Chapter 12

CONSTITUTIONAL ISSUES IN THE PUBLIC SECTOR WORKPLACE

I. Public Employee Speech, Protected?

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This paper reviews important decisions by the federal courts on protected free speech by public employees. Special attention is given the leading precedent from the U.S. Supreme Court in *Garcetti v. Ceballos*.[1] *Garcetti* and its progeny illustrate the kinds of situations in which public employee speech is protected along with situations in which it is not.

Pickering[2]

From 1968 to 2006, protection of employee First Amendment speech was subject to the following balancing analysis:

a) Is the speech of public interest or a personal grievance or concern?[3]
b) Is the employee speaking as an employee or a citizen?
c) Did the employer retaliate against the employee for speaking on a topic of public interest?
d) Then balance the competing interest of the public employer to manage its operations efficiently versus the free speech interest of the public employee.

Garcetti[4]

Defense counsel asked Ceballos, a Deputy District Attorney, in his capacity as a Deputy D.A. to review an affidavit in support of a

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[1]Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951 (2006).
[2]Pickering v. Board of Educ., 391 U.S. 563 (1968).
[3]Connick v. Myers, 461 U.S. 138 (1983).
[4]Garcetti v. Ceballos, 547 U.S. 410, 126 S. Ct. 1951 (2006).

search warrant. Ceballos wrote a memo challenging the accuracy of a Deputy Sheriff's affidavit that served as the basis of the search. Ceballos found inaccuracies in the affidavit. He recommended dismissal of the prosecution. He disclosed his concerns to defense counsel. Ceballos testified at a hearing seeking to exclude the evidence produced through the use of the warrant. The employer transferred him to a different courthouse and denied him a promotion.

The Supreme Court, after re-argument to allow Justice Alito to participate after Justice O'Connor stepped down from the Bench, by a 5-4 majority concluded that Ceballos acted within the scope of his job responsibilities. "The Government as employer has broader powers than the Government as sovereign," Justice Kennedy wrote for the Court majority. The First Amendment does not allow public employees to constitutionalize their personal grievances, citing *Connick v. Myers*.

The majority established a hard and fast rule: if the employee's speech is the product of an employee's official duties, the speech is not subject to First Amendment protection. Ceballos' speech was not protected.

The Court majority viewed speaking "as a citizen" not as a marker to indicate whether the subject of the speech was of public interest, but whether the employee's speech falls within the scope of his or her normal responsibilities. If the employee's report or comments are made in the course of employment, then it is not protected. *Although Bar Canons required Ceballos to disclose to defense counsel information regarding the affidavit, this factor did not serve to protect his speech.*

Justice Breyer and Stevens wrote separate dissenting opinions. Justice Souter wrote a dissent with Justices Stevens and Ginsburg concurring. In his dissent, Justice Souter notes that in 1979, then-Justice Rehnquist, writing for a unanimous court in *Givhan v. Western Line Consolidated School District*,[5] recognized the First Amendment–protected speech of English teacher Givhan's complaints about the administration's racist hiring policies. Justice Souter notes that under the *Garcetti* majority's decision, if a human resources officer of the district in *Givhan* had voiced the same complaint internally, his speech would not be protected.

The *Garcetti* Court, both the majority and the dissents, recognize the need of the public employer for employee loyalty. The

[5]439 U.S. 410, 414 (1979).

public employer requires a work force that implements the policy choices made by elected officials and their designated managers and supervisors. Both recognize, as well, that public employees do not relinquish all rights of citizenship when they enter public service.[6] The *Garcetti* majority does not want courts second-guessing public management under the guise of the First Amendment, when they make "personnel" determinations relative to employee work product.

The dissents share the majority's concern. They, too, have no desire to constitutionalize every employee grievance. Justice Souter notes that it is difficult to differentiate between an employee performing her job or seeking advancement. In the first instance, the employee may come upon corruption, misfeasance, or malfeasance in the course of performing her job of monitoring such activity. She performs her job and is disciplined for doing so. Or in the alternative, an employee is ambitious and she is passed over. The gravamen of her claim is a personal grievance related to career advancement, rather than some incidental remark. It is difficult to clearly identify the source of the complaint, whether it originates from a desire to get ahead or a concern for the public good.

There is a public interest in the latent dispute between an employee and public management. Does not the public want to know if a bridge design is faulty, or the concrete or rebar used in construction defective or that it does not conform to specification? How is the public to know, if not from public employee inspectors or private sector whistle blowers?

The analytical constructs of the Court do not serve to protect the public from corruption or political blindness to defective work in public projects or malfeasance in office. Categorizing certain subjects as protected does not resolve the problem. An employee may believe there is wrongdoing, when in fact his vision is impaired by his own political view or personal interests. The employer should be able to function within the legal authority of its office and set policy accordingly.

Both the majority and dissents in *Garcetti* recognize that it is irrelevant whether the speech occurs in the office or off premises in the analysis of whether it is protected. Justice Stevens sums up the problem in his dissent recorded here in its entirety, but without footnotes:

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[6] *Connick*, 461 U.S. 138; *Pickering*, 391 U.S. 563.

> The proper answer to the question "whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties,"... is "Sometimes," not "Never." Of course a supervisor may take corrective action when such speech is "inflammatory or misguided."... But what if it is just unwelcome speech because it reveals facts that the supervisor would rather not have anyone else discover?
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> As Justice Souter explains, public employees are still citizens while they are in the office. The notion that there is a categorical difference between speaking as a citizen and speaking in the course of one's employment is quite wrong. Over a quarter of a century has passed since then-Justice Rehnquist, writing for a unanimous Court, rejected "the conclusion that a public employee forfeits his protection against governmental abridgment of freedom of speech if he decides to express his views privately rather than publicly." We had no difficulty recognizing that the First Amendment applied when Bessie Givhan, an English teacher, raised concerns about the school's racist employment practices to the principal. Our silence as to whether or not her speech was made pursuant to her job duties demonstrates that the point was immaterial. That is equally true today, for it is senseless to let constitutional protection for exactly the same words hinge on whether they fall within a job description. Moreover, it seems perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors.
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> While today's novel conclusion to the contrary may not be "inflammatory," for the reasons stated in Justice Souter's dissenting opinion it is surely "misguided."
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> How are employers and employees to differentiate between protected and unprotected speech? Employers and employees would want to know.
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> Justice Souter emphasizes that:
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> > Open speech by a private citizen on a matter of public importance lies at the heart of expression subject to protection by the First Amendment.

It is unwelcome speech by a public employee on a topic of substantial public interest that Justice Souter would protect. It would make no difference if the employee spoke in or out of the office or as part of his or her regular job responsibilities. Justice Souter would continue the use of the *Pickering* analysis in these cases.

In his dissent, Justice Breyer starts his analysis:

> I begin with what I believe is common ground:
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> (1) Because virtually all human interaction takes place through speech, the First Amendment cannot offer all speech the same degree of protection. Rather, judges must apply different protec-

tive presumptions in different contexts, scrutinizing government's speech-related restrictions differently depending upon the general category of activity. Compare, e.g., Burson v. Freeman, 504 U. S. 191 (1992) (plurality opinion), (political speech), with Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y., 447 U.S. 557 (1980) (commercial speech), and Rust v. Sullivan, 500 U.S. 173 (1991) (government speech).

(2) Where the speech of government employees is at issue, the First Amendment offers protection only where the offer of protection itself will not unduly interfere with legitimate governmental interests, such as the interest in efficient administration. That is because the government, like any employer, must have adequate authority to direct the activities of its employees. That is also because efficient administration of legislatively authorized programs reflects the constitutional need effectively to implement the public's democratically determined will.

(3) Consequently, where a government employee speaks "as an employee upon matters only of personal interest," the First Amendment does not offer protection. Connick v. Myers, 461 U.S. 138, 147 (1983). Where the employee speaks "as a citizen . . . upon matters of public concern," the First Amendment offers protection but only where the speech survives a screening test. Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty., 391 U.S. 563, 568 (1968). That test, called, in legal shorthand, "Pickering balancing," requires a judge to "balance . . . the interests" of the employee "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." Ibid. See also Connick, supra, at 142.

(4) Our prior cases do not decide what screening test a judge should apply in the circumstances before us, namely when the government employee both speaks upon a matter of public concern and does so in the course of his ordinary duties as a government employee.

. . .

Like the majority, I understand the need to "affor[d] government employers sufficient discretion to manage their operations."...And I agree that the Constitution does not seek to "displac[e]...managerial discretion by judicial supervision." Ibid. Nonetheless, there may well be circumstances with special demand for constitutional protection of the speech at issue, where governmental justifications may be limited, and where administrable standards seem readily available—to the point where the majority's fears of department management by lawsuit are misplaced. In such an instance, I believe that courts should apply the Pickering standard, even though the government employee speaks upon matters of public concern in the course of his ordinary duties.

This is such a case.

Justice Breyer notes that *Garcetti* engaged in professional speech subject to the legal canon of ethics. Under the Constitution, as a prosecutor, Ceballos was obligated to communicate and provide to defense counsel exculpatory evidence. Justice Breyer would apply the *Pickering* balancing test. However, Justice Breyer points to a problem with Justice Souter's analysis:

> While I agree with much of Justice Souter's analysis, I believe that the constitutional standard he enunciates fails to give sufficient weight to the serious managerial and administrative concerns that the majority describes. The standard would instruct courts to apply Pickering balancing in all cases, but says that the government should prevail unless the employee (1) "speaks on a matter of unusual importance," and (2) "satisfies high standards of responsibility in the way he does it." ante at 8 (dissenting opinion). Justice Souter adds that "only comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety can weigh out in an employee's favor." Id., at 9.
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> There are, however, far too many issues of public concern, even if defined as "matters of unusual importance," for the screen to screen out very much. Government administration typically involves matters of public concern. Why else would government be involved? And "public issues," indeed, matters of "unusual importance," are often daily bread-and-butter concerns for the police, the intelligence agencies, the military, and many whose jobs involve protecting the public's health, safety, and the environment. This aspect of Justice Souter's "adjustment" of "the basic Pickering balancing scheme" is similar to the Court's present insistence that speech be of "legitimate news interest", ibid., when the employee speaks only as a private citizen. See San Diego v. Roe, 543 U.S. 77, 83-84 (2004) (per curiam). It gives no extra weight to the government's augmented need to direct speech that is an ordinary part of the employee's job-related duties.
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> Moreover, the speech of vast numbers of public employees deals with wrongdoing, health, safety, and honesty: for example, police officers, firefighters, environmental protection agents, building inspectors, hospital workers, bank regulators, and so on. Indeed, this categorization could encompass speech by an employee performing almost any public function, except perhaps setting electricity rates. Nor do these categories bear any obvious relation to the constitutional importance of protecting the job-related speech at issue.
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> At the same time, the list of categories substantially overlaps areas where the law already provides non-constitutional protection through whistle-blower statutes and the like. See ante, at 13 (majority opinion); ante, at 13-15 (Souter, J., dissenting). That overlap diminishes the need for a constitutional forum and also means that adoption of the test would authorize federal Constitution-based legal actions that

threaten to upset the legislatively struck (or administratively struck) balance that those statutes (or administrative procedures) embody.

The majority provides clarity where the *Pickering* analysis presents a case-by-case analysis that provides some, but not substantial, guidance as to what speech is or is not protected.

It is important to remember, in the vast majority of the cases cited, the appellate courts are reviewing a District Court's decision on summary judgment. *No trial or fact finding has occurred.* The District Court has viewed the allegations of the complaint in a fashion most favorable to the plaintiff.

In a recent application of *Garcetti* in the Ninth Circuit, *Posey v. Lake Pend Oreille School District*,[7] the plaintiff's job as a Security Specialist was eliminated. Previously, he had raised concerns about security at the school with the principal and he had sent a letter critical of security at the school to the Superintendent and other top school administration officials. The Ninth Circuit reversed the District Court dismissal on summary judgment of the lawsuit filed under 42 U.S.C. §1983. In reaching the above conclusion, the Ninth Circuit reasoned that (1) it must first determine whether the subject of the letter is a matter of public concern; then (2) whether the District, the public employer, lacked justification for treating its employee differently than a member of the public.

The District Court found as a matter of law that Posey wrote his letter in the course of his employment as a Security Specialist. It granted summary judgment for the employer under *Garcetti.* Circuit Judge Hawkins writing for the Ninth Circuit panel stated that the scope of Posey's responsibilities was in dispute and a matter of fact for a jury to determine. The question then of whether Posey sent his letter speaking as a citizen or as part of his job is a mixed question of law and fact. The court asserts that its position is in keeping with the approach of the Third and Seventh Circuits that a determination of whether an individual speaks as an employee or a citizen is a mixed question of law and fact. The author of this presentation doubts that the Ninth Circuit's analysis will stand up under *Garcetti* if the Supreme Court reviews it.

[7] 546 F.3d 1121 (9th Cir. 2008).

Other Post-*Garcetti* Cases

The following cases demonstrate the consequence of the *Garcetti* approach.

- *Mills v. City of Evansville*, 452 F.3d 646 (7th Cir. 2006). Sgt. Mills, a police supervisor, learned at a public meeting of the reduction of the number of officers in her unit. She voiced her concern to upper command. Her removal from her supervisory position and loss of the use of a departmental car were upheld.
- *McGee v. Public Water Supply*, 471 F.3d. 918 (8th Cir. 2006). District manager criticized how projects were completed and voiced environmental concerns. Elimination of his position upheld.
- *Casey v. West Las Vegas School District*, 473 F.3d. 1323 (10th Cir. 2007). Superintendent disclosed to Regional Head Start Agency that a number of families with children in the program do not meet program income guidelines. The Superintendent contacted the Attorney General's office about open meeting laws violation by the Board. The Board's non-renewal of the Superintendent's contract was upheld on the disclosure to the federal Head Start program of the income guideline violations under *Garcetti* as disclosures made as part of her job responsibilities. Her disclosure to the Attorney General of Board open meeting law violations was not part of her job duties. The Tenth Circuit allowed this part of her claim to proceed to trial.
- *Mayer v. Monroe Community School Corp.*, 474 F.3d. 477 (7th Cir. 2007). First Amendment did not protect a probationary sixth grade teacher from non-renewal of her contract, when she told her current events class that she honked her car horn for peace when she passed a demonstration asking to remove our troops from Iraq.
- *Salas v. Wisconsin Department of Corrections*, 493 F.3d 913 (7th Cir. 2007), did *not* apply a First Amendment analysis. Salas gave a statement in an Equal Employment Opportunity Commission (EEOC) investigation supporting another employee's complaint of discrimination. He alleged retaliatory discharge. The District Court found that Salas' complaint to the EEOC was untimely filed. The Seventh Circuit reversed on the timeliness issue. The court sustained the entry of summary judg-

ment. The court assumed that Salas' speech was protected. On his section 1983 First Amendment free speech retaliatory claim, the Seventh Circuit ruled that on the basis of Salas' pleadings and affidavits, he would be unable to demonstrate a causal relationship between his speech and his termination. He was unable to show that those who made the discharge decision knew of his statements to the EEOC concerning the complaint of another employee. On the portion of his complaint based on section 1983 equal protection grounds, the Seventh Circuit concluded that Salas' complaint and affidavits failed to show discriminatory intent. The Seventh Circuit affirmed the District Court's dismissal of Salas' complaint.

- *Morales v. Jones*, 494 F.3d 590 (7th Cir. 2007). One police officer reported to another that the Chief and the Deputy Chief of the Milwaukee Police Department may have harbored a fugitive. They brought this allegation to the District Attorney, who investigated the charge and found it to be false. The officers were demoted. They sued and obtained a $170,000 jury verdict. The Seventh Circuit reversed on the basis of *Garcetti*. The officers reported their charge as part of their regular job duties.
- *Fuerst v. Clarke*, 454 F.3d 770 (7th Cir. 2006). Fuerst, a Deputy Sheriff, objected publically to the Sheriff's intention to take a bargaining unit position and make it an exempt position to handle public relations. Fuerst charged that the Sheriff intended to use the position to assist his candidacy for Mayor of Milwaukee. The Seventh Circuit reversed all retaliatory action imposed by the Sheriff, inasmuch as Fuerst was the president of the union. The court concluded that Fuerst acted in his capacity as union president when he criticized the Sheriff.
- *Sigsworth v. City of Aurora*, 487 F.3d 506 (7th Cir. 2007). Verbal report by Sigsworth to the Chief concerning suspected leaks in a drug task force investigation was not protected. His report to the Chief falls within his job responsibilities. Sigsworth was passed over for promotion. Sigsworth sued under 42 U.S.C. §1983. The District Court dismissed his complaint, which the Seventh Circuit affirmed.
- *Spiegla v. Hull*, 481 F.3d 961 (7th Cir. 2007). A correction officer whose assignment was to search every vehicle leaving a prison was told by her supervisor to allow a truck with two high-ranking officers to leave without inspection. Her report of this incident to the Assistant Superintendent was not

protected. The employer transferred her to a less-desirable assignment. Her case was initially decided in her favor before a jury. After trial, the case was appealed by the State of Indiana under *Garcetti*. The Seventh Circuit vacated the judgment in her favor for $210,000. Her report of a breach in the security protocol was not protected.

- *Vose v. Kliment*, 506 F.3d 565 (7th Cir. 2007). Vose, a 26-year employee, a Sergeant who worked as a supervisor in the narcotics unit in Springfield, Illinois, reported to the Deputy Chief and Chief that detectives in another unit, the major cases unit, violated police procedures in the manner in which they obtained search warrants. His reports to supervision led to his forced resignation. The Seventh Circuit reversed the District Court's denial of supervision's claim to qualified immunity and denial of summary judgment in Vose's section 1983 claim. The court found Vose's actions commendable, but unprotected.
- *Crawford v. Metropolitan Government of Nashville*, U.S. No. 06-1595, (Jan. 26, 2009). The Supreme Court concluded that statements made in an internal investigation about a manager's sexually harassing conduct were protected under Title VII, as speech in opposition to the harassing conduct. The employee's participation in an internal investigation about the conduct is protected. The employer is prohibited from taking retaliatory action against the employee.

The above list of cases is not meant to be exhaustive. Where an employee's speech is not protected, the employer's adverse action in retaliation for the comments stands. The recent unanimous Supreme Court decision in *Crawford* suggests that employee participation in and statements made to the employer in the course of an investigation initiated by the employer are protected.

Sarbanes-Oxley Experience

It is interesting to look at a parallel experience involving speech—charges of malfeasance in the private sector. In 2002, under the Sarbanes-Oxley Act, Congress afforded whistleblower protection to an employee of a publicly traded company or contractor or subcontractor of such company that provides information to: (1) law enforcement agencies, (2) government bodies conducting investigations, (3) or supervisors or persons designated by the company to conduct such investigations. If an employee suffers an adverse

action, then he or she files a complaint with the Department of Labor. The statute provides that an employee must convince the Department of Labor, in the first instance, that: (1) he or she *reasonably believed* that the employer was breaking the law; (2) he or she engaged in whistleblowing activity as contemplated by the statute, (3) he or she suffered an adverse employment action, and (4) there is a causal connection between the whistle blowing activity and the adverse action. If the Department acts on the case, then the burden shifts to the employer to defend against these allegations of retaliation.

It appears that the administrative agency, the Department of Labor, and the courts have narrowly construed the statute and its short 90-day limitation period. In 2007, CFO.com (Corporate Financial Officers) reported a study by Orrick, Herrington & Sutcliffe that of 947 Sarbox (Sarbanes-Oxley) cases, 70 percent had been dismissed and 28 percent had been settled or withdrawn.

Welch v. Chao[8] illustrates how Sarbanes-Oxley has been narrowly construed. In that case, the Fourth Circuit affirmed the Department of Labor's Administrative Review Board (ARB) reversal of the recommended decision of the administrative law judge. The court found, as did the ARB, that Welch, the whistleblower certified public accountant, had failed to explain how the employer's activity violated any statute. Welch had charged that the company had misstated its income on its balance sheet. Note that the statute requires only that the employee reasonably believe that the employer violated the law. The court concluded, as did the Department of Labor's ARB, that Welch's activities were not protected. His discharge would stand.[9]

Some Concluding Thoughts

The whole subject of protected free speech by public employees raises difficult questions. Dealing with "speech" issues in a public agency through the application of 42 U.S.C. §1983 First Amendment claims is akin to killing a bug with a tank. Whether the bug is killed or not, there is enormous collateral damage. The employee loses his or her job and the employer spends a small fortune defending its action.

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[8] Case No. 07-1684 (4th Cir. 2008).

[9] *See also* Platone v. U.S. Dep't of Labor, Case No. 07-1635 (4th Cir. 2008) (Fourth Circuit affirmed Department of Labor's finding that Platone did not engage in protected activity under Sarbanes-Oxley).

Because I am an Arbitrator, please forgive the self-promotion of the utility of arbitration in this setting. There is an advantage to arbitrating whistleblower or speech/retaliatory discipline disputes that may arise in a public agency. Provided that the employee has access to arbitration, the disputes may be intensely fought, but relatively quickly processed and decided.

The *Welch* and *Platone* cases began in 2003 and reached finality in 2009 for Welch with the U.S. Supreme Court's denial of certiorari. The just cause standard, rather than a complicated multi-step First Amendment analysis, can better handle issues of professional obligation to disclose (*Garcetti*, who did not have arbitration available to him), and whistle blowing protection to employees who disclose malfeasance, corruption, and rule violations to upper management.

The reader should review the factual patterns described in the post-*Garcetti* cases described above and imagine how each of the suing employees would fare in an arbitral setting. Instead of expensive litigation, most would be resolved in the grievance procedure. The "political" case would proceed to arbitration. I suspect that the outcome in an arbitral setting where an arbitrator applies a just cause analysis would be predictable.

For its part, the *Garcetti* majority has achieved predictability. However, in the author's opinion, the majority has failed to take account of the value to the public, when public employees bring instances of malfeasance and misfeasance to the attention of *management.* This failure is best exemplified in *Vose v. Kliment.*[10] Vose raised his concerns to the Chief and Deputy Chief about the manner in which the major crimes unit obtained search warrants. His speech was unprotected. Admittedly, if he had disclosed his concerns to the public in the first instance rather than to supervision, he undoubtedly would have violated police department rules. *Garcetti* fails to address the important public interest met by employees who disclose possible corruption, not to the public, but to supervision. The Court analysis in *Garcetti* encourages employees to disclose concerns of malfeasance or corruption to the public in the first instance, rather than to management, because such public disclosures may obtain protection as the speech of a private citizen.

The application of just cause principles encourages employees making such charges to make their disclosures in the first instance

[10]506 F.3d 565 (7th Cir. 2007).

to supervision and management. A just cause analysis takes into account the tension between principles of employee loyalty to the employer and principles that recognize and tend to protect an employee who responsibly performs his or her duties. When discipline or other adverse actions are taken against an employee for properly and conscientiously performing his or her job, the experienced human resource manager and union representative could predict the outcome, if arbitration were an available forum for the resolution of that type of post-*Garcetti* case. The balance struck by the *Garcetti* Court recognizes the hazard of elevating workplace grievances to constitutionally protected conduct. It fails to take account of upper management's need to know and hear what may be going awry in the public workplace.

II. Individual Rights v. Collective Interests: Can a Public Employer and a Union Collectively Bargain a Valid Waiver of Public Employees' Constitutional Rights?

James Q. Brennwald*

Background: The Subordination of Individual to Collective Interests, and the Union's Discretion in Enforcing Collectively Bargained Rights

As a general matter, rights arising under a collective bargaining agreement (CBA) may be enforced by only the union, and not by individual employees. The union has considerable discretion in determining when and how to enforce a collectively bargained right, subject only to the union's duty of fair representation. As stated by the U.S. Supreme Court in *Vaca v. Sipes*:[1]

> The federal labor laws seek to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining. See N.L.R.A. §1, as amended, 61 Stat. 136, 29 U.S.C. §151. The collective bargaining sys-

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[1]386 U.S. 171, 181 (1967).