257 Ed. Law Rep. 823

West's Education Law Reporter
August 19, 2010

Commentary

Gina K. DePietro, J.D., and Perry A. Zirkel [aa1]

EMPLOYEE SPECIAL EDUCATION ADVOCACY:RETALIATION CLAIMS UNDER THE FIRST AMENDMENT,SECTION 504 AND THE ADA [a1]

This Article surveys the case law in which a public school employee has filed a retaliation claim under the First Amendment and/or Section 504 or the ADA after experiencing an adverse employment action in the wake of advocating on behalf of students with disabilities. The first part provides an overview of the framework of First Amendment claims prior to *Garcetti v. Ceballos* [1] and—as the baseline for considering *Garcetti*'s effect—the pertinent lower court case law decided under this framework. The second part summarizes the *Garcetti* decision, showing how it changed the landscape for these First Amendment retaliation claims. The third part examines retaliation claims decided after *Garcetti,* focusing on the fatal effect of the decision's additional prerequisite. The final part canvasses the relevant retaliation claims under Section 504 and/or the ADA, revealing that these claims—which *Garcetti* does not affect—are often more successful than their First Amendment counterparts.

Introduction

In public schools, teachers and other school employees are often in position to observe whether special education students are receiving the educational services to which they are legally entitled. When a public school employee perceives that the school district is violating its legal obligations and speaks up on behalf of the student with disabilities, such speech generally amounts to advocacy. If a school district takes an adverse employment action, such as a negative performance evaluation or even termination of employment, against the school employee in the wake of such advocacy, the issue extends beyond the originally perceived violation of the students' rights to the possible legal protection of the employee. Specifically, the question is whether the school district has engaged in prohibited retaliation against the public school employee for her advocacy on behalf of one or more students with disabilities.

***824** The primary avenues of the litigation resulting from retaliation claims stemming from such advocacy are federal. Prior to the U.S. Supreme Court's 2006 decision in *Garcetti v. Ceballos*, [2] most of the traffic was under First Amendment expression. The *Garcetti* decision, which held that First Amendment protection does not extend to public employees' expression pursuant to their official duties, narrowed progress of the litigation traffic in this lane. However, public school employees have continued to have some success with retaliation claims under Section 504 of the Rehabilitation Act (Section 504) and the Americans with Disabilities Act (ADA).

This article will canvass the case law before and after *Garcetti* in which a public school employee filed a claim under the First Amendment and/or Section 504 or the ADA based on asserted retaliation for advocating on behalf of students with disabilities. The scope of coverage of this paper does not include two related but separable areas. First, it does not extend to retaliation cases where the plaintiff was a parent, a parent attorney, special education hearing officer, or private school employee since the *Garcetti* decision is applicable only to public employees and does not impact cases where the plaintiff does not fall into that

category.[3] Second, the coverage does not include claims under state whistleblower laws, which vary considerably from one jurisdiction to another and have been the basis for much more limited pertinent litigation.[4]

The literature is replete with discussions of public employees' free speech rights in general[5] as well as those in the educational setting[6] particularly ***825** in the wake of *Garcetti*. However, these relatively recent articles have not focused specifically on public school employees' retaliation claims for purported "advocacy" on behalf of special education students.[7]

First Amendment Advocacy Retaliation Claims

Basic Framework

The judicially developed framework for First Amendment retaliation claims amounts to a burden–shifting test.[8] First, the public school employee must establish that 1) her speech was constitutionally protected; 2) she suffered an adverse employment action; and 3) her protected speech was causally connected to the adverse employment action or a substantially motivating factor in the adverse employment action. Based on the Supreme Court cases decided prior to *Garcetti*, step one, protected speech, consists of two parts—A) whether the expression concerned a public issue, and B) whether, via balancing, the individual's interest outweighs the institutional interest. Second, to rebut the plaintiff's claim and break the prima facie causal connection, the school district must preponderantly prove that it would have taken the same action even if the employee had not engaged in the protected speech.

The basis for—and refinement[9] of—this multi–part test is a series of U.S. Supreme Court cases dealing with the free speech rights of public employees, starting in 1968 with *Pickering v. Board of Education of Township High School District 205*.[10] In *Pickering*, the Supreme Court established a balancing test for the threshold step of First Amendment protection. The school district in this case had dismissed a teacher after he wrote a letter to the local newspaper criticizing the school board's allocation of funds. In the subsequent litigation, the teacher claimed that the First Amendment protected the letter, and the school board countered that publication of the letter was "detrimental to the ***826** efficient operation and administration of the schools of the district."[11] Ultimately deciding in the teacher's favor, the Supreme Court ruled that the determination depended on balancing the interest of the teacher, as a citizen commenting upon matters of public concern, with the interest of the school board in promoting the efficiency of providing public educational services.

Next, in *Mt. Healthy City School District Board of Education v. Doyle,*[12] the Supreme Court gave shape to the causal–connection element of a First Amendment retaliation claim. In this case, a school district had decided not to renew the contract of a nontentured teacher after he objected to a teacher dress code by calling a local radio station and conveying the contents of a memo issued by the school principal. The school district cited both the teacher's radio call and his inappropriate incidents with students as the basis for not renewing the teacher's contract. In a unanimous decision, the Court held that the plaintiff employee must show that the protected speech played a substantial role in the adverse employment decision and, at the final step, the defendant public employer may prevail by showing that it would have made the same decision even if the employee had not engaged in the protected activity.

While *Mt. Healthy* was being decided, another case involving employee speech in the school setting was pending before the Court. In *Givhan v. Western Line Consolidated School District*,[13] a school district that was under a desegregation order dismissed a junior high school English teacher from her employment. The teacher intervened in the desegregation action, seeking reinstatement and arguing that her termination violated her First Amendment rights. The school district attempted to justify its decision to terminate the teacher by presenting evidence that the teacher made "petty and unreasonable" demands to the school principal in purportedly hostile, loud, and arrogant manner. The court ruled that the dismissal violated the teacher's First Amendment rights because the primary reason for the dismissal was the teacher's criticism of the district's policies and practices. The Fifth Circuit Court of Appeals reversed, reasoning that the teacher's speech was not protected because she had

expressed her concerns privately to the school principal rather than publicly. The Supreme Court disagreed, concluding that its previous decisions, including *Pickering* and *Mt. Healthy,* had shown that content rather than context was the primary factor in determining whether, at the first step, public employee expression concerned an issue of public concern. Because the Court had decided *Mt. Healthy* while this case was pending, the school district had not attempted to prove that it would have made the decision not to rehire the teacher in the absence of her expression. Thus, the *Givhan* Court remanded the case to the trial court to resolve the causal connection issue.

In 1983, the Supreme Court revisited the first, protected–expression step in *Connick v. Myers*. [14] In this case, a municipality terminated an assistant district attorney for insubordination after she distributed a questionnaire ***827** regarding her office's transfer policy to her fellow assistant district attorneys in the office. Elaborating on the plaintiff's interest in the *Pickering* balancing test, the *Connick* Court determined that, with the exception of one item in the questionnaire, the assistant district attorney's expression did not fall under the rubric of public concern. Distinguishing private grievances, the Court clarified that the threshold protection of the First Amendment is limited to matters of public concern. The plaintiff–employee is this case did not get beyond the balancing step, because the public employer's interest in harmony and efficiency outweighed the limited extent that her expression was a public issue.

Pre–*Garcetti* Advocacy–Retaliation Cases

Following these decisions, lower courts, when examining the free speech rights of public school employees who were advocating for the rights of students with disabilities, were most often faced with the task of determining whether the speech in question pertained to a matter of public concern and was therefore constitutionally protected. The pertinent lower court decisions before *Garcetti* had mixed results at the various steps of the First Amendment multi–part test. Following is a summary of the outcomes of these cases at each of the successive steps.

The leading successful example of the pertinent lower court decisions prior to *Garcetti,* which largely hinged on whether the plaintiff–teacher's advocacy was a matter of public concern is *Settlegoode v. Portland Public Schools*. [15] In *Settlegoode*, the defendant district issued a nonrenewal of an adaptive physical education teacher's contract after she wrote a letter to a supervisor about the treatment of special education students in the school system. Specifically, the teacher had complained that she often had trouble finding a place to teach her special education students and that the equipment available was frequently inadequate or unsafe. The Ninth Circuit Court of Appeals ruled that the teacher's expression was a matter of public concern, noting that her speech may have had important effects for students with disabilities and their parents. The court reasoned as follows:

> [T]eachers are uniquely situated to know whether students are receiving the type of attention and education that they deserve and, in this case, are federally entitled to.... This is particularly so with respect to disabled children, who may not be able to communicate effectively that they lack appropriate facilities. Teachers may therefore be the only guardians of these children's rights and interests during the school day. [16]

As a result, the appellate court reinstated the jury's verdict of almost a million dollars for plaintiff–teacher along with post–judgment interest and attorneys' fees. [17]

***828** Several of the pertinent pre–*Garcetti* cases succeeded in hurdling the threshold step prior to balancing, with lower courts ruling that incidents of public school educators' advocacy on behalf of special education students were a matter of public concern. [18] In contrast, where the public school special education personnel's complaints focused on their own working conditions, courts generally found that such complaints were personal grievances rather than matters of public concern and, thus, not entitled to First Amendment protection. [19]

In a few of the earlier cases, the speech addressed matters of both public and private concern, whereupon the courts considered the context and recipient of the speech as the determinative factors.[20] For example, in *Khuans v. School District 110*,[21] the Seventh Circuit concluded that a school psychologist's complaints that her supervisor was not following proper legal procedures regarding the education of students with disabilities was not entitled to First Amendment protection because, looking at the compliance complaint in the context of all of the psychologist's complaints, it was only one of many complaints about the supervisor, the rest of which were private employment matters concerning the psychologist's conflict with the supervisor. Similarly, in another decision during the same year, *Wales v. Board of Education of Community Unit School District 300*,[22] the Seventh Circuit concluded that the letter from a teacher at an inclusion facility to the school principal expressing concerns about what she perceived as a lack of discipline procedures for students with behavioral issues was of intramural rather than of general concern, because the teacher had communicated her complaints to a supervisor, not the public. Yet, such factors were not necessarily consistent or controlling. In a Virginia case, the federal district court ruled that a school psychologist's private communication of her criticism of the district's compliance ***829** with federal law to her supervisors and coworkers, rather than to the public at large, did not negate the public–issue content of her expression.[23]

Fewer of these aforementioned[24] cases hinged on the balancing test, which weighs the interest of the public educator, as a citizen, to speak on a matter of public concern against the school district's interest in promoting the efficiency of providing public educational services. In *Love v. City of Chicago Board of Education,*[25] the court determined that the balance weighed in favor of First Amendment protection where the school's reactions to the employee's complaints, not the complaints themselves, caused disruption and disharmony. In contrast, the plaintiff educators in *Fales v. Garst*[26] and the Seventh Circuit's *Khuans* decision[27] lost at the balancing step because the respective courts concluded that the particular advocacy resulted in factional disharmony among other school employees or undermined orderly authority within the special education department.

Whether the employee suffered an adverse employment action has generally not been an issue of dispute in cases filed by public school employees who have been disciplined for their advocacy on behalf of students with disabilities. However, a few cases have turned on the causal connection element of a First Amendment retaliation claim. For example, in *Forrest v. Ambach,*[28] the appellate court affirmed the dismissal of a school psychologist's First Amendment retaliation claim because she failed to demonstrate that exercising her protected advocacy of students with disabilities was a substantial factor in the school district's decision to terminate her employment for unsatisfactory performance.

Cases where the school district attempted to rebut the plaintiff's evidence of causal connection have also had mixed results. In *Wytrwal v. Saco School Board,*[29] the teacher lost at the final causation step based on the defendant district's preponderant evidence that it would have taken the same nonrenewal action even without the employee's protected speech. In contrast, in *Settlegoode,* where the district argued that it would have not renewed the teacher's contract even in the absence of her protected speech because she developed deficient IEPs, the the Ninth Circuit observed that such proof was determinative of whether the district could have, not would have, chosen not to renew her contract.

Although *Garcetti* would further add to the first element of a First Amendment retaliation claim, the remaining steps continue to be the same as they were prior to the Supreme Court's decision, and thus a familiarity with courts' analyses is helpful. However, given the added burden imposed by *Garcetti*, it is becoming far more difficult for plaintiff–educators to reach these remaining steps.

Garcetti and its Aftermath

***830** In 2006, the landscape for public employee free speech cases changed dramatically with the Supreme Court's decision in *Garcetti v. Ceballos.*[30] The *Garcetti* decision imposed an additional first step prerequisite for a public employee to be able to prevail on a First Amendment retaliation claim. Specifically, even if the public employee's expression was on a matter of

public concern, the *Garcetti* Court added that such speech is not protected from employer discipline if the employee is speaking pursuant to his or her official duties.

In *Garcetti*, the plaintiff, Richard Ceballos, was a supervising district attorney who submitted a memo to his supervisors recommending dropping the prosecution of a case due to what he believed were serious misrepresentations in an affidavit that the police had used to obtain a critical search warrant. Ceballos' supervisor decided to proceed with the prosecution, and, although the defense called Ceballos as a witness, the court rejected the challenge to the warrant. Following these events, Ceballos claimed that his supervisors subjected him to retaliatory employment actions, including reassignment to a different position, transfer to another courthouse, and denial of a promotion. After unsuccessfully filing an employment grievance, Ceballos filed suit in federal court claiming retaliation under the First Amendment. The district court ruled that Ceballos was not entitled to First Amendment protection for the contents of his memo, because he had written the memo pursuant to his employment duties. The Ninth Circuit reversed the decision, concluding that under the *Pickering–Connick* analysis, the memo, which set forth what Ceballos believed to be government misconduct, was a matter of public concern and that, in the absence of any disruptive effect, the balance was in favor of First Amendment protection.

However, the Supreme Court reversed, finding that the controlling factor in this case was that Ceballos' speech was made pursuant to his duties as a calendar deputy. The Court held—in light of *Pickering*'s reference to a public employee's expression "as a citizen" on matters of public concern—that when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes; thus, the Constitution does not insulate their communications from employer discipline. [31]

Unlike cases decided prior to *Garcetti*, the main issue for lower courts in cases of public school employees' special education advocacy after *Garcetti* has been whether the employee was speaking pursuant to his or her official duties. The threshold issue for courts remains determining whether the public school employee's speech is constitutionally protected, but *Garcetti* adds this duty–related factor, which has proven fatal in most of the First Amendment special education advocacy cases in recent years.

***831** More specifically, most post–*Garcetti* lower court decisions have generally treated speech relating to a school district's compliance with federal or state special education laws as within the scope of a public school employee's duties and, thus, not entitled to First Amendment protection. [32] Some examples of duty–related speech in the advocacy context include: a special education counselor's communications regarding the lack of physical education and art classes for her students [33]; a special education teacher's complaints to school administration about the district's failure to properly provide equipment and staff for special education students [34]; and a special education teacher's concerns about her students' inappropriate curriculum and insufficient school supplies. [35]

The context of the speech and to whom it was made can be a significant factor in the determination of whether it was made pursuant to an employee's official duties. For example, in a New York case, a teacher claimed her letter to the state education department—after receiving no rectification in response to her complaints at the school level—that students with disabilities were not getting certain services to which they were entitled resulted in her termination. Although the department of education not only received but also substantiated her complaints, ordering the school to take corrective action, the court concluded that her expression was pursuant to her professional duties, thus without First Amendment protection. [36]

However, the recent Tenth Circuit decision in *Reinhardt v. Albuquerque Public School District Board of Education* concluded that one of the deciding factors in determining whether an employee's speech was protected under *Garcetti* is to whom the public employee directed his or her speech. [37] In this case, a speech–language pathologist (SLP) made regular complaints to school district administrators that she was not receiving accurate and timely caseload lists of students. According to the SLP, these inaccurate lists resulted in qualified special education students not receiving the services to which they were entitled. When she was unable to get the district to respond to her complaints, she consulted an attorney and ultimately filed a complaint with the state department of education, which resulted in an order for the district to take corrective action. In addition, the SLP also

advocated for rights of ***832** particular student to receive a neuropsychological evaluation and specialized reading instruction. Soon thereafter, the district reassigned the SLP to work with only ninth grade students, leaving her with well below a full–time caseload and, as a result of her reduced caseload, a reduction from an extended contract to a standard contract. The SLP filed suit against the district alleging retaliation, and the district moved for summary judgment.

On Reinhardt's First Amendment claim, the Tenth Circuit noted that it has identified two factors in determining whether a public employee is speaking pursuant to her is her official duties: whether the employee's job responsibilities related to reporting the wrongdoing and whether the employee went outside the chain of command when reporting. In this case, the court found that the SLP's consulting with an attorney and filing of a complaint with the state board of education satisfied both factors, as such actions went well beyond her official job responsibilities. Because the school district's summary judgment motion was limited to the question of whether the SLP's speech was made pursuant to official duties, the court did not resolve the remaining First Amendment retaliation factors—the balance of interests or whether her speech was a motivating factor in the district's actions.

Another example of a case which survived the threshold first step of First Amendment analysis following *Garcetti* was an unpublished federal district court decision in New York, in which an applied behavior analysis specialist attended two meetings with regard to the early intervention services for children, aged 0–3, with disabilities.[38] At both the first meeting, which the county convened, and the second meeting, which the organization of special service providers convened, she expressed criticism of the county's program. The county terminated her contract soon thereafter, and she filed a civil rights claim, alleging that her termination was in retaliation for her advocacy of special education services that she believed necessary for her students. The court granted the defendant–county's motion for summary judgment with regard to the first meeting, concluding that her expression there was pursuant to her official duties, but denied the motion with regard to her expression at the second meeting, concluding that a jury could conclude that it was in her role as a private citizen. The court went on to rule that there were also genuine issues of material fact as to the public–concern and causation steps, thus preserving for jury determination the First Amendment retaliation issue with regard to her expression at the second meeting. Thus, the case is only a limited exception for two reasons: 1) only part of the plaintiff's First Amendment claim survived summary judgment, and, more importantly, 2) unlike the conclusive outcome in *Settlegoode*,[39] the surviving part was inconclusive, subject to further deliberations.[40]

***833** In sum, before *Garcetti,* public school educators who were subject to adverse employment action in the wake of special education advocacy might well have to think thrice before following their ethical precepts. However, after *Garcetti* the risk of fatally falling at the threshold hurdle of the applicable First Amendment test is high, but not impossible, as a few recent cases have shown. Nevertheless, while a First Amendment claim should not be abandoned entirely, public school employees may also need to look to other laws to protect them from discipline for special education advocacy.

Section 504 and the ADA Advocacy Retaliation Claims

The primary alternative to raising a retaliation claim under the First Amendment at the federal level consists of the sister statutes prohibiting disability discrimination—Section 504 and the ADA.[41] Section 504 applies to educational programs that receive federal financial assistance, including but not limited to public schools. Although extending to private schools, the ADA also applies to public schools. Both Section 504 and the ADA prohibit discrimination against individuals with disabilities, but they also provide protection from retaliation to individuals who have attempted to protect the rights of people with disabilities, including public school teachers and other school employees.[42] The Section 504 prohibition of retaliation is via its regulatory incorporation of the procedural provisions of Title VI,[43] and the ADA anti–retaliation regulation is modeled on the corresponding Title VI provision.[44]

In any event, the judicial test for an employee–advocacy retaliation claim under both the ADA and Section 504 are the same: 1) the employee engaged in protected activity; 2) the defendant(s) knew the employee was engaged in protected activity; 3) the defendant(s) took an adverse employment action after or contemporaneous with the protected activity; and 4) there was a causal

connection between the protected activity and the adverse employment action. [45] Also, similar to a First Amendment claim, the district can offer as a defense that it had a legitimate, nondiscriminatory reason for taking action against the employee. Thus, if a school district can show that it would have taken the same action against the employee even if he or she had not engaged in the protected activity, the district may defeat the employee's retaliation claim.

***834** The case law to date illustrates the application of this judicial test. [46] Several court decisions elaborated on the threshold, protected activity step. First, in *Houlihan v. Sussex Technical School District,* [47] the court observed that the judiciary has long recognized advocating on behalf of students with disabilities to be a protected activity. In *Houlihan,* a school psychologist in Delaware alleged that she had brought to the school district's attention several incidents of noncompliance with the IDEA and that, as a result, the administration had rewritten her job description to prevent her from speaking out on such concerns. She further alleged that after contacting a school board member regarding her concerns with the district's IDEA compliance, the administration issued to her several reprimands and ultimately informed her that her contract would not be renewed. Denying the school district's dismissal motion, the federal district court ruled that for a retaliation claim under Section 504, the employee need not identify any actual violations of the law. Rather, for protected activity under Section 504 it was sufficient that she had a reasonable, good–faith belief that the district was violating the IDEA and that she attempted to correct this perceived noncompliance by notifying her superiors.

Second, just calling speech or activity "advocacy" does not make it a protected activity for purposes of stating a claim under Section 504. For example, in *Montanye v. Wissahickon School District,* [48] a teacher alleged that the district had constructively discharged her based upon the assistance that she provided to an at–risk student. The teacher had discussed the student's problems with her parent and accompanied the student to therapy sessions. School officials subsequently directed the teacher to refrain from activities not expressly required by her job or her contract and to comply with school processes, such as the student assistance program, for at–risk students. The teacher alleged that these directives constituted retaliation under Section 504 for helping special education students. The Third Circuit upheld the lower court's dismissal of the teacher's Section 504 claim, concluding that providing assistance and support to at–risk students is not protected activity under Section 504, which is limited to actual speech or "expressive conduct which conveys a message," e.g., complaining to school officials about the mistreatment of at–risk students or writing letters to parents criticizing the school's special education policies. [49]

Similarly, in another Pennsylvania case, [50] the court dismissed a public school employee's Section 504 retaliation claim for failure to meet the protected–activity prerequisite. In this case, a school bus driver claimed that the district decided not to renew his contract after he advocated for a student ***835** with a medical disability on his bus route. Specifically, the driver claimed that after the student's father informed him that the long, unaccommodating bus ride was exacerbating child's medical condition, he repeatedly advised the school district that the student's health was in jeopardy and recommended an adjustment to the bus route to accommodate the student's needs. However, the school district alleged, with confirming affidavits from the student's parents, that the bus driver had refused to allow the student to continue to ride the bus due to behavioral issues. The court concluded that the bus driver had not engaged in protected activity, as he did not advocate on the student's behalf or otherwise oppose unlawful discrimination within the meaning of the ADA and Section 504. According to the court, the driver had failed to specify what it was he was advocating and to identify a discriminatory practice on the part of the district. Moreover, the court suggested that the driver's speech could even have been designed to cover his own misconduct in refusing to allow student to ride the bus.

Fewer cases have hinged on the next two steps—district knowledge or adverse action. [51] Instead, most of the remaining cases have depended on the causal connection prong of the test. For example, in a Georgia case where a special education teacher's contract was not renewed after she spoke out against the use of time–out rooms as a disciplinary method for one of her students, the Eleventh Circuit ruled that the adverse employment action was not connected to the teacher's speech. [52] Instead, the district showed that the reason for the nonrenewal was unsatisfactory performance. More specifically, a classroom aide had complained about the teacher's lack of structure in her classroom and her propensity to take long breaks and lunches, and after an observation, an independent consultant concluded that the teacher had been focusing on teaching skills that were inappropriate for students

with the level of disability of those in her classroom. Consequently, the court determined that retaliation claims under both the First Amendment and the Rehabilitation Act required evidence of a causal link between the employee's speech and the adverse employment action. Given the evidence presented in this case, the court concluded that no reasonable jury could find that the district's decision not to renew the teacher's contract was based on anything other than the reasonable belief that she was not qualified to continue in her position as a special education teacher.

A Kansas case serves as a contrasting example.[53] In this case, a physical therapist (PT) had advocated for additional services for one of her students and had also raised concerns about inadequate staffing and providing physical therapy to students without doctor's orders, which she believed contravened state law. When district officials later asked the PT to resign, she complied. However, she subsequently filed suit, claiming that her resignation ***836** was a constructive discharge in retaliation for her protected expression under Section 504. Denying the school district's motion for summary judgment, the court concluded that a jury could find that the plaintiff had reasonably believed that the district was discriminating against students with disabilities by failing to provide them with a free appropriate public education, as required by federal law, and that she had engaged in protected activity by making informal complaints to her superiors about this perceived discrimination. Next, assuming without deciding that the PT had established that she had suffered adverse employment action, the court similarly concluded that a jury could find that her supervisors, who were undeniably aware of her complaints, took the first opportunity to force the plaintiff to resign, thus preserving for trial her Section 504 retaliation claim, including the causal–connection element.

Perhaps the best example of a case providing a comprehensive analysis of all of the factors of a retaliation claim filed under Section 504 and the ADA is—as the plaintiff's alternate claim in an aforementioned[54] case—the Tenth Circuit's *Reinhardt* decision.[55] In that case, in addition to bringing a retaliation claim under the First Amendment, the SLP also argued that the school district had retaliated against her in violation of Section 504 and the ADA. The Tenth Circuit found all three of these forms of advocacy presented by the plaintiff—advocacy on behalf of a particular student; her repeated complaints to the district over a long period of time; and her filing of a complaint with the state board of education—to be protected activity.

Next, noting that it construes the term "adverse employment action" liberally and does not limit it to monetary losses in wages or benefits, the court determined that the SLP's changed assignment to serve only ninth grade students led directly to a reduction in compensation because she no longer qualified for an extended contract. Under these facts, the court concluded that a reasonable employee might be dissuaded from advocating for special education students knowing that her workload and salary would be reduced.

Turning to whether there was a causal connection between the advocacy and the adverse employment action, the court observed that the adverse actions closely followed the protected activity in time in this case. Finally, the court examined whether the district had a legitimate nondiscriminatory reason or whether the district's action was a pretext for discrimination. The district's proffered reason for assigning the SLP to only ninth grade students was that the SLP had experience transitioning middle school students to the high school. However, at least one other SLP at the high school had similar experience, and the district offered no explanation of why the plaintiff–SLP could not be assigned other students in addition to 9th graders. While the district argued that the SLP's schedule did not warrant an extended contract, the court found that there was conflicting information as to how the district calculated extended contracts and whether the SLP qualified for one had ***837** been presented. Thus, the court found sufficient evidence of pretext to withstand the district's motion for summary judgment in this case.

Conclusion

Special education personnel and other public school employees face an ethical dilemma when faced with what they regard, perhaps accurately, as school district noncompliance with the federal and/or state legal requirements for students with disabilities. The two principal avenues for legal protection at the federal level are First Amendment expression and Section 504/ADA disability discrimination. Under the multi–step test that the courts have developed for First Amendment employee expression, such retaliation claims prior to the Supreme Court's 2006 decision in *Garcetti* faced a difficult course that yielded

mixed outcomes and generally few conclusive victories. However, *Garcetti* raised the initial hurdle so high that First Amendment retaliation claims for employee advocacy on behalf of students with disabilities face even lower prospects of legal vindication given that many courts view speech regarding the treatment of special education students as within the scope of employment for many school employees.

The alternative avenue of retaliation protection under Section 504 and/or the ADA is similarly a hurdling event, with similarly mixed outcomes in the case law to date. However, unlike in a First Amendment retaliation claim, whether speech was made pursuant to an employee's job duties is not a factor in determining whether the employee can state a claim for retaliation. Thus, special education advocacy cases that a court may easily dismiss under the First Amendment still have a chance to go forward if brought simultaneously or alternatively under Section 504 and the ADA.

A review of the cases reported in this article shows that both before and after *Garcetti*, public school employees had a difficult time prevailing on First Amendment claims based on special education advocacy, as most of those claims were likely to fail. However, before *Garcetti*, more cases were able to satisfy the first element of a First Amendment retaliation claim, as speech pertaining to the rights of students with disabilities was at least viewed by courts as a matter of public concern. Following *Garcetti*, however, the majority of advocacy cases were dismissed because the employee's speech was determined to be within the scope of the employee's employment.

With Section 504 and ADA claims, although the adverse action and causal connection elements of a retaliation claim are similar to those of a First Amendment retaliation claim, the first element differs significantly and is likely the reason that claims brought under Section 504 and the ADA are more successful when it comes to advocacy on behalf of students with disabilities. Rather than determining whether an employee's speech is pursuant to her or her job duties, the first element of a retaliation claim brought under Section 504 and/or the ADA is whether the employee has engaged in protected activity, and advocacy on behalf of students with disabilities is generally recognized by courts as a protected activity. Thus, it is much easier for public school employees to satisfy the first element of a Section 504 or ADA retaliation claim in the context of special education advocacy.

***838** In this article, only one case prior to the *Garcetti* decision included a Section 504 claim, and plaintiff lost on the causation factor. [56] In the cases decided after *Garcetti*, courts allowed more than half of the 504/ADA claims to go forward. The two that did not go forward were dismissed due to plaintiffs' failure to show that they engaged in protected activity. [57]

Interestingly, only a few of the cases mentioned in this article included claims under both the First Amendment and Section 504 and/or the ADA. Of those cases, the outcomes varied. For example, in *Ryan*, [58] although dismissing the plaintiff's First Amendment claims because the bulk of her speech was pursuant to her official duties and the remainder failed to involve matters of public concern, the federal district court allowed the plaintiff to go forward with her Section 504 retaliation claims. Yet, in the *Isler* case, [59] both the plaintiff's First Amendment and Section 504 claims failed. Finally, the Tenth Circuit *Reinhardt* ruling [60] allowed both claims to go forward. In none of the cases, however, were Section 504 claims dismissed, while First Amendment claims were allowed to go forward. Thus, while it appears from the case law that retaliation claims brought under Section 504 and the ADA may have a better chance of surviving a court's scrutiny, school employees should certainly consider both avenues if they should find themselves under fire due to their advocacy on behalf of special education students.

Footnotes

a1 The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 257 Ed.Law Rep. [823] (August 19, 2010).

aa1 Gina K. DePietro is an education law and civil rights attorney in Warrington, Pennsylvania. Perry A. Zirkel is university professor of education and law at Lehigh University. The views expressed in this article are those of the authors, entirely separate from their institutional affiliations .

1 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006).

2 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006).

3 See, e.g., *Evans v. Chichester Sch. Dist.,* 533 F.Supp.2d 523 [229 Ed.Law Rep. [624]] (E.D. Pa. 2008) (ruling that the complaints of a parent regarding a school district's deficiencies in educating students with disabilities were not constitutionally protected where the parent had failed to allege facts indicating specifically how and when she submitted the complaints); *Herring v. Chichester Sch. Dist.,* 2008 WL 436910 (E.D. Pa. 2008) (concluding that a special education attorney had sufficiently alleged a retaliation claim under Section 504 and the First Amendment); *Stengle v. Office for Dispute Resolution,* 631 F.Supp.2d 564 [248 Ed.Law Rep. [118]] (M.D. Pa. 2009) (dismissing a special education hearing officer's First Amendment and Section 504 claims that her contract was not renewed in retaliation for operating a blog in which she discussed mainstreaming and other special education issues); *Ross v. Allen,* 515 F.Supp. 972 (S.D.N.Y. 1981) (holding that psychologist employed by a private school had standing to bring an action for retaliation under Section 504 after the school discharged her in the wake of her advocating behalf of an expelled special education student).

4 See, e.g., *Sweet v. Tigard–Tualatin Sch. Dist. #23J*, 124 Fed.Appx. 482 [196 Ed.Law Rep. [474]] (9th Cir. 2005) (summarily rejecting school psychologist's claim under Oregon's whistleblower statute for failure to show that district's legitimate nondiscriminatory reason was pretext); *Carey v. Aldine Indep. Sch. Dist.,* 996 F.Supp. 641 [126 Ed.Law Rep. [129]] (S.D. Tex. 1998) (dismissing teacher's claims under Texas Whistleblower Act where her reports of violations were not to "appropriate law enforcement authorities" as defined in the Act); *cf. Wytrwal v. Saco School Board,* 70 F.3d 165 [104 Ed.Law Rep. [1023]] (1st Cir. 1995) (subsuming the claim under the Maine Whistleblowers' Protection Act under the plaintiff's First Amendment claims).

5 E.g., Richard T. Geisel & Brenda Kallio, *Employee Speech in K–12 Settings: The Impact of* Garcetti *on First Amendment Retaliation Claims,* 251 Ed.Law Rep. [19] (2010); Robert C. Cloud, *Silence is Golden When Public Employees Consider Speaking on Matters Pursuant to Official Duties,* 245 Ed.Law Rep. [1] (2009); Ralph D. Mawdsley & Allan Osborne, *The Supreme Court Provides new Direction for Employee Free Speech in* Garcetti v. Ceballos*,* 214 Ed.Law Rep. [457] (2007); Martha McCarthy*,* Garcetti v. Ceballos*: Another Hurdle for Public Employees*, 210 Ed.Law Rep. [867] (2006); Robert C. Cloud, *Public Employee Speech on Matters Pursuant to Their Official Duties: Whistle While You Work?,* 210 Ed.Law Rep. [855] (2006).

6 E.g., Ann Hassenpflug, *Job Duties and Teacher Freedom of Speech*, 220 Ed.Law Rep. [471] (2007).

7 For an early examination of this issue, which was two decades before *Garcetti* but also considered the ethical dimension, see Perry A. Zirkel & Robert Suppa, *Legal–Ethical Conflicts for Educator–Advocates of Handicapped Students*, 35 Ed.Law Rep. [9] (1986).

8 This overview consists only of the basic building blocks in the Supreme Court's employment expression jurisprudence prior to *Garcetti*. It does not include various other Supreme Court decisions in this area, e.g., *City of San Diego v. Roe*, 543 U.S. 77, 125 S.Ct. 521, 160 L.Ed.2d 410 (2004) (ruling that First Amendment protection does not extend beyond the employment context to matters of private, not public, concern); *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 116 S.Ct. 2342, 135 L.Ed.2d 843 (1996) (holding that First Amendment protections for public employees extends to independent contractors); *Waters v. Churchill*, 511 U.S. 661, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994) (ruling that the *Connick* test applies to what the government employer reasonably thought the employee said, not to what the trier of fact ultimately determines the employee said).

9 The primary refinement pre–*Garcetti*, as explained *infra*, was the *Pickering–Connick* elaboration of the protected–expression step into what is often understood as two sub–steps, one concerning public issues and the other amounting to a balancing text.

10 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

11 *Id*. at 564.

12 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed.2d 471 (1979).

13 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979).

14 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

15 371 F.3d 503 (9th Cir. 2004), *cert. denied*, 543 U.S. 979, 125 S.Ct. 478, 160 L.Ed.2d 356 (2004).

16 *Id*. at 513.

17 The jury's award was $500,000 in non–economic damages, $402,000 in economic damages, and $50,000 in punitive damages. *Id*. at 509. The trial judge's subsequent award of attorneys' fees and court costs totaled $200,000. *Settlegoode v. Portland Pub. Sch*., 2005 WL 1899376 (D. Or. 2005).

18 See, e.g., *Wytrwal v. Saco Sch. Bd*., 70 F.3d 165 [104 Ed.Law Rep. [1023]] (1st Cir. 1995) (a Maine special education teacher's speech at a board meeting expressing her concerns that the school district lacked programs for students with emotional disturbance and was violating the Individuals with Disabilities Education Act (IDEA) by failing to arrange appropriate placements for them); *Love v. City of Chicago Bd. of Educ*., 5 F.Supp.2d 611 (N.D. Ill 1998), *further proceedings*, 241 F.3d 564 (7th Cir. 2001) (two Illinois elementary school teachers' and an instructional aide's complaints regarding the school board's ineffective operation of an inclusion program); *Fales v. Garst*, 235 F.3d 1122 [150 Ed.Law Rep. [41]] (8th Cir. 2001) (three Arkansas middle school teachers' complaints focusing on the proper care and education of special education students); *Echtenkamp v. Loudoun County Pub. Sch*., 263 F.Supp.2d 1043 [178 Ed.Law Rep. [271]] (E.D. Va. 2003) (a school psychologist's allegations that her school district's special education policy did not comport with Section 504 and the ADA).

19 See, e.g., *Carey v. Aldine Indep. Sch. Dist.,* 996 F.Supp. 641 [126 Ed.Law Rep. [129]] (S.D. Tex. 1998) (a special education teacher's complaints about the assignment of too many students to her class her class, the denial of her planning time, and the failure to implement student's IEPs, which resulted in the students spending additional time in her class); *Ifill v. Dist. of Columbia,* 665 A.2d 185 [103 Ed.Law Rep. [1101]] (D.C. Ct. App. 1995) (a special education teacher's claim that district administrators subjected her to a campaign of harassment after she had written letters regarding overcrowding in her classroom).

20 The post–*Garcetti* courts subsequently considered the context and recipient factors to determine whether a public employee was speaking pursuant to his or her official duties. See *infra* notes 36–37 and accompanying text.

21 123 F.3d 1010 [121 Ed.Law Rep. [29]] (7th Cir. 1997).

22 120 F.3d 82 (7th Cir. 1997).

23 *Echtenkamp v. Loudoun County Pub. Sch.,* 263 F.Supp.2d 1043 [178 Ed.Law Rep. [271]] (E.D. Va. 2003).

24 See *supra* notes 18–23.

25 5 F.Supp.2d 611 (N.D. Ill 1998), *further proceedings*, 241 F.3d 564 (7th Cir. 2001).

26 235 F.3d 1122 [150 Ed.Law Rep. [41]] (8th Cir. 2001).

27 123 F.3d 1010 [21 Ed.Law Rep. [29]] (7th Cir. 1997).

28 463 N.Y.S.2d 84 [11 Ed.Law Rep. [590]] (App. Div. 1983), *appeal dismissed*, 468 N.Y.S.2d 1028 (1983).

29 70 F.3d 165 [104 Ed.Law Rep. [1023]] (1st Cir. 1995).

30 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006).

31 Acknowledging that expression in the context of academics or classroom instruction may implicate additional constitutional interests, the *Garcetti* Court specifically noted that it was not deciding whether its analysis would apply in the same manner in a case involving speech related to teaching and scholarship. *Id*. at 425

32 See, e.g., *Brown–Criscuolo v. Wolfe,* 601 F.Supp.2d 441 [243 Ed.Law Rep. [245]] (D. Conn. 2009) (concluding that it was the plaintiff–principal's duty to ensure that special education laws and procedures were being implemented and to bring any problems to the attention of the proper authorities); *Lindsey v. Lee County Sch. Dist*., 2008 WL 2517169 (N.D. Miss 2008) (ruling that special education teacher's comments at meetings about the district's failure to comply with the IDEA were made pursuant to her official duties, as she was at those meetings in her official capacity); *Yatzus v. Appoquinimink Sch. Dist.*, 458 F.Supp.2d 235 [214 Ed.Law Rep. [1098]] (D. Del. 2006) (concluding that school psychologist's speech regarding school district's compliance with the legal requirements for testing students was within the scope of her job duties); *Houlihan v. Sussex Technical Sch. Dist.,* 461 F.Supp.2d 252 [215 Ed.Law Rep. [303]] (D. Del. 2006) (ruling that school psychologist's complaints about district's compliance with IDEA were connected to her job duties).

33 *Woodlock v. Orange Ulster B.O.C.E.S.*, 281 F. App'x 66 (2d Cir. 2008).

34 *Smith v. Beaufort County Sch. Dist.*, 2008 WL 821809 (D.S.C. 2008).

35 *Felton v. Katonah Lewisboro Sch. Dist.,* 2009 WL 2223853 (S.D.N.Y. 2009).

36 *Rodriguez v. Int'l Leadership Charter Sch.,* 2009 WL 860622 (S.D.N.Y. 2009).

37 595 F.3d 1126 (10th Cir. 2010).

38 *McGuire v Warren*, 2009 WL 3963941 (S.D.N.Y. 2009).

39 See *supra* text accompanying notes 15–17.

40 Although dealing with advocacy on behalf of gifted students rather than students with disabilities, a New York court also recently refused to dismiss two elementary school teachers' First Amendment retaliation claims in *Kelly v. Huntington Union Free Sch. Dist.,* 675 F.Supp.2d 283 [254 Ed.Law Rep. [132]] (E.D.N.Y. 2009), ruling that there were not enough facts in the pleadings to conclude as a matter of law that the teachers' speech was made pursuant to their official duties.

41 *See generally* PERRY A. ZIRKEL, SECTION 504, THE ADA, AND THE SCHOOLS (2004).

42 See, e.g., *Corrales v. Moreno Valley Unified Sch. Dist.,* 2008 WL 4382507 (C.D. Cal. 2008); *Barker v. Riverside County Office of Educ.,* 584 F.3d 821 (9th Cir. 2009).

43 34 C.F.R. § 104.61 (2008) (incorporating, *inter alia*, 34 C.F.R. § 100.7(e)).

44 28 C.F.R. § 35.134(b) (2008).

45 See, e.g., *Weixel v. Bd. of Educ. of the City of New York,* 287 F.3d 138 [163 Ed.Law Rep. [640]] (2d Cir. 2002). While the courts have varied in elaborating the elements of an ADA or Section 504 retaliation claim, the basic framework follows this general sequence. For example, the federal district court in Iowa omitted the element requiring that the defendant knew of the protected activity. See, e.g., *Belkin v. Sioux City Community Sch. Dist.,* 2006 WL 2925660 (N.D. Iowa 2006). In addition to not requiring the knowledge element, the Third Circuit also formulated the adverse action element as requiring the plaintiff to show that the "defendants' retaliatory action was sufficient to deter a person of ordinary firmness from exercising his or her rights." *Lauren W. v. DeFlaminis,* 480 F.3d 259, 267 [217 Ed.Law Rep. [96]] (3d Cir. 2007).

46 This article does not extend to Section 504 and ADA special education advocacy claims resolved via the alternate route of administrative complaint resolution via the Office for Civil Rights. See, e.g., Lone Grove (OK) Pub. Sch., 37 IDELR ¶ 223 (OCR 2002) (finding lack of adverse action); Anchor Bay (MI) Sch. Dist., 25 IDELR 71 (OCR 1996) (finding lack of causal connection). For various other OCR rulings regarding retaliation against employees or others, see ZIRKEL, *supra* note 41, at Three:266–72 and Four:50.

47 461 F.Supp.2d 252 [215 Ed.Law Rep. [303]] (D. Del. 2006).

48 218 Fed.Appx. 126 [219 Ed.Law Rep. [899]] (3d Cir. 2007), *cert. denied*, 552 U.S. 803 (2007).

49 *Id.* at 131.

50 *Isler v. Keystone Sch. Dist.,* 2008 WL 3540603 (W.D. Pa. 2008).

51 In *Sweet v. Tigard–Tualatin Sch. Dist. #23J*, 124 Fed.Appx. 482 [196 Ed.Law Rep. [474]] (9th Cir. 2005), a school psychologist contested her termination following her complaint that the district had held a meeting that violated the IDEA. Although concluding that the case presented a genuine issue of material fact as to whether the district knew of the complaint, the appellate court upheld summary judgment in favor of the school district based on its nondiscriminatory reason for the termination.

52 *Mize v. Jefferson City Bd. of Educ.* 93 F.3d 739 (11th Cir. 1996).

53 *Ryan v. Shawnee Mission Unified Sch. Dist. No. 512*, 437 F.Supp.2d 1233 [211 Ed.Law Rep. [318]] (D. Kan. 2006).

54 See *supra* note 37.

55 *Reinhardt v. Albuquerque Pub. Sch. Bd. of Educ.,* 595 F.3d 1126 [253 Ed.Law Rep. [567]] (10th Cir. 2010).

56 See *supra* note 52 and accompanying text.

57 See *supra* notes 48 and 50 and accompanying text.

58 See *supra* note 51 and accompanying text.

59 See *supra* note 50 and accompanying text.

60 See *supra* notes 37 and 55 and accompanying text.

257 WELR 823

End of Document