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FREEDOM DICTATED BY OCCUPATION? HOW *DAHLIA v. RODRIGUEZ* IMPACTS FREE SPEECH PROTECTION AFFORDED TO PUBLIC EMPLOYEES

*Heidi Tong**

I. INTRODUCTION

Burbank Police Department (BPD) officer, Angelo Dahlia, witnessed and made several attempts to report fellow officers for physically and verbally abusing individuals during suspect interviews.¹ Dahlia's complaints, however, resulted only in frustration with his supervisor's lack of corrective action and threats directed toward Dahlia himself.² Dahlia reported the injustice to BPD's Internal Affairs.³ Immediately following Dahlia's disclosure, BPD placed him on administrative leave.⁴

Penalized for promoting BPD's core values of respect, integrity, and excellence,⁵ Dahlia filed a complaint in the United States District Court for the Central District of California alleging several claims, including retaliation against a public employee for disclosing police misconduct—violating the First Amendment.⁶ Ultimately, the Ninth Circuit held that Dahlia's speech was protected.⁷

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1. *Dahlia v. Rodriguez*, 735 F.3d 1060, 1063–64 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1283 (2014).

2. *Id.* at 1064–65.

3. *Id.* at 1065.

4. *Id.*

5. *See Mission Statement*, BURBANK POLICE DEPARTMENT, <http://www.burbankpd.org/inside-bpd/mission-statement/> (last visited Feb. 22, 2013).

6. *Dahlia*, 735 F.3d at 1065.

7. *Id.* at 1078.

There has been a longstanding legal debate about where to draw the line on First Amendment protection for public employees.⁸ Precedent dictates that public employees are not entitled to First Amendment protection when the employees' speech is made pursuant to their official duties.⁹ However, neither the legislature nor the courts have established a test to determine the scope of an employee's official duties.¹⁰ Consequently, courts have struggled with the "official duties" rule, resulting in different approaches to determine what constitutes official duties.¹¹

Part II of this Comment presents the historical background of the First Amendment's protection for public employees. Part III discusses the factual background of *Dahlia v. Rodriguez*.¹² Part IV sets forth the reasoning the court adopted in holding that the First Amendment protected Dahlia's speech. Part V analyzes the implications of the court's adoption of the chain-of-command approach on which the *Dahlia* opinion relies and ultimately concludes that the approach should be abandoned.

II. HISTORICAL FRAMEWORK

In 1892, Justice Oliver Wendell Holmes held in *McAuliffe v. Mayor of Bedford*¹³ that a mayor had the right to terminate a police officer's employment for expressing his political opinions.¹⁴ In doing so, Holmes declared that "[an officer] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman . . . [he] cannot complain, as he takes the employment on the terms which are offered him."¹⁵ Since this declaration, the First Amendment's protection, as it extends to public employees, has been the subject of much debate and development.¹⁶

8. *See id.* at 1067–69.

9. *Garcetti v. Ceballos*, 547 U.S. 410, 411 (2006).

10. *See* Tyler Wiese, *Seeing Through the Smoke: "Official Duties" in the Wake of Garcetti v. Ceballos*, 252 A.B.A. J. LAB. & EMP. L. 509, 509 (2010).

11. *See id.*

12. 735 F.3d 1060, 1063–64 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1283 (2014).

13. 29 N.E. 517 (Mass. 1892).

14. *Id.* at 517–18. *But see* O'Hare Truck Serv., Inc. v. City of Northlake, 518 U.S. 712, 716–717 (1996) ("The [Supreme] Court has rejected for decades now the proposition that a public employee has no right to a government job and so cannot complain that termination violates First Amendment Rights . . .").

15. *Id.*

16. *See* Caroline Flynn, *Policeman, Citizen, or Both? A Civilian Analogue Exception to Garcetti v. Ceballos*, 111 MICH. L. REV. 759, 760–63 (2013).

Following a series of landmark cases that laid the foundation of First Amendment rights for public employees, the Supreme Court added a significant limitation to the original two-step analysis.¹⁷ To be protected by the First Amendment initially, public employees' speech had to (1) address a matter of public concern and (2) demonstrate that the employees' interests in the speech outweighed the employer's administrative concerns.¹⁸ In 2006, however, *Garcetti v. Ceballos*¹⁹ added an additional rule.²⁰ *Garcetti* denied First Amendment protection to a deputy district attorney who submitted to his superior a memo explaining the inaccuracies of an affidavit.²¹ The *Garcetti* court reasoned that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for the First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."²² By supplanting the original two-step analysis with an additional "official duties" rule, the decision significantly diminished the scope of protection afforded to public employees.²³

In adding this new bright-line rule, however, *Garcetti* failed to define the scope of the term "official duties."²⁴ The undefined term resulted in lower courts applying a variety of inconsistent tests.²⁵ *Dahlia v. Rodriguez* attempted to fill the void left by *Garcetti* by implementing a chain-of-command approach to determine the scope of official duties.²⁶

III. STATEMENT OF THE CASE

BPD assigned Dahlia to assist in the investigation of an armed robbery at Porto's Bakery & Café in Burbank, California on December 28, 2007.²⁷ Lieutenant Jon Murphy supervised the

17. See Wiese, *supra* note 10, at 514.

18. *Id.* at 511–13.

19. 547 U.S. 410 (2006).

20. See *id.* at 421.

21. *Id.* at 424.

22. *Id.* at 421.

23. Flynn, *supra* note 16, at 760–61.

24. *Garcetti*, 547 U.S. at 424.

25. See Wiese, *supra* note 10, at 515–16.

26. See *Dahlia v. Rodriguez*, 735 F.3d 1060, 1077–78 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1283 (2014).

27. *Id.* at 1063.

investigation.²⁸ On Dahlia's second day assisting in the investigation, he witnessed a higher-ranked Burbank police officer, Lieutenant Omar Rodriguez, grab one of the suspects' throat, place the barrel of his handgun under the suspect's eye and state, "How does it feel to have a gun in your face motherfucker[?]"²⁹ That same day, Dahlia overheard yelling and the sounds of a suspect being slapped coming from a room where another investigator, Sergeant Edgar Penaranda, was interviewing another suspect for the same offense.³⁰

After Rodriguez saw the shock on Dahlia's face, the Burbank Officers ("Defendant Officers") quickly proceeded to exclude Dahlia from engaging in subsequent suspect interviews and began to take exclusive control of the investigation.³¹ Prohibiting all other personnel from walking past the interview rooms, Defendant Officers continued to assault and beat suspects, evidenced by booking photos of suspects.³² Dahlia reported the improper conduct and his lack of control over the investigation to Murphy.³³ Murphy responded by instructing Dahlia to "stop his sniveling."³⁴ Dahlia met with Murphy twice more after this incident, pleading for an end to "the madness."³⁵ Despite Dahlia's many complaints, Defendant Officers continued to physically and verbally abuse suspects.³⁶

Four months after the Porto's investigation commenced, BDP's Internal Affairs decided to examine the investigation for any unlawful physical abuse.³⁷ Defendant Officers learned of the impending investigation and, upon such notice, threatened Dahlia daily to ensure that he would remain silent on the matter.³⁸ Specifically, Defendant Officers "incessantly harassed, intimidated and threatened Dahlia over the following weeks, to the point where his working conditions were 'fully consumed' by the intimidation."³⁹

28. *Id.*

29. *Id.*

30. *Id.* at 1063–64.

31. *Id.* at 1064.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

Nearly one year after the start of Defendant Officers' misconduct, Rodriguez instructed Dahlia to enter his office, wherein Rodriguez reached for his own gun, stared at Dahlia, and placed his gun in a drawer.⁴⁰ Rodriguez then leaned into Dahlia and said, "Fuck with me and I will put a case on you, and put you in jail."⁴¹ As a result of Rodriguez's aggressive behavior, Dahlia informed the Burbank Police Officers' Association (BPOA) of his encounter with Rodriguez.⁴² Then, the BPOA reported it to the Burbank City Manager.⁴³ In a May interview with the Los Angeles Sheriff's Department, Dahlia disclosed the Defendant Officers' misconduct.⁴⁴ Four days following that interview, Dahlia was placed on administrative leave pending discipline.⁴⁵

Thereafter, Dahlia filed an action against Defendant Officers and the City of Burbank in district court, alleging several claims, including violation of the First Amendment.⁴⁶ Defendant Officers moved to dismiss the case for failure to state a claim.⁴⁷ The district court held that the claim was barred because the First Amendment did not protect Dahlia's speech.⁴⁸ Dahlia appealed to the Ninth Circuit Court of Appeals, which affirmed the district court's ruling.⁴⁹ Following a majority vote of eligible judges, the Ninth Circuit reheard the case en banc.⁵⁰

IV. THE REASONING OF THE COURT

On appeal, Defendant Officers relied on *Huppert v. City of Pittsburg*,⁵¹ which held that police officers' official duties included reporting police misconduct.⁵² Based on *Huppert*, Defendant Officers argued that Dahlia acted within his official duties and therefore was not protected by the First Amendment.⁵³ Dahlia

40. *Id.* at 1065.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 1066.

48. *Id.*

49. *Id.*

50. *Id.*

51. 574 F.3d 696 (9th Cir. 2009).

52. *Id.* at 707.

53. *See Dahlia*, 735 F.3d at 1071.

counter-argued that to remain consistent with the principles set forth in *Garcetti*, the court would have to overrule *Huppert* and deem Dahlia's speech protected by the First Amendment.⁵⁴ Dahlia asserted that under *Garcetti*'s official duties rule, Dahlia's speech fell outside of the realm of his official duties as a police officer and thus deserved First Amendment protection.⁵⁵

The court agreed with Dahlia and overruled *Huppert* to abide by *Garcetti*'s official duties rule.⁵⁶ Furthermore, the court established factors to determine the scope of an employee's official duties.⁵⁷ These factors are: (1) whether the employee communicated with individuals outside his chain of command, (2) the subject matter of the communication, and (3) whether the employee was speaking in direct contravention to his supervisor's orders.⁵⁸

Based on these factors, the court found that, construing the complaint in Dahlia's favor, Dahlia's speech fell outside of the scope of official duties and therefore merited First Amendment protection.⁵⁹ The court subsequently decided that Dahlia sufficiently stated a claim, and reversed the district court's ruling.⁶⁰ The Ninth Circuit remanded the case for further proceedings consistent with its findings.⁶¹

The Ninth Circuit first looked to the analysis set forth in *Garcetti* to determine whether the First Amendment protected Dahlia's speech.⁶² The Court in *Garcetti* held that the First Amendment does not protect statements made pursuant to an officer's official duties.⁶³ Although *Garcetti* rejected broad job descriptions and mandated a fact-specific inquiry to determine the scope of official duties, it did not provide a specific test.⁶⁴

54. United States Court of Appeals for the Ninth Circuit, *10-55978 Dahlia v. Rodriguez*, YOUTUBE (Mar. 22, 2013), http://www.youtube.com/watch?v=BTiSKFx5_98.

55. *See Dahlia*, 735 F.3d at 1077.

56. *Id.* at 1063.

57. *Id.* at 1074.

58. *Id.* at 1074–75.

59. *Id.* at 1077–78.

60. *Id.* at 1080.

61. *Id.*

62. *Id.* at 1068.

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

64. *See id.* at 424; *see Dahlia*, 735 F.3d at 1068–69.

Accordingly, the court referred to *Huppert* to define the scope of official duties.⁶⁵ Employed as an officer of the Pittsburg Police Department (PPD), Ron Huppert was subpoenaed to testify before a grand jury investigating corruption within the PPD.⁶⁶ The court in *Huppert* found that officers were acting pursuant to their official duties by investigating and reporting police corruption.⁶⁷ The *Huppert* court relied on *Christal v. Police Commission of City and County of San Francisco*⁶⁸ as a shortcut to automatically classify whistleblowing as part of an officer's official duties.⁶⁹

Huppert followed *Christal*'s sweeping, generalized definition to determine the scope an officer's official duties rather than conducting *Garcetti*'s fact-specific inquiry.⁷⁰ *Dahlia* determined that *Huppert* incorrectly relied on the general job description in *Christal*, which stated that an officer's official duties included the duty to "testify freely" concerning facts before a grand jury.⁷¹ Distinguishing *Christal* from *Huppert*, *Dahlia* stated that *Christal* was solely limited to whether police officers "could assert their Fifth Amendment right against self-incrimination and still remain police officers."⁷² Unlike *Christal*, which concerned a Fifth Amendment claim, *Huppert* concerned a First Amendment claim.⁷³ Consequently, *Dahlia* overruled *Huppert* for improperly relying on *Christal*.⁷⁴

Left without *Huppert*'s definition of official duties, the court set forth the three aforementioned factors, consisting of whether the communication fell outside the chain of command, the subject matter of the communication, and whether the communication was a contravention of orders. The court examined these three factors to determine whether *Dahlia*'s speech fell within the scope of an officer's official duties.⁷⁵

65. *Dahlia*, 735 F.3d at 1069–70.

66. *Huppert v. City of Pittsburg*, 574 F.3d 696, 698–701 (9th Cir. 2009).

67. Leslie Pope, *Huppert v. City of Pittsburg: The Contested Status of Police Officers' Subpoenaed Testimony After Garcetti v. Ceballos*, 119 YALE L.J. 2143, 2143–44 (2010).

68. 92 P.2d 416 (Cal. Ct. App. 1939).

69. *Id.* at 419; *Dahlia*, 735 F.3d at 1070.

70. *Dahlia*, 735 F.3d at 1070–71.

71. *Id.*; *Christal*, 92 P.2d at 419.

72. *Dahlia*, 735 F.3d at 1071.

73. *Id.* at 1070–71.

74. *Id.* at 1071.

75. *Id.* at 1074–75.

The Ninth Circuit determined that the first factor, whether the employee communicated with individuals outside his chain of command, weighed in Dahlia's favor.⁷⁶ By speaking to BPD's Internal Affairs officers, Dahlia communicated *outside* of his chain of command.⁷⁷ The majority determined that "it [was] reasonable to infer that Dahlia did not have a duty to report threats to his union . . . clearly [speaking] outside the chain of command."⁷⁸ The court stated that this chain-of-command factor was "a relevant, if not necessarily dispositive, factor in determining whether he spoke pursuant to his official duties."⁷⁹ Consequently, the court abstained from analyzing the second and third factors.⁸⁰ The court held that, construing the complaint in favor of Dahlia, his speech was protected, and the court reversed both the district court's and three judge panel's ruling.⁸¹

V. ANALYSIS: THE NINTH CIRCUIT'S ADOPTION OF THE CHAIN-OF-COMMAND ANALYSIS

While *Garcetti* held that a public employee's speech would not be protected if the speech was made pursuant to the employee's official duties, it left the determination of the scope of official duties to the lower courts.⁸² The *Dahlia* court attempted to clarify *Garcetti* by providing three factors to determine the scope of official duties.⁸³ Of these factors, the court focused its analysis on the first factor and adopted a "de facto" chain-of-command approach.⁸⁴ Although Dahlia's speech was protected, this was the result of his reporting to an outside agency.⁸⁵ Many misconduct reports, however, may likely be conveyed to a direct supervisor and consequently will be subject to First Amendment limitations. Accordingly, this approach represents a misapplication of *Garcetti* that undercuts the principles *Garcetti* sought to implement.⁸⁶ As evidenced by other courts' use of

76. *Id.* at 1077–78.

77. *Id.*

78. *Id.* at 1077.

79. *Id.* at 1074.

80. *See id.* at 1077–78.

81. *Id.* at 1080.

82. Wiese, *supra* note 10, at 509.

83. *See Dahlia*, 735 F.3d at 1074–76.

84. *Id.* at 1074–78.

85. *Id.* at 1077–78.

86. *Id.* at 1080–83 (Pregerson, J., concurring).

alternative approaches,⁸⁷ the weight that the *Dahlia* court bestowed on an employee's communication, or lack thereof, with individuals within the chain of command presents significant consequences and complications for public employees, as well as the lower courts.

A. *The Chain-of-Command Analysis Undermines the Principles Set Forth in Garcetti*

The objective of the *Garcetti* decision is to ensure that courts balance deference to government employers' daily operations, while still providing an individual citizen a platform to speak out on matters of public concern.⁸⁸ Due to the nature of the trusted positions public employees frequently hold, employees who enter into public employment are subject to more limitations on their First Amendment rights.⁸⁹ By adopting the chain-of-command approach, the court in *Dahlia* thwarts the main balancing objective set forth in *Garcetti*.

The controlling rationale behind public employees being subject to more limitations on their First Amendment rights is government efficiency.⁹⁰ Without some degree of control over their employees, government employers are unable to provide citizens with efficient public services.⁹¹ Public employees often occupy trusted positions in the community.⁹² In such trusted positions, there is a concern that a public employee may voice an opinion that could encroach on government policies or impair government functions if given unlimited First Amendment protection.⁹³ This does not, however, completely bar public employees from civic discourse. Rather, *Garcetti* simply does not grant public employees "a right to perform their jobs however they see fit."⁹⁴

Nevertheless, a criticism of this policy is that prohibiting public employees from speaking on matters of public concern deprives citizens of informed opinions on such matters.⁹⁵ Public employees

87. See Wiese, *supra* note 10, at 515–16; see also Flynn, *supra* note 16, at 771 (discussing the different approaches courts have used to evaluate public employees' First Amendment rights).

88. Flynn, *supra* note 16, at 767–68.

89. *Garcetti v. Ceballos*, 547 U.S. 410, 418–19 (2006).

90. See *id.*

91. *Id.* at 418.

92. *Id.* at 419.

93. *Id.*

94. *Id.* at 422.

95. *Id.* at 420 (quoting *San Diego v. Roe*, 543 U.S. 77, 82 (2004)).

are frequently in “the best position to know what ails the agencies for which they work” and are best able to utilize their informed opinions to contribute significantly to public debates.⁹⁶ As such, courts are placed in a delicate yet essential position to strike a balance between promoting both individual and societal interests served by a public employee’s free speech.⁹⁷

Taking these two adverse interests into account, the emphasis that the Ninth Circuit placed on the chain-of-command analysis undermines *Garcetti*’s underlying rationale of government efficiency. *Garcetti* implemented restrictions on public employees’ First Amendment protection to promote efficiency of government services, while still affording public employees a right to engage in civic discourse.⁹⁸ *Dahlia*’s chain-of-command analysis, however, runs counter to these goals.

The *Dahlia* court failed to consider that in order to promote the aims of *Garcetti*, it benefits both the government and society to allow employees to report up the chain of command, without fear of being subject to retaliation.⁹⁹ First, public employees’ communication with their supervisors promotes efficiency.¹⁰⁰ Presumably, a supervisor is in the best position to know the information and subsequent actions necessary to resolve any issue brought to his or her attention.¹⁰¹ Involving multiple outside parties to avoid reporting up the chain of command may only serve to confuse or distort the situation at hand.¹⁰² Disclosure to a supervisor keeps the conflict within the agency.¹⁰³

Second, a government employee’s ability to disclose potential misconduct to his superiors strengthens the public’s confidence in law enforcement.¹⁰⁴ Without this freedom, the public may think that

96. *Waters v. Churchill*, 511 U.S. 661, 674 (1994).

97. *Garcetti*, 547 U.S. at 420.

98. *Id.*

99. *See Garcetti* 547 U.S. at 427–29 (Souter, J., dissenting); *see also Waters*, 511 U.S. at 674 (emphasizing the benefits to society and government agencies of First Amendment protection for public employees).

100. *See Garcetti*, 547 U.S. at 427 (Stevens, J., dissenting); *see also Wiese, supra* note 10, at 528 (discussing why public employees’ communication with supervisors promotes efficiency).

101. *See Garcetti*, 547 U.S. at 427 (Stevens, J., dissenting); *see also Wiese, supra* note 10, at 528 (discussing why public employees’ communication with supervisors promotes efficiency).

102. *See Wiese, supra* note 10, at 528.

103. *See id.*

104. *See Dahlia v. Rodriguez*, 735 F.3d 1060, 1082–83 (9th Cir. 2013) (Pregerson, J., concurring), *cert. denied*, 134 S. Ct. 1283 (2014).

officers are simply turning their heads to ongoing police corruption.¹⁰⁵ An officer's ability to report police misconduct without fear significantly diminishes the chance that the public will perceive law enforcement as a corrupt agency.¹⁰⁶

With these policies in mind, it is evident that the Ninth Circuit's opinion undermines the principles that *Garcetti* sets forth.¹⁰⁷ Rather than incentivizing and promoting government efficiency and societal interests, the majority opinion traps officers in a catch-22—either violate their duty to report to their supervisors and receive First Amendment protection, or adhere to their duty and expose themselves to employment retaliation.¹⁰⁸ Indeed, as a result of *Dahlia*, officers who find themselves in a position akin to Dahlia's will be forced to choose between sacrificing the public interest and work efficiency (by not reporting up their chain of command), or adhering to their duty and risking employer retaliation.¹⁰⁹ The court has essentially asked officers to choose between the public interest and their own self-interest.¹¹⁰ In sum, it is this predicament in which an officer may find himself that warrants abandoning the chain-of-command analysis.

B. Alternative Methods to the Chain-of-Command Analysis

Other circuits' decisions to refrain from adopting the chain-of-command approach evidences that others view the law and policy advanced by *Dahlia* negatively.¹¹¹ Consequently, courts have adopted other approaches, such as the civilian-analogue exception and the assigned-responsibilities approach.¹¹²

1. The Civilian-Analogue Exception

One alternative to the chain-of-command approach is the civilian-analogue exception.¹¹³ Under this exception, a public

105. *Id.*

106. *See id.*

107. *See id.* at 1083.

108. *Id.*

109. *See id.* at 1082–83.

110. *See id.*

111. *See* Wiese, *supra* note 10, at 519 & n.96; *see also* Flynn, *supra* note 16, at 772 (discussing the Second Circuit's adoption of the Civilian Analogue Approach).

112. Wiese, *supra* note 10, at 519; Flynn, *supra* note 16, at 772.

113. *See* Jackler v. Byrne, 658 F.3d 225, 241–42 (2d Cir. 2011); Flynn, *supra* note 16, at 772.

employee's act is protected if a civilian would be able to perform the same act.¹¹⁴ In *Jackler v. Byrne*,¹¹⁵ the Second Circuit held that the plaintiff's refusal to comply with orders to issue false statements to hide police misconduct had a civilian analogue.¹¹⁶ The court reasoned that any citizen could report a police officer.¹¹⁷ Even though the officer's actions were part of his official duties, there was a civilian analogue, and thus, his actions warranted First Amendment protection.¹¹⁸

There is an argument, however, that when an "employee speaks as an employee, 'there is no relevant analogue to speech by citizens who are not government employees,' and thus normal First Amendment protections for *citizens* should not apply."¹¹⁹ Therefore, *Jackler's* civilian-analogue exception is not without its faults, and only one of the many alternatives courts have implemented.

2. The Assigned-Responsibilities Approach

Other courts, including those in the Ninth Circuit, have adopted the assigned-responsibilities approach to define the scope of a public employee's official duties.¹²⁰ Using this approach, courts examine whether the employee was required to engage in speech as part of his official duties.¹²¹

For example, *Marable v. Nitchman*¹²² focused its analysis on the assigned responsibilities of the employee.¹²³ Marable was an engineer for Washington State Ferries and began witnessing allegedly "corrupt financial schemes."¹²⁴ Consequently, Marable reported the misconduct to the Chief Executive Officer, the Department of Transportation auditor, the State Executive Ethics Board, and his supervisor.¹²⁵ The *Marable* court concluded "that Marable had no official duty to ensure that his supervisors were

114. See Flynn, *supra* note 16, at 774–75.

115. 658 F.3d 225 (2d Cir. 2011).

116. Flynn, *supra* note 16, at 774.

117. *Id.*

118. *Id.* at 775.

119. Wiese, *supra* note 10, at 515 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 424 (2006)).

120. *Id.* at 519–20.

121. See *Marable v. Nitchman*, 511 F.3d 924, 932–33 (9th Cir. 2007).

122. 511 F.3d 924 (9th Cir. 2007).

123. *Id.* at 932–33.

124. *Id.* at 926, 933.

125. Wiese, *supra* note 10, at 520.

refraining from the alleged corrupt practices.”¹²⁶ Thus, the court rejected defendant Nitchman’s motion for summary judgment, stating that the speech was not part of Marable’s official duties.¹²⁷

The *Marable* court’s decision contrasts with the decision in *Freitag v. Ayers*.¹²⁸ Freitag was a correctional officer for the California Department of Corrections and Rehabilitation (CDCR) who had witnessed inmates engaging in inappropriate sexual exhibitionist acts.¹²⁹ In response, Freitag submitted several internal reports, disciplinary reports, and various other documents to CDCR officials, the California State Senator, and the California Office of the Inspector General.¹³⁰ The *Freitag* court determined that the internal reports to CDCR officials were “pursuant to [Freitag’s] duties as a correctional officer and thus not in her capacity as a citizen.”¹³¹ The court determined that her communications to the Senator and Inspector General, however, were protected because Freitag was not acting in her official capacity in making these communications.¹³²

Both courts in *Marable* and *Freitag* implemented the assigned-responsibilities analysis.¹³³ Rather than looking to whom the speech was directed, this alternative approach asks the questions: “What are the responsibilities that correspond to this plaintiff’s position, and can the communication be considered part of these responsibilities?”¹³⁴ While the result in *Freitag* would have been the same if the court had applied a chain-of-command analysis, *Marable* would have resulted in the opposite outcome. Marable’s communication to the Chief Executive Officer would have been within Marable’s chain of command, and thus, would not have been protected. Prohibiting an engineer like Marable from speaking to his superior about finances, a subject completely detached from his actual work responsibilities, runs counter to *Garcetti*’s principles.

126. *Marable*, 511 F.3d at 933.

127. *Id.* at 926, 932–33.

128. *Compare id.* at 929, 932 (holding that a defendant’s internal reports of misconduct was outside scope of official duties), *with Freitag v. Ayers*, 468 F.3d 528, 546 (9th Cir. 2006) (holding that a defendant’s internal reports of misconduct was within scope of official duties).

129. *Freitag*, 468 F.3d at 532–34.

130. *Id.* at 532–35.

131. *Id.* at 546.

132. *Id.* at 545–46.

133. Wiese, *supra* note 10, at 520–21.

134. *See id.* at 521.

Thus, the chain-of-command approach should not be as dispositive as the *Dahlia* court suggested.

*C. The Chain-of-Command Analysis Could
Lead To Inconsistent Results
for Different Public Employees*

Dahlia's chain-of-command analysis presents further implications if this approach is applied to public employees who, unlike police officers, may not have a distinct hierarchical employment structure.

While most employees do have supervisors, the structure of the police department consists of *direct* rankings in a military-like fashion, each officer knowing who is above and below him.¹³⁵ Teachers, in contrast, are employed within a much less distinct hierarchy.¹³⁶ Several teachers report to one principal. Possibly excluded from this two-tier hierarchy are administration staff, educational support, and other ad hoc committees.¹³⁷ Thus, a question becomes immediately apparent: what happens when a teacher reports misconduct to someone other than the principal? Do members of an ad hoc committee or administrative staff constitute individuals within the teacher's chain of command?

This wrinkle in the chain-of-command analysis creates an unfair advantage to public employees who do not have a strict vertical hierarchy. If personnel other than the principal, such as an ad hoc committee member, were labeled as outside the chain of command, teachers would be more likely to encounter someone not within the chain of command. This would result in varying degrees of protection for different types of public employees.

Rather than have an individual's occupation determine the limitations on his or her First Amendment protection, it is better policy to give all public employees the same quality of protection. Allowing certain employment fields to have more First Amendment limitations may deter individuals from entering those employment

135. See *The LAPD Career Ladder*, JOINLAPD, http://joinlapd.com/career_ladder.html (last visited Jan. 10, 2014).

136. Cf. Nirav S., *What Are Hierarchies in the School System?* PRESERVE ARTICLES, <http://www.preservearticles.com/2012011120547/what-are-hierarchies-in-the-school-system.html> (last visited Feb. 3, 2014) (stating schools comprise of different available positions depending on each school's unique needs and employ contrasting models of hierarchies).

137. See *id.*

fields for fear of being retaliated against. Additionally, the lack of a specific test to determine who is within a public employee's chain of command leaves this uncharted territory to the discretion of lower courts. This absence could lead to courts' conflicting views about who is within an employee's chain of command. The anticipated possibility of inconsistent and uncertain applications of the chain-of-command analysis thus warrants the disposal of the chain-of-command approach.

VI. CONCLUSION

Rather than utilizing the chain-of-command approach, the court could have simply found guidance in *Garcetti's* statement that official duties are tasks that an "employee actually is expected to perform."¹³⁸ Even if a public employee is expected to report up his chain of command, he is not expected to contradict his supervisor's orders. Accordingly, because Dahlia spoke in direct opposition to his instructions, *Garcetti's* "expected to perform" statement alone suggests that Dahlia's speech does not fall within his official duties. Therefore, Dahlia's speech warranted protection under the First Amendment.

The Ninth Circuit's reliance on the chain-of-command approach not only undercuts the principles set forth by *Garcetti* but also presents significant implications for future applications and public employees' constitutional rights. For these reasons, the chain-of-command approach should be abandoned.

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

