. 2008) (compiling cases 6 "holding that when a public employee raises complaints or 7 concerns up the chain of command at his workplace about his job 8 duties, that speech is undertaken in the course of performing his 9 job"). His grievance filing, therefore, lacked a relevant analogue to citizen speech and "retain[ed no] possibility" of 10 constitutional protection. Garcetti, 547 U.S. at 423. 11

12 Notwithstanding the Supreme Court's pronouncement in 13 Garcetti, Weintraub urges us to find that his speech is protected 14 by the First Amendment under Cioffi v. Averill Park Central School District Board of Education, 444 F.3d 158 (2d Cir. 2006), 15 a case we decided two months before the Supreme Court issued its 16 17 decision in Garcetti. In Cioffi, we held that the First Amendment protected a high school athletic director's letter to 18 19 his supervisor and to the school board criticizing the school 20 district's handling of a sexual harassment and hazing incident. Id. at 161-65. Weintraub directs us to a footnote in Cioffi 21 opining that "[t]he Supreme Court's forthcoming decision in 22 23 Garcetti . . . as to whether the First Amendment protects an 24 employee's purely job-related speech . . . does not affect the 25 disposition of [Cioffi's] case because the record here

1 establishes that Cioffi's speech was not made <u>strictly</u> pursuant 2 to his duties as a public employee." (Appellant's Br. at 15 3 (quoting <u>Cioffi</u>, 444 F.3d at 167 n.3) (emphases in Appellant's 4 Brief).)

5 We are not persuaded that Cioffi compels us to find that the 6 First Amendment protects Weintraub's filing of a grievance. In Cioffi, we held that a letter that an athletic director wrote to 7 his supervisor and to the school board was protected speech. Id. 8 9 at 161, 165. The speech at issue in Cioffi had been publicly 10 disclosed and the athletic director subsequently pursued the 11 public controversy in a press conference; thus, the "public's 12 interest in receiving the well-informed views" of the athletic 13 director, as a government employee, Garcetti, 547 U.S. at 419, was strong. In contrast, Weintraub never communicated with the 14 15 public about the book-throwing incidents and the school 16 administration's subsequent refusal to discipline the particular 17 student. Accordingly, we remain convinced that under Garcetti, 18 because Weintraub made his statements "pursuant to" his official 19 duties as a schoolteacher, he was "not speaking as [a] citizen[] 20 for First Amendment purposes," 547 U.S. at 421, and thus, that 21 his speech was not protected.

22

CONCLUSION

For the reasons stated above, the order of the district court is AFFIRMED.

1 2

CALABRESI, Circuit Judge, dissenting:

2 3	Garcetti v. Ceballos, 547 U.S. 410 (2006), lends itself to multiple interpretations, and the
4	majority's decision to construe it broadly (and, concomitantly, to construe public employees'
5	First Amendment protections narrowly), while a possible reading, is not compelled by anything
6	in the Supreme Court's opinion. Because I think a less expansive definition of speech made
7	"pursuant to official duties," id. at 421, is both a more appropriate reading of Garcetti and a
8	more constructive resolution of the "delicate balancing" required by the First Amendment in the
9	public employment context, id. at 423, I respectfully dissent.
10	As I read the majority opinion, it holds that a public employee's speech is "pursuant to
11	official duties" and accordingly unprotected when it both (a) is "in furtherance of" the
12	employee's "core duties," and (b) "ha[s] no relevant analogue to citizen speech." Maj. Op. at 3 .
13	To be sure, Garcetti contains some language that can be read along these lines. But Garcetti
14	leaves open the definition of "pursuant to official duties," and I do not think that the majority's
15	two requirements, either separately or in combination, provide the right doctrinal framework for
16	analyzing that question. ¹
17	The majority's first prong, which looks to whether speech is "in furtherance of" an
18	employee's "core duties," seems to me too broad. The majority's discussion could be read to

19 imply that—assuming the second prong of the majority's test is also satisfied—classroom

¹ I do not share the majority's belief that the Supreme Court "'narrowed [its] jurisprudence in the area of employee speech" in *Garcetti*. Maj. Op. at **10** (quoting *Reilly v. City of Atl. City*, 532 F.3d 216, 228 (3d Cir. 2008)). *Garcetti* did not overturn or even call into question any of the Court's prior precedents on employee speech; indeed, it specifically reaffirmed or cited approvingly many of the precedents that the majority opinion suggests were "narrowed." *See, e.g., Garcetti*, 547 U.S. at 417, 419, 420.

1	teachers receive no First Amendment protection anytime they speak on matters that implicate
2	anything that is "an indispensable prerequisite to effective teaching and classroom learning."
3	Maj. Op. at 15. But the prerequisites for effective learning are broad and contentious; everything
4	from a healthy diet to a two-parent family has been suggested to be necessary for effective
5	classroom learning, and hence speech on a wide variety of topics might all too readily be viewed
6	as "in furtherance of" the core duty of encouraging effective teaching and learning. The line-
7	drawing this entails is necessarily subjective and provides little certainty to the employers and
8	employees who must structure their behavior around our law. Is speech regarding, say, a
9	teacher's concerns about a student's misconduct outside the classroom "in furtherance of" the
10	teacher's core duty of maintaining class discipline? What of a teacher who discovers that a
11	student is the victim of domestic abuse, which is affecting the student's classroom performance,
12	and brings his concerns to the administration's attention? The majority's elaboration of Garcetti
13	provides no administrable standards for analyzing such cases, and as such poorly serves not only
14	the courts and juries that will hear future cases but also the parties who look to us for legal
15	guidance.
16	The majority's second prong, which asks whether there is a "relevant citizen analogue" to
17	Weintraub's speech, Maj. Op. at 16, is also a plausible interpretation of Garcetti, but I am not
18	convinced that it is the right one. I do not read Garcetti's discussion of "analogue[s] to speech
19	by citizens who are government employees," Garcetti, 547 U.S. at 424, to set out a doctrinal
20	requirement. Rather, the Supreme Court was expounding upon "the theoretical underpinnings of
21	[its] decisions." Id. at 423. That is, it was explaining why speech that is "pursuant to

22 employment responsibilities," *id.* at 424, is unprotected, not defining that category of speech.

1	The idea that the existence of citizen analogues is a prerequisite for suit seems
2	contradicted by Garcetti's statement that the fact that a public employee "expressed his views
3	inside his office, rather than publicly, is not dispositive." Id. at 420; accord Givhan v. W. Line
4	Consol. Sch. Dist., 439 U.S. 410, 414 (1979) ("[The Supreme] Court's decisions do not
5	support the conclusion that a public employee forfeits his protection against governmental
6	abridgment of freedom of speech if he decides to express his views privately rather than
7	publicly."). A "citizen analogue" inquiry will often replicate the private/public distinction that
8	the Supreme Court has disavowed. The majority's analysis illustrates this problem, noting that
9	"[r]ather than taking his grievance elsewhere, through channels available to citizens at large,
10	Weintraub's speech took the form of an internal communication made pursuant to an existing
11	dispute-resolution policy established by his employer." Maj. Op. at 18. ² The Supreme Court has
12	made clear that not all internal speech is unprotected, see Garcetti, 547 U.S. at 420, and
13	accordingly some speech that is not "through channels available to citizens at large" must be free
14	from retaliation.
15	Even when read together, the majority's two prongs permit readings that would allow
16	retaliation against much speech that seems to me to require protection and to remain protected
17	after Garcetti. This sits uneasily with the Supreme Court's repeated assertion that "the members
18	of a community most likely to have informed and definite opinions" about an issue must "be able
19	to speak out freely on such questions without fear of retaliatory dismissal." Pickering v. Bd. of

² Additionally, the description of Weintraub's union complaint as an "internal communication" seems dubious. The Union Federation of Teachers is an external body, even if the union representative through whom Weintraub directed his complaint was presumably an employee of the Appellees.

1	Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563, 572 (1968); accord Garcetti, 547 U.S. at 421.
2	Consider Givhan, for example. In Givhan, a junior-high teacher had privately requested that the
3	school principal make a number of administrative changes, all of which "reflect[ed] Givhan's
4	concern as to the impressions on black students of the respective roles of whites and blacks in the
5	school environment." Ayers v. W. Line Consol. Sch. Dist., 555 F.2d 1309, 1313 (5th Cir. 1977).
6	Writing for a unanimous Supreme Court, then-Justice Rehnquist wrote that Givhan's speech was
7	protected even though it consisted of a private, internal communication and even though the
8	principal was a willing recipient of her speech. See Givhan, 439 U.S. at 415-16. Would Givhan
9	come out the same way under the majority's framework? Givhan's speech concerned her
10	students' opinions on the school's handling of racial issues, a matter that has serious pedagogical
11	implications. Accordingly, it could be described as a "means to fulfill [her] primary
12	employment responsibility of teaching," and, thereby, as an effort to further her core duty of
13	"effective teaching." Maj. Op. at 14-15 (internal quotation marks and citations omitted); cf. id. at
14	13 (citing Renken v. Gregory, 541 F.3d 769, 773 (7th Cir. 2008), for the proposition that any
15	actions taken "for the benefit of students" and that "aid[] in the fulfillment of teaching
16	responsibilities" are within a teachers' duties). And it certainly was a private communication to a
17	willing audience that a regular citizen likely could not access in the same way. As a result, I fear
18	that some courts will conclude that speech like Givhan's would fail both prongs of the majority's
19	test. But Garcetti specifically reaffirmed Givhan. See Garcetti, 547 U.S. at 420-21. ³

³ I recognize and greatly appreciate the majority's analysis of why its two-prong test is consistent with *Givhan*, and why *Givhan* is distinguishable from the case before us. But if *Givhan* survives it is because the two-pronged test the majority employs is not in fact the end of the matter. For that reason, I discuss *Givhan* primarily to illustrate why I believe that the test outlined today does not suffice to differentiate protected and unprotected speech.

1	Furthermore, the pragmatic concerns motivating Garcetti do not support such an
2	expansive reading. Garcetti recognized the need for employers to have the freedom to "ensure
3	that their employees' official communications are accurate, demonstrate sound judgment, and
4	promote the employer's mission." Id. at 422-23. When an employee is engaged in speech that
5	the "employer itself has commissioned or created," id. at 422, then the employee is acting as an
6	agent or a mouthpiece of the employer, and the employer must have a substantial degree of
7	control over the employee's execution of his responsibilities. If an employer could not discipline
8	or fire an employee for the substance of his work product, the employer would be all but unable
9	to function.
10	By contrast, when an employee's speech is not part of the implementation of the
10 11	By contrast, when an employee's speech is not part of the implementation of the employer's business operations, the employer does not depend on "substantive consistency and
11	employer's business operations, the employer does not depend on "substantive consistency and
11 12	employer's business operations, the employer does not depend on "substantive consistency and clarity," <i>id.</i> at 422, in that speech. Instead, employers may well benefit from a narrowly defined
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11 12 13 14	employer's business operations, the employer does not depend on "substantive consistency and clarity," <i>id.</i> at 422, in that speech. Instead, employers may well benefit from a narrowly defined exception to First Amendment protection, for an exemption that sweeps more broadly than necessary will likely encourage employees to make complaints publicly when they might
11 12 13 14 15	employer's business operations, the employer does not depend on "substantive consistency and clarity," <i>id.</i> at 422, in that speech. Instead, employers may well benefit from a narrowly defined exception to First Amendment protection, for an exemption that sweeps more broadly than necessary will likely encourage employees to make complaints publicly when they might otherwise be handled internally. <i>See id.</i> at 424 ("Giving employees an internal forum for their

19

I would hold the scope of *Garcetti* to be coextensive with its prime concerns and to go no further. An employee's speech is "pursuant to official duties" when the employee is required to

⁴ On this point, both the majority and at least one of the dissenters in *Garcetti* were in agreement. *See Garcetti*, 547 U.S. at 427 (Stevens, J., dissenting) ("[I]t seems perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors.").

1	make such speech in the course of fulfilling his job duties. This necessitates a "practical" inquiry
2	into each plaintiff's job duties. See id. at 424; see also Marable v. Nitchman, 511 F.3d 924, 932-
3	33 (9th Cir. 2007). I do not mean to suggest that speech must be explicitly envisioned in a job
4	description or specifically requested by the employer; on this point I agree with the majority. See
5	Maj. Op. at 17. ("[S]peech can be 'pursuant to' a public employee's official job duties even
6	though it is not required by the employee's job description or included in it or in response to a
7	request by the employer."). But it must be possible to say that the employer has "commissioned
8	or created" the speech, Garcetti, 547 U.S. at 422-that the employer in some way relies on the
9	speech made by the employee, as where the speech is an "official communications" or is used by
10	the employer to "promote the employer's mission," id. at 423.
11	In Garcetti, for example, the plaintiff Richard Ceballos's responsibilities as a calendar
12	deputy called for him "to advise his supervisor about how best to proceed with pending
13	case[s]." Id. at 421. The speech at issue involved a memo recommending that a case assigned to
14	Ceballos be dismissed, which Ceballos was not authorized to do without his supervisor's
15	approval. Brief of Petitioner at 4, Garcetti, 547 U.S. 410 (2006) (No. 04-473). The memo that
16	Ceballos wrote was not merely related to his job duties, but rather it was the very thing he was
17	paid by the Los Angeles County District Attorney's Office to do. Without Ceballos's competent
18	advice and input, his employer could not function anywhere near as well. His employer therefore
19	had a need to supervise the quality and content of that speech, and was entitled to discipline him
20	accordingly.
21	As far as the record reflects, Appellees here did not in any way depend on Weintraub

22 bringing union grievances or refraining from bringing them (subject, of course, to the

1	requirement that speech not "disrupt[] the workplace," Cioffi v. Averill Park Cent. Sch. Dist. Bd.
2	of Educ., 444 F.3d 158, 162 (2d Cir. 2006)). He may well have been in a position to file a
3	grievance only because of his official duties, and the subject matter of that grievance may have
4	had the potential to further those duties, but neither of these facts establishes that he filed his
5	grievance pursuant to his official duties.
6	In the present posture of the case, I take it as a given that Weintraub's duties entailed
7	informing the school administration of violent incidents, such as those at the root of this case, as
8	a means of facilitating the school's disciplinary apparatus. This justifies the District Court's
9	holding that Weintraub's comments to his supervisor were not protected. ⁵ But grieving the
10	administration's response through his union is quite another matter. And neither the Appellees
11	nor the majority direct us to any evidence that such a response was in any way required of
12	Weintraub. It is possible that the union grievance was an official part of a process by which
13	employees brought subjects of concern to Appellees' attention, facilitating corrective action; if
14	this were the case, then Weintraub's grievance might be pursuant to his official duties and
15	exempt from First Amendment protection. ⁶ But on the record before us, there is no reason to
16	think this is so. ⁷

⁵ Because Weintraub does not appeal this part of the District Court's holding, we need not consider it in any detail.

⁶ As a general matter, I doubt that most employers would view union activity as something that their employees do *for the employer's benefit*. There is a distinct irony in the idea that unions, which so many employers seek to exclude from the workplace, are somehow transmuted into entities that "promote the employer's mission," *Garcetti*, 547 U.S. at 423, for purposes of the First Amendment.

⁷ If nothing else, this presents a question that should be explored on remand or put before a jury. It should not be disposed of on summary judgment without further inquiry. This is

1 For these reasons, I respectfully dissent.

²

exactly what the Ninth Circuit did in *Freitag v. Ayers*, 468, F.3d 528 (9th Cir. 2006), upon which the majority relies. *Freitag* found that a first level of internal forms filed by a corrections officer about inmate misconduct was unprotected, as the officer was "required as a part of her official duties to report inmate misconduct and to pursue appropriate discipline," but it also remanded the case to the district court "for a determination of whether prison guards are expected to air their complaints regarding prison conditions all the way up to the CDCR director." *Marable*, 511 F.3d at 932; *see also Freitag*, 468 F.3d at 546. I agree with the majority that *Freitag* provides a good model for the case before us—but I do not believe that it supports the majority's conclusion.