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FREEDOM OF SPEECH AND THE “CATCH-22” FOR PUBLIC EMPLOYEES IN THE NINTH CIRCUIT—*HUPPERT v. CITY OF PITTSBURG*

*Jody L. Rodenberg**

IN *Huppert v. City of Pittsburg*, the Ninth Circuit incorrectly held that a police officer’s subpoenaed testimony before a grand jury investigating possible corruption within a police department is not protected by the First Amendment.¹ When public employees make statements “pursuant to their official duties,” they are not speaking as a citizen for purposes of First Amendment protection.² The Ninth Circuit held that testifying about corruption within the police department was part of the officer’s required duties and that any speech made during the testimony was pursuant to his duties and not afforded protection by the First Amendment.³ However, the Ninth Circuit failed to recognize that Huppert had an independent duty as a citizen to offer truthful testimony, which should have been protected by the First Amendment because he spoke as a private citizen.

Ron Huppert joined the Pittsburg Police Department as a patrol officer and inspector in January 1991 and was promoted to Inspector in 1996.⁴ Sometime before 2001, Huppert worked with the FBI on an investigation of suspected corruption within the Pittsburg Police Department.⁵ In March 2004, Huppert was subpoenaed to testify before a grand jury investigating corruption inside the police department.⁶ Other officers were subpoenaed to testify, and the subpoenas were received at the police department.⁷ Huppert claimed that Chief of Police Aaron Baker discussed Baker’s own testimony and told Huppert that he was aware of Huppert’s

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1. See *Huppert v. City of Pittsburg*, 574 F.3d 696, 708 (9th Cir. 2009).

2. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2007).

3. *Huppert*, 574 F.3d at 707-08.

4. *Id.* at 698.

5. *Id.* at 699. While Huppert did not disclose what type of assistance he gave to the FBI, he did claim that it was outside of his duties as an officer for the police department. *Id.*

6. *Id.* at 700.

7. *Id.*

testimony as well.⁸

Sometime after Huppert testified before the grand jury, he was told that “his position as a gang investigator was being eliminated and he was transferred to a [less desirable] position investigating fraud and forgery.”⁹ William Addington, Huppert’s new supervisor, changed the way fraud cases were handled by requiring Huppert to generate a report before a case could be closed.¹⁰ Additionally, Huppert was criticized by his new supervisor for minor details, such as having the letter “M” for male in the wrong font.¹¹ Also, Addington frequently joked about giving Huppert a “pink slip,” and Huppert was not allowed to wear a particular shirt that other officers were allowed to wear.¹² Finally, after Huppert received a high rating on his annual evaluation by his previous supervisor, Addington attempted to replace it with his own evaluation.¹³ In 2003, Huppert took temporary leave for disability and retired on disability in 2004.¹⁴

Huppert and another officer filed a civil rights action under 42 U.S.C. § 1983 in the Northern District of California in April 2005 against the Pittsburg Police Department and the individuals within the department.¹⁵ They both alleged that retaliatory actions were taken by their superiors for various instances of speech that were protected by the First Amendment, and the other officer filed a claim under the Fourth, Sixth, and Fourteenth Amendments.¹⁶ In November 2007, the district court granted the defendants’ motion for summary judgment.¹⁷ The only issue addressed here is whether Huppert’s subpoenaed speech given before a grand jury should have been afforded protection by the First Amendment.

The Ninth Circuit held that Huppert’s subpoenaed testimony before a grand jury investigating potential corruption within the department was not protected by the First Amendment because this speech was expected of all officers and thus was made pursuant to his duties as a police officer.¹⁸ In determining whether speech is protected by the First Amendment, a court looks at two issues: 1) whether the public employee spoke “on a matter of public concern” as opposed to a matter of private concern; and 2) whether the employee spoke as a public employee or as a private citizen.¹⁹ If a public employee speaks as a private citizen on a matter of public concern, that speech is protected by the First Amend-

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* Huppert’s original evaluation was restored after a grievance was filed by himself and the Patrol Officers’ Association. *Id.* at 700-01.

14. *Id.* at 701.

15. *Id.* at 698, 701.

16. *Id.* at 698.

17. *Id.* at 701.

18. *Id.* at 708.

19. *Id.* at 702.

ment.²⁰ The Ninth Circuit conceded that speech regarding corruption or illegal activity within a local police department is a matter of public concern, and thus the court's analysis focused on whether Huppert's speech was made as a private citizen or a public employee.²¹ If a statement is made pursuant to one's official duties, then that person is speaking as a public employee and is not protected by the First Amendment.²² The Supreme Court explained in *Garcetti* that restricting the speech of a public employee does not limit any rights that "the employee might have enjoyed as a private citizen."²³ The Ninth Circuit reasoned that because officers are expected to testify in corruption investigations, the speech made during Huppert's testimony was made pursuant to his official duties.²⁴

The court relied primarily on *Christal v. Police Commission of San Francisco* to establish that it is the official duty of a police officer to investigate and testify regarding matters of corruption.²⁵ *Christal* held that it is the duty of an officer to testify regarding facts that will incriminate any person.²⁶ Thus, because it is the duty of a police officer to testify, the court held that Huppert spoke in accordance with his official duties.²⁷ This is the only argument the court made in determining that the subpoenaed testimony of an officer is not protected by the First Amendment.²⁸ In its conclusion, however, the majority explained that whistle-blower statutes exist as more appropriate avenues for employees who expose misconduct.²⁹

This decision by the Ninth Circuit is inconsistent with the rulings of other federal circuit courts because it failed to recognize the independent duty of every citizen to offer truthful testimony. In his dissent, Judge Fletcher noted that the majority's decision conflicts with decisions made by the Third and Seventh Circuits.³⁰ The dissent argued that giving truthful testimony is the duty of every citizen, and that duty is separate from any duty that might exist as a public employee.³¹ In *Morales v. Jones*, the Seventh Circuit held that subpoenaed testimony given in a deposition for a civil suit fell outside of an officer's official duties.³² In reaching this decision, the Seventh Circuit noted the "oddity of a constitutional ruling" where protection by the First Amendment is based on whom the officer

20. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2007).

21. *See Huppert*, 574 F.3d at 704.

22. *Garcetti*, 547 U.S. at 421.

23. *Id.* at 421-22.

24. *Huppert*, 574 F.3d at 707.

25. *See id.* (quoting *Christal v. Police Comm'n of San Francisco*, 92 P.2d 416, 419 (Cal. Ct. App. 1939)).

26. *Christal*, 92 P.2d at 419.

27. *Huppert*, 574 F.3d at 707-08.

28. *See id.*

29. *Id.* at 710.

30. *Id.* at 721 (Fletcher, J., dissenting).

31. *Id.*

32. *Morales v. Jones*, 494 F.3d 590, 598 (7th Cir. 2007).

was speaking to and not the words actually uttered.³³ In that case, when one officer spoke to another officer regarding allegations of police misconduct, the speech was considered to be pursuant to the officer's official duties.³⁴ However, when he testified regarding that same speech in a deposition, that speech was protected by the First Amendment.³⁵

The Third Circuit recognized that an officer's subpoenaed testimony is protected under the First Amendment because that officer spoke pursuant to an independent duty to offer truthful testimony and thus spoke as a private citizen.³⁶ In *Reilly v. Atlantic City*, a police officer assisted in a state investigation concerning police misconduct and offered testimony at a criminal trial.³⁷ The officer was retaliated against by his employer because of the testimony he offered.³⁸ The Third Circuit reasoned that because every individual has a duty to offer truthful trial testimony, the officer spoke as a private citizen, even though he testified about information he learned in the course of his employment.³⁹ This duty to testify truthfully at trial is essential to "protect[ing] the integrity of the judicial process" and "is the responsibility of every citizen."⁴⁰ The Third Circuit further explained that the protection offered by the First Amendment is not eliminated simply because that person is a public employee: "When a government employee testifies truthfully, s/he is not 'simply performing his or her job duties,' rather; the employee is acting as a citizen . . ." ⁴¹ It should be noted that the Third Circuit did not hold that speech offered in testimony should receive absolute protection from the First Amendment; instead, it held that testimony in the courtroom is spoken in an individual's capacity as a citizen.⁴² In other words, if the employee is acting as a private citizen, that person is afforded protection—so long as the speech is about a matter of public concern—because they are not speaking pursuant to their official duties.

The Ninth Circuit incorrectly decided the issue of whether Huppert's speech was subject to the protection of the First Amendment because he spoke pursuant to his duty as a private citizen. The Ninth Circuit's decision in *Huppert* is not consistent with the logic of other circuit courts that have addressed this issue, thus creating a split among the circuit courts. The facts of *Reilly* are strikingly similar to the facts of this case, in that the officer testified regarding police misconduct and the officer had participated in the investigation of that misconduct.⁴³ The difference between *Reilly* and *Huppert* is how each court handled the question of what hap-

33. *Id.*

34. *Id.* at 597.

35. *Id.* at 598.

36. *Reilly v. Atlantic City*, 532 F.3d 216, 231 (3d Cir. 2008).

37. *Id.*

38. *Id.* at 224.

39. *Id.* at 231.

40. *Id.*

41. *Id.* (internal citation omitted).

42. *Id.* at 231 n.6.

43. *Id.* at 220.

pens when a public employee speaks pursuant to an official duty *and* pursuant to a legal duty that every citizen possesses.⁴⁴

The Third Circuit did not hold that Reilly's official duty to testify in a criminal proceeding was nonexistent; instead, it gave greater weight to the independent duty that a citizen has to offer truthful testimony in a legal proceeding.⁴⁵ The dissent in *Huppert* quoted this highly persuasive language from the Third Circuit:

[T]he act of offering truthful testimony is the responsibility of every citizen, and the First Amendment protection associated with fulfilling that duty of citizenship is not vitiated by one's status as a public employee. That an employee's official responsibilities provided the initial impetus to appear in court is immaterial to his/her independent obligation as a citizen to testify truthfully.⁴⁶

The majority in *Huppert* relied on language from *Christal* to establish that it is the duty of a California police officer to investigate and testify about matters of corruption.⁴⁷ Thus, the fact that every private citizen also shares a duty to testify truthfully regarding any matter is of little concern to the Ninth Circuit majority.⁴⁸ In failing to address any duties the employee had as a private citizen, the Ninth Circuit removed deserved First Amendment protection from retaliation for testimony that every citizen would have been required to give.

The *Huppert* majority incorrectly relied on the dictum of the Supreme Court in *Garcetti* in its explanation of why *Huppert*'s constitutional rights are not infringed. In *Garcetti*, the Supreme Court explained that restricting the speech of a public employee, when that speech owes its existence to the professional responsibilities of the employee, does not violate any constitutional rights that the employee would have enjoyed as a private citizen; it reflects the rights of the employer.⁴⁹ However, the *Huppert* majority cannot use this explanation to support their holding because *Huppert*'s speech was the result of his official duty *and* the duty that every citizen has to offer truthful testimony.⁵⁰ Since *Huppert*'s speech stemmed from a duty shared by all citizens, the Ninth Circuit cannot rely on the Supreme Court's rationale in *Garcetti* because *Garcetti* addressed a situation where the employee spoke pursuant to an official duty only.⁵¹

44. Compare *id.* at 231 with *Huppert v. City of Pittsburg*, 574 F.3d 709-10 (9th Cir. 2009).

45. *Reilly*, 532 F.3d at 231.

46. *Huppert*, 574 F.3d at 721 (Fletcher, J., dissenting) (quoting *Reilly*, 532 F.3d at 231).

47. *Id.* at 707 (quoting *Christal v. Police Comm'n of San Francisco*, 92 P.2d 416, 419 (Cal. Ct. App. 1939)).

48. See *id.*

49. *Garcetti v. Ceballos*, 547 U.S. 410, 421-22 (2007).

50. See *Reilly*, 532 F.3d at 231.

51. See *Garcetti*, 547 U.S. at 421. The dissent in *Huppert* does not discuss this First Amendment issue in terms of a "dual duty" per se. In the dissent's critique of the majority's reliance on *Christal*, however, Judge Fletcher similarly argues that the employee's duty to testify is "independent of any duty he or she might also have as an employee" and thus is "not performing an official duty within the meaning of *Ceballos*." *Huppert*, 574 F.3d at 721 (Fletcher, J., dissenting). Further, the majority in *Reilly* relied on the clarifying

In *Garcetti*, the employee did not have a separate duty as a private citizen, which Huppert did have.⁵²

The Ninth Circuit's holding is not consistent with sound public policy. In fact, the dissent correctly explains that the majority's holding essentially results in a "Catch-22" for police officers.⁵³ As a result, when an officer receives a subpoena to testify, the officer has two options. First, the officer can testify before the grand jury and be lawfully fired for any speech offered during that testimony.⁵⁴ Second, the officer can refuse to testify and, at a minimum, be held in contempt.⁵⁵ This Catch-22 situation does not facilitate an officer's purpose to bring criminals to justice, and an officer's commitment to further our justice system should not cost him his livelihood. Similarly, a state should not be able to contract away any rights that a private citizen would have by simply creating a job description that requires the officer to testify. By failing to consider that the speech of a public employee also stems from a duty that every citizen has to offer truthful testimony, the Ninth Circuit is stripping that employee of deserved protection under the First Amendment.

In conclusion, the Ninth Circuit incorrectly held that an officer's subpoenaed testimony regarding corruption in the police department was not protected by the First Amendment. First, the majority erred by failing to consider that a separate duty to testify at trial exists apart from any official duties that an officer may have. In doing this, the Ninth Circuit essentially created a split with the Third and Seventh Circuits.⁵⁶ Second, the Ninth Circuit was remiss to apply the reasoning of the Supreme Court's decision in *Garcetti* to this case because *Garcetti* did not address a situation where the public employee also had a separate duty to speak as a citizen.⁵⁷ The Ninth Circuit simply held that because Huppert's speech was made pursuant to his official duties, his speech was not afforded protection by the First Amendment.⁵⁸ This holding results in a "lose-lose" situation and is not consistent with sound public policy. In situations such as this, a court should affirm the right that every citizen possesses to offer truthful testimony, just as the Third and Seventh Circuits did.

language in Justice Souter's dissent in *Garcetti*, which explained that the majority did not decide First Amendment issues of trial testimony. *Reilly*, 532 F.3d at 231 (quoting *Garcetti*, 547 U.S. at 444 (Souter, J., dissenting)).

52. *Garcetti*, 547 U.S. at 421 (majority opinion) (noting that Ceballos did not dispute that the speech was made "pursuant to his official duties").

53. *Huppert*, 574 F.3d at 722.

54. *Id.*

55. *Id.*

56. See *Reilly v. Atlantic City*, 532 F.3d 216, 220 (3d. Cir. 2008); *Morales v. Jones*, 494 F.3d 590, 598 (7th Cir. 2007).

57. See *Garcetti*, 547 U.S. at 421.

58. See *Huppert*, 574 F.3d at 707-08 (majority opinion).